



Ottawa, 31 July 2020
SOPF File: 120-853-C1
CCG File: n/a

VIA MAIL AND EMAIL

Senior Director of Incident Management, Response Directorate
Canadian Coast Guard
200 Kent Street (5N177)
Ottawa, Ontario K1A 0E6

RE: *Unknown name (Black gaff cutter)* – Comox, British Columbia
Incident date: 2018-01-17

SUMMARY AND OFFER

This letter responds to a submission from the Canadian Coast Guard (the “CCG”) with respect to a vessel with no known name. It is identified in this letter as a black gaff cutter (the “Vessel”). The Vessel was involved in an incident on 17 January 2018, in Comox, British Columbia (the “Incident”).

On 17 December 2019, the office of the Administrator of the Ship-source Oil Pollution Fund (the “SOPF”) received a submission from the CCG on behalf of the Administrator. The submission advances claims totaling \$30,993.43 for costs and expenses arising from measures taken by the CCG to respond to the Incident.

The submission has been reviewed and a determination with respect to its claims has been made. This letter advances an offer of compensation to the CCG pursuant to sections 105, 106 and 116 of the *Marine Liability Act* (the “MLA”). Also provided in this letter are a description of the CCG’s submission and an explanation of the findings.

The claim is allowed in part. The amount of \$3,164.17 (the “Offer”), plus statutory interest to be calculated at the time the Offer is paid and in accordance with s. 116 of the MLA, is offered with respect to this claim.

The reasons for the Offer are set forth below.

THE SUBMISSION RECEIVED

The submission includes a narrative that describes events relating to the Incident.

The submission also includes a summary of the costs and expenses claimed, backup documents related to some of those costs and expenses, a marine survey report with pictures, and several emails. To the extent that those documents are relevant to the determination, they are reviewed below.

The narrative

On 17 January 2018, at approximately 13:00, the CCG was notified that a 30' sailing vessel had smashed against the breakwater in Comox, BC, and deployed a search and rescue team to the wreck. After determining that no one was aboard the Vessel, the matter was handed over to the CCG Environmental Response team (the "ER") for further action.

On the day of the Incident, poor weather conditions made assessing the Vessel difficult. It was suspected that the Vessel contained several tanks that the CCG presumed were filled with gas, oil, and other pollutants. The Vessel was also observed to have an outboard kicker engine, although it was not known if the Vessel had an inboard engine as well. Moderate waves made it difficult to determine the extent of any oil that the Vessel may have released, although the narrative notes that CCG personnel observed an oily sheen on the surrounding water and a smell of oil in the air extending from the Vessel.

The CCG's initial efforts to contact the Vessel's owner failed, although the narrative does not identify the nature of these efforts. The CCG, having determined that the Vessel should be raised and removed from the water, retained Wills Marine out of Comox for an