

**THE *ERIKA* AND THE EROSION OF THE CIVIL LIABILITY CONVENTION:
VETTING, NON-USE AND ENVIRONMENTAL DAMAGE
BEFORE THE FRENCH COUR DE CASSATION***

On December 12, 1999 the Maltese tanker *Erika* broke in two in the Bay of Biscay 60 miles from the coast of Brittany, France. The tanker was carrying 31,000 tonnes of heavy fuel oil. Two thirds spilled into the sea at the time of the incident. The two sections of the broken hull sank in different areas of the sea.

Over 400 kilometres of shoreline were soiled with the cargo of the *Erika*. The cleanup was immediately commenced but secondary cleaning was required in the 2000 and 2001 summer months. More than 250,000 tonnes of waste oil were collected and the oil giant Total, the shipper and charterer, paid over \$75 million to have the waste disposed of. The French government paid to have the oil removed from the two sunken sections of the vessel.

The *Erika* was a relatively small vessel and the limitation fund under the international oil pollution regime amounted to slightly less than \$20 million. The funding available under the international regime totalled 135 million special drawings rights (SDR) or about \$200 million.

Total had approved the *Erika* for chartering notwithstanding that the vessel had not been approved by Total in over a year and was 23 years old. Approval was blocked by Total's in-house vetting system, due to the delay since the last approval, but the system was overridden by the vetting manager. Total voluntarily undertook not to pursue claims against the available funding to the extent that the presentation of such claims would result in the total amount of claims exceeding the compensation available. The French government made a similar pledge.

In the end, in addition to the claims of Total and of the French government, over 7,000 claims were made for a total of \$600 million, well in excess of the limited amount of funding available, and Total and the French government thus waived their claims against the International Oil Pollution Compensation Fund (IOPC Fund). However, the French government did not waive its claim against Total or against the other parties involved in the incident.

At a seminar of the Canadian Maritime Law Association in 2012, the authors of this paper canvassed the compensation available from the international pollution regime, the implementation of that regime in Canada, and the lessons to be drawn from the *Erika* incident, including the effect of the *Erika* rulings on charterer and cargo owner liability for oil pollution damage. That paper was issued prior to the decision of the French Supreme Court, the Cour de cassation, which agreed to hear the appeal of the decision of the French Court of Appeal in the *Erika*. The final decision was handed down on September 25, 2012.

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The purpose of this paper is to review the questions raised at the 2012 seminar and to see what the Cour de cassation decided.

Part I: The Regime of Liability and Compensation in Canada

The liability and compensation regime reflected in the 1992 Convention on Civil Liability for Oil Pollution Damage (Civil Liability Convention or CLC) and the Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund Convention), as supplemented by the 2003 Protocol to the Fund Convention (Supplementary Fund), represents one of the most successful, if not the most successful, compensation regimes ever devised at the international level. The regime replaced an earlier regime, reflected in the 1969/1971 CLC and Fund Convention. Since the entry into force of the original IOPC Fund in 1979, millions of dollars of compensation have been paid out of the Fund. The overwhelming number of claims submitted have been settled amicably without recourse to the courts, providing proof of the exceptional efficacy of the system.

One of the reasons for the extraordinary success of the international regime relates to its relative simplicity. The drafters of the original conventions resisted the temptation of developing an all-encompassing scheme of liability and compensation for pollution caused by ships. Instead, they focused on the problems raised by a specific incident, the *Torrey Canyon* incident in 1967 off the coast of the United Kingdom. The original scheme enshrined the notion of shared responsibility to provide compensation for oil pollution caused by tankers. The principal responsible party was identified as the registered shipowner, providing compensation up to a specified limit of liability and backed by compulsory insurance. Cargo owners contributed to compensation through the mechanism of an international fund, where the amount of assessed claims exceeded the shipowner's limit of liability or where the shipowner was unable to meet its responsibilities to pay claims for a variety of reasons. The notion of shared responsibility was preserved in the 1992 conventions and remains the corner stone of the current regime.

Over the years, the international regime has been modified, largely in response to specific incidents. As a result of the *Amoco Cadiz* incident in 1978 off the coast of France, it was recognized that the original scheme contained in the 1969/1971 conventions did not provide sufficient compensation to cover spills of such magnitude. Negotiations were initiated to amend the scheme, resulting in the adoption of what came to be known as the 1984 Protocols. For political reasons, those protocols never entered into force. After a further round of negotiations, the substance of the 1984 Protocols was taken up in two new protocols, the 1992 Protocols, which form the basis for the 1992 CLC and Fund Convention.

Even the significantly enhanced compensation package contained in the 1992 Protocols proved to be insufficient. A number of the incidents in the late 1990s and early 2000s, including the *Erika* off the coast of France and the *Prestige* off the coast of Spain demonstrated the need for further funding. In May 2003, an optional further tier of compensation was adopted by a diplomatic conference held in London. The Supplementary Fund is not mandatory, but offers additional cover to Fund Convention states wishing to join.

At this point, it might be useful to dwell on some key elements of the international regime. As already mentioned, the registered owner of an oil tanker is primarily responsible for damage caused by spills of oil from the vessel. Liability is strict, meaning that liability can only be avoided by proving one of a very limited and narrowly defined list of defences¹.

To avoid a multiplicity of actions and insurance policies, liability is channelled to the registered owner. Originally, under the 1969 version of the CLC, the channelling provision of the regime was very restricted. In accordance with article III.4, no claim for pollution damage under the CLC or otherwise could be made against “the servants of or agents of the owner”. Under the amendments to the convention adopted in 1992, a number of other parties associated with the management and operation of the ship are specifically excluded from liability, notably, servants or agents of the owner, pilots, charterers and salvors².

The shipowner may limit its liability and, in the case of a ship carrying more than 2,000 tons of persistent oil in bulk as cargo, must provide evidence of insurance to cover its liability with direct access against the insurer. Limitation of liability is based on the tonnage of the ship, the maximum amount being reached at 140,000 tons. Converted to Canadian dollars, the maximum amount available is approximately \$137,496,600³.

