Creative Sentencing, Restorative Justice and Environmental Law:
Responding to the Terra Nova FPSO Oil Spill

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On 20 November 2004 the Terra Nova FPSO inadvertently discharged 165 m\(^3\) of oily water into the surrounding waters of the Newfoundland and Labrador offshore area. Petro-Canada was charged with having caused a spill and thereby committing an offence pursuant to the Canada-Newfoundland Atlantic Accord Implementation Act. This was the first charge of its type arising from offshore oil and gas operations on the east coast of Canada. The authors provide a factual overview of the incident and identify some resultant legal issues, including the application of creative sentencing and the use of probation orders.

Le 20 novembre 2004, l'unité flottante de production, de stockage et de déchargement Terra Nova a par inadvertance rejeté 165 m\(^3\) d'eau huileuse au large de la région extracôtière de Terre-Neuve-et-Labrador. Petro-Canada a été accusé d'avoir causé ce déversement, commettant ainsi une infraction mentionnée dans la Loi de mise en œuvre de l'Accord atlantique Canada-Terre-Neuve. C'était la première fois qu'une telle accusation était déposée en relation avec l'exploitation extracôtière d'hydrocarbures sur la côte est du Canada. Les auteurs donnent une vue d'ensemble factuelle de l'incident et font ressortir certaines questions juridiques, notamment la détermination créatrice de peines et l'utilisation d'ordonnances de probation.
Introduction

I. The events of 20-21 November 2004
II. The response
III. The charge
IV. The investigation
   1. Search warrant
   2. Interviews
   3. Reporting of spill quantity
   4. Reasonable measures
   5. Creative sentencing

Conclusion

Introduction

On the evening of 20 November 2004 the Terra Nova Floating Production Storage and Offloading Facility (FPSO) inadvertently discharged what was ultimately determined to be approximately 165 m$^3$ of oily water into surrounding waters comprising part of the Newfoundland and Labrador offshore area. This paper provides a factual overview of the incident, the spill response, and the resultant charge, and identifies legal issues that arose in the course of the regulatory investigation, the spill response and the disposition of the charge, including efforts to use creative sentencing as a method to provide a direct local benefit.

Petroleum resources derived from the Newfoundland and Labrador offshore area are managed by the Canada-Newfoundland Offshore Petroleum Board (C-NLOPB), a federal and provincial authority established by the joint operation of s. 9 of the Canada-Newfoundland Atlantic Accord Implementation Act$^1$ and s. 9 of the Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act$^2$ (collectively, the Accord Acts). The Accord Acts are, in essence, mirror federal and provincial legislation implementing the agreement reached between both governments respecting resource management and

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1. S.C. 1987, c. 3 [Accord Act].
revenue sharing in relation to activities respecting the exploration for or the production of petroleum.³

Pursuant to the Accord Acts, Petro-Canada was issued a Production Operations Authorization to produce crude in the Terra Nova Commercial Discovery Area located approximately 350 kilometres southeast from St. John’s, Newfoundland and Labrador, in the Newfoundland and Labrador offshore area using a floating production, storage and offloading vessel, known as the Terra Nova FPSO.⁴ Petro-Canada is the operator of the Terra Nova FPSO.

The Terra Nova FPSO is a ship-shaped production platform. Fluids from subsea reservoirs consisting of the hydrocarbons and formation water flow through subsea wellheads into flowlines and to the FPSO. Once the fluids reach the Terra Nova FPSO they must be processed to separate the formation water from the hydrocarbons. The hydrocarbons are subsequently separated into oil and gas. The gas is returned into the reservoir.

The separated oil is stored on board the Terra Nova FPSO and subsequently offloaded to shuttle tankers which transport it to a shore-based transshipment facility from which it is ultimately shipped to refineries. The separated water is further processed to ensure that it does not exceed the permissible regulatory limit for oil content (referred to as produced water) and is then discharged to the sea.

The separation process begins when the well fluids are brought on board. The separation of water and oil is achieved by gravity separation of the two liquids, with the oil floating on top of the water. However, separation is not perfect as some oil droplets will remain in the water phase and some water droplets will remain in the oil phase. Also, some crude oil has a tendency to form an emulsion of oil and water. For those reasons very small amounts of a demulsification chemical (demulsifier) are added by way of a chemical injection system to assist in the separation and/or demulsification process.

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⁴ Accord Act, supra note 1, s.2. This section defines 'offshore area' as meaning “those submarine areas lying seaward of the low water mark of the Province and extending, at any location, as far as: (a) any prescribed line, or (b) where no line is prescribed at that location, the outer edge of the continental margin or a distance of two hundred nautical miles from the baselines from which the breadth of the territorial sea of Canada is measured, whichever is the greater.”
The settled-out produced water collected in the separators is then routed to a series of hydrocyclones which are designed to remove any residual oil from the water using centrifugal force as the method for separation. After passing through a hydrocyclone the produced water is routed to the Produced Water Degasser. This enclosed vessel is designed to remove any remaining trace quantities of dissolved gasses and to allow any final quantities of oil to settle out. The oil collected in the Produced Water Degasser is periodically discharged into the Closed Drain Vessel and then returned to the production process. The produced water, having an oil content of not greater than 60 mg/litre, is legally discharged from the Terra Nova FPSO.

The C-NLOPB Offshore Waste Treatment Guidelines determine the permissible limits of "oil in water" for produced water. They require the concentration of oil in produced water that is discharged to be measured every twelve hours and a volume-weighed thirty-day rolling average be calculated daily. Further, the thirty-day weighted average oil in water concentration must not exceed 40 mg/litre and its twenty-four hours arithmetic average must not exceed 60 mg/litre. An exceedence of either limit must be reported to C-NLOPB within twenty-four hours of its occurrence. Accordingly, a produced water sample is collected and analyzed twice daily by the laboratory technicians on board the Terra Nova FPSO and the results are recorded and reported.

The events of 20-21 November 2004

On 20 November 2004 the Terra Nova FPSO was in production, its daily production rate during November 2004 being in the range of 21,000 m³ per day. At 0700 hours on that day the produced water was sampled by the laboratory technician and was found to be 7.1 mg/litre and therefore within the regulatory limit. A produced water sample analysis at 1717 hours indicated an oil in water content of 7.8 mg/litre, which was also well within the allowable limit.

