CROSS-BORDER OIL POLLUTION – PACIFIC FOCUS

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INTRODUCTION

Images of an oil pollution spill with depictions of oiled birds and oil-soaked coastlines resonate loudly in the homes of average citizens as well as in the offices of politicians and government agencies. A ship-source oil spill is messy at the best of times, but when it fails to respect national boundaries, matters become a lot more complicated. When it comes to pollution prevention, governments are generally helpless in controlling the behaviour and movement of oil in the ocean.

Oil spills have the potential to cause significant harm to the marine environment. Marine pollution creates vulnerabilities to birds, marine mammals and inter-tidal species including early developmental stage organisms, with oil spill impacts ranging over short and long term time scales.[1] Interestingly, the legal issues and aspects of a ship-source oil pollution incident are compounded by the vagaries of tidal currents, sea conditions, and weather as these natural phenomena impact where an oil slick will spread. International considerations become involved when an oil spill occurs in the vicinity of national boundaries such as the Pacific boundary at the 49th parallel between the United States and Canada.

Ship-source oil pollution has been the subject of significant technical, scientific and legal examination from many viewpoints. Oil pollution impacting the marine environment from vessel operations has significant national and international implications leading to ongoing efforts by government and industry in respect to prevention, preparedness and response.

Transboundary pollution incidents on the Pacific coast of the United States and Canada have illustrated the difficulties and sometimes unpredictable issues of a political, practical and social nature that can arise with an oil spill occurrence. While the sophistication of governments and industry continues to increase over time with respect to preparedness and response to significant oil pollution and environmental disasters,

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[1] Congressional Research Service, Oil Spills in U.S. Coastal Waters: Background, Governance and Issues for Congress (CRS Report for Congress, 2010) [Congressional Research].

affected citizens, communities and politicians demand prosecution, cleanup and compensation outcomes that are often difficult to meet.[2]

Both Canada and the United States share a common fact that oil and oil products are a critical source of energy and fuel for their economies. Huge quantities of oil products are transported by tanker vessel and barge along the coastlines of both nations. Numerous deep sea cargo vessels regularly transit Canada and the United States carrying goods to and from the world's trading nations. All of those vessels carry significant quantities of bunkers onboard as fuel. Oil spills will occur within the jurisdictions of both Canada and the United States. A central issue for both nations is whether and to what degree the task of responding to oil spills, particularly a major spill, carried out by government agencies, the shipowner, insurers and experts can be effectively accomplished with the resources available. This issue, together with questions on response funding and compensation, is compounded by an oil pollution event that evolves into a significant cross-border spill. According to the National Academies of Science, the *Exxon Valdez* oil spill disaster caused "fundamental changes in the way the US public thought about oil, the oil industry, and the transport of petroleum products by tankers...'big oil' was suddenly seen as a necessary evil, something to be feared and mistrusted."[3]

Recent developments and headlines in Canada confirm similar concerns about oil industry initiatives on the West Coast. Immense media scrutiny and government focus has been applied to Enbridge's proposed Northern Gateway Pipeline which would deliver Alberta Oil Sands products to the port in Kitimat, British Columbia, for loading on tankers and export to Asian markets. The proposed tanker route from Kitimat necessarily involves transit within confined waters and requires challenging navigation through narrow channels. Interestingly, the proposed tanker route passes nearly directly over the British Columbia ferry, *Queen of the North*, which struck Gil Island in 2006 and sank causing the loss of two lives and the release of bunker fuel into the sea – a fact not lost on environmentalists, First Nations people and government agencies. Another oil industry plan involves Kinder Morgan's proposed expansion of its existing transmountain pipeline into the Port of Vancouver, which could increase tanker traffic by more than 1,000 trips annually off the Pacific coast. As a result, Canada has undertaken recent initiatives to strengthen tanker safety, including the appointment of a Tanker Safety Expert Panel to conduct an evidence-based review and assessment of Canada's tanker safety system and to make recommendations to the government on development of a world-class tanker safety system.[4]

[2] Peter G. Bernard and Andrew P. Mayer, "A Tale of Two Sovereigns: Canada, the United States and Trans-Border Pollution Issues" (2000-2001) 13 USF Mar LJ 125 [Bernard].
[3] Congressional Research, *supra* note 1 at 5.
[4] "Oil Spill Would 'Overwhelm' Resources, B.C. Minister Warned", The Canadian Press (26 August 2013), online: <http://www.cbc.ca/news/canada/british-columbia/oil-spill-woodoverwhelm-resources-b-c-minister-warned-1.1332454>.

This article will review the pollution prevention regimes in Canada and in the United States. Textbooks are written on the subject of oil pollution, prevention and response. Therefore, this article will provide an overview only. There will be some focus on the cooperative agreements and arrangements between the Federal Governments of Canada and the United States, and the regional governments of Washington State and British Columbia, dealing with cross-border oil pollution. A discussion on recent Canadian assessments and measures to improve tanker safety and strengthen capacity for spill preparedness and response will also be included. This article is a modest attempt at updating the scholarly treatment of this subject by Peter G. Bernard, Q.C., a friend and colleague to many maritime practitioners on both sides of the border.[5]

Two significant pollution incidents in the Pacific Northwest provided real hands-on experience to government agencies, response organizations, legal practitioners and experts in dealing with a significant cross-border spill. While the legal proceedings were resolved before trial, a description of those pollution occurrences provides context for a discussion of the respective pollution regimes that would come into play if a similar incident occurred today. Fortunately, the Pacific Northwest has been spared a significant cross-border spill for over two decades following the *Nestucca* oil barge spill in 1988 and the *Tenyo Maru* bunker spill in 1991. However, there have been several other notable pollution accidents on the Pacific coast including the grounding of the deep sea vessels *New Carissa* in Oregon in 1989 and the *Salendang Ayu* in Alaska in 2004. In March 2006, the British Columbia ferry, *Queen of the North*, sank in 1,500 feet of water after running aground on Gil Island south of Prince Rupert, British Columbia. However, oil exports, imports, consumption and transportation continue to rise and the risk of a major oil spill in the future is always present.

CROSS-BORDER POLLUTION INCIDENTS

The Nestucca

The Pacific Northwest coastline of British Columbia, Washington and Oregon is notorious for storms and heavy sea conditions. On December 23, 1988, while off the coast of Gray's Harbour, Washington, the tug *Ocean Service* was towing the bulk oil barge *Nestucca* in heavy sea conditions. The heavy seas caused the towline to the loaded oil barge to part, creating a hazardous and dangerous situation. In an effort to reconnect the towline, the tugboat struck the barge, causing a hole in the side shell sufficient to allow loss of an estimated 200,000 gallons of bunker oil into the sea.[6]

Although the size of the pollution occurrence did not compare to the large oil spill disasters in Alaska and elsewhere, the effect of ocean currents and wind pushed the oil slick in a northward direction up the coast of Washington and across the mouth of the

[5] Bernard, *supra* note 2.
[6] *Ibid* at 129.

