INTERNATIONAL LAW

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As international law has become so complex and many sided, it cannot be expected that this annual survey be both comprehensive in scope and thorough in its treatment of particular topics. And, since this is a survey of Canadian law, it is proposed to confine the scope of inquiry to Canadian legislation, executive order, and decisions of Canadian judicial and administrative tribunals. International treaties and adjudications which are readily available in various international law journals are not intended to be covered in this survey.

I. SOVEREIGN IMMUNITY

Canada's position concerning the extent to which foreign sovereigns are to be accorded immunities remained unanswered by the Supreme Court of Canada despite the historic occasion presented to it in the recent case of *La république démocratique du Congo v. Venne.* [1]

The case arose out of a suit by the respondent, an architect, who entered into an agreement with representatives of the appellant government of the Democratic Republic of Congo to prepare plans for a pavilion to be erected on the grounds of Expo '67. The respondent architect prepared an account for the sum of $20,000 for the work done. That was later reduced to $12,000. The appellant government elected not to proceed with the building. When the respondent sued for the sum claimed in the Superior Court of Quebec, Montreal District, the appellant sought a declinatory exception, whereby it claimed the privilege of sovereign immunity from the jurisdiction of the court. The trial court dismissed the appellant's claim, [2] and the dismissal was affirmed unanimously by the Quebec Court of Appeal [3] on the basis of the restrictive theory of sovereign immunity. [4] The appellant

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[1] [1971] Sup. Ct. 997.

[2] [1968] Qué. R. Prat. 6 (C.S. 1967). *See also* Chen, *Annual Survey of International Law*, 3 OTTAWA L. REV. 573-75 (1969).

[3] [1969] Qué. B.R. 818, 5 D.L.R.3d 128 (1968). *See also* Chen, *Annual Survey of International Law*, 4 OTTAWA L. REV. 525-27 (1971).

[4] According to the practice of states, there are two conflicting concepts of sovereign immunity—the restrictive and the absolute theories. Under the former theory, sovereign immunity should only apply to sovereign or public acts (*jure imperri*) of a state, while under the latter theory, it should equally apply to private acts (*jure gestionis*). The modern trend is toward abandoning the absolute theory in favour of the restrictive theory. As observed by O'Connell: "the absolute view is not sanctioned by international law" and that "[a]t the present time only English, and perhaps Russian, law reflects to any extent the traditional doctrine." See 2 D. O'CONNELL, INTERNATIONAL LAW 844 (2d ed. 1970).

government further appealed to the Supreme Court of Canada in which the judgments of the lower courts were set aside and the declinatory exception was allowed.

The majority opinion of the Supreme Court was given by Mr. Justice Ritchie, who also spoke for the Court in an earlier case. [5] The rationale of Ritchie in the *Venne* case was that, since the building of the pavilion was to be contracted for by the Republic of Congo, a sovereign state, and the contract was made by the appellant's diplomatic representative and one of its departments of government, it followed that it was a contract made by a foreign sovereign "in the performance of a public sovereign act of state . . . and that the employment of the respondent was a step taken in the performance of that sovereign act . . . even if the so-called doctrine of restrictive sovereign immunity had been adopted in our courts. . . ." [6]

The implications of such a holding are that as long as a sovereign and its diplomatic representative are the parties to the transaction, immunity must ipso facto follow. [7] The majority here seems to have fallen back on the status of the contracting parties rather than the nature of the contract as the determinant of immunity. Thus, the Court is in effect adopting the absolute theory of sovereign immunity, while claiming not to be so doing.