Trend data gathered during subsequent investigations into the discharge by both Petro-Canada and C-NLOPB indicated that the Test Separator functioned normally until about 1930 hours and that between 1930 hours on 20 November 2004 and 0030 hours on 21 November 2004 there was a loss of flow of demulsifier into the inlet stream of the Test Separator which caused an emulsion to form in the Test Separator. As the emulsion had properties similar to those of produced water, the instrumentation (level

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detectors) used to detect the oil/water interface in the Test Separator could not distinguish between the emulsion and produced water and interpreted the emulsion as produced water. As a result, the emulsion was treated as produced water by the system and was ultimately discharged into the ocean.

This was discovered at about 0036 hours on 21 November 2004 by a crew member who observed oil on the water on the starboard side of the Terra Nova FPSO. Trouble-shooting procedures were immediately commenced to determine and isolate the source of the oil in the water and stop any discharge and, at 0047 hours, it was confirmed that the produced water from the Test Separator was the source of the oil in the ocean sighted by the crew members. By 0059 hours a check of the status of the chemical injection panel for demulsifier had been conducted which revealed that there was no demulsification chemical flow to the Test Separator. The demulsifier flow was immediately re-introduced. Produced water discharge was also routed to the crude storage tank, rather than to disposal to sea, which stopped any further overboard discharge of produced water and emulsified oil from the Test Separator. Terra Nova FPSO personnel took the steps necessary to restore the produced water quality and at 0124 hours the oil in water limits were restored to allowable limits. C-NLOPB was notified and operations were resumed. The Test Separator produced water system functioned normally and within limits until approximately 0415 hours when C-NLOPB ordered that production be shut down.

By way of subsequent investigations by both Petro-Canada and C-NLOPB it was determined that due to a combination of events, commencing with the loss of flow of the demulsifier, an emulsion of oil and water formed in the Test Separator and passed through into the Test Hydrocyclone, then into the Produced Water Degasser and was ultimately discharged with the produced water into the ocean.

The response
Commencing at 0110 hours the Terra Nova FPSO spill response was initiated. The standby vessel was requested to provide a size estimate of the discharged emulsion. It launched a fast rescue craft to obtain samples and to report on the size and type of the discharge. At 0145 hours the Terra Nova FPSO emergency command centre was staffed and the information obtained from the standby vessel, together with what other information was available at the time, was used to estimate the discharge size and location. Based on this, a preliminary discharge estimate by Petro-Canada of 25m³ was obtained.
The *Terra Nova FPSO* gave verbal notice of the spill to the Canadian Coast Guard (CCG) at 0312 hours and C-NLOPB at 0321 hours and subsequently confirmed this notice in writing. The Petro-Canada Emergency Team was also notified and the Scotia Centre Incident Coordination Centre was mobilized.

By 0430 hours on 21 November 2004 Petro-Canada had mobilized its onshore Emergency Response Team and initiated its Oil Spill Response Plan, which had previously been approved by the C-NLOPB. Petro-Canada also immediately activated the Eastern Canada Response Corporation (ECRC) and consulted with Oil Spill Response Limited. Petro-Canada transitioned its Emergency Response Team to a Major Emergency Response Team at 1600 hours on 21 November 2004.

On the following day the volume of the oil discharged was also calculated based on a difference between oil inflow from the wells and the outflow from the production system to storage. The estimated volume, based on this analysis, was 165m$^3$; and this revised figure was reported to C-NLOPB. The oil was tracked and a response conducted using dedicated vessels, satellite data, a tracker buoy and ten surveillance flights. Trajectory models and weather forecasting were also utilized. Five wildlife surveillance flights were conducted and Petro-Canada mobilized its oiled seabird rehabilitation centre and manned it with specialist veterinarians and technicians flown in for this purpose. ECRC and Petro-Canada mobilized spill response equipment, such as booms, skimmers and sorbant materials, as part of the response. In total a team of 170 people were mobilized and remained engaged until 28 November 2004 when it was determined that no oil remained on the water. At that time the C-NLOPB, working in conjunction with the Regional Environmental Emergencies Team comprised of Environment Canada, Canadian Wildlife Services, Canadian Coast Guard, Department of Fisheries and others, authorized the demobilization of the response.

*The charge*

This was the first instance in which, as a result of a discharge from offshore oil and gas production activities off the east coast of Canada, a charge
pursuant to an offshore regulatory regime was laid. On 29 July 2005 an Information was laid by a conservation officer of the C-NLOPB stating that Petro-Canada did between 20 November 2004 and 21 November 2004 at or near the Terra Nova FPSO, operated by Petro-Canada, located in the Terra Nova Commercial Discovery Area in the Newfoundland Offshore Area cause a spill as defined by subsection 160(1) of the Canada-Newfoundland Atlantic Accord Implementation Act, and, contrary to Section 161(1), thereby committed an offence pursuant to paragraph 194(1)(a) of that legislation. A spill is defined therein as:

s. 160 (1) In Sections 161 to 165, a “spill” means a discharge, emission or escape of petroleum, other than one which is authorized under the regulations or any other federal law or that constitutes a discharge from a ship to which Part XV of the Canada Shipping Act or Part 6 of the Marine Liability Act applies.

And spills are prohibited by s. 161(1):

s.161 (1) No person shall cause or permit a spill on or from any portion of the offshore area.

The offence provision reads:

s. 194 (1) Every person is guilty of an offence who (a) contravenes this Part or the regulations;

(2) Every person who is guilty of an offence under subsection (1) is liable (a) on summary conviction, to a fine not exceeding one hundred thousand dollars or to imprisonment for a term not exceeding one year, or to both; or (b) on conviction on indictment, to a fine not exceeding one million dollars or to imprisonment for a term not exceeding five years, or to both.