As already mentioned, responsibility to pay compensation for oil pollution damage under the international regime is shared with cargo interests through the mechanism of the IOPC Fund. The fund is financed by the levy of contributions from receivers of contributing oil⁴. The IOPC Fund is basically a call fund; contributions are levied as the need arises either because the claims exceed the limit of liability of the shipowner or because the shipowner is unable to meet its obligations⁵. The total amount of compensation available from the IOPC Fund, including the Supplementary Fund, converted into Canadian dollars, is \$1,145,805,000, including any amounts recovered from the shipowner⁶.

Exceptionally, in Canada, contributions to the IOPC Fund are paid by the Ship-source Oil Pollution Fund (SOPF) on behalf of receivers. The SOPF also pays contributions to the Supplementary Fund. That Fund also offers a further tier of compensation for spills in Canada, some \$161,293,660, on top of what is available from the international funds, bringing the maximum available for a tanker spill in Canada to \$1,307,098,660. In this sense, Canada is the best protected member of the international regime of liability and compensation.

It is noteworthy that the entire regime, both in its original and amended form, is silent with regard to cargo owners, except for their obligation, as receivers of contributing oil, to pay contributions to the international funds. They should logically, therefore, be free of civil

¹ CLC, article III. 2.

² CLC, article III. 4.

³ Amounts in the CLC are expressed in Special Drawing Rights of the International Monetary Fund. See article V. The conversion to Canadian dollars is as of May 1, 2013.

⁴ For the definition of contributing oil, see article I.3, as read with article 10 of the Fund Convention.

⁵ Fund Convention, article 4.

⁶ This figure is as of May 1, 2013.

liability for pollution. Their contribution to liability for oil pollution damage comes through the funds. It will be seen that Canada has enacted federal legislation that overlaps liability and potentially risks coming into conflict with its convention obligations.

Not all states were satisfied with the outcome of the 1969 Brussels Conference which adopted the original CLC. Canada, for example, was disappointed with the result for a variety of reasons. In the first place, Canada had hoped for a more comprehensive convention dealing with liability for all forms of pollution from ships. With respect to the notion of sharing, Canada advocated direct cargo owner liability on the grounds that oil companies that shared in the profits from the maritime carriage of oil should also share in the liabilities inherent in this kind of transport. Canada responded by tabling its own made-in-Canada regime the following year in a Bill containing amendments to the *Canada Shipping Act*.

While the draft legislation in many respects closely resembled the 1969 CLC (strict liability, same limits of liability, compulsory insurance), it also contained some material differences. In principle the legislation applied to all ships and all pollutants. It attempted to make cargo owners directly liable for pollution damage on the same basis as the shipowner. In fact cargo owners, at least of oil, faced two hits, since they were also obliged to pay a levy into the newly created Maritime Pollution Claims Fund, the predecessor of the current Ship-Source Oil Pollution Fund (SOPF), for oil carried by ship⁷.

The new legislation did not prove to be an unmitigated success. While seemingly progressive and comprehensive, key provisions could not be brought into force. First and foremost, the compulsory insurance requirements could not be activated. The International Group of P&I Clubs would not provide the necessary “blue card” to back a certificate issued under the new legislation. The Clubs took the position that they would only honour certificates requiring direct access within the context of the international convention (CLC). Similarly, the cargo owner liability provisions could not be made to work, since no insurance was available for this kind of risk. The application of the new legislation to all pollutants carried in bulk as cargo on ships proved to be illusory and, in fact, the new regime only applied to oil⁸.

Part XX of the *Canada Shipping Act* entered into force, June 30, 1971⁹ and remained the governing legislation for the next 18 years. In the 1980s it became increasingly clear that the operation of a unilateral system was perhaps not providing the best protection for Canada and Canadians. Canada had an observer delegation at all business meetings of the newly created IOPC Fund and could observe at first hand the expeditious manner in which claims were being settled by that organization in close cooperation with the P&I Clubs. The governing bodies of the IOPC Fund endorsed the basic policy that claims should be investigated and paid as quickly as possible. This contrasted with what was happening in Canada.

⁷ It should be remembered that the new Part XX of the *Canada Shipping Act* closely followed the model included in the *Arctic Waters Pollution Prevention Act*, adopted in 1970, which contained some of these features.

⁸ For a comment and analysis of Part XX, see A.H.E. Popp, “Conference Proceedings” (1992), 18 *Canada-United States Law Institute and Case Western Reserve University School of Law*, 315 to 318.

⁹ Revised Statutes of Canada 1970, c. 27 (2nd Supplement, 1970).

In 1979, the British oil tanker, *Kurdistan*, broke in two off the coast of Nova Scotia causing extensive pollution damage. It took some five years to settle claims arising out of the incident. In 1988 Canada suffered the consequences of an incident in United States waters. The tank barge, *Nestucca*, collided with its tow off the coast of Washington state, puncturing one of its tanks. The resulting spill of oil spread up the coast into British Columbia. In this case it took some four years to settle claims and involved expensive and time consuming proceedings in the federal courts of the United States.

In the late 1980s the decision was made to abandon the unilateral regime contained in the *Canada Shipping Act* and to embrace the international regime contained in the 1969/1971 conventions. On April 24, 1989, amendments to the *Canada Shipping Act* implementing those conventions came into force. The following year, the British flag asphalt carrier, *Rio Orinoco*, grounded on the south shore of Anticosti Island spilling her bunker fuel. Claims arising out of the incident were submitted to the IOPC Fund and settled within 18 months of the incident, illustrating the efficiency of the international regime.

To complete the record, it should be noted that, in 2001 and 2009 respectively, amendments to the *Marine Liability Act* came into force implementing in Canada the 1992 Protocols and the Supplementary Fund Protocol. That Act replaced the original liability regime contained in the *Canada Shipping Act*. By virtue of these amendments, Canada receives the full coverage afforded by the international regime with respect to oil pollution caused by tankers.