Strait of Juan de Fuca to the west coast of Vancouver Island.[7] Although a relatively small amount of oil came ashore on Vancouver Island, the fishing industry, First Nations bands, inter-tidal seafood harvesters and environmental tourists were up in arms about the oil arriving on the beaches and the cleanup response. Both the local British Columbia government and the Canadian Federal Government became involved in the response process as the reactions of the media, coastal population and governments reached extreme levels.[8]

Cleanup efforts were undertaken involving local citizens, volunteers and First Nations bands as well as government agencies in Canada. Demands by some citizens that the Canadian Army take over the cleanup effort were eventually resolved. On completion of the cleanup, private plaintiff lawsuits against the tug and barge were commenced by tourist operators, fishermen and seafood harvesters which were ultimately settled or abandoned (as was the case for the volunteers' claim). Legal actions were commenced in the United States by the British Columbia and Canadian Governments along with First Nations bands seeking compensation for cleanup expense and coastal foreshore damage, together with a non-use damage claim supported by a Contingency Evaluation Survey prepared for the Canadian Government. The cases were settled before a judicial decision was rendered on the claims for damage including the controversial non-use damage claim.[9]

The Tenyo Maru

Cape Flattery is the northwestern-most point of the contiguous United States located on the Olympic Peninsula in Washington State where the Strait of Juan de Fuca joins the Pacific Ocean. All vessel traffic inbound and outbound to southern British Columbia ports, including Vancouver, and Puget Sound ports, including Seattle, transit the entrance to Juan de Fuca Strait. On July 22, 1991, the Chinese flagged cargo ship *Tuo Hai* collided with and sank the Japanese fishing trawler *Tenyo Maru* approximately 25 miles northwest of Cape Flattery, and a few miles north of the ocean boundary between Canada and the United States.[10] The *Tenyo Maru* sunk in approximately 550 feet of water and the wreck continued to discharge oil. Despite response efforts by the United States Coast Guard, the oil slick expanded and drifted to shore along the Washington State coast. Although the spill occurred in and continued from Canadian waters, no observable oil reached Canadian shores. Ultimately, a $4.5 million claim for cleanup and response expenses was presented by the US Government together with individual plaintiff claims by First Nations bands and persons involved in fisheries. Although observable oil spill damage to the Canadian coastline was negligible, the Canadian Government also

[7] *Ibid* at 130.
[8] *Ibid.*
[9] *Ibid* at 131.
[10] National Oceanic and Atmospheric Administration, "Case: *Tenyo Maru*, WA", (US Department of Commerce), online: <http://www.darrp.noaa.gov/northwest/tenyo>.

presented claims for pollution and environmental damage.[11] As in the *Nestucca* incident, all claims were ultimately settled so that no judicial authority with respect to dealing with cross-border pollution damage claims under the respective nations' pollution regimes was generated.

UNITED STATES OIL POLLUTION PREVENTION LEGISLATION

US Federal Legislation

The review contemplated in this article allows for only a brief overview of oil spill governance in the United States. Prior to March 1989 when the *Exxon Valdez* ran aground in Prince William Sound, Alaska, oil discharges were dealt with through several federal and state statutes together with international conventions. Called an ineffective patchwork, the existing regime failed to provide comprehensive oil spill coverage and many shortcomings of the collection of statutes were observed.[12] In the years prior to the *Exxon Valdez* spill, Congress had made many attempts to enact a unified oil pollution law. The passage of unified legislation was hindered by contentious issues such as whether a federal oil pollution law ought to fetter a state's power to impose stricter penalties or requirements, such as unlimited liability, or whether oil-carrying vessels should be built with double hulls.[13] Issues were also raised regarding concerns that US federal and state laws could be pre-empted by international standards if the United States became a party to certain international conventions.[14]

Following the *Exxon Valdez* spill, Congress was under significant pressure to show leadership in overcoming the contentious issues in the face of strong media and public disdain. Ultimately, the *Oil Pollution Act of 1990* (OPA) was enacted and is discussed below.[15] In addition to the OPA, a review of relevant but lesser-known federal legislation is also necessary.[16]

Federal Water Pollution Control Act

The *Federal Water Pollution Control Act*,[17] commonly known as the *Clean Water Act*, is a comprehensive statute aimed at restoring and maintaining the physical and biological integrity of United States waters. It establishes a complex regulatory scheme administered by federal agencies and by the United States related to water pollution. The goal of the Act is to eliminate the pollution of the waters of the United States, with the most commonly prosecuted crime being the discharge of a pollutant into US waters. The

[11] Bernard, *supra* note 2 at 131.
[12] Congressional Research, *supra* note 1 at 10.
[13] *Ibid* at 11.
[14] *Ibid.*
[15] 33 USC § 2701 et seq; Congressional Research, *supra* note 1 at 11.
[16] Pollution Legislation Information in this section of the article, unless otherwise cited, is taken from the US Coast Guard website, online: <http://www.uscg.mil/>.
[17] 33 USC §§ 1251-1387.

Act's prohibitions against discharge of a pollutant apply to foreign vessels in US waters. The statute also requires immediate notification of a pollution discharge by vessels. When violations are committed knowingly in contravention of the Act, they are felonies. When violations are committed negligently, they are misdemeanors. Because the prohibition against discharge is unrelated to vessel design, construction, manning and equipment requirements, the Act's prohibition against discharge of pollutants would apply to a Canadian or foreign vessel passing through US waters.[18]

Comprehensive Environmental Response Compensation and Liability Act

The *Comprehensive Environmental Response Compensation and Liability Act*[19] of 1980 ("CERCLA") regulates the notification, response, cleanup and liability for hazardous substances deposited into the environment including navigable waters. The Act creates a superfund which is used to finance governmental response actions and to reimburse private parties for costs incurred in carrying out the cleanup of pollutant substances.

Act to Prevent Pollution from Ships

In the United States the *Act to Prevent Pollution from Ships*[20] enacted portions of the *International Convention for the Prevention of Pollution from Ships*, 1973,[21] as modified by the Protocol of 1978[22] (MARPOL). Enacted portions of MARPOL include Annex 1 which established requirements to prevent the discharge of oil except in accordance with specific conditions. The regulations implementing Annex 1 limit the discharge of oil and establish reporting requirements for discharges. They also establish specific requirements for monitoring equipment and record keeping on board vessels, including oil record books in which all discharges, disposals and transfers of oil are kept. The Act applies to all foreign flag vessels operating in navigable waters of the United States, including Canadian vessels. As MARPOL Annex 1 is in effect in both Canada and the United States, the requirements should be the same in both countries.

Oil Pollution Act of 1990

The OPA was enacted in the aftermath of the *Exxon Valdez* spill and created a comprehensive prevention, response, liability and compensation regime dealing with oil pollution incidents in navigable waters of the United States. The OPA deals with a range

[18] In 1979, the US and Canada entered into the bilateral treaty, the *Exchange of Notes Between the Government of Canada and the Government of the United States of America Constituting an Agreement on Vessel Traffic Management for the Juan de Fuca Region*, 32 UST 377, TIAS 9706, 1221 UNTS 67, whereat section 204.2, the governments agreed that, in applying regulations to vessels proceeding through its portion of applicable waters, they would consider compliance with the requirements of the other parties: "Vessel Design, Construction, Manning and Equipment Requirements....to be effectively equivalent to material compliance with its own requirements."

[19] 42 USC § 9601.

[20] 33 USC § 1901.

[21] 12 ILM 1319 (1973), not in force.

[22] *Protocol Relating to the Convention for the Prevention of Pollution from Ships*, 17 ILM 246 (1978).

of contentious issues connected with responding, preventing and paying for oil pollution accidents. The federal oversight of maritime oil transportation was increased by the OPA and focus was directed toward environmental safeguards by the following changes:

- Increasing penalties,
- Increasing potential liabilities,
- Broadening enforcement authority,
- Broadening financial responsibility requirements,
- Setting new requirements for vessel construction, licensing and manning, and
- Mandating contingency planning.[23]

The US Coast Guard's National Pollution Fund Center ("NPFC") was created to implement Title I of the OPA which deals with prevention, response and financial responsibility for oil pollution. The OPA created the Oil Spill Liability Trust fund ("OSLTF") which is managed by the National Pollution Fund Center ("NPFC") and has increased to $1 billion.[24] As in Canada, the United States follows the polluter-pays principle where the polluter, otherwise known as the Responsible Party, is liable for payment of cleanup of the spill and claims, up to the applicable limit of liability set out in OPA. If the Responsible Party cannot or will not pay up to the limit of liability, claimants are entitled to present claims for funding from the OSLTF. Under the OPA, US and foreign flag vessels must demonstrate financial ability to pay for pollution damages or they generally are prohibited from operating in US waters.