6. In the case of a spill of diesel fuel from the North Triumph, four charges were laid against ExxonMobil Canada Properties—including a charge that the operator unlawfully caused or permitted a spill on or from a portion of the Nova Scotia offshore area—on 15 August 2006. This is the first charge of its type laid pursuant to the Nova Scotia regulatory regime, and the charges were brought under the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act, S.C. 1988, c. 28, s. 166(1). On 21 December 2007 a guilty plea was entered to a single charge of causing or permitting spill. The remaining charges were withdrawn. A fine of $10,000 was levied with respect to the 4,000 litre diesel spill and ExxonMobil Canada Properties was also required, by way of a probation order, to pay $50,000 to the Environmental Damages Fund. The spill did not require clean up and there was no damage to the environment.
In Canada, discharges of pollutants are generally categorized as regulatory or public welfare offences. In *R. v. Sault Ste. Marie (City)*\(^7\) the Supreme Court of Canada confirmed that public welfare offences are not criminal in any real sense but are prohibited in the public interest. Although enforced as penal laws through the utilization of the machinery of the criminal law, the offences are in substance of a civil nature and might well be regarded as a branch of administrative law to which traditional principles of criminal law have but limited application. These include matters such as pollution, and violation of liquor laws and occupational health and safety laws.

In prosecuting a strict liability offence there is no necessity for the prosecution to prove the existence of *mens rea*. The doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving due diligence. This involves a consideration of what a reasonable person would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or, if the accused took all reasonable steps to avoid the particular event. As to issues of proof, the prosecution must prove beyond a reasonable doubt that the accused committed the prohibited act, while the accused must only establish on the balance of probabilities that it has a defence of reasonable care.

The Supreme Court of Canada also held that public welfare offences *prima facie* fall within the strict liability category and would only be criminal offences if words such as “wilfully,” “with intent,” “knowledge” or “intentionally” were contained in the statutory provisions creating the offence.

The categorization of the charge laid pursuant to s. 161(1) of the *Accord Act* with respect to the oily water discharge from the *Terra Nova FPSO* as a strict liability offence, thus affording a defence of due diligence, was not disputed by the Crown. Ultimately, however, Petro-Canada elected to enter a plea of guilty to the charge having reached an agreement with the Crown as to an agreed statement of facts and a joint recommendation as to sentencing.

*The investigation*

As noted above, petroleum resources in the Newfoundland and Labrador offshore area are managed by the C-NLOPB pursuant to the *Accord Acts*. Section 46 states that to ensure effective coordination and avoid duplication of work and activities, C-NLOPB shall conclude with the

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appropriate departments and agencies of the Government of Canada and of
the Government of the Province memoranda of understanding in relation
to, among other things, environmental regulation, emergency measures
and such other matters as are appropriate.

It is understood that there are memoranda of understanding in place
with regard to investigation of discharges from offshore structures which,
at the time of the discharge, are engaged in hydrocarbon exploration or
production, thereby avoiding the spectre of regulators from multiple
agencies attending on board for purposes of conducting separate
investigations of the same discharge. Such a jurisdictional overlap is
possible as C-NLOPB's jurisdiction is not exclusive.

For example, Part XV of the *Canada Shipping Act*\(^8\) (CSA), "Pollution
Prevention and Response," applies to all Canadian waters and waters in the
exclusive economic zone of Canada.\(^9\) The *Terra Nova FPSO* is a "ship"\(^10\)
as defined by the CSA and the CSA prohibits the discharge of pollutants
from ships in contravention of any regulations made under s. 656 which,
in the context of ship-source marine pollution charges, frequently involves
the *Oil Pollution Prevention Regulations*.\(^11\) The CSA is enforced by the
Marine Safety Branch of Transport Canada. However, s. 655(2) of the
CSA states that Part XV does not apply to a discharge that constitutes a
spill from a ship that is on location and engaged in exploration or drilling
for, or production, conservation or processing of, oil or gas in an area
described in s. 3(a) or (b) of the *Oil and Gas Production and Conservation
Regulations*,\(^12\) insofar as the discharge emanates from those activities. On
20 November 2004, the *Terra Nova FPSO* was engaged in processing of
hydrocarbons, thus precluding the application of the CSA and involvement
of Transport Canada for purposes of the investigation. It should be noted,
however, that the CSA would otherwise apply.

Similarly, s. 36(3) of the *Fisheries Act*\(^13\) prohibits the deposit of
deleterious substances of any type in waters frequented by fish\(^14\) and
applies to "Canadian fisheries waters" which, as defined, would include the

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c.26, will come into force together with an updated regulatory regime.
9. Ibid. ss. 2, 655(1).
10. Ibid. Part XV, "Ship" includes any description of a vessel or craft designed, used or capable of
being used solely or partly for navigation, without regard to method or lack of propulsion.
14. Ibid. s. 36(3). This states: "subject to subsection (4), no person shall deposit or permit the deposit
of a deleterious substance of any type in water frequented by fish or in any place under any conditions
where the deleterious substance or any other deleterious substance that results from the deposit of the
deleterious substance may enter any such water."
Newfoundland and Labrador offshore area. The *Canada Environmental Protection Act, 1999* also has a number of provisions which could potentially extend its application to the offshore with respect to discharges of pollutants; it is enforced by Environment Canada. The *Migratory Birds Convention Act, 1994* applies in Canada and in the exclusive economic zone of Canada and prohibits persons and vessels from depositing or permitting to be deposited substances harmful to migratory birds in waters frequented by migratory birds or in a place from which the substance may enter such waters. It is enforced by Canadian Wildlife Services, Environment Canada.

The agency most directly involved was, however, the C-NLOPB and the on-board investigation of the discharge from the *Terra Nova FPSO* was conducted solely by C-NLOPB. No other regulatory authorities asserted jurisdiction or attended on the FPSO for purposes of same, and no charges were laid under any legislation other than the * Accord Act*. It is important to note, however, that many regulatory and other agencies successfully worked together with Petro-Canada with respect to the spill response. These included C-NLOPB, Environment Canada, Canada Wildlife Services, Transport Canada-Marine Safety, the Department of Fisheries and Oceans, including the Canadian Coast Guard, and the many other participants in the Regional Environmental Emergencies Team that was assembled, as well as Eastern Canada Response Corporation, International Tanker Owners Pollution Federation Limited and other entities retained by Petro-Canada to support the spill response.