Part II: Environmental Law in Canada

In addition to the *Marine Liability Act*, implementing the international regime of liability and compensation in Canada, there are several other pieces of federal legislation having regard to the marine environment. These include the *Canada Shipping Act, 2001*, the *Migratory Birds Convention Act, 1994* and the *Canadian Environmental Protection Act, 1999*.

By virtue of the above legislation, Canada has ratified and enacted several international conventions concerning oil pollution, including the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL). A further convention, the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (Bunkers Convention) is aimed at ship bunkers as a potential source of pollution to the extent they are not covered by the other conventions.

From the perspective of penal liability, MARPOL is a complex and detailed convention covering the construction and operation of sea-going ships in view of reducing or preventing marine pollution. MARPOL prohibits the discharge of pollutants. Oil and liquid noxious substances are listed in annexes to the convention. Only cargoes carried in bulk are covered by MARPOL. State members are required to prohibit discharges of any type of oil in their waters.

There are exceptions to the prohibition, such as where the discharge is necessary for the purpose of saving lives or the ship itself, or where the discharge results from an accident damaging the ship unless the accident occurs as a result of an action outside the ordinary practice of seamen. MARPOL defences avoid penal action but leave the shipowner strictly liable civilly. For

example, a ship pumping out an oil cargo to avoid sinking cannot be prosecuted for polluting under MARPOL, but will have to pay for the clean up under the Civil Liability Convention.

The *Canada Shipping Act, 2001*¹⁰

The *Canada Shipping Act, 2001* is principally administered by Transport Canada. The Act concerns ship-sourced pollution prevention and control. It is in this Act that MARPOL is enacted. Under the Act, any person or ship that discharges a pollutant faces strict penal liability and may be fined up to \$1,000,000 per day and terms of imprisonment not exceeding 18 months are available in certain cases.¹¹ For continuing offences, each day can be a separate offence and entail a separate fine.¹²

Regulations made under the Act incorporate the MARPOL defences to penal liability discussed above,¹³ but otherwise penal liability is strict. Thus petroleum products, whether persistent or non-persistent, are treated in a similar manner under the *Canada Shipping Act, 2001* and a spill gives rise to strict penal liability of the polluting vessel and any person causing or contributing to the discharge.

The *Canada Shipping Act, 2001* also contains a general penal provision which concerns the intentional or reckless causing of a disaster that results in serious damage to the environment. Being more of the nature of a true crime, the offence is punishable on indictment and allows the court to set the fine and can result in up to five years imprisonment.¹⁴ Canada's *Criminal Code* contains similar provisions such as the reckless operation of a vessel.

However, it is difficult to imagine how a cargo owner or charterer could be held liable under any of the penal provisions of the *Canada Shipping Act, 2001*. Prosecutions are usually directed against a vessel and, when it can be shown that an individual on board the vessel actually participated in causing the pollution, can be addressed to the individual. There have, however, been no cases published where a cargo owner or charterer has been involved in penal prosecutions under the Act. The Act does provide for wide discretion of the court finding an offender guilty and the court can order almost anything it considers appropriate. However, the Act does not go so far as to expressly enable the sentencing court to order the offender to pay compensation for the cleanup, in a case where, for example, the available compensation were to be insufficient to fully compensate a victim.

The *Canada Shipping Act, 2001* also provides for prevention by obliging ships and shore-based oil-handling facilities to have oil pollution emergency plans and arrangements in place with a certified Canadian response organization such as Western Canada Marine Response Organization which operates on the Pacific Coast. Ships must have a declaration detailing such

¹⁰ S.C. 2001, c. 26.

¹¹ *Canada Shipping Act, 2001*, s. 191(2).

¹² *Canada Shipping Act, 2001*, s. 191(3).

¹³ *Vessel Pollution and Dangerous Chemicals Regulations*, SOR/2012-69, s. 5.

¹⁴ *Canada Shipping Act, 2001*, s. 253.

plans and arrangements and indentifying the “authorized individual” who can trigger the arrangement and take preliminary steps to avoid delay.¹⁵

*The Migratory Birds Convention Act, 1994*¹⁶

The *Migratory Birds Convention Act, 1994* is administered by Environment Canada. The Act gives effect to Canada’s ratification of a protocol to a 1916 convention between Canada and the United States concerning migratory birds. There is similar federal legislation in the United States. The Act envisages the protection of birds and nests and provides for the creation of regulations. The regulations concern hunting, possession and baiting of birds but include a section concerning pollution which states that oil shall not be deposited on waters frequented by migratory birds.

In recent years, Parliament has adopted legislation to greatly reinforce the pollution provisions of the *Migratory Birds Convention Act, 1994*. The first amending legislation, Bill C-15, was passed on May 19, 2005 and is in force.¹⁷ The Bill extended the marine scope of offences under the Act notwithstanding the concerted opposition of the entire shipping community. Fines under the *Migratory Birds Convention Act, 1994* were increased but only to the same level as currently available under the *Canada Shipping Act, 2001*. Further, the MARPOL defences available under the latter Act are preserved in the amendments.

Since the adoption of Bill C-15, the owner or operator of a polluting vessel, as well as the master, chief engineer and the directors and officers of the ship-owning or operating corporation, face not only strict penal liability, but the reverse-onus of proving they took “all reasonable care” to ensure that the vessel and its crew did not pollute.¹⁸ This is a heavier onus than a due diligence defence. The term “operator”¹⁹ is defined to be the person, other than the owner, who has the possession and use of the vessel. This would include a demise charterer and a ship manager but it is unlikely that a time or voyage charterer would be included in this definition, nor are cargo owners made subject to this requirement.