Mr. Justice Laskin, on the other hand, agreed with the courts below and flatly rejected the absolute theory. In his dissenting opinion, he preferred to "consider immunity from the standpoint of function rather than status." He observed that:

> Affirmatively, there is the simple matter of justice to a plaintiff; there is the reasonableness of recognizing equal accessibility to domestic courts by those engaged in transnational activities, although one of the parties to a transaction may be a foreign state or an agency thereof; there is the promotion of international legal order by making certain disputes which involve a foreign state amenable to judicial processes, even though they be domestic; and, of course, the expansion of the range of activities and services in which the various states today are engaged has blurred the distinction between governmental and non-governmental functions or acts (or between so-called public and private domains of activity), so as to make it unjust to rely on status alone to determine immunity from the consequences of state action. [8]

According to him, it was the restrictive theory, not the absolute theory, that had the impressive support from scholars as well as judges, and also from

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[5] In the judgment in Flota Maratima v. The Canadian Conqueror, [1962] Sup. Ct. 598, 34 D.L.R.2d 628, the language used by Mr. Justice Ritchie, with three other justices concurring, was interpreted as a strong indication of the Court's intention to adopt the restrictive theory. See J.-G. CASTEL, INTERNATIONAL LAW 686-87 (1965). In the present case, however, the same justice has pretty well ended the hope of Canadian adoption of the restrictive theory.

[6] *Supra* note 1, at 1003.

[7] *Id.* at 1004.

[8] *Id.* at 1020.

the practice of states as reflected in the negotiation of treaties providing for waiver of immunity in commercial matters.

A further point of inconsistency in the majority opinion seems to be in Mr. Justice Ritchie's handling of the burden of proof in respect to establishing right to immunity. He said: "The question of whether the contract in question was purely private and commercial or whether it was a public act done on behalf of a sovereign state for state purposes, is one which should be decided on the record as a whole without placing the burden of rebutting any presumption on either party." [9]

At first blush, the Court seems to approve of submitting foreign sovereigns to the jurisdiction of Canadian courts in order to ascertain whether their acts have been of a private or public nature. This is, in effect, an indication of the adoption of a restrictive theory. The inconsistency, however, is due to the readiness the majority had in granting immunity to the government of the Congo with next to no facts on which to base their decision. As Laskin criticized: "the issue of immunity . . . cannot be resolved on the record that is now before this court. . . . If the immunity claimed herein is to be tested on a restrictive basis, as I think it should be, there is, in my opinion, not enough in the record upon which a ready affirmation of immunity can be founded." [10]

There exists then an obvious discrepancy between the Court's contention and its action. The Court's contention that it could decide the question of public or private act on the record has, as suggested above, an implication of ending absolute theory, whereas its action in granting immunity on the basis of incomplete record resulted practically in the granting of absolute immunity without actually examining the facts.

The majority opinion of the Supreme Court seems to be never to deny the validity of the restrictive theory while constantly granting immunity. Technically speaking, this may well be taken as an intended theory or at least practical application of the absolute theory. [11] However, since at no place did the majority advocate the absolute theory of immunity and, in fact, Ritchie repeatedly maintained that the Court's decision would be proper under either theory, the door may be still open for a judicial change to a restrictive theory.

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[9] *Id.* at 1003.

[10] *Id.* at 1024.

[11] The inclination of the Supreme Court toward adopting the absolute theory can also be seen from the refusal of Ritchie J. to follow the American cases favouring the restrictive theory of sovereign immunity. According to him, these cases were "of little or no authority in Canada." His rationale was that the direction of the United States courts had been caused by opinions from the State Department. See Ritchie's judgment at 1005.

II. EXTRADITION

Extradition is the surrender of a criminal fugitive by one state to another for trial or punishment of the offence accused or convicted of. [12] Therefore, the court will not allow an abuse of extradition process by permitting the surrender of a person to foreign state not for the bona fide purpose of prosecuting the fugitive but for the indirect purpose of obtaining or enforcing a civil judgment. In *Nebraska v. Morris,* [13] the Manitoba Queen's Bench reaffirmed this principle of law.