1. **Search warrant**

   On 21 November 2004, two representatives of C-NLOPB, a conservation officer and a safety officer, attended on board the *Terra Nova FPSO* to commence an investigation into the discharge. Prior to their attendance C-NLOPB had indicated its intention to obtain a search warrant to be effected as a part of its investigation. Petro-Canada advised that it would cooperate fully with C-NLOPB’s investigation and questioned if a search warrant was therefore necessary. C-NLOPB took the position that a warrant was required and, in any event, that warrants were a part of C-NLOPB’s established investigation protocol.

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15. *Ibid.*, s. 2, which defines “Canadian fisheries waters” as all waters in the fishing zones of Canada, all waters in the territorial sea of Canada and all internal waters of Canada.
18. S.C. 1994, c. 22 [MBC].
The powers of conservation and safety officers appointed as such by C-NLOPB are set out in s. 189 of the Accord Act. They include the right to enter any place, including installations and vessels, used for any work or activity to which Part II, “Petroleum Operations”, applies “for the purpose of carrying out inspections, examinations, tests or inquiries or of directing that the person in charge of the place carry them out”; to require the production, for inspection or copying, of any required books, records or documents; to take samples or to require the person in charge of the place, or any other person in the place who has knowledge, relevant to an inspection, examination, test or inquiry, to furnish information, either orally or in writing, in the form requested.

Owners, persons in charge and every person in such a place must give the conservation or safety officer all reasonable assistance to enable them to carry out their duties under the Accord Act.

Section 189 could be read to pertain solely to inspection powers and the legislation makes no specific provision as investigative, enforcement or search and seizure powers. There is case law which indicates that once there are reasonable and probable grounds to believe an offence has been committed then all inspection powers cease and a warrant is required to enter, search and seize. Accordingly, it may be that C-NLOPB has taken a policy position to obtain search warrants prior to any investigation of a suspected breach of the Accord Act in the hope of avoiding a subsequent challenge of the obtaining and utilization of the evidence seized. However, it is understood that this has not been the approach adopted by the Canada-Nova Scotia Offshore Petroleum Board. Further, in the event that an operator and its counsel advise the regulator that its investigation will be fully accommodated and that all requested information will be and is voluntarily provided, then the risk of a subsequent successful challenge to the admissibility of that information on the basis that it was obtained without a search warrant would seem to be mitigated. Such an approach would also facilitate an ongoing cooperative approach to all regulatory matters as between regulators and operators.

20. Accord Act, supra note 1, s. 189(a), (d)-(f).
21. Ibid., s. 191.
22. Newfoundland and Labrador Offshore Area Petroleum Production and Conservation Regulations, S.O.R./95-103, s. 67(2), permits the Chief Conservation Officer or the Safety Officer to investigate or cause to be investigated any incident, accident or other event at a production site that results, amongst other things, in a spill of oil, but does not elaborate on the investigative powers of those officers.
In this case a search warrant was issued on 22 November 2004 requiring, among other things, that Petro-Canada provide travel assistance to the Terra Nova FPSO for purposes of searching for and seizing the items identified in the warrant to search. On 31 May 2005, a further search warrant pertaining to Petro-Canada’s office in St. John’s was issued. A third warrant was subsequently obtained which was directed to a third party supplier of response services to Petro-Canada seeking to obtain original tapes and records of spill overflights. Petro-Canada cooperated in the discharge of the warrants and counsel was made available to assist in the appropriate identification and classification of the enumerated materials.

Thus, it should be anticipated that, unless C-NLOPB revisits its approach, any future compliance investigations by C-NLOPB will be supported by search warrants. Accordingly, appropriate advance consideration should be given to this eventuality, including protection of solicitor and client privileged documentation.

2. Interviews
During the onboard investigation, in addition to gathering documentation and other evidence pursuant to the search warrant, the C-NLOPB investigators sought to conduct interviews with many of the officers and crew of the Terra Nova FPSO. The C-NLOPB investigators advised each person that the interviews were purely voluntary in nature. No statements were taken under caution of rights. The officers and crew agreed to be interviewed and counsel for Petro-Canada was permitted, with the consent of the person being interviewed, to attend during those interviews. It should be noted that there may be circumstances where the interests of the operator and those of the on-board personnel may diverge. In ship-source pollution cases this most typically occurs when it becomes apparent during the course of the investigation that the officers and crew may have departed from ship owner operational policy and instructions, which departure may have caused or contributed to the discharge. In such a circumstance the officers and crew should be advised to consult with independent counsel prior to consenting to an interview. C-NLOPB subsequently sought to interview Petro-Canada shore-based engineering personnel. Those interviews were conducted on the same basis just described.
3. **Reporting of spill quantity**

While it is prohibited to cause or permit a spill on or from any portion of the offshore area, should one occur then a duty to report arises. Section 161(2) of the *Accord Act* states that where a spill occurs in any portion of the offshore area, any person who at the time of the spill is carrying out any work or activity related to the exploitation for or development or production of petroleum in the area of the spill shall, in the manner prescribed by the regulations, report the spill to the Chief Conservation Officer.

As previously noted, the *Terra Nova FPSO* gave notice of the spill to CCG and C-NLOPB in the early hours of 21 November 2004, including a preliminary discharge estimate of 25m³ based on night-time observations. The following day the volume of the oil discharged was calculated based on a difference between oil inflow from the wells and the outflow from the production system to storage. A conservative approach, intended to err on the side of over- rather than under-estimation, was taken and the estimated volume, based on this analysis, was 165m³ of crude oil. This revised figure was reported to C-NLOPB.

C-NLOPB expressed concern with the upward estimate of the spill or, more specifically, with the fact that the original estimate had been lower. It should be noted, however, that when a spill report is originally made, the reported spill size is based on the best information available at the time, which in reality may be very limited. The estimate given will have to be revised, upward or downward, as the matter unfolds. In the case of the *Terra Nova FPSO* the original estimate was based primarily on the on-site survey of the spill obtained in the dark, late at night. At the time the report was generated the estimate was based on the best available information. The following day data necessary to confirm or revise the preliminary estimate was obtained and analyzed and a revised figure submitted — again based on the best available information at that time.