The OPA requires that vessels over 300 gross tons operating in US navigable waters obtain and maintain a Certificate of Financial Responsibility[25] ("COFR"). Procedures are set out in the COFR regulations requiring vessel owners to establish and maintain evidence of their financial ability to meet a worst case liability under OPA. In the case of an oil spill, an owner or operator of the offending vessel is a Responsible Party and generally strictly liable for cleanup and removal costs. With a COFR comes a limit of liability (with certain exceptions, such as willfulness in regards to the oil spill or gross negligence).[26] The current limits of liability are set out for non-tank vessels, tank barges and tank ships. Non-tank vessels are subject to a limit of liabilityof $1,000 per gross ton or $854,400, whichever is greater. Tank barges and tank ships greater than 3,000 gross

[23] This description of the operation of OPA is taken from United States Coast Guard, "National Pollution Fund Centre", (US DPT of Homeland Security), online: <http://www.uscg.mil/ccs/npfc/>.
[24] *Ibid.*
[25] 33 USC § 2716 (a) (1).
[26] 33 USC § 2704.

tons that are not double bottom are subject to a limit of $3,200 per gross tons or $23,496,000, whichever is greater.[27]

Civil penalties for illegal discharges of oil were increased by OPA with fines of up to $25,000 per each day of violation.[28] Criminal penalties for a negligent discharge of oil include fines up to $25,000 per day of violation, or imprisonment for not more than one year, or both.[29] Criminal penalties for intentional discharge of oil include fines of not less than $5,000 nor more than $50,000 per day of violation, or imprisonment for not more than 3 years, or both.[30]

Washington State Legislation

Prior to the passage of OPA in 1990, many American states had oil spill liability laws. One of the central obstacles to unified federal oil pollution legislation was whether or not to pre-empt state liability laws, with pre-emption opponents arguing that the states ought to be permitted to set stiffer compensation, liability and cleanup standards. The alarm caused by the *Exxon Valdez* spill led to inclusion in the OPA of wording in section 2718 that preserved any state's right to impose increased liability and additional requirements related to cleanup standards and the discharge of oil. Many states imposed unlimited liability.[31]

On the Pacific coast, Washington State has legislated with respect to environmental protection and the prevention of oil discharges by way of the Revised Code of Washington, notably the chapter on Vessel Oil Spill Prevention and Response.[32] The Washington State law seeks to achieve the highest level of protection through use of the best achievable technology, training and operational methods available. Under Washington law, vessels over 300 gross tons are "covered vessels," as are vessels carrying oil as cargo and smaller tank ships. Each of these covered vessels is required to have a contingency plan for oil spill cleanup and containment.[33]

The Washington State Department of Ecology has statutory authority pursuant to Washington State law to respond to oil spills, or threats of spills, and to take all necessary action to respond to a substantial threat of an oil spill and recover expenses from the Responsible Party or other sources, including the Federal Government.[34] If the Responsible Party will not or is unable to reimburse Washington State for the oil spill

[27] United States Coast Guard, Oil Pollution Act Liability Limits in 2012 (US Dpt of Homeland Security), online: <http://www.uscg.mil/npfc/docs/PDFS/reports/liability_limits_report_2012.pdf>.
[28] 33 USC § 2716(a).
[29] 33 USC § 1319(c)(1).
[30] 33 USC § 1319(c)(2).
[31] Congressional Research, *supra* note 1 at 20; 33 USC § 2718.
[32] RCW 88.46.
[33] RCW 88.46.010.
[34] RCW 90.56.

response expenses, the Department of Ecology can seek reimbursement directly from the OSLTF fund.

Washington law also requires foreign vessels to have evidence of insurance, surety bonds or other evidence of financial responsibility. Where a covered vessel has filed documentation of financial responsibility with the Federal Government such as a COFR that exceeds or is the same as state requirements, no additional filing need be made to the state.[35] Cargo vessels or passenger ships that carry oil only as fuel are required to demonstrate financial responsibility to pay up to $300 million, but this can be accomplished through proof of membership in a recognised protection and indemnity association.[36] Tanker vessels are required to establish a higher level of financial responsibility, that is, $500 million.

The line between US federal and state jurisdiction in regard to environmental regulations aimed at vessels has been tested. The Supreme Court in *United States v. Locke*[37] struck down Washington legislation purporting to establish rules with respect to tanker inspection programs, oil spill prevention plans, and the screening of crew and vessels with respect to determining risks to the environment. However, the United States Supreme Court considered the OPA savings clause and confirmed that, in OPA, Congress permitted the states to establish financial responsibility requirements and liability rules relating to oil pollution incidents.[38]

CANADIAN OIL POLLUTION LEGISLATION

According to Transport Canada, on any given day there are 180 *International Convention for the Safety of Life at Sea*[39] (SOLAS) vessels (over 500 tonnes) operating within Canada's exclusive economic zone (200 nautical miles from shore). There are about 475,000 vessel movements per year on the West Coast, with tankers accounting for more than 1,500 movements. Canada has the world's longest coastline (243,000 km) and each year 80 million tonnes of oil are shipped off of the east and west coasts.[40] Canadians are keenly aware of the pristine environment up and down both coastlines, and with a strong environmental movement (Greenpeace was started in Vancouver, British Columbia), both the federal and provincial coastal governments have legislated significantly in the area of marine pollution prevention and response. As a general rule, ship–source oil pollution falls within Canadian federal jurisdiction. Historically Canada has taken a rather aggressive stance at both national and international levels regarding pollution prevention and protection of the marine environment. Fortunately, Canada has not been subjected to a large catastrophic oil pollution disaster such as the *Exxon Valdez*.

[35] RCW 88.40.030.
[36] RCW 88.40.020(3)(b).
[37] 529 USC 89 (2000).
[38] *Ibid* at 105.
[39] 32 UST 47; 1184 UNTS 278.
[40] Canada, "Transport Canada Tanker Safety and Spill Prevention", online: <http://www.tc.gc.ca/eng/marinesafety/menu-4100.htm> [Tanker Safety and Spill Prevention].

However, over the years, there have been a significant number of marine pollution accidents in Canadian waters.

As a result, Canada has typically been a supporter of most international conventions directed to the protection of the marine environment. Generally, the International Maritime Organization conventions pertaining to oil pollution liability, compensation and prevention, otherwise described as the international marine pollution prevention legal regime, is essentially Canadian law.[41] However, this has not always been the case. In the 1970s, Canada was disappointed with the direction being taken in regard to the international conventions, particularly with the fact that the international regime would only deal with pollution caused by tanker spills of persistent oil rather than all forms of pollution caused by ships. Rules were enacted in the previous *Canada Shipping Act* that were similar but not identical to the international conventions. For over a decade, Canada operated what was essentially a parallel regime outside the international one. However, following further international spill incidents, Canadian authorities observed that some of the features of the Canadian regime were not working and the regime created disadvantages for potential Canadian claimants who would be precluded from presenting claims to the well-functioning international regime. Ultimately, the Canadian government concluded that adoption of the international regime provided Canada with the necessary coverage to deal with a major tanker incident in Canadian waters.[42]

Canadian Federal Legislation

A brief review of some of the pertinent Canadian legislation relating to oil pollution prevention, enforcement and compensation follows.

Canada Shipping Act, 2001

The *Canada Shipping Act, 2001*[43] ("CSA 2001") is Canada's most comprehensive statute regulating shipping. Parts 8 and 9 apply to ships within Canada's exclusive economic zone and deal with pollution prevention and response. The CSA 2001 gives effect to many of the international conventions, to which Canada is a party, including MARPOL. The CSA 2001 is applicable to pollution incidents, prevention, response, and offences and gives effect to various regulations relating to oil pollution. In addition to MARPOL, Canada is a party to the *International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990*[44] ("OPRC 1990") regime.[45] Canada is therefore obliged to be capable and prepared to respond to oil spills. A private network of response organizations were set up by Transport Canada for specific Canadian

[41] Edgar Gold, Aldo Chircop & Hugh Kindred, Maritime Law (Toronto: Irwin Law, 2003) [Gold, Chircop & Kindred].
[42] Alfred H. Popp, Q.C., "Marine Liability Act (MLA), Part 6-Substantive Amendments and Primer on Claims to the SOPF", (2010), online: <http://www.cmla.org/papers>.
[43] SC 2001, c 26 [CSA 2001].
[44] 1891 UNTS 51; 30 ILM 733 (1990).
[45] CSA 2001, *supra* note 43 at Sch 1.

geographical regions. These response organizations are the designated first responders required to initiate response and cleanup.[46]

The CSA 2001 sets out various offences with a maximum penalty of $1 million and/or 18 months' imprisonment for contravention of certain provisions of the Act including failing to have an arrangement with a pollution response organization, failing to have or implement a pollution prevention plan, and failing to have prescribed equipment and procedures.[47] Prohibited discharge of prescribed pollutants, including oil and requirements for implementation of an oil pollution emergency plan, are set out in the CSA 2001.[48] The offence provisions for the discharging of oil under the CSA 2001 provide for a maximum penalty of $1 million and/or 18 months' imprisonment.[49]

In 2008, Canada introduced new administrative enforcement tools applicable to pollution prevention as well as other matters through the *Administrative Monetary Penalties Regulations*.[50] These regulations allow Transport Canada to impose administrative penalties for violations of offence provisions under the CSA 2001 including the unlawful discharge of oil into the sea. The maximum penalty is $25,000. Therefore, typically the regulations will only be applied in small spill incidents. Transport Canada always has the option to proceed through criminal court proceedings where an oil pollution offence has occurred.