The second amending legislation is Bill C-16, which was adopted on June 18, 2009.²⁰ Bill C-16 does not expressly extend the application of Environment Canada’s legislation to cargo owners or time or voyage charterers of vessels. However, it greatly increases fines for pollution. Maximum fines under the *Migratory Birds Convention Act, 1994* can now reach \$6,000,000, many times higher than the previous level. Minimum fines now apply to any individual, corporation or ship and minimum fines are doubled for second and subsequent offences. A court may only impose a fine less than the minimum fine if it believes the minimum fine will

¹⁵ A new Bill presently before Parliament, Bill C-57, will increase the prevention and preparedness aspects of oil-handling facility emergency plans.

¹⁶ S.C. 1994, c. 22.

¹⁷ S.C. 2005, c. 23.

¹⁸ *Migratory Birds Convention Act, 1994*, s. 5.4.

¹⁹ *Migratory Birds Convention Act, 1994*, s. 2(1).

²⁰ S.C. 2009, c. 14.

cause “undue financial hardship” and the judge must provide reasons therefor.²¹ The following table shows the new level of fines available to prosecutors under the revised legislation:

More serious offences	Individual	Indictment	Min. \$15,000
			Max. \$1 million (and/or 3 years imprisonment)
		Summary conviction	Min. \$5,000
			Max. \$300,000 (and/or 6 months imprisonment)
	Large revenue corporation, or vessel or ship of 7,500 tonnes deadweight or over	Indictment	Min. \$500,000
			Max. \$6 million
		Summary conviction	Min. \$100,000
			Max. \$4 million
	Small revenue corporation, or vessel or ship of less than 7,500 tonnes deadweight	Indictment	Min. \$75,000
Max. \$4 million			
Summary conviction		Min. \$25,000	
		Max. \$2 million	
Less serious offences	Individual	Indictment	No minimum
			Max. \$100,000
		Summary conviction	No minimum
			Max. \$25,000
	Large revenue corporation, or vessel or ship of 7,500 tonnes deadweight or over	Indictment	No minimum
			Max. \$500,000
		Summary conviction	No minimum
			Max. \$250,000
	Small revenue corporation, or vessel or ship of less than 7,500 tonnes deadweight	Indictment	No minimum
			Max. \$250,000
		Summary conviction	No minimum
			Max. \$50,000

Bill C-16 also allows sentencing courts to direct offenders to compensate any person for the cost of any remedial or preventive action taken as a result of the act that constituted the offence, including pollution caused by a vessel, unless the victim “is entitled to make a claim for compensation for that cost under the *Marine Liability Act* or the *Arctic Waters Pollution Prevention Act*”.²²

This exception is open to interpretation in the sense that where a victim is unable to obtain any or full compensation due to channelling, or to a defence or limitation provided for under the *Marine Liability Act*, the query arises whether a sentencing court can order compensation

²¹ *Migratory Birds Convention Act, 1994*, s. 13.06.

²² *Migratory Birds Convention Act, 1994*, ss. 16(1)(d) and 17.1(3).

without limitation. Consequently, it is possible that a shipowner or operator can face a sentencing court which would have the power to order full compensation for pollution damage. This would clearly run afoul of Canada's obligations under the Civil Liability Convention.

Finally, Bill C-16 amended the *Migratory Birds Convention Act, 1994* with regard to environmental damage. New section 13.1 requires the sentencing court to "consider [that] the amount of the fine should be increased to account for every aggravating factor associated with the offence." "Aggravating factors" are defined to include irreparable damage²³ and damage is defined to include loss of use value or non-use value of the environment.²⁴ If the sentencing court decides not to increase the amount of the fine to compensate loss of use, it must give reasons therefor.²⁵ This is a strong message that fines should compensate non-use or loss of use of the environment.

*The Canadian Environmental Protection Act, 1999*²⁶

The *Canadian Environmental Protection Act, 1999* is a vast piece of legislation administered by Environment Canada. It covers subjects as varied as toxic substances, nutrients, vehicle emissions, fuel standards, international air pollution, ocean dumping, land-based water pollution and international water pollution.

Part 8 of the *Canadian Environmental Protection Act, 1999* regulates environmental matters related to emergencies including the release or threatened release of any regulated substance. The owner of such substances and anyone having the charge, management or control thereof must repair the release by cleaning up at his own cost and is liable for any measures taken by the government.²⁷ The regulations made to date include chemicals, liquefied natural gas and gasoline but persistent oils such as crude oil are not yet listed. Thus Part 8 of the Act would not apply to a spill covered by the Civil Liability Convention. However, as items are added to the list, such substances may be included. Once included, emergency plans must be prepared by the owner of the substance or the person having the charge, management or control thereof.

Under Part 8 of the *Canadian Environmental Protection Act, 1999*, any person who owns or has the charge, management or control of a prescribed substance immediately before an environmental emergency, or who causes or contributes to the environmental emergency, shall notify the authorities and take all reasonable emergency measures consistent with the protection of the environment to prevent or mitigate the emergency.²⁸ Where such a person fails to take any of the measures, the authorities may do so in his stead and may recover all costs and expenses incurred.²⁹ The owner of the substance and the person having the charge, management or control, are jointly and severally liable for such costs and expenses as well as for the cost of

²³ *Migratory Birds Convention Act, 1994*, s. 13.1(2)(c).

²⁴ *Migratory Birds Convention Act, 1994*, s. 13.1(4).

²⁵ *Migratory Birds Convention Act, 1994*, s. 13.1(5).

²⁶ S.C. 1999, c. 33.

²⁷ *Canadian Environmental Protection Act, 1999*, s. 205.

²⁸ *Canadian Environmental Protection Act, 1999*, s. 201.

²⁹ *Canadian Environmental Protection Act, 1999*, s. 203(1).

restoring any part of the environment damaged by or during the emergency.³⁰ Liability is unlimited and strict and does not depend on proof of fault or negligence. Any other person having caused or contributed to the emergency will also be liable to the extent of their negligence.³¹

The *Canadian Environmental Protection Act, 1999* also provides that any person who suffers loss or damage as a result of conduct that contravenes the Act will have a civil cause of action and will have access to potential relief by injunction.³² However, the Act excludes any claim for damage caused by a ship to the extent that a claim for that damage may be made under the *Marine Liability Act* or the *Arctic Waters Pollution Prevention Act*.³³ This is interpreted to mean that the *Canadian Environmental Protection Act, 1999* does not create secondary civil liability for ship-sourced pollution.