This was an application by the state of Nebraska to extradite the respondent, a Canadian citizen and resident of Manitoba, for the offence under the law of Nebraska of issuing an insufficient funds cheque. The case involved a sale of four aircrafts by a Nebraska company to the respondent for a price in excess of $200,000. A cheque given in payment for ten per cent of the purchasing price was dishonoured. When the respondent refused to make good the amount, the respondent was charged with an offence of issuing an insufficient funds cheque by the county attorney in Omaha and the application for extradition was made to the governor of Nebraska. The state of Nebraska's application for extradition was rejected by the Manitoba Queen's Bench.

The court's rationale was that, although the offence of issuing an insufficient funds cheque was an extradition crime, and that there was sufficient prima facie evidence to connect the respondent with the crime, the extradition application was "no more than an attempt to use the machinery of extradition to compel the settlement or abandonment of a civil suit and therefore an abuse of the power of the court." [14]

The evidence relied on by the court included a letter from an officer of the county attorney in Omaha to the respondent at Winnipeg demanding payment at his office of the amount represented by the cheque in question. The letter added that "failure to so will necessitate issuance of a warrant for your arrest." [15] Before the court, the first assistant to the Omaha county attorney further admitted that, "had the cheque been paid, no proceedings would have been taken." [16] In light of the evidence, the judge stated: "I find it difficult to accept the allegation ... of the application for extradition, addressed to the Governor of the State of Nebraska and signed by the County Attorney, wherein it is alleged that the application 'is not made for the purpose of enforcing the collection of a debt.' " [17]

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[12] Extradition is defined as "the surrender by one state at the request of another of a person within its jurisdiction who is accused or has been convicted of a crime committed within the jurisdiction of the other state." See G. LAFOREST, EXTRADITION TO AND FROM CANADA 15 (1961).

[13] [1971] 1 W.W.R. 53 (Man. Q.B. 1970).

[14] *Id.* at 58.

[15] *Id.* at 56.

[16] *Id.*

[17] *Id.*

A second case relevant to the law of extradition is *Regina v. Crux*, a decision of the British Columbia Court of Appeal.[18] The case involved a well-established rule that "the state to which a person has been extradited may not, without the consent of the requisitioned state, try a person extradited save for the offence for which he was extradited."[19] This is often referred to as the rule of speciality. However, the question in dispute was whether, for the trial of another offence to proceed, the consent given by the requisitioned state must precede the return of the accused, or whether it could be given after the accused had left the state.

The *Crux* case was an appeal against an order dismissing a motion for a writ prohibiting a provincial court judge from proceeding further in respect of certain information pending before him. The appellant had been extradited from the Bahama Islands on a particular charge. After his return to Canada, the charge was amended and the consent of the governor of the Bahama Islands as to the amended charge was obtained. The appellant raised the objection that he was being tried for an offence other than that for which he was surrendered. The objection was dismissed by the court below, and the dismissal was affirmed unanimously by the court of appeal.

In his objection the appellant maintained that the amended charge differed so substantially from the original charge set out in the governor's warrant that it amounted to a breach of the arrangement between Canada and the Bahama Islands and was contrary to section 33 of the Extradition Act,[20] and also that the governor's consent was ineffective because it was not given before he was sent out of the colony, and therefore was contrary to natural justice.

The appellant's claim of natural justice was rejected by the court. In the judgment, Mr. Justice Robertson, concurred in by the two other justices, stated:

> This plea for natural justice appears to me to be based on a false premise, namely, that one who does something in Canada and then leaves

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[18] [1971] 2 Can. Crim. Cas.2d 427.

[19] 2 D. O'CONNELL, INTERNATIONAL LAW 731 (2d ed. 1970). Thus, § 33 of the Extradition Act, CAN. REV. STAT. c. E-21 (1970) provides:

> Where any person accused or convicted of an extradition crime is surrendered by a foreign state, in pursuance of any extradition arrangement, he is not, until after he has been restored or has had an opportunity of returning to the foreign state within the meaning of the arrangement, subject, in contravention of any of the terms of the arrangement, to a prosecution or punishment in Canada for any other offence committed prior to his surrender, for which he should not, under the arrangement, be prosecuted.