The CSA 2001 implements regulations dealing with pollution prevention, notably the *Vessel Pollution and Dangerous Chemicals Regulations*[51] enacted in 2012, which replaced previous pollution regulations. These new regulations set out standards that are additional or complementary to the standards set out in MARPOL. The regulations implement vessel construction and equipment requirements, and regulate record keeping as well as ship board documentation, among other things. The regulations prohibit discharge of oil or oily mixtures unless the discharge is necessary to save the ship or lives, or the discharge results from an accident that is not the result of un-seaman like action.[52]

Marine Liability Act

The *Marine Liability Act*[53] ("MLA") was enacted in 2001 to collect varied shipping liability provisions into one statute. The compensation and liability provisions were moved from the CSA 2011 to Part 6 of the MLA. Part 6 legislates in respect to liability and compensation for pollution. The Canadian regime set out in Part 6 of the MLA

[46] *Ibid* at ss 169, 171.
[47] *Ibid* at ss 183-187.
[48] *Ibid* at ss 187, 188.
[49] *Ibid* at s 191.
[50] SOR/2008-97.
[51] SOR/2012-69.
[52] *Ibid* at ss 4-5.
[53] SC 2001, c 6.

implements the international conventions bringing Canada in line with the international regime. The MLA implements the *International Convention on Civil Liability for Oil Pollution Damage*, 1992 and amendments ("*Civil Liability Convention*"), the *International Convention on Civil Liability for Bunker Oil Pollution Damage*, 2001 ("*Bunker Convention*") and the *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage*, 1992 ("*Fund Convention*") and the *Protocol of 2003* to the *Fund Convention*. As a result, ship-source oil pollution damage claims are considered in respect to whether they are governed by the *Civil Liability Convention* or the *Bunker Convention*. If neither of these conventions applies, then the claims will be governed by the rules set out in Division 2 of Part 6 of the MLA. Those provisions deal with liability for pollution and environmental damage including provisions dealing with strict liability defences and limitation periods.[54]

Currently Canada has a regime of compulsory insurance through the implementation of the above Conventions. This includes sea-going vessels engaged in carriage of oil in bulk as cargo as well as general cargo vessels that carry bunker oil as fuel. The *Protocol of 2003*, mentioned above, was acceded to by amendments to the MLA in 2010 which established that, for tanker spills affecting Canada, approximately $1.18 billion is available to compensate claims with an additional sum potentially available from a Canadian-specific fund discussed below.

Part 7 of the MLA deals with the *Canadian Ship-Source Oil Pollution Fund* ("SOPF"). The SOPF fund is available to pay claims for oil pollution damage or anticipated damage in Canadian waters, including the exclusive economic zone, caused by ship-source oil discharges. Compensation payable is in regard to all classes of ships but subject to the terms and conditions of the governing legislation. The SOPF can also provide a fourth layer of compensation in the event that compensation from the shipowner under the applicable conventions is insufficient to cover all claims. For 2013, the maximum liability of the SOPF was $161 million for all claims from one oil spill.[55]

Civil liability against the shipowner for oil pollution damage is set out in section 51 of the MLA and includes the reasonable costs and expenses incurred to prevent, repair, remedy or minimize oil pollution damage from the ship.

Fisheries Act

The CSA 2001 provides shared responsibility between Transport Canada and Fisheries and Oceans Canada with respect to the discharge of oil. The Canadian Coast Guard, now part of Fisheries and Oceans Canada, has certain enforcement powers in regard to the adequacy of oil pollution plans and prevention of the discharge of pollutants

[54] *Ibid* at ss 75-77.
[55] Canada, Ministry of Transport, *Administrator's Annual Report*, 2012-2013 (The) (Ottawa: Ship Source Oil Pollution Fund, 2013).

during loading and unloading operations. The *Fisheries Act*[56] contains provisions designed to protect fish habitat and prevent pollution. That Act prohibits the introduction of "deleterious substances" into water frequented by fish.[57] The offence provisions include severe penalties similar to the CSA 2001 with a fine of $1 million and/or imprisonment for up to three years for an indictable offence.

Canadian Environmental Protection Act, 1999

The *Canadian Environmental Protection Act, 1999*[58] ("CEPA") came into force in 2000 over concerns by Environment Canada in regard to environmental pollution. This wide ranging environmental legislation also deals specifically with marine pollution and prohibits the disposal of wastes at sea within Canadian jurisdiction and by Canadian ships in waters under foreign jurisdiction, unless the disposal is done under a permit issued by Environment Canada. Predictably, oil is not a substance that is considered a "waste" under the Act and therefore its disposal is prohibited.

Any contravention of the Act may attract a fine of up to $1 million and imprisonment for not more than three years. A ship is deemed to be a person in respect of the offence provisions. The Act further provides that a person who intentionally or recklessly causes a disaster that results in a loss of the use of the environment may be imprisoned for up to five years.[59] Under the Act, the directors and officers of a corporation, and the master and chief engineer of a vessel, shall take all reasonable care to ensure that a ship is in compliance with the Act. It further provides that if a ship commits an offence, the master and chief engineer of the ship are guilty of the offence and liable for punishment whether or not the ship has been prosecuted or convicted.[60]

Migratory Birds Convention Act, 1994

The *Migratory Birds Convention Act, 1994*[61] implements Canada's obligations under a longstanding treaty with the United States designed to protect migrating birds. The Act prohibits the deposit of a substance harmful to migratory birds in waters frequented by migratory birds. Recent amendments to the Act by Environment Canada have targeted ship-source pollution. Every master, chief engineer, owner and operator of a vessel, including corporate directors, shall take all reasonable care to ensure that the vessel and persons on board comply with the prohibition provisions.[62] The powers of game officers are significant including arrest without warrant, entry and seizure of evidence together

[56] RSC 1985 c F-14.
[57] *Ibid* at ss 35-36.
[58] SC 1999, c 33.
[59] *Ibid* at ss 272-274.
[60] *Ibid* at ss 280.1-280.3.
[61] SC 1994, c 22.
[62] *Ibid* at ss 5.1-5.4.

with the power to stop or detain vessels. Every person or vessel that commits an offence is liable to a fine of up to $1 million and/or imprisonment of not more than three years.[63]

It should be clear from this brief overview of Canadian legislation that marine polluters can expect to be vigorously prosecuted under one or more of the several offence regimes encompassing both shipping and environmental legislation.

British Columbia Legislation

As Canada's west coast province, British Columbia has approximately 475,000 vessel movements per year.[64] Oil tankers have been moving regularly along Canada's west coast since the 1930s with most oil moved via the ports of Vancouver, Prince Rupert and Kitimat. In 2009 8.4 million tonnes of oil were shipped out of Vancouver with much of the oil transported in oil barges to communities on the extensive British Columbia coastline.[65]

In respect to pollution legislation, given the division of powers between the Federal Government and the Provinces, generally environmental protection within a province and pollution from land comes within the provincial jurisdiction. The Federal Government has jurisdiction in all matters concerning navigation and shipping, fisheries, and the sea coast. However, one piece of British Columbia legislation touches on marine pollution. The *Environmental Management Act*[66] ("EMA") was brought into force in 2004 and replaced the *Waste Management Act*.[67] The scope of the Act is broad and prohibits the discharge of waste from a boat into any natural body of water except in compliance with a permit.[68] Persons with possession, charge or control of polluting substances may be required to prepare contingency plans and such persons must report any spills.[69]

Canadian Common Law

It is generally accepted that the statutory remedies under Canadian law and the international conventions permit appropriate recovery and redress for oil spills. Nevertheless, typically claimants will plead common law remedies of nuisance, negligence and trespass. The issue of negligence in oil pollution cases is approached on the same principles as in other damage claims. Typically, oil pollution cases arising from grounding or collision will focus on principles of negligence including breach of the duty of care and the remoteness of damages. In respect to nuisance, the Canadian Federal

[63] *Ibid* at s 13.
[64] Tanker Safety and Spill Prevention, *supra* note 40.
[65] *Ibid*.
[66] SBC 2003, c 53.
[67] RSBC 1996, c 482.
[68] *Ibid* at s 13.
[69] *Ibid* at ss 79-81.