However, in a manner similar to the amended *Migratory Birds Convention Act, 1994*, a remedy may lie to the extent that damages are not available under the *Marine Liability Act* or the *Arctic Waters Pollution Prevention Act*. For example, those Acts provide for limitation. The *Marine Liability Act* is also silent with regard to cargo owners. This is not the attitude of the *Canadian Environmental Protection Act, 1999* and it might be argued that cargo owners of a polluting cargo, whether on board a ship or on shore, may be civilly liable.

Bills C-15 and C-16 also amend the *Canadian Environmental Protection Act, 1999* in a manner similar to the amendments made to the *Migratory Birds Convention Act, 1994*. Thus, a remedy may lie under the “polluter pays” principle to the extent that damages are not available under the *Marine Liability Act*. As indicated above, that Act provides for limitation but is silent with regard to cargo owners.

Bill C-16 amends Part 10 of the *Canadian Environmental Protection Act, 1999* by increasing fines to the same levels as in the amended *Migratory Birds Convention Act, 1994*, reflected in the table above. The sentencing court is given the same obligation as concerns minimum fines and the same powers to order an offender to pay compensation without limitation as part of the sentence.³⁴

Further, Bill C-16 amends a section of Part 10 of the *Canadian Environmental Protection Act, 1999* to create a provision similar to the general penal provision contained in the *Canada Shipping Act, 2001* concerning the intentional or reckless causing of a disaster that results in serious damage to the environment.³⁵ However, the new section refers to the loss of the use or the non-use value of the environment. The concept of loss of use or non-use is also made available to the sentencing court for any offence under the *Canadian Environmental*

³⁰ *Canadian Environmental Protection Act, 1999*, s. 203(3).

³¹ *Canadian Environmental Protection Act, 1999*, s. 203(1)(b).

³² *Canadian Environmental Protection Act, 1999*, ss. 22 *et seq.*

³³ *Canadian Environmental Protection Act 1999*, s. 42(3).

³⁴ *Canadian Environmental Protection Act, 1999*, s. 291(1)(k).

³⁵ *Canadian Environmental Protection Act, 1999*, s. 274.

Protection Act, 1999 in a manner similar to the changes made to the *Migratory Birds Convention Act 1994* by Bill C-16.³⁶

The above enactments give effect to the international oil pollution regime but the Acts administered by Environment Canada have created parallel unlimited liability, principally triggered by the penal provisions which allow the sentencing court to order that an offender compensate victims without limitation or that he compensate the loss of use or non-use of the environment. These provisions are in conflict with the Civil Liability Convention as enacted in the *Marine Liability Act*.

Part III: The *Erika* Proceedings

Following the *Erika* incident, criminal proceedings were commenced in the Criminal Court of First Instance in Paris against the master of the *Erika*, the representative of the registered owner of the vessel, the president of the vessel's managing company, the classification society, RINA, and against Total and its chartering subsidiary. As the proceedings were criminal, the IOPC Fund was not involved as a party and was not represented.

The trial at first instance lasted for over four months, a very long time for a civil law court, and a voluminous³⁷ decision was handed down in January 2008.³⁸ The court found the representative of the owner of the *Erika* and the president of the management company guilty for lack of proper maintenance of the vessel. RINA was found guilty for carelessly renewing the classification of the vessel based on an unprofessional inspection of the hull. Total was found guilty of imprudently vetting the ship. This flowed from the testimony of a Total manager who admitted that he had overridden Total's in-house vetting system to allow the *Erika* to be cleared prior to confirming the charter. Fines ranged from \$100,000 to \$600,000. But civil liability was more costly.

In civil law countries, it is common for penal courts to also award civil remedies and the Criminal Court of First Instance in Paris held the four offenders jointly and severally liable for the damages caused by the incident and awarded various claimants consequential damages and damages for the loss of use or non-use of the environment. Damages awarded by the court amounted to more than \$300 million, over and above the amounts paid out or to be paid out by the IOPC Fund.

The channelling provision of article III.4 of the Civil Liability Convention was a point of contention before the court. The court ruled that Total could not avail itself of the provision since the charterer of the *Erika* was not Total, but one of its independent subsidiaries. The court held that RINA was not protected by channelling as a classification society was not a person performing services for the vessel.

³⁶ *Canadian Environmental Protection Act, 1999*, s. 287.1.

³⁷ In civil law countries, judicial decisions are very short. The *Erika* ruling is almost 300 pages in length, the appeal decision is almost 500 pages and the decision of the Cour de cassation is over 300 pages!

³⁸ Tribunal de grande instance de Paris, 16 janvier 2008, n° 9934895010, *DMF*, 2008, HS (12), p. 89.

As could be expected, the offenders, as well as over 70 civil parties, appealed the decision of the Criminal Court of First Instance to the Court of Appeal in Paris. However, in a public relations effort, Total voluntarily paid sums totalling over \$250 million to the civil parties, including to the French government.

The Court of Appeal rendered its decision in March 2010.³⁹ In a decision even more voluminous than that of the first instance court, the Court of Appeal upheld the convictions of the court below and many of the civil liability findings.

The Court of Appeal held that although the representative of the owner was an “agent of the owner” as defined in article III.4(a) of CLC, and therefore theoretically entitled to benefit from the channelling provision, he had acted recklessly, with knowledge that damage would probably result, thereby depriving him of protection.⁴⁰ Note that although this is not a limitation of liability ruling, it is an important interpretation of a wording very similar to that contained in article 4 of the 1976 Limitation Convention.⁴¹

In the Court of Appeal’s opinion, the president of the management company was not an agent of the ship owner but rather an agent of a company that performs services for the ship, or a sub-agent of the ship, and thus unable to benefit from channelling under article III.4(a).