Many extradition treaties also embody this rule. For example, article III of the Supplementary Extradition Convention of 1899 between Canada and the United States reads: "No person surrendered by or to either of the high Contracting Parties shall be triable or be tried for any crime or offence committed prior to his extradition, other than the offence for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered." DEPT. OF EXTERNAL AFFAIRS, TREATIES BETWEEN CANADA AND THE UNITED STATES, 1814-1825 73, at 74 (1927).

[20] CAN. REV. STAT. c. E-21 (1970).

> the country may thereby acquire a sort of qualified immunity, a preferred position in comparison with others. If A does something in Canada and remains here, he can be charged with an offence in respect of his act; if B does the same thing here, goes abroad and later returns here voluntarily, he can be charged with an offence in respect of his act; but, it is urged, if C does the same thing here, goes abroad and later is returned here against his will, he can escape prosecution for his act, if something done in a foreign country in respect of his return to Canada therefrom was contrary to natural justice. In my opinion the only special privilege to which C may be entitled arises, not from a regard for natural justice, but from the recognition that s. 33 of the *Extradition Act* gives to any arrangement with a foreign country that Canada may have made in order to obtain C's return. [21]

The court further found that the giving of the consent after the accused had left the colony was not in contravention of any of the terms of the arrangement between Canada and the Bahama Islands. In other words, under the Fugitive Offenders (Bahama Islands) Order, 1967, [22] and the certificate of arrangement, [23] a consent was not required to be given before the person accused was put out of the colony pursuant to the warrant for return issued by the governor of the Bahama Islands. According to the court, there was no limit upon the time when a consent might be given, except that it should precede the accused person being dealt with in the country to which he was returned. What was required before a person might be returned was that an arrangement be made. The rationale of the court was that,

> The words "in respect of which the Governor may consent" [in the certificate of arrangement] are future in their import and, so far as time is concerned, are limited only by their context, and that is to a time before the person is dealt with. If it had been intended to limit the giving of consent to a period ending immediately before the person left the colony, the language used would, I should think, have been something like... "in respect

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[21] *Supra* note 18, at 431.

[22] The order is one that extends to the colony certain provisions of the Fugitive Offenders Act 1967, c. 68 U.K.) modified and adopted as set out in a schedule. § 4(3) of the order reads:

> A person shall not be returned under this Act to any country, or committed to or kept in custody for the purposes of such return, unless provision is made by the law of that country, or by an arrangement made with that country, for securing that he will not, unless he has first been restored or had an opportunity of returning to the Colony, be dealt with in that country for or in respect of any offence committed before his return under this Act other than—
> (a) the offence in respect of which his return under this Act is requested;
> (b) any lesser offence proved by the facts proved before the court of committal; or
> (c) any other offence being a relevant offence in respect of which the Governor may consent to his being so dealt with.

[23] The certificate of arrangement reads: "The Canadian Government undertakes that should... Crux be returned to their jurisdiction... he will not... be dealt with for any offence other than any... offence... *in respect of which the Governor may consent* to his being dealt with." (Italics added). *See* [1971] 2 Can. Crim. Cas.2d 427, at 432.

of which the Governor before such return may have consented to his being dealt with." [24]

III. Fishing Zones

The Fishing Zones of Canada (Zones 1, 2 and 3) Order, which was announced on December 18, 1970, became effective on March 10, 1971. [25] This ordinance provides for the implementation of the 1970 amendment to the Territorial Sea and Fishing Zones Act which authorizes the Governor in Council to create exclusive Canadian fishing zones comprising areas of the sea adjacent to the coasts of Canada. [26]

Under the ordinance, the so-called "fisheries closing lines" are drawn across the entrance to the Gulf of St. Lawrence, the Bay of Fundy, Queen Charlotte Sound and Dixon Entrance-Hecate Strait. [27] The effect of this action is to assert Canadian jurisdiction over fisheries conservation and management in an additional 80,000 square miles of coastal waters [28] and

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[24] *Id.*

[25] Promulgation of Fisheries Closing Lines, 115 H. C. Deb. 2244-45 (1970); SOR/71-81.