Court considered a ship-source oil pollution incident in *The Queen v the Sun Diamond*[70] and held that private land owners of the foreshore were entitled to an action in nuisance.

UNITED STATES/CANADA TRANS-BOUNDARY COOPERATIVE AGREEMENTS AND TREATIES

Adoption of the international pollution regime by Canada in the late 1980s and subsequently was a significant step in bringing North America into a universal international oil pollution prevention and response regime. The possibility of a North American regime, or inclusion of the United States in the international regime, was precluded by the 1989 *Exxon Valdez* oil spill disaster and subsequent adoption of OPA in the United States.

On the Pacific coast, notwithstanding the significant differences and complexities between the United States and Canadian pollution legislation, the practicalities of having to deal with cross-border oil spills has led the respective governments, federally and regionally, to enter into various agreements and oil spill working groups.

The Pacific State/British Columbia Oil Spill Task Force

The Pacific States/British Columbia Oil Spill Task Force (the "Spill Task Force") involves the states of Washington, Oregon, California, Hawaii, Alaska and the province of British Columbia. The stated goal of the Spill Task Force is to strengthen state and provincial abilities to prevent, prepare for, and respond to oil spills. Efforts are directed to facilitate communication and promote policy uniformity and improve prevention, preparedness and response through the sharing of information and ideas.[71] The Spill Task Force targeted changing trends on the West Coast involving the transportation of oil and dry cargos. Specific trends include heavier ship traffic with anticipated increased oil transmission pipeline throughput and the expanded use of unit trains to ship oil. The Spill Task Force has identified dramatically increased production of unconventional crude oils from the Alberta oil sands and the Bakken formation in North Dakota as drivers of significant future tanker traffic. The Spill Task Force has also observed that proposals to dramatically increase the shipment of North American coal and grain to Asian markets will have an impact on prevention and response issues.

The Spill Task Force continues to consider issues including emergency response tug availability, promotion of best industry practices for vessels and tank barges, and further oil spill prevention education.[72] The Spill Task Force tracks Canadian and American federal pollution policy initiatives and coordinates meetings with Canadian and US oil spill agencies.

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[70] [1984] 1 FC 3 at 25.
[71] The Pacific State/British Columbia Oil Spill Task Force, *2013-2014 Annual Workplan*, online: <http://www.oilspilltaskforce.org>.
[72] *Ibid.*

Canada-United States Joint Marine Pollution Contingency Plan

The first *Canada-United States Joint Marine Pollution Contingency Plan* ("Joint Plan") was promulgated in 1974 in respect of the Great Lakes. In 1983, four geographical annexes were added: one for the Atlantic, one for the Beaufort Sea area and two for the Pacific ("CANUSDIX" and "CANUSPAC"). CANUSDIX covers the area known as Dixon Entrance in the Pacific Ocean at the boundary between Alaska and British Columbia. CANUSPAC applies to the internal and navigable waters of both the United States and British Columbia, including waters off the Pacific coast from the border and Boundary Bay through the Strait of Georgia, Boundary Pass, Haro Strait and the Strait of Juan de Fuca. The Joint Plan provides guidance for joint response teams and for co-chairing by the Canadian Coast Guard and the US Coast Guard.[73]

Inter-agency environmental emergency contingency plans allow spill response agencies from various levels of government in Canada and in the United States to work together and share ideas in spill preparedness, response and prevention. It is recognized that oil spill accidents are not necessarily limited to a single jurisdiction and that ongoing cooperative efforts are required to deal with the release of oil and other pollutants that may cause damage to the environment. In Canada, the process that the Canadian Coast Guard will follow in responding to a marine emergency is set out in the Marine Spills Contingency Plan – National Chapter. The Pacific Regional Marine Spills Contingency Plan provides additional details specific to British Columbia.[74] As discussed above, the central cooperative arrangement between Canada and the United States dealing with protection of the environment from oil spills is the Joint Plan.[75] The Joint Plan provides for cooperation in responding to pollution incidents in the contiguous waters of Canada and the United States. The Joint Plan addresses the obligation of cooperation in regard to expeditious response, communication, provision of resources and appointment of a joint response team.[76]

Other Joint Agreements and Understandings

The Spill Task Force has reached other specific agreements and understandings that have been adopted as set out below.

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[73] The Pacific State/British Columbia Oil Spill Task Force, "The Stakeholder Workgroup Review of Planning and Response Capabilities for a Marine Oil Spill on the US/Canadian Transboundary Areas of the Pacific Coast Project Report", (2011), online: <http://www.oilspilltaskforce.org/docs/notes_reports/Final_US_Canada_Transboundary_Project_Report.pdf> [Stakeholder Workgroup Report].

[74] Canada, Ministry of Environment, "Inter-Agency Contingency Plans", online: <http://www.env.gov.bc.ca/eemp/coop/plans.htm>.

[75] *Ibid.*

[76] *Ibid.*

Incident Command System

This system provides a framework for managing emergencies and response activities with the purpose of creating a well-managed response system recognizing people as primary assets.[77]

Oil Spill Reporting Cooperative Agreement

In 1993 this agreement was reached to provide a consistent oil spill reporting telephone number that is directed to an appropriate state or provincial emergency services authority.[78]

Mutual Aid Agreement

The Spill Task Force created a mutual aid agreement in 1997 with the stated purpose of setting specific conditions whereby certain task force members may be in a position to free up their equipment for mutual aid by meeting temporarily reduced response standards.[79]

Spill and Incident Data Collection Insuring Agreement

This is an agreement by the members of the Spill Task Force to cooperate and participate in the exchange of oil spill data to expand the database on West Coast oil spills and facilitate information exchange.[80]

Marine Spill Prevention Cooperative Agreement

This cooperative agreement comprises a brief memorandum between British Columbia and Washington State that reflects the intention of the parties to facilitate and increase cooperation in regard to oil spill prevention and response.[81]

Stakeholder Workgroup Review of Planning and Response Capabilities for a Marine Oil Spill on Transboundary Areas of the Pacific Coast Project Report

The Spill Task Force released a report in 2011 regarding oil spill response capacities in the transboundary areas (the "Project Report").[82] Involved in this process were 88

[77] Bernard, *supra* note 2 at 162.
[78] *Ibid* at 161.
[79] *Ibid* at 162.
[80] *Ibid* at 163.
[81] *Ibid.*
[82] Stakeholder Workgroup Report, *supra* note 73.

trustees and stakeholders who live and work along the two Pacific marine borders between Canada and the United States. The recommendations contained in the Project Report are directed at state or provincial United States and Canadian federal agencies. The stakeholder workgroup recognized that when a significant spill occurs in a transboundary area, many people have a stake in a successful response and cleanup including government agencies, the polluter, national resource trustees, response organizations, wildlife experts, the media and the public.[83] Stakeholders from Alaska, British Columbia and Washington State initially met to review and document existing US/Canadian transboundary oil spill response plans and capabilities and to recommend improvements for both joint response and planning efforts. The report addressed in detail transboundary planning and preparedness topics including command topics, planning topics, operations, logistics and finance.[84]

Referencing the *Nestucca* fuel barge spill in 1988, the Project Report identified several challenges that remain to this day including:

- Coordination of the port-of-refuge decisions in cross-border locations;
- Challenging logistical issues relating to spill response on remote coastlines;
- Oily waste disposal – which jurisdiction;
- Volunteer management, wildlife rehabilitation and media relations; and
- The increased role of shipping and oil industries in transboundary response planning.[85]

Logistical issues are likely to arise in implementing the Joint Plan as the plan requires response measures to be carried out under the procedures of each country's national response system. The Canadian Coast Guard uses the Response Management System whereas the US Coast Guard uses the Incident Command System ("ICS"). Under the ICS system, the Responsible Party polluter will be in a unified command with the federal on-scene coordinator, whereas under the Canadian Response Management System, the polluter may be the Incident Commander, with the Canadian Coast Guard serving as a monitoring officer only.[86] In the case of an oil spill in Canadian waters, the Canadian Coast Guard will monitor the actions of the polluter and only take over if there is inadequate response implementation by the polluter.