The Court of Appeal found that RINA was not a person who performs services for the ship under article III.4(b) of the CLC, but was rather an agent of the flag state and thus not protected by channelling.⁴²

However, Total was found by the Court of Appeal to be the *de facto* charterer of the *Erika* and thus could benefit from the channelling provision of article III.4(c) of the CLC. The Court of Appeal reversed the finding of the lower court and held that Total could have no civil liability.

This portion of the ruling of the Court of Appeal was not sufficient however to allow Total to claim a refund of the \$250 million it had paid awaiting the appeal. Total had argued that should the channelling provision be to its benefit, refunds would be in order. The Court of Appeal found these to be final payments which could not be recovered. The importance of this ruling is that the P&I clubs, as the liability insurers of the ship owner who is strictly liable for cleanup measures, often pay out sums before or even in lieu of constituting a formal fund under CLC, in view of getting compensation to victims as soon as possible. Can the ruling of the French Court of Appeal be grounds for arguing that such payments are final payments that would not relieve the club from having to subsequently constitute a formal fund for the full amount, regardless of what has been paid out previously?

³⁹ Cour d’appel de Paris, 30 mars 2010, n° 08-02278, *DMF*, 2010, p. 857.

⁴⁰ CLC, article III.4.

⁴¹ The difference in the wording is subtle, but article 4 of the Limitation Convention speaks of “loss” whereas articles III.4 and V.2 of the CLC speak of “damage”.

⁴² It should be noted that in litigation taken by Spain in the United States against ABS, the classification society of the *Prestige*, the Southern District of New York came to the opposite conclusion. *Reino de España v. ABS*, 2010 A.M.C. 1877 (S.D.N.Y.).

Part IV: La Cour de cassation

The decision of the Court of Appeal was appealed to the Supreme Court of France, la Cour de cassation. The final hearing before that court took place on May 24, 2012 and the high court ruling was handed down on September 25, 2012.⁴³ In yet another lengthy ruling, the Cour de cassation revisited both the channelling provision of article III.4 of the Civil Liability Convention and the effect of that provision on a classification society and vessel charterer.

The high court, reversing the Court of Appeal on this point, found that RINA was a person providing services for the vessel and was thus eligible to benefit from the channelling provision. The court also reversed the finding of the Court of Appeal as to the eligibility of Total as charterer to benefit from channelling. The Cour de cassation agreed that Total as charterer was able to invoke channelling, but found that the Court of Appeal had erred in allowing such a defence on the facts of the case.

The Cour de cassation did not find it necessary in the present case to go further than to make these statements of principle concerning channelling, as it found both RINA and Total ineligible on the facts of the case to benefit from protection. The Cour de cassation found that both were sufficiently reckless to lose their right to protection. The high court noted that the channelling provision of article III.4 of the CLC does not apply where the party claiming the benefit has been reckless and was aware of the consequences. This was the case for both RINA and Total.

The court found that the senior representative of Total, although not held personally liable for overriding the vetting system, was “ necessarily aware that pollution damage was likely to occur” from such a gesture, thus removing any chance Total had to protection by way of channelling under article III.4(c) of the CLC⁴⁴.

Similarly, although reversing the decision of the Court of Appeal with regard to RINA, the classification society could not benefit from the protection of channelling under article III.4(b) as its participation in the inspection of the *Erika* could only be qualified as recklessness and it too was aware of the outcome of any such accident⁴⁵.

A similar logic applied to the representatives of both the registered owner and managing company. The Cour de cassation agreed that the owner’s representative could not benefit from channelling due to his recklessness, but reversed the Court of Appeal with regard to the representative of the managing company, finding him also covered by article III.4(c) of the CLC but ineligible to benefit therefrom due to his recklessness⁴⁶.

⁴³ Cour de cassation, 25 septembre 2012, n° 3439, *DMF*, 2012, p. 985.

⁴⁴ See page 316 of the decision of the Cour de cassation.

⁴⁵ *Id.*, page 222.

⁴⁶ *Id.*, page 220.

Part V: Limitation and the *Erika*

The French courts all referred to the closing words of article III.4 of the CLC, whereby the channelling protection will not apply where the damage resulted from the personal act or omission of the person invoking channelling, “committed with the intent to cause such damage, or recklessly, and with knowledge that such damage would probably result”. Although article III.4 is not concerned with limitation of liability, the wording is identical to the limitation provision in article V.2 and, as noted above, is also similar to that in the 1976 Limitation Convention, except the word “loss” is replaced by “damage”.

The Cour de cassation found that all four of the main defendants, including RINA, Total and the representatives of the registered owner and manager were covered by article III.4 and yet ineligible to invoke channelling due to their reckless activity.

It is fairly clear from the fact situation that all four were indeed reckless to varying degrees. It is also likely that “such damage”, if any, would be pollution damage. What is however less clear in the reasons of the French courts is how each defendant was found to have known that pollution damage would probably result from that recklessness. Pollution damage would have been the worst scenario, and could possibly result from such activity, but the French courts found that the defendants knew that pollution damage would probably result from their respective participation.

The wording of the CLC in article III.4 is repeated in identical wording in article V.2 with regard to the eligibility of the ship owner to obtain limitation of liability. Courts around the world have been hesitant to break this limitation and, indeed, the new test replacing the former “fault or privity” test was introduced as being much more difficult to break in exchange for higher limits on the shipowner.

In Canada a case is presently before the Supreme Court on breaking limitation under the 1976 Limitation Convention⁴⁷. In *Telus Communications v. Peracomo*, the owner of a fishing boat admitted having cut an underwater cable with an electric saw. It turned out that the cable was an active fiber-optics communication cable which had to be repaired. The defendant alleged having believed, although not having verified, that the cable was no longer in use. The defendant knew he was damaging a cable but the question was whether “such loss” under article 4 of the 1976 Limitation Convention meant physical damage to the cable or economic loss to its owner.