It is difficult to see how precise spill estimates can be achieved in such circumstances and thereby avoid negative regulatory comment when the original estimate must be revised. Submission of a “worst case” figure is neither realistic nor reasonable as the spill response effort will, in part, be tied to the same. Petro-Canada is of the view that in this case the best information available was used both initially to estimate the potential loss and subsequently to confirm the spill estimate by alternate informational sources. However, the decision to take a conservative approach, erring towards over-estimation of the spill with respect to the inflow/outflow

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24. *Supra* note 1, s.161(1).
data, may have contributed to an adverse perception of the gap between the two estimates. This may be a topic for further discussion with the regulators.

4. Reasonable measures
The Accord Acts, like the CSA and the Marine Liability Act, adopt a regime whereby the responsible party is required to respond to the spill and to remedy any damage arising. In the case of the Accord Act the responsible party is the holder of the Production Operations Authorization. As the federal Accord Act notes, a high burden is placed on those required to report a spill:

> Every person required to report a spill... shall, as soon as possible, take all reasonable measures consistent with safety and the protection of the environment to prevent any further spill, to repair or remedy any condition resulting from the spill and to reduce or mitigate any danger to life, health, property or the environment that results or may reasonably be expected to result from the spill.26

Moreover, “[w]here the Chief Conservation officer is satisfied on reasonable grounds that a spill has occurred and immediate action is necessary in order to effect any such reasonable measures and [that] such action is not being taken or will not be taken the Chief Conservation Officer may take such action or direct that it be taken by such persons as may be necessary.”27 In that regard, “the Chief Conservation Officer may authorize and direct such persons as may be necessary to enter the place where the spill has occurred and take over the management and control of any work or activity being carried on in the area of the spill,” and the costs of doing so and of taking all reasonable measures in relation to the spill will be to the account of the permit holder.28 The holder of the Production Operations Authorization, without proof of fault or neglect, is liable for all actual loss or damage incurred by any persons as a result of the spill and the costs and expenses “reasonably incurred” by the C-NLOPB or the federal or provincial government or any other person in taking any action or measure in relation to the spill.29 None of these provisions have, as yet, been interpreted by the courts.

In the case of the spill from the Terra Nova FPSO, while the amount of the spill, 165m³, was significant, the actual environmental harm resulting

26. Accord Act, supra note 1, s. 161(3).
27. Ibid. s. 161(4).
28. Ibid. s. 161(5), (7).
29. Ibid. s. 162(1).
from it was very limited in scope. Wind, waves and currents greatly aided the natural dispersion of the oil discharged and kept it offshore. Despite concentrated beach surveys and analysis of oil samples collected on shore, there was no evidence that any oil from the Terra Nova FPSO came ashore. Rather, the vessel and aerial surveillance conducted, the oil spill trajectory forecasts and tracker buoy data demonstrated that the spill remained offshore and was dispersed naturally.

Despite considerable bird monitoring conducted from vessels, including the Terra Nova FPSO, two other offshore structures, and four anchor-handling supply tugs, as well as aerial bird surveys conducted by Petro-Canada and the regulatory authorities, only twenty-four seabirds were sighted, which were thought to be oiled. Of these, personnel were able to recover fourteen seabirds and of these fourteen, ten had actually been oiled. The ten oiled seabirds were sent to a dedicated seabird recovery centre which was fully equipped and manned by specialist veterinarians and technical staff. Of the ten oiled birds sent to the rehabilitation centre, two were subsequently determined by oil sample analysis to have been oiled by sources other than the Terra Nova FPSO discharge. Seven of the ten seabirds were successfully rehabilitated and subsequently released.

Both Environment Canada and Petro-Canada concluded that fish were unlikely to be affected by the discharge. There was no evidence of damage to fish populations or marine mammals. This conclusion was supported by the water quality tests that were conducted by Petro-Canada. As no fishing activities were being conducted in the area of the spill there was no impact to this commercial activity.

Petro-Canada had in place a response plan and mounted an immediate full response to the discharge. The response included offshore containment and recovery efforts; deploying in excess of 170 personnel, including the onshore and offshore responders, and other support activities such as aerial overflights, weather forecasting and spill modelling, at a cost of approximately $3 million.

Given these circumstances it was unnecessary for the Chief Conservation Officer to consider taking any of the actions set out in s. 161 of the Accord Act during the spill response. It is of interest, however, to consider the duty to take "all reasonable measures" consistent with safety and the protection of the environment to prevent any further spill, to repair

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30. It is very difficult to quantify accurately the number of seabirds directly impacted by the discharge. The Canadian Wildlife Service estimated, based on worst case model projections, that it was possible that there could have been up to 10,000 birds affected. However, based on actual data collected during the response and other information, the Canadian Wildlife Service's estimate was not validated.
or remedy any condition resulting from the spill and to reduce or mitigate any danger to life, health, property or the environment that results or may reasonably be expected to result from the spill.\textsuperscript{31} This raises the perennial spill response question of what are “all reasonable measures” and when have they been achieved? It is often the case that regulators and the public will demand that a responsible party be seen to be taking action to respond to a spill — even though such actions may have little realistic prospect of success. For example, in an open ocean spill situation when wind and wave action is high, the technical limitations on existing booms, containment systems and oil recovery equipment are such that the prospect of recovering any significant portion of the spilled oil is very low. That same wind and wave activity may well be the most effective method of dispersing the oil. In such a circumstance, the question could arise as to whether a sustained response effort was a reasonable measure as required, but not defined, by the \textit{Accord Acts}.

These determinations will, of course, be fact driven in each case. However, should there be a serious disagreement as to what comprises reasonable measures in spill response, mitigation or remediation, then a responsible party would have to consider its options. Presumably, one option would be to proceed with the effort, the responsible party having given formal notice that it did not deem the effort to be a “reasonable measure” and that indemnity for costs would be sought. Another option may be to stand down the effort. From an operational perspective the former option may be the only practical alternative if there is a concern as to a third party taking over “management and control” of the operation in question. In the latter, the Chief Conservation Officer would likely retain a response corporation such as ECRC or other third party to undertake the measure in issue and then attempt to recover the cost from the holder of the Production Operations Authorization.