[83] *Ibid* at 3.
[84] *Ibid* at 4-5.
[85] *Ibid* at 5-6.
[86] *Ibid.*

Joint United States/Canada Transboundary Exercises

The Joint Plan provides that exercises may include a table-top exercise, an equipment deployment exercise or a call-out exercise.[87] Based on current risk analysis and resource availability, exercises are to be developed and documented cooperatively. Much of the transboundary cooperative discussions have revolved around the challenges of responding to major vessel casualties that can lead to oil pollution incidents.

OTHER CROSS-BORDER SPILL PREVENTION ISSUES

Mystery Spills

Both the United States and Canada have a legal mandate to respond to and clean up mystery spills originating in their respective jurisdictions. In Canada, where the polluter is unknown, the Canadian Coast Guard will assume overall management of the incident and ensure a proper response. In the United States, the US Coast Guard and the Washington Department of Ecology have contracts with response organizations to expedite cleanup actions where the polluter is unknown. The Joint Plan includes commitments to make timely notifications as between the two nations in the event a spill may impact an adjacent country.[88]

Spill Response Plans

In both the United States and Canada, inbound vessels must ensure that they have a valid contractual arrangement in place with an approved spill response organization or contractor in their region prior to arrival in Canadian or US waters. On the west coast of Canada, the certified response organization is the Western Canada Marine Response Corporation. The CSA 2001 requires inbound vessels to have an arrangement with a response organization (with respect to a quantity of oil carried as cargo and fuel to a prescribed maximum quantity) and to confirm that pollution insurance coverage is in place.[89]

In Washington State there are now two response contractors, the Washington State Marine Cooperative and the National Response Corporation. As a subscriber of one of the two approved response plans, vessels are provided with response planning, communications, spill management and spill response capabilities that are required under Washington regulations.[90] As of October 2013, non-tank vessel owners are required to

[87] *Ibid* at 75.
[88] *Ibid* at 50-51.
[89] CSA 2001, *supra* note 43 at s 167.
[90] National Response Corporation, "NRC Covered Vessels Washington State Contingency Plan", online: <http://nrcwaplan.nrcc.com/>.

enter into agreements with oil spill contractors with sufficient response resources to deal with the worst case discharge. This new requirement applies to non-tank vessels of 400 gross tons or greater that carry oil of any kind as fuel for main propulsion on the navigable waters of the United States.[91]

Rescue Tug Capability

Following the *Nestucca* oil spill and *Exxon Valdez*, Washington State authorities and politicians were pressured to establish a large ocean-going tug at the entrance of Juan de Fuca Strait at Neah Bay, Washington. In 1999, after several years of discussions between authorities and the shipping industry, a dedicated rescue tug was established to protect coastal waters.[92] In British Columbia, rescue tug capability relies on a "tug-of-opportunity" arrangement which relies on a commercial tug being in the area of a stricken vessel. Consideration of the establishment of a dedicated rescue assist tug to serve British Columbia's southern west coast had been undertaken previously. However, in the last twenty years no significant vessel accidents have occurred to raise public and political pressure. Criticisms of the "tug-of-opportunity" arrangement include reliance on the master and crew to have the necessary skill and training, and the arrangement assumes that the tug has a place to harbour its tow.[93]

Tank Vessel Tug Escort

British Columbia requires tug escort for partially or fully loaded crude oil tankers of 40,000 tonnes or greater transiting Haro Strait and Boundary Pass (US/Canada border), pursuant to guidelines developed in the 1990s by Transport Canada, Pacific Pilotage Authority, Vancouver Port and the oil industry.[94] In January 2014, the tug escort requirement will apply to all other vessels carrying liquid in bulk of that size. Oil tanker escort services are also provided by tugs stationed at Delta, British Columbia on the Strait of Georgia. United States tanker tug escort requirements are well-defined for laden oil tankers in both Alaska and Washington State. Prince William Sound has a world-class tanker escort system consisting of powerful tractor tugs that accompany Alaskan oil tankers through the sound.[95] With the increasing possibility of far higher frequency tanker traffic in Georgia Strait and Haro Strait there have been calls to revisit the older guidelines to ensure they reflect best practices for oil tanker escort.[96]

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[91] Federal Register, Vol 78, No 189, September 30, 2013 [Federal Register].
[92] EnviroEmerg Consulting Services, *Major Marine Vessel Casualty Risk and Response Preparedness in British Columbia* (July 2008), online: <http://www.acee-ceaa.gc.ca/050/documents_staticpost/cearref_21799/86129/Major_Marine_Vessel_Casualty.pdf> [Major Marine Vessel Casualty].
[93] *Ibid* at 121.
[94] *Ibid* at 127.
[95] *Ibid.*
[96] *Ibid.*

Vessel Traffic Management

The Canadian Guard operates the Marine Communications and Traffic Services program which provides marine safety communications and coordination with rescue resources and vessel traffic services. The United States Coast Guard operates the Puget Sound VTS System from Seattle, Washington. A Cooperative Vessel's Traffic Services Agreement ("CVTS") exists between Canada and the US. As part of the Agreement, Tofino, BC traffic provides vessel traffic services for the offshore approaches to Juan de Fuca Strait and along the Washington State coastline.[97] Additionally, traffic separation schemes have been set up cooperatively in Juan de Fuca Strait and Puget Sound.

Tanker Exclusion Zones

A voluntary tanker exclusion zone has been established off the British Columbia coast by agreement between the US Coast Guard and the tanker industry. This zone applies to oil tankers in service between Valdez, Alaska and Puget Sound, Washington. The voluntary zone requires laden tankers to remain approximately 60 nautical miles offshore, although it does not apply to tankers travelling to or from British Columbia ports. On average there is one loaded tanker from Alaska entering the Juan de Fuca Strait every day. Transport Canada Policy prevents tankers over 40,000 DWT from using the southern portion of the inside passage and tankers are directed to the outside Pacific Ocean route. The United States Coast Guard also places restrictions on tankers that operate in Puget Sound.[98]

Places of Refuge

The Pacific *Regional Places of Refuge Contingency Plan* implemented by Canada includes regional measures to complement the national plan and establishes a framework to provide an effective and efficient response to requests from ships in need of assistance seeking a place of refuge.[99] The Places of Refuge Plan applies to all situations where a ship needs assistance and requires a place of refuge within Canadian waters. It also applies if a ship headed to Canada reports a problem such as a deficiency, defect or casualty. However, the Places of Refuge Plan does not apply to distress situations if lives are in danger as it is contemplated that existing search and rescue procedures will apply in those cases.[100] The Places of Refuge Plan aligns with the International Maritime Organization *Guidelines on Places of Refuge for Ships in Need of Assistance*.[101]

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[97] United States Coast Guard, "Canada/US Cooperative Vessel Traffic Service", (US Dpt of Homeland Security), online: <http://www.uscg.mil/d13/cvts/>.

[98] Tanker Safety and Spill Prevention, supra note 40; see also Chamber of Shipping BC, "Tanker Exclusion Zone Classification", online: <http://www.cosbc.ca/index.php?option=com_content&view=article&id=475%3>.

[99] Canada, Transport Canada, "Section 2 - Places of Refuge Contingency Plan - Pacific Region", online: <http://www.tc.gc.ca/eng/marinesafety/tp-menu-515-3051.htm>.