Both Harrington, J. at first instance and Gauthier, J.A. on behalf of a unanimous Federal Court of Appeal found that the damage wilfully caused to the cable was sufficient to meet the “such damage” test because the defendant knew damage had been caused. The further knowledge of loss of use or of economic loss was unnecessary. However, the Supreme Court of Canada has agreed to hear the case and the nature of recklessness and of the required test

⁴⁷ *Telus Communications v. Peracomo*, 2011 FC 494; 389 F.T.R. 196, aff’d 2012 FCA 199; 433 N.R. 152.

of knowing that such loss would probably result remains to be finally decided by Canada's highest court⁴⁸.

If the Supreme Court of Canada finds that the knowledge of the owner of the fishing boat was insufficient to break limitation, it will illustrate how differently the French and Canadian courts view this all-important test.

Part VI: Channelling and the *Erika*

The channelling provision of article III.4 of the Civil Liability Convention was intended to simplify the compensation process in two ways. First, by making only one party liable for compensation, the insurance market would not be fragmented and ship owners would be able to obtain insurance without any other party needing to insure the same risk. Secondly, the victim of a pollution would not have to wait until a national court ruled on claims between the ship owner and the charterer under the charter party before knowing who is liable for the spill. Rather, with strict liability on the ship owner and no liability on anyone else, the victim would be able to proceed regardless of any claim over by the ship owner against the charterer, or any servant of the owner.

Where the CLC was arguably unclear, was in determining who could benefit from the channelling provision. In its original form, the CLC only protected servants or agents of the owner. In its 1992 form, the protected include others as we have seen. But in no event does channelling protect cargo owners.

The *Erika* ruling has eroded the channelling concept even for protected parties by finding ways to circumvent the channelling provision of CLC. The Cour de cassation found that all main parties defendant, including the representative of the ship owner and of the management company, as well as the classification society and the charterer were covered by the provision, but were then denied benefit as their respective behaviour was found to be reckless and committed with knowledge that the pollution would probably happen.

The *Erika* ruling was also based in part on the French enactment of MARPOL⁴⁹ which entrenched the "polluter pays" principle. The ruling is from courts of civil law which allows the penal court to rule on civil consequences of an offence. Until recently, this has not been the case in Canada.

In Canada, the federal legislation we have seen is not based on civil law. But the *Migratory Birds Convention Act, 1994* and the *Canadian Environmental Protection Act, 1999* both allow a penal court in sentencing an offender to order the offender to pay compensation without limit to the victim of a spill. If the offender is a person otherwise protected by the channelling provision of the Civil Liability Convention, the convention and the law are in contradiction. In Canada, Parliament is sovereign, so much so that it can even breach its own conventional obligations. It is thus not impossible that a Canadian criminal court, finding the

⁴⁸ *Peracomo v. Telus Communications*, Supreme Court of Canada, file 34991.

⁴⁹ Loi n° 83-583 du 5 juillet 1983, *J.O.R.F.* 1983, p. 2066.

ship owner or charterer guilty of an offence, could order compensation to be paid notwithstanding the Civil Liability Convention. It can only be hoped that prosecutors will not seek such measures where they contravene the conventions.

As always, cargo owners have no protection, but it might be difficult to imagine how a cargo owner would commit an offence under Environment Canada's legislation. One way might be in misdescribing the cargo to be carried, to the extent the description could cause the spill.

Part VII: Vetting and the *Erika*

The *Erika* is one of the first cases to consider the vetting of a tank vessel in the context of the Civil Liability Convention. Vetting is simply the verification by a charterer, cargo shipper or terminal operator of the acceptability of a vessel proposed to carry a cargo. There is no legislative requirement for any charterer, shipper or terminal operator to vet a vessel, and the vessel's owner is obliged to ensure that a vessel complies with the legislative requirements applicable in the waters of each country the vessel is proposing to transit.

However, the enhanced awareness of marine pollution and the increasing cost of cleanup and civil liability flowing from oil spills have forced the oil companies to take voluntary measures to reduce the risk of pollution. One of these measure has been to implement vetting procedures which go beyond legislative requirements, and which evaluate the acceptability of a given tank vessel.

The efficiency of the vetting effort lies in the small number of very large oil and trading companies which charter or otherwise make use of tank vessels. It has become common in chartering tank vessels to include provisions that make it a requirement that the vessel maintain acceptance from the oil majors throughout the charter. A vessel owner who does not have such accreditation will face a limited market for his vessel. Many oil companies have their own in-house vetters and vetting criteria. That was the case in the *Erika* and had Total not overridden its own vetting system the vessel would never have been approved for service.

To assist oil companies in their vetting efforts, the Oil Companies' International Marine Forum, a grouping of oil majors and other smaller oil companies, has created a Ship Inspection Reporting system (SIRE), which gathers and makes available to its members ship inspection reports concerning tank vessels and tank barges. The information could be seen to be confidential, but members chartering tank vessels require ship owners to contractually and voluntarily allow such reports to be filed in SIRE and thus made available to SIRE members. If a vessel owner were to refuse to allow its vessels to be SIRE participants, the market for the vessel's services would disappear. Once on SIRE, the reports are available to all SIRE members, including a majority of the oil companies chartering tank vessels. A vessel report underlining problems will prevent the acceptance of the vessel by any SIRE member, regardless of whether the vessel is fully in class and certificated.

But the *Erika* rulings have not only looked at the vetting system of one oil major. They have raised vetting from an in-house preventive or even public relations effort to a legal

requirement. The courts held that one charterer could not wash its hands of vetting by relying on another oil company's prior approval of the vessel. More importantly, by finding that the overriding of Total's vetting system was done recklessly enough to disallow the application of the channelling provision of CLC to Total, the future of tank vessel chartering has been forever changed and yesterday's voluntary vetting has become today's compulsory vetting. Total and the other majors could not possibly now dismantle their vetting system and rely on legislative compliance. On the contrary, vetting is now a requirement for tank vessels carrying bulk oil or HNS cargoes and may very well become a requirement for dry bulk cargoes which are potential polluters.