5. \textit{Creative sentencing}

Petro-Canada had hoped to proceed by way of a joint statement of facts and a joint agreed submission on sentencing. In that regard it had initially proposed that the Crown re-elect so as to proceed by way of summary conviction, rather than by indictment, and that a fine within the summary conviction range be proposed to the court together with a proposed voluntary payment by Petro-Canada to the Environmental Damages

\textsuperscript{31} \textit{Accord Act, supra} note 1, s. 161(3).
Creative Sentencing and the Terra Nova Oil Spill

Fund. However, unlike some other legislation, the offence sections of the Accord Acts contain no provisions whereby upon conviction a court, in addition to the levying of a fine, could make a further order requiring a convicted offender to comply with other requirements as imposed by the court.

For example, the Migratory Birds Convention Act, 1994 permits a court to impose a wide range of prohibitions, directions or requirements where deemed appropriate, including orders directing the offenders to conduct environmental audits, to pay for research into the protection of migratory bird populations, and to perform community service. The question that arose in the Terra Nova FPSO situation was whether, in the absence of such legislative provisions, creative sentencing could be utilized in the disposition of the charge.

Relevant to this question is Bill C-45: An Act to Amend the Criminal Code (Criminal Liability of Organizations) which came into force on 31 March 2004. This amendment to the Criminal Code gave rise to a new legal duty of care whereby every one, which includes a corporation, who undertakes or has the authority to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that or any other person arising from that work or task. An organization is now defined to include a corporation and organizations can be convicted of negligence-based and other crimes.

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32. The Environmental Damage Fund is a special holding account administered by Environment Canada. Organizations eligible for EDF support include non-profit (e.g., community-based) environmental groups, Aboriginal communities and organizations, universities, provinces, territories and municipalities. Eligible recipients are encouraged to submit restoration, environmental quality improvement, research or educational-based project proposals. Project proposals submitted to the EDF must satisfy the following requirements:
   1) satisfy all conditions specified by the courts (if any);
   2) demonstrate broad community support (e.g., partnerships both financial and in-kind);
   3) must be scientifically sound, and technically feasible; and,
   4) be cost effective in achieving goals, objectives and results.
In addition, recipients must also show that they possess or have access to the necessary experience, knowledge and skills required to undertake the project. Canada, Environment Canada, About the Environmental Damages Fund (June 2004), online: Environment Canada, <http:www.ec.qc.ca/edf-fde/>.
33. CSA, supra note 8, s. 644.1, provides juxtaposition and also sets out the factors to be considered in sentencing; CEP, supra note 16, s. 287; MBC, supra note 18, s. 17.
34. MBC, supra note 18; Also see CEP, supra note 16, s. 291.
37. Ibid., ss. 2, 22.2.
38. Ibid., s. 217.1.
39. Ibid., s. 2.
40. Ibid., s. 22.1.
41. Ibid., s. 22.2, ss. 219-21.
In addition, Bill C-45 codified sentencing criteria for corporations and permitted the imposition of probation orders on corporations containing both mandatory and discretionary terms. As outlined in s. 732.1 of the Criminal Code, these terms may include the making of restitution, the establishment of policies designed to reduce the likelihood of future offences, and the provision to the public of information about the offence, the sentence, and remedial measures being undertaken.

In the situation of the Terra Nova FPSO the Crown initially rejected the proposed creative sentencing submission based on concerns surrounding the legality of a probation order as discussed in R. v. Miller Shipping Ltd. In that case the accused company was found guilty of three offences under the Canada Labour Code. The charges resulted from the death of an individual who was killed when a crane overturned while in the process of loading a barge. In declining to issue a probation order, the court referred to section 34(2) of the Interpretation Act, which provides that:

All provisions of the Criminal Code relating to indictable offences apply to indictable offences created by an enactment, and all the provisions of that code relating to summary offences apply to all other offences created by an enactment, except to the extent that the enactment otherwise provides.

Section 718.21 of the Criminal Code, R.S.C. 1985, c. C-46 now states that a court “that imposes a sentence on an organization shall also take into consideration the following factors:

(a) any advantage realized by the corporation as a result of the offence;
(b) the degree of planning involved in carrying out the offence and the duration and complexity of the offence;
(c) whether the organization has attempted to conceal its assets, or convert them, in order to show that it is not able to pay a fine or make restitution;
(d) the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees;
(e) the cost to public authorities of the investigation and prosecution of the offence;
(f) any regulatory penalty imposed on the organization or one of its representatives in respect of the conduct that formed the basis of the offence;
(g) whether the organization was – or any of its representatives who were involved in the commission of the offence were – convicted of a similar offence or sanctioned by a regulatory body for similar conduct;
(h) any penalty imposed by the organization on a representative for their role in the commission of the offence;
(i) any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence; and
(j) any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence.”

The court went on to note that amendments to the *Criminal Code* in section 732.1 provide for the imposition of a probation order on an organization and that, even before this amendment was effected, courts had placed companies in breach of health and safety regulations or environmental offences on probation.\(^{46}\) Section 732.1 now provided a statutory framework for such orders. Further, a provision found in the Newfoundland legislation, the *Occupational Health and Safety Act*,\(^ {47}\) provided that a court may, on conviction, make an order directing the accused to perform community service, pay for education programs, and undertake other restorative actions. However, there was no equivalent provision in the *Canada Labour Code*,\(^ {48}\) although arguably the same type of restorative sentence could be achieved through a probation order.

The court in *R. v. Miller Shipping* noted that in the circumstances of that case it would have been beneficial to place the company on probation, in addition to levying the fine that was imposed.\(^ {49}\) It would have been useful to order the company to produce a written company policy and procedure manual on health and safety under the company name and have it reviewed by an outside party to ensure that it properly addressed the safety concerns that came to light at trial. In addition, it would have been useful to ensure through a probation order that the company made certain that its employees received proper instruction about the hazards of working around equipment on barge decks and other work areas. Regardless, the court concluded as follows:

However section 154(1) of the Canada Labour Code Part II states:

> If a person is convicted of an offence under this part on proceedings by way of summary conviction, no imprisonment may be imposed in default of payment of any fine imposed as punishment.