[100] *Ibid.*

[101] International Maritime Organization (IMO), *Guidelines on Places of Refuge for Ships in Need of Assistance*, Resolution A.949(23).

In Canada and internationally "Places of Refuge" plans have become an important issue in maritime circles because of an apparent change to what had been long accepted as a customary international law of the sea, namely that requests for a place of refuge are rarely, if ever, refused.[102] There has been an increasing reluctance on the part of coastal states to provide refuge to ships in distress, particularly those vessels carrying dangerous cargo or oil. There have been several significant and major incidents involving ships carrying oil and other dangerous cargo being refused access to places of refuge. Two of the ships, the *Erika* and the *Prestige* caused massive pollution damage after sinking off the coasts of Spain and France.

Under the Places of Refuge Plan, Transport Canada has the authority to direct a vessel to a location to carry out inspections or to proceed to a selected place to anchor. Where there are grounds to believe the vessel may have discharged a pollutant, Transport Canada is authorized to direct a vessel to proceed through Canadian waters or be directed to move or anchor at selected locations. However, challenges remain in respect to decisions in British Columbia regarding places of refuge. As discussed above, concerns with respect to the rescue tug capability on the west coast of Canada exist. Documentation of anchorage suitability and environmental sensitivity issues is lacking. Communications with local community, coastal entities and First Nations bands regarding understanding place of refuge decisions will be important.[103]

In the United States, authorities deal with a place of refuge request on a case-by-case basis. The National Response Team ("NRT"), which includes the US Coast Guard, developed an approved *Guidelines for Places of Refuge Decision-Making* (the "NRT Guidelines") that provides for an incident-specific decision-making process for deciding whether a ship ought to be moved to a place of refuge. The NRT Guidelines require consultation with stakeholders and experts in the identification of potential places of refuge.[104]

Marine Pilots

Another significant risk reduction measure is the requirement that all vessels entering Canadian and US waters are required to take on a marine pilot to advise the master on the safe navigation of the ship through the various passageways along the coast.[105] In Canada, pilotage is managed by the Pacific Pilotage Authority, and in Washington State, by the Puget Sound Pilots.

[102] Aldo Chircop, Olof Linden & Detlef Nielsen, "Characterizing the Problem of Places of Refuge" in Aldo Chircop and Olof Linden, eds, *Places of Refuge for Ships – Emerging Environmental Concerns of a Maritime Custom* (Martinus Nijhoff, 2006) at 3-4.
[103] Major Marine Vessel Casualty, *supra* note 92 at 133.
[104] US Department of Homeland Security, "United States Coast Guard Places of Refuge Policy, COMDTINST 16451.9", July 17, 2007, online: <http://www.mlaus.org/archives/library/1948.pdf>.
[105] *Pilotage Act*, RSC 1985, c P-14.

CROSS-BORDER COMPENSATION AND RESPONSE FUNDING COMPARISONS

The issue of compensation and response funding to the citizens located in the border areas between the United States and Canada is not straight-forward when considering the significant differences between American and Canadian oil spill damage compensation schemes. Questions arise regarding the ability to recover damages where the vessel is lost or the owner or underwriters do not respond. Will there be equal protection on both sides of the border if the spill originates from a tanker rather than bunkers on board a cargo vessel? Significant issues arise with respect to the recovery for environmental or non-use damages in each of the two jurisdictions.

Marine Liability Act Remedies

As discussed above, the MLA provides for legal liability on the shipowner for actual and anticipated oil spill damage, costs of the cleanup and reasonable measures of reinstatement if the environment has been impacted. Canada is a party to the international conventions discussed above. Under the *Civil Liability Convention* a shipowner has strict liability for pollution damage to the limit of financial liability determined by the tonnage of the ship. The shipowner's liability insurer is required to guarantee that amount. The *Civil Liability Convention* typically applies to vessels carrying more than 2,000 tonnes of persistent oil in bulk as cargo.

General Pollution Damage Recovery in Canada

The present Canadian scheme for compensation for ship-source oil pollution can be summarized briefly by describing the four tiers of coverage set out below.

Tier 1: Protection and Indemnity Insurance and Civil Liability Convention

Most shipowners are insured through a mutual association, usually a Protection and Indemnity Club. Shipowners operating vessels carrying more than 2,000 tonnes of persistent bulk oil as cargo must carry insurance or other financial security to cover oil pollution damage. Shipowners are liable up to $140 million, typically paid by their Protection and Indemnity Association.

Tier 2: International Oil Pollution Compensation Fund

Once compensation available under Tier 1 becomes inadequate, the international oil compensation fund can be accessed and tops up the Tier 1 amount to about $318 million.

Tier 3: International Oil Pollution Compensation Supplementary Fund

In 2010, Canada joined this Fund which makes available to any person having a valid claim under Tier 2, the value of which exceeds $318 million, this Supplementary Fund,

which operates to top up the total coverage to approximately $1.18 billion total from Tiers 1, 2 and 3.

Tier 4: Canada's Ship Source Oil Pollution Fund

The SOPF described earlier operates to provide an amount over and above any sum paid under Tiers 1, 2 and 3. However, the maximum liability of the SOPF to respond to a single oil spill incident is $161 million. Therefore, under the current Canadian compensation regime, the total amount of compensation available from all four tiers of funding is approximately $1.34 billion.

Claimants can be governments, businesses, First Nations bands or individuals but claimants must show damage resulted from oil pollution (with the types of damage including property, cleanup, economic loss and environmental damage/reinstatement). The costs and preventative measures must meet the reasonableness test.[106]

General Pollution Damage Recovery in the United States

Claimants must show that the damage claimed was caused by an oil spill, that the claim falls under OPA and that the amount claimed is appropriate. The claimant must show that he or she has presented a claim to the Responsible Party polluter, unless that party is not known. However, OPA does provide the polluter with limits of liability provided that there was no gross negligence or violations of federal regulations. Under the OPA system, the polluter has the burden of paying for spill costs, including cleanup and restoration of the environment, together with compensation to parties economically harmed by the spill. Once the limit of liability has been reached, or where the polluter does not pay or cannot be identified, OPA permits a claim on the OSLTF Fund. The Fund was largely financed by a per-barrel tax on petroleum products.[107] Currently, due to consolidation of certain other oil pollution funds and collection of the tax on the petroleum industry the OSLTF Fund has increased to $1 billion. To ensure rapid and effective response to oil spills, the President of the United States has the authority to make available up to $50 million each year. The balance of the Fund is used to pay claims and fund appropriations by Congress to Federal agencies.[108] Costs claimed can also be in regard to a substantial threat of a discharge into US waters.[109]

United States Pollution Damage Claims in Canada

No recovery is available to a United States citizen for pollution damage under the provisions of the MLA. That is because, in Canada, the MLA limits the recovery of

[106] Stakeholder Workgroup Report, *supra* note 73 at 197-198.
[107] Major Marine Vessel Casualty, *supra* note 92 at 102.
[108] United States Coast Guard, "Oil Spill Liability Trust Fund (OSLTF)", online: <http://www.uscg.mil/npfc/about_Npfc/osltf.asp>.
[109] *Ibid* at 199.

pollution expenses to the Minister of Fisheries and Oceans, the response organization, other persons in Canada or any person in a state other than Canada that is a party to the *Civil Liability Convention*. Since the United States is not a party to the *Civil Liability Convention*, a US citizen is limited to bringing a claim based on common law tort against a shipowner liable for oil pollution damage.[110]

Canadian Pollution Damage Claims in the United States

There is no jurisprudence dealing with transboundary ship-source oil pollution claims. OPA places the primary burden of liability and costs of oil spills on the vessel owner responsible for the oil spill into the navigable waters of the United States. As discussed above, OPA provides for a wide range of damages that can form the basis of a claim for compensation including property damage, loss of profits, loss of government revenue, loss of subsistent use of natural resources, and importantly, natural resource damage and costs of assessing such damage.[111]

OPA provides for claims by foreign governments and persons if they have not otherwise been compensated and if the recovery is authorized by a treaty or executive agreement between the United States and the claimant's country by which the claimant's country has certified that it provides for a comparable remedy for United States' claimants.[112] Canada does not have such an agreement with the United States. In the result, Canadians are not able to file a claim under OPA notwithstanding the number of cooperative agreements and working groups in existence between the two jurisdictions regarding oil pollution. One exception provides relief to Canadians who suffer damages in the course of a discharge of Alaskan oil arising from Trans-Canada pipeline legislation.[113]

RECENT INITIATIVES TO IMPROVE PREVENTION AND RESPONSE

2013 United States Vessel Response Plans

The United States Coast Guard published their Final Rule addressing non-tank vessel response plans in September 2013. Under the new rule, not only tankers, but non-tank vessel owners, must enter into contracts with oil spill contractors having sufficient response capability to deal with a worst-case discharge.[114]

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[110] *Ibid* at 201.
[111] The International Tanker Owners Pollution Federation Limited (ITOPF), "Spill Compensation – National Regimes", online: <http://www.itopf.com/spill-compensation/national-regimes/>.
[112] 33 USC § 2707.
[113] *Ibid*.
[114] Federal Register, *supra* note 91.