[26] Can. Rev. Stat. c. 45, § 4 (1970 1st Supp.). *See also* Chen, *Annual Survey of International Law*, 4 Ottawa L. Review. 525, at 536-38 (1971).

[27] The actual fisheries closing lines proclaimed include the following:

(1) Gulf of St. Lawrence

(A) Across Cabot Strait a total distance of 54 miles extending from Money Point on Cape North, N.S., to St. Paul Island, N.S., to Cape Ray, Nfld.

(B) Across the Strait of Belle Isle a total distance of 45 miles from Eastern White Island, Nfld., to Northeast Ledge off Belle Isle, to Double Island, Labrador.

(2) Bay of Fundy
From Whipple Point, N.S., a distance of 23 miles to Gannet Rock, then a distance of 38 miles to Yellow Ledge, Machias Seal Island, and North Rick, and thence along Grand Manan Island to the Canada-U.S. boundary in Grand Manan Channel.

(3) Queen Charlotte Sound
From Winifred Island (Vancouver Island) to Beresford Islands, Sartine Islands, and Triangle Islands — a distance of 31 miles — and thence a further 97 miles to the Kerouard Islands and Kunglit Island (Queen Charlotte Islands).

(4) Dixon Entrance-Hecate Strait
Across Dixon Entrance a distance of 28 miles from Langara Island (Queen Charlotte Islands) to point A of the A-B Line off Cape Muzon, Alaska.

See Dept. of Fisheries and Forestry news release in 1 International Canada 267 (1970), and SOR/71-81.

[28] The Gulf of St. Lawrence has an area of nearly 60,000 square miles, the Bay of Fundy, 3,600 square miles, and Queen Charlotte Sound and Dixon Entrance-Hecate Strait, 18,500 square miles. See Dep't of Fisheries and Forestry news release in 1 International Canada 267 (1970).

to extend to these waters the effective range of Canada's anti-pollution programs. [29]

Thus, from March 10, 1971, no nation can establish a new fishery inside these exclusive fishing zones. Nor can it set up new fishing activity from that which it has traditionally conducted there. Having established their new fishing zones, Canada also intends to conclude negotiations for the phasing out of the fishing activities of certain countries which have traditionally fished in the areas concerned, namely, the United Kingdom, Denmark, France, Italy, Norway, Portugal and Spain. [30]

IV. The Marine Environment

Following its adoption of the Arctic Waters Pollution Prevention Act, [31] the twenty-eighth Parliament further amended the Fisheries Act [32] and the Canada Shipping Act [33] to ensure the maximum protection of Canada's coastline and coastal waters.

The major purpose of the Fisheries Act amendment is to improve the control of pollution in Canadian fisheries waters, although the original act had always contained provisions dealing with this subject. [34] Accordingly, section 33 of the original act is extensively revised in many respects.

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[29] According to the Fisheries Amendment Act and the Canada Shipping Amendment Act, "coastal waters of Canada" include waters in the fishing zones of Canada. Therefore, the anti-pollution provisions of these acts will apply within the limits of these new fishing zones proclaimed. *See* CAN. REV. STAT. c. 17, § 5 (1970 1st Supp.); and § 736(2) of Bill C-2, to amend the Canada Shipping Act, 28th Parl., 3d Sess. (1970-71) as passed by the House, March 1, 1971 and approved by the Senate without amendment, March 25, 1971. The royal assent of the bill was given on March 30, 1971.

[30] However, on April 24, 1971, Canada entered into an agreement on reciprocal fishing privileges with the United States and, thus, the activities of the United States fishermen in the areas concerned will not be affected by the promulgation of the fisheries closing lines. *See* statement of Hon. Jack Davis, then Minister of Fisheries and Forestry, 115 H. C. DEB. 2189 (1970).