The French Supreme Court has institutionalized the necessity of vetting. The Cour de cassation had previously ruled on the poor vetting done by Total in the *Erika* in another case involving a municipality that did not join the main criminal and civil litigation.⁵⁰

In a civil suit by the Commune de Mesquer, a municipality that was unable to obtain complete compensation from the international regime, the highest court in France and the Court of Justice of the European Communities both agreed that Total, as producer, seller and owner of the pollutant and charterer of the *Erika*, was liable to the extent that it contributed to the spill, i.e. through poor vetting.⁵¹ The Court de cassation has now confirmed vetting as a legal obligation at least for oil cargoes.

Part VIII: Environmental Damage and the *Erika*

Environmental damage has also become an issue in the international community since the ruling of the French courts in the *Erika*. The fact that article I.6(a) of the Civil Liability Convention, article 1.2 of the Fund Convention and article 1.9 of the Bunkers Convention all limit compensation for impairment of the environment to "costs of reasonable measures of reinstatement actually undertaken or to be undertaken" illustrates the desire of the international regime to avoid the valuation of loss of use or similar environmental damages that can be awarded under the laws of other countries.⁵² The same wording appears again in subsection 77(2) of the *Marine Liability Act* with regard to oil pollution that is not covered by the conventions, including spills of non-persistent oil cargoes. But the *Erika* pollution has brought to light the contradictions that can occur in national legislation, not only in France, but also in Canada.

In the *Erika*, the French courts ruled that damage to the environment can give rise to claims for compensation even when reinstatement is not envisaged. This is based on the interpretation of the French penal legislation, not on the interpretation of the Civil Liability Convention as enacted in France. But can this effect environmental damage claims in Canada?

⁵⁰ *Commune de Mesquer c. Total*, Cass., 17 décembre 2008, Bull. Civ. 2008 n° 206.

⁵¹ *Commune de Mesquer c. Total*, ECJ, 24 juin 2008, C-188/07.

⁵² Principally the United States, where the *Oil Pollution Act of 1990* and the *Clean Water Act* allow for contingent valuation methodology to assess, through public polling, the value of loss of use or non-use of the environment.

In *British Columbia v. Canadian Forest Products*,⁵³ a province sued one of Canada's largest forest products companies for loss arising from a forest fire on Crown land. The company, which was licensed to harvest timber on the land, admitted negligence in causing the fire, but contested the claim for environmental damages with regard to the loss of trees that were non-harvestable due to their remote mountain location. In a lengthy decision, the Supreme Court held unanimously that a claim for environmental damage could be made by the Crown, even though the majority rejected the claim in this case on a procedural footing. The Court held that environmental damage could be sought as part of a public nuisance claim. The Court reviewed the United States legislation and case law as well as the evaluation techniques used in that country. Although the Crown's claim for environmental loss was rejected, the decision stands as the highest Canadian authority endorsing environmental damage as part of the Crown's claim, whether or not the enabling statute mentions this head of damages.

Further, although the *Marine Liability Act* limits environmental damage to measures of reinstatement actually taken or to be undertaken, the Supreme Court did not reject more modern techniques of valuation, including "contingent valuation methodology", where not prevented by statute. It may thus not be surprising that, as set out above, Parliament recently introduced the undefined concept of "non-use value" into both the *Canadian Environmental Protection Act, 1999* and the *Migratory Birds Convention Act, 1994*. At committee hearings, Environment Canada witnesses explained that this would allow a sentencing judge to evaluate the "bequest" value of pollution damage to the environment even if it were not to be cleaned up. This would appear to be an importation of the "contingent valuation methodology" used in the United States.

Pollution damage is defined in the amended legislation as including loss of use value and non-use value and states that such damage is to be considered as an aggravating factor. Sentencing courts are to increase fines to take account of such aggravating factors and, should a court decide not to do so, the court must give reasons for that decision. It appears that contingent valuation methodology risks coming to Canada even though the *Marine Liability Act* and the Civil Liability Convention specifically prevent such methods from being used to calculate compensation.

Conclusion: The Eroding of the Civil Liability Convention

Ultimately, the provisions enacted by Parliament will end up before Canadian courts. The risk remains that these provisions, which can impose unlimited liability, will come into conflict with the Civil Liability Convention. Should a court interpret the changes introduced in Bill C-16 in this manner, the channelling and limitation provisions of the Civil Liability Convention and its prohibition of non-use compensation may be in jeopardy. Apparently, Environment Canada believes that international unity in the handling of marine spills is protected by its prosecutorial policy. This remains to be seen.

The *Erika* case shows how legislation similar to the Canadian legislation described above can lead to an end run around the international pollution regime. The French courts gave

⁵³ *British Columbia v. Canada Forest Products*, 2004 SCC 38; [2004] 2 S.C.R. 74.

effect to the “polluter pays” principle and in several cases avoided the maritime law principles of channelling and of limitation of liability. The IOPC Fund was neither a party to the proceedings nor represented before the French courts. It is unknown whether the presence of the IOPC Fund would have changed the outcome of the courts’ findings. However, the French proceedings are of interest in Canada considering that, although neither the legislation of Transport Canada nor that of Environment Canada place civil or penal liability on the owner of the pollutant, they do provide for penal liability on any person causing or contributing to the spill.

The only link to the cargo owner or charterer would appear to be the obligation that the *Erika* decisions have placed on the need to vet carrying vessels. It has become necessary to be familiar with modern vetting tools and would be prudent to make sure that all vessels proposed to carry petroleum products are acceptable vessels, whether one is charterer, shipper or the owner of the terminal the proposed vessel is to visit. This would include adopting a marine policy requiring double-hulled vessels of recent vintage and vetting and monitoring the ships and practices of the carriers. In this sense, the French proceedings are a warning for all international regime states, including Canada. Failing to heed the warning could raise the possibility of bringing the decision of the Cour de cassation to Canada.