2011 Washington State – Improving Oil Spill Prevention and Response

Following the BP *Deepwater Horizon* Gulf oil spill in 2010, Washington State considered that the Gulf oil spill provided an opportunity to study the lessons learned and recommendations that could apply to spill prevention and response planning in the State. In August 2011, the Department of Ecology issued a report, Improving Oil Spill Prevention and Response in Washington State (the "Report"), following a review of oil spill response planning, financial responsibility, and safety of off-shore operations. The central question, often asked, was "how prepared is Washington for a catastrophic spill?" The Report identified the gaps and strengths that exist in those critical areas and provided recommendations for improvement.[115]

The Report recommended that action be taken to assess improved methods of risk assessment and management. The Report identified that one of the biggest gaps in the Northwest is a limited capability to respond to large oil spills when they cross the international border with Canada. It was noted that complex coordination and logistical issues between the two countries ought to be addressed well-ahead of a spill. The Report noted that recommendations from the Spill Task Force, discussed above, must be considered in dealing with transboundary spill planning issues.[116]

2010 Audit of the Canadian Government's Management of Oil Pollution Incidents

In 2010, the Office of the Auditor General of Canada released an audit report (the "Audit Report") focused on oil spill preparedness and response activities in Canada. The audit team conducted an assessment as to whether Transport Canada, the Canadian Coast Guard and Environment Canada have sufficient plans, systems, or protocols in place to prepare for and respond to ship-source oil and chemical spills.[117] No examination of prevention or detection activities was conducted. The Audit Report noted that the Canadian Coast Guard's role as the lead responder to ship-source oil spills requires an up-to-date national emergency management plan which is currently lacking. Environment Canada's main responsibility related to ship-source oil spill response is to support the Canadian Coast Guard by providing advice and expertise on sensitive ecological areas and potential risks. The Audit Report also points out potential shortcomings with respect to the Coast Guard's current spill response capacity and the state of the response equipment, noting the last assessment of spill response capacity was conducted in 2000.[118]

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[115] State of Washington – Department of Ecology & the Puget Sound Partnership, "Improving Oil Spill Prevention", (August 2011), online: <http://www.ecy.wa.gov/programs/spills/studies_reports/ECY-PSP%20Review%20of%20DWH%20Commission%20Report.pdf>.

[116] *Ibid* at 8-10.

[117] Office of the Auditor General, "2010 Fall Report of the Commissioner of the Environment and Sustainable Development", online: <http://www.oag-bvg.gc.ca/internet/english/parl_cesd_201012_01_e_34424.html>.

[118] *Ibid.*

2013 Tanker Safety Expert Panel Review

The last formal review of Canada's tanker safety system was conducted following the 1989 *Exxon Valdez* oil spill. The review led to implementation of a comprehensive national spill preparedness and response regime discussed in detail previously. The 2010 Audit Report discussed above recommended that the Government of Canada ensure that Canada is prepared to respond to ship-source oil spills in Canadian waters. Transport Canada convened the Tanker Safety Expert Panel in March 2013 to conduct an evidence-based review and assessment of the tanker safety system, including the system structure, functionality and overall effectiveness.[119] The review focused on whether the current regulated response capacity of 10,000 tonnes is adequate and consistent with other international standards. The review also considered the system's effectiveness with respect to response structure, funding of response activities, and placement of response assets. The Phase 1 report dealing with the CANUSDIX and CANUSPAC areas south of 60° N will be released in December, 2013.

2013 British Columbia West Coast Spill Response Study

The British Columbia Government has a strong interest in ensuring its coastline is protected by a world-class marine oil spill prevention, preparedness and response regime. This is particularly so, given the increased volume of tanker shipping expected by the number of proposed major projects involving transportation of oil products to and from British Columbia ports. The Ministry of Environment commissioned a report to assess the current oil spill regime on the west coast of Canada. The West Coast Spill Response Study (the "Response Study") is significant and comprises three volumes dealing with the current oil spill prevention and response regime, vessel traffic, and an overview of an ideal, world-class spill preparedness system with recommendations for enhancement.[120]

The Response Study makes some thirty-four formal recommendations in respect to specific characteristics of an ideal world-class response regime pertaining to prevention standards, timely implementation of resources, comprehensive contingency planning, timely deployment of equipment and personnel, resource restoration, response funding, and compensation. No doubt this comprehensive examination of the Canadian oil spill regime and its recommendations, together with the imminent release of the Tanker Review Panel Report, will be considered in detail by government agencies as Canada ensures that it continues to be an international leader in oil-spill prevention and response.

[119] Transport Canada, "Creation of the Tanker Safety Expert Panel", online: <http://www.tc.gc.ca/eng/mediaroom/backgrounders-menu-7088.htm>.
[120] British Columbia Ministry of Environment, "West Coast Spill Response Study", online: <http://www.env.gov.bc.ca/main/west-coast-spill-response-study/>.

CONCLUSION

The protection of the environment worldwide has become a major focus at the highest political levels as well as for the average citizen. Media treatment of significant international vessel casualties and pollution events has resulted in increased legislative action directed to prevention, enforcement, liability and compensation for pollution incidents. It is commonly accepted that almost all developments, legislative initiatives, international conventions and vessel safety improvements have been spurred by some type of maritime disaster. The *Torrey Canyon* tanker spill in 1967 off the British coast, which caused the largest single oil spill in history, directly resulted in the conclusion of two new international conventions related to marine pollution.[121]

Interestingly, over the last two decades, there has not been a significant cross-border oil spill in the Pacific Northwest to test the performance of the respective agencies and response capabilities. Certainly, issues around response and compensation reciprocity between the United States and Canada, given the different compensation and funding regimes for oil spills, remain a concern. For instance, natural resource damages compensation from the Responsible Party polluter is routine in the Unites States. Canada on the other hand, has not progressed toward a national resource damage assessment policy and, without commenting on the respective merits of the positions of the countries in that regard, neither governments nor claimants can be assured of the degree of reciprocity that may exist in a cross-border spill incident.[122]

There is little doubt that, from a spill management perspective, many of the issues would be significantly simpler if the United States were a participant in the international compensation regime. Participation by the United States would provide claimants with a source of compensation for pollution damage to either country that would be largely reciprocal. Clearly, that scenario is not on the horizon. Nevertheless, efforts should be directed by both the United States and Canadian governments to undertake a comprehensive comparison in respect of oil spill response, damage assessment and compensation. Equitable reciprocity and joint response capability planning ought to be considered. Canadian claimants are unable to make a claim under OPA whereas American claimants are unable to claim for oil pollution damage under the international conventions in force in the Canadian regime. Governments have identified the pressing need to improve transboundary oil spill response capability and coordination.

The timing is right for discussion between the two countries. The Canadian and British Columbia governments are currently engaged in a multi-agency all-encompassing assessment of tanker safety, oil spill prevention, and response preparedness. The likelihood of significantly increased oil tanker traffic from proposed major marine transportation projects, increased port calls from cargo ships, and the growth of tank

[121] Gold, Chircop & Kindred, *supra* note 41 at 661.
[122] Major Marine Vessel Casualty, *supra* note 92 at v-vi.

barge traffic in waters bordering both nations lend support for renewed efforts in transboundary cooperation.