[31] CAN. REV. STAT. c. 2 (1970 1st Supp.).

[32] Fisheries Amendment Act, CAN. REV. STAT. c. 17 (1970 1st Supp.).

[33] For the text of the act, see Bill C-2 to amend the Canada Shipping Act, 28th Parl. 3d Sess. (1970-71). The Canadian government is hopeful that the amendments to the Fisheries and the Canada Shipping Acts will lead to international agreement developing the new law of the sea. See Hon. Mitchell Sharp, *Canadian Foreign Policy and International Law*, 23 EXTERNAL AFFAIRS 175, at 178 (1971).

[34] For example, § 33(2) of the Fisheries Act, CAN. REV. STAT. c. F-14 (1970) which was repealed by the new amendment provided that:

> No person shall cause or knowingly permit to pass into, or put or knowingly permit to be put, lime, chemical substances or drugs, poisonous matters, dead or decaying fish, or remnants thereof, mill rubbish or sawdust or any other deleterious substance or thing, whether the same is of a like character to the substance named in this section or not, in any water frequented by fish, or that flows into such water, nor on ice over either such waters.

Firstly, the old definition of "wastes" is updated in the new amendment in order to be more specific [35] and to correspond directly to the definitions in other legislation such as the new Canada Water Act and the Northern Inland Waters Act. [36] Secondly, the maximum fine of $1,000 for violation under the Fisheries Act is increased to $5,000. And it could be $5,000 a day under the new amendment if the pollution continues. [37] Thirdly, the Department of Fisheries and Forestry (now Department of the Environment) is given new powers to: (1) ask any firm about its plans for expansion; (2) be informed about the anti-pollution measures to be taken in each case; and (3) to approve or disapprove of these plans and, by an Order in Council, to require any modifications necessary to protect the fisheries waters of Canada. [38] A further improvement is to give the department the power to recover from those responsible for pollution its costs incurred in looking after the interim arrangements. [39]

While the Fisheries Act amendment is no more than an improvement of the hitherto existing pollution prevention provisions in the act, the amendment to the Canada Shipping Act [40] introduces an entirely new pollution prevention scheme into the act. The scheme is applicable to pollution arising from shipping in Canadian waters south of the sixtieth parallel north latitude, [41] in Canadian arctic waters not covered by the Arctic Waters Pollution Prevention Act, [42] and in any fishing zones of Canada. [43]

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[35] The old definition did not deal with "waste" in quantitative terms, *i.e.*, concentrations. *Compare* the old definition in CAN. REV. STAT. c. F-14, § 33(2) *with* the new definition in CAN. REV. STAT. c. 17, § 3 (1970 1st Supp.).

[36] Basically the same definition of waste appears in the Fisheries Amendment Act, CAN. REV. STAT. c. 17, § 3(11) (1970 1st Supp.); the Canada Water Act, CAN. REV. STAT. c. 5, § 2(1) (1970 1st Supp.); and the Northern Inland Waters Act, CAN. REV. STAT. c. 28, § 2(1) (1970 1st Supp.) as follows:

> (a) Any substance that, if added to any waters would degrade or alter or form part of a process of degradation or alteration of the quality of those waters to an extent that is detrimental to their use by man or by any animal, fish or plant that is useful to man, and
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> (b) Any water that contains a substance in such a quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any waters, degrade or alter or form part of a process of degradation or alteration of the quality of those waters, ...

[37] *Id.* at § 3(5), (6).

[38] *Id.* at § 33 1(1), (2).

[39] *Id.* at § 3(10).

[40] Bill C-2, to amend the Canada Shipping Act, 28th Parl. 3d Sess. (1970-71).