It appears therefore that the legislation does not contemplate the imposition of any penalty other than a fine. Nor does it make reference to the possibility of probation or any other corrective type of order. As a result I find that the legislation "does otherwise provide" (Interpretation Act s. 34(2)) and therefore I cannot make a probation order.\(^ {50}\)


\(^{47}\) R.S.N.L. 1990, c. 0-3, s. 69.

\(^{48}\) *Labour Code*, supra note 44.

\(^{49}\) *Miller Shipping*, supra note 43.

\(^{50}\) Ibid. at paras. 13-14.
There is other case law that could be argued to support a restrictive view of the application of creative sentencing. In *R. v. Imperial Oil* the accused had been convicted of discharging sludge into a river. Fines totalled $25,000 but an order that the defendant make contributions to two local school boards for education respecting pollution was set aside on the basis that there was no jurisdiction to make such an order. In *Ontario v. Kirk* the court considered whether a creative sentence type of probation order could be imposed as an order for restitution. The court held that it could not because it was not enabled by the provincial statute creating the offence and, therefore, declined to impose such an order.

Petro-Canada's position was that a creative sentence could be imposed in cases where the governing legislation did not specifically provide for creative sentencing, such as in the instant case, by levying a fine together with recognition by the court of a voluntary payment made by Petro-Canada to the Environmental Damages Fund and/or another agreed recipient. In effect, the court would judicially recognize the jointly recommended voluntary payments as a sentencing factor, such as the demonstration of remorse, if not an actual part of the sentence. Alternatively, this could be achieved by utilization of the probation provisions pertaining to organizations found in the *Criminal Code*. It could also be argued that the above passage from *R. v. Miller Shipping Ltd.* should not be interpreted as disallowing a probation order under the *Accord Act* which is not incompatible with the probation provisions of the *Criminal Code*.

Academic writing supports the use of creative sentencing for a variety of reasons, including the public benefit of providing an opportunity for the offender to educate others in the same industry and helping avoid further environmental offences. In the case of the *Terra Nova FPSO* the most obvious benefit of a creative sentence is that the funds, other than the fine portion, go directly to environmentally related projects, research or studies in the jurisdiction where the spill occurred, rather than into the

52. Ibid. See also, Rick Libman, *Libman on Regulatory Offences in Canada* (British Columbia: EarlsCourt Legal Press, 2002).
general revenue fund of Canada. That is, some local good would come of an unfortunate local event.

Petro-Canada was motivated to seek a creative sentence as it believed that any penalty for the event should be used in Newfoundland and Labrador to benefit environmental efforts. This beneficial goal was initially difficult to effect. In order to elicit support for the creative sentencing approach Petro-Canada provided examples of beneficial creative sentences used in similar environmental cases and noted that in other jurisdictions within Canada the use of these sentences had received the support of Crown counsel. Ironically, at the time Petro-Canada was having difficulty structuring a creative sentence in this case, the Province of Newfoundland was embracing the use of creative sentences for occupational health and safety cases. In March 2006 funds to support an online safety course came from a creative sentence arising out of a case involving a breach of the *Asbestos Abatement Regulations*. Dianne Whalen, Minister of Government Services, stated that "[c]reative sentencing is relatively new and it is an effectual way to contribute something back to the communities involved."57 For its part, the federal government has been supportive of creative sentences for environmental matters, especially with respect to the Environmental Damages Fund which can be used in relation to seven federal acts including the *Fisheries Act*,58 the *Canadian Environmental Protection Act, 1994*,59 the *Species at Risk Act*60 and the *Canada Shipping Act*.61

Notwithstanding general support for creative sentencing, the lack of specific legislative language in the *Accord Act* viewed in the context of the *R. v. Miller* decision, threatened to derail efforts to adopt such measures. It is suggested that this omission in the current legislation should be addressed to promote creative sentences that enure to local benefit.

Ultimately, on the question of whether s. 732.1(3.1) of the *Criminal Code*62 applied with respect to the *Accord Act* and, if so, whether it was broad enough to permit the court to order Petro-Canada to make the proposed payments, the Crown agreed that the proposed joint submission on facts and sentencing could be put before the court on the basis that: (i)

59. *CEP, supra* note 16.
60. *S.C. 2002, c. 29*.
Petro-Canada enter a guilty plea to the offence as charged; (ii) the Crown would re-elect to proceed by way of summary conviction; and, (iii) the Crown and Petro-Canada would jointly submit to the court that Petro-Canada would pay an agreed fine and would contribute the additional sums to the Environmental Damages Fund to be utilized for projects within the province and to the Grenfell College Environmental Science Merit Scholarship, which payments were effected by way of a probation order. At the sentencing hearing the court stated that it was satisfied that it had jurisdiction to proceed in this manner.

While Petro-Canada did agree to proceed by way of a probation order rather than by way of voluntary payments recognized by the court, it had concerns about the practical implications of a probation order. From the Crown's perspective a corporation being placed on probation for an environmental offence is, perhaps, a positive thing:

> Being placed on probation for an environmental offence ups the ante beyond a normal regulatory offence as a breach of a federal probation order will be an offence under the Canada Criminal Code. While vagueness of what the federal mandatory probation condition on "keeping the peace and being of good behaviour" means in the environmental context has been criticized, much more explicit conditions can also be imposed under a probation order. After some earlier controversy, it now appears clear that corporations and other organizations can be subject to probation orders so long as the statute under which the conviction is registered, or companion procedural statutes like the Criminal Code, explicitly provide for the imposition of such orders. Even where there is no legislative authority for probation, there may be authority for other NFM that incorporate probation-like conditions.

From the corporate perspective, the mandatory requirement of s. 732.1(2) that the court prescribe, as a condition of a probation order, that the offender "keep the peace and be of good behaviour" is so broad that, in the context of a large company with multiple facilities in many provinces and significant numbers of employees, it raises the concern that a relatively insignificant unauthorized action by an employee unrelated to the offence charged which gave rise to the probation order could, potentially, place the corporation in a situation where it is alleged to have breached the probation order.

63. At the sentencing hearing the Court reduced the proposed fine to $70,000.00 and Petro-Canada agreed to increase the payments to the Environmental Damages Fund and Grenfell College Environmental Science Merit Scholarship to $120,000.00 and $100,000.00, respectively.

There are very few cases which deal with the issue of corporate probation orders. Therefore, jurisprudence gives little guidance as to what it means for a corporation to “keep the peace and be of good behaviour” or addressing breaches of a probation order by a corporation. In *R. v. Westower Communications Ltd.*,\(^{66}\) which predated the coming into force of Bill C-45, the corporation pled guilty to a charge under the *Canada Labour Code*\(^{67}\) for failing to ensure proper training of employees. As a result of this improper training, a fatal accident occurred. The court held that this was an appropriate case in which to impose a probation order that, in addition to the normal statutory terms, included eleven other terms pertaining to improving the company’s training and supervision which the court held were appropriate remedies. While the court did not address the issue, it is reasonable to assume that for a corporation to “keep the peace and be of good behaviour,” it must implement any of the various policies and/or additional terms of the probation order that may be prescribed pursuant to s. 732.1(3.1) of the *Criminal Code* or otherwise. Further, any continuation or recurrence of the impugned behaviour could be viewed as a breach of the “keep the peace and be of good behaviour” mandatory requirement of a probation order. It is less clear if such a breach could be alleged as arising from an unrelated offence by the corporation.

*R. v. Gauthier*\(^{68}\) is of interest with respect to the effect of a breach of a corporate probation order on the directors of the corporation. There, the corporation was convicted of breaches under the *Yukon Waters Act*\(^{69}\) and was fined and placed on probation for six months. The terms of the probation order required the company to live up to the terms of its water licence. The Crown subsequently charged the company with numerous breaches of the probation order, all pertaining to its failure to submit a required annual report, to maintain all works associated with a mining operation, to take the necessary steps and to implement all required treatment set out in the probation order. The company did not appear and was convicted. Although only the corporate defendant was charged and convicted of the breaches of the *Yukon Waters Act*\(^{70}\) and only the corporate defendant was placed on probation, the Crown charged not only the corporation with breaches of

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68. 2002 YKTC 75, 2002 CarswellYukon 109 [*Gauthier*].
69. S.Y. 2003, c. 19 [*YWA*].
70. Ibid.
the probation order, but also the president of the corporate defendant with the same breaches of the probation order.

The court stated that there could be no objection in principle to charging officers of the corporation, as well as the corporation itself, with breaches of the criminal law, and that there is a clear trend in general law toward imposing personal liability of officers and directors for offences committed by the corporations they control. Indeed, prosecutions under the *Yukon Waters Act* itself have included corporate alter-egos, along with their corporations. The court noted that there are several public policy reasons for doing so, as otherwise a risk to the corporation of monetary penalties may be viewed simply as a cost of doing business or, where the company is insolvent or merely a shell, may amount to no cost at all. However, the court did not specifically address the question of whether a company officer should be personally charged with breach of a probation order when only the company had been charged and convicted with the original offence and the probation order applied only to the company.

In *Gauthier* the corporation was convicted of the breaches of the probation order and the question remained as to whether or not the president should be convicted as well. The court noted that the president had been one of five members of the board of directors of the corporate defendant who had decided on the plea bargain whereby the company would plead guilty to the offences, and which included the issuance of the probation order. Subsequently, the company was unable to comply with the terms of the probation order because it lacked the financial capacity to do so.

The court also noted that the president was not charged with a breach of the *Yukon Waters Act* but with six criminal offences. It followed that the Crown had to prove not only the commission of the acts alleged, but also the necessary mental elements of the offences charged. Further, the president had available to him the full range of defences which may be given in answer to a criminal charge. He was not restricted to the defence of due diligence. Among those defences available on a charge of breach of probation was that the accused had a reasonable excuse for his failure to comply. In this case the reasonable excuse advanced was that the accused did everything in his power to comply but was defeated by events, most particularly by the inability to secure financing.

The Crown’s position was that the president agreed to have the company enter into the probation order knowing that it was not in a position to comply or, alternatively, that he was reckless about that fact.

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71. Ibid.
72. Ibid.
The court rejected that argument as unsupported by the evidence, noting that the president had an honest belief that the company would ultimately succeed:

In my view, working for two and a half years for no pay or reward, other than to be charged with six criminal offences, is more than a credible effort. I find as a fact that Mr. Gauthier acted in good faith throughout, and made a genuine effort to revive the company, and to comply with the probation order.\textsuperscript{73}

He was found not guilty on all six counts of the breach of the probation order.

The case raises the prospect of officers and directors being found liable for breaches of a probation order rendered against a corporate entity. While in \textit{Gauthier} the company was small in size and the president/director was directly involved in the efforts to revive the company and comply with the probation order, it raises the question of whether officers and directors could be similarly charged in a large company where their involvement may not be hands on as it was in \textit{Gauthier}.

In the \textit{Terra Nova FPSO} situation, Petro-Canada dealt with the concern about the effect of a general probation order by reaching an agreement with the Crown that the probation order would expire on payment into court of the fine and the provision to the court of the creative sentencing cheques to be forwarded to the Environmental Damages Fund and Grenfell College. As this was done shortly after sentencing, the probation order had a shelf life of less than twenty-four hours, which served to limit the concern as to generality of its application. Other than the mandatory provisions and the payments to the EDF and Grenfell College, no other conditions were effected by the probation order.\textsuperscript{74}

\textit{Conclusion}

The discharge from the \textit{Terra Nova FPSO} is an example of an inadvertent spill arising from offshore oil production operations. Despite the best efforts of all concerned, it is unrealistic to think that there will not be similar occurrences in the future. Given this likelihood, the lessons learned in this case may assist operators and regulators in addressing the investigative process and issues arising with respect to spill size reporting as well as permitting them to give advance consideration to the issue of what comprises "reasonable measures" in response operations and the effect on corporation of probation orders. Most significantly, the case

\textsuperscript{73} \textit{Gauthier, supra} note 68 at para. 25.

\textsuperscript{74} The information for this paper was derived from public sources.
suggests that the Accord Acts should perhaps be amended to specifically permit and delineate creative sentencing in such situations. Having said that, it is conceded that this is but one of many aspects of the existing offshore regulatory regime could benefit from a legislative and regulatory update.