[41] Canada's territorial sea has been extended from three miles to twelve miles. *See* Territorial Sea and Fishing Zones Amendment Act, CAN. REV. STAT. c. 45, § 1 (1970 1st Supp.).

[42] "Arctic waters" are defined in the Arctic Waters Pollution Prevention Act, CAN. REV. STAT. c. 2, § 3(1) (1970 1st Supp.) as waters in both a liquid and a frozen state "adjacent to the mainland and islands of the Canadian Arctic within the area enclosed by the sixtieth parallel of north latitude, the one hundred and forty-first meridian of longitude and a line measured seaward from the nearest Canadian land a distance of one hundred nautical miles . . . ." In addition, Arctic waters include waters adjacent to those in the area described above to the exent that such adjacent

The amendment prohibits, and prescribes penalties for, the discharge from ships of pollutant in the above waters and further requires that any discharge of pollutant or danger thereof be reported. [44] The Governor in Council may also order the destruction or removal of ships in distress which are discharging pollutant or which are likely to discharge pollutant. [45] The defintion of pollutant is comprehensive and covers, *inter alia,* "any substance that, if added to any waters, would degrade or alter or form part of a process of degradation or alteration of the quality of those waters to an extent that is detrimental to their use by man or by any animal, fish or plant that is useful to man . . . ." [46]

The Governor in Council may, by order, make regulations relating to navigation in such waters and prohibit any ship from entering any waters unless it meets the prescribed safety regulations. [47] The amendment further provides for the appointment of pollution prevention officers having broad powers, including authority both to go on board ships within such waters for inspection purposes, and to order ships in or near such waters to remain outside them if the officers suspect that the ships do not comply with the standards applicable within the waters. [48]

The remedial provisions of the amendment are far-reaching. Any person who and any ship that discharges a pollutant in violation of the act is liable to a fine not exceeding $100,000. [49] Furthermore, a pollution prevention officer may, with the consent of the Minister, seize a ship and any pollutant that is carried thereon in such waters when he suspects on reasonable grounds that the ship or pollutant owners have contravened provisions of the amendment. [50]

The amendment further establishes a Maritime Pollution Claims Fund by way of levying up to fifteen cents per ton on oil shipments entering Canada and on all movements of oil by water within Canada. [51] Under this plan, the pollution fund will be used to clean up a pollution incident. From

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waters overlie "submarine areas [that] Her Majesty in right of Canada has the right to dispose of or exploit" (§ 3(2)) insofar as the act applies to persons exploring for, developing, or exploiting natural resources in such submarine areas. (§ 6(1) (*a*)).

[43] *Supra* note 40, § 736(2).

[44] *Id.* at § 737.

[45] *Id.* at § 738.

[46] *Id.* at § 736(1) (*k*). The same definition is also adopted in the Fisheries Amendment Act, CAN. REV. STAT. c. 17, § 3(11) (1970 1st Supp.); the Canada Water Act, CAN. REV. STAT. c. 5, § 2(1) (1970 1st Supp.); and Northern Inland Waters Act, CAN. REV. STAT. c. 28, § 2(1) (1970 1st Supp.).

[47] *Id.* at § 739.

[48] *Id.* at §§ 740, 741.

[49] *Id.* at § 761.

[50] *Id.* at § 769.

[51] *Id.* at §§ 747, 757(1). According to the estimate of the Minister of Transport, Hon. Donald Jamieson, this toll, calculated on the basis of 15 cents per ton, will generate a fund of about $300,000 annually. See his statement at 115 H. C. DEB. 519 (1970).

it payments can also be made to fishermen in order to cover their loss of income as a result of pollution. [52] The amendment also provides for civil liability for all costs and expenses incurred by the Canadian government with regard to the violation and for actual loss or damage incurred by other persons resulting from the discharge of a pollutant into such waters by a ship. [53] Such civil liability is absolute and does not depend upon proof of fault or negligence. The liability, however, is limited and the Minister may require evidence of financial responsibility adequate to cover the cleanup and damage. [54]

V. Foreign Investment Insurance

Since its formation on October 1, 1969, the Export Development Corporation (EDC) has administered a new program to insure Canadian investors in developing countries against loss due to non-commercial risks such as war or revolution, confiscation or expropriation, or the inability to repatriate capital or transfer earnings. [55] To be eligible for the investment insurance program, a pre-condition under section 34(2)(*d*) of the original act establishing EDC is the need for the host country concerned to enter into a bilateral agreement giving assurance satisfactory to Canada that in the event of payment of a claim by EDC, the investor's rights can be subrogated to the corporation and that the corporation will receive treatment as favourable as that accorded any other person. [56]

Soon after the introduction of the program, EDC encountered some difficulties in the signing of a bilateral agreement. The problem stems from two controversial points in the rigid agkreement requirement stated above. Firstly, concerning EDC's right to subrogation, the problem lies in the fact that certain countries already have existing legislation to prevent foreign government, thus EDC, from ownership in the host country. [57] Secondly, in respect to EDC's claim of equal treatment in the host country, this again is hindered by some countries already having laws outlining different treat-

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[52] § 760.

[53] § 743(1).

[54] §§ 744, 745.

[55] Export Development Act, Can. Rev. Stat. c. E-18, § 34(1) (1970). *See also* Chen, *Annual Survey of International Law*, 4 Ottawa L. Rev. 525, at 538-39 (1971).

[56] *Id.*

[57] For example, under article 1 of the Spanish Decree-Law of July 27, 1959, foreign investments in Spain are restricted to investments by foreign private individuals, private corporations and the International Finance Corporation. *See* Foreign Investment in Spain 2 (Public Relations Office, Commission for the Economic and Social Development Plan, National Press of Boletin Official Del Estado. 5th ed., Dec. 1965).

ment to different kinds of investors. [58] Therefore, as of the end of 1970, EDC had successfully signed only two such agreements. [59]

In response to the proposal of the government, Parliament in February, 1971, amended the Export Development Act to dispense with the earlier legislative requirement for a bilateral agreement. [60] EDC is now authorized to provide foreign investment insurance in cases where "(i) the Minister [of Industry, Trade and Commerce] is satisfied that the interests of the Corporation in investments in that country will be protected, [61] and (ii) the government of that country has signed its approval of the investment by that investor." [62]

The same amendment also raised the maximum liability of EDC's foreign investment insurance program from $50 million to $150 million. [63] As of September 20, 1971, the insurance portfolio of EDC consisted of six contracts with a volume involved between $4 million to $5 million. [64]

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[58] For instance, Malaysian law gives more favourable treatment to its own people than to investors from abroad. *See* statement Mr. H. T. Aitken, President of EDC, in *Minutes of Proceedings and Evidence of the House Standing Comm. on Finance, Trade and Economic Affairs* No. 14, at 13 (1971).

[59] Canada had pursued bilateral negotiations with twenty countries. Only the countries of St. Lucia and Barbados in the Caribbean had signed agreements with the aforementioned clauses contained in them. Singapore signed recently, with the "as favoured treatment" clause removed. (Information obtained from EDC in its correspondence to this writer dated September 20, 1971).

[60] Bill C-184, § 9, 28th Parl. 3d Sess. (1970-71). Royal assent was given on March 11, 1971. See 115 H. C. DEB. 4185 (1971).

[61] According to Mr. Aitken, EDC will give the Minister advice guided by its interpretation of the law in the host country, by the experience of others in that country, and by EDC's own assessment of the country's economic and legal climate. *See* Aitken, *supra* note 58, at 31.

[62] The investor must get a letter from the appropriate governmental authority of the host country that they do not object to his investment, hopefully they approve of his investment. *Id.* at 12. *See also* EDC, *The Facts Behind It* 3-4 (April 1971).

[63] *Supra* note 60, § 10.

[64] Information from *supra* note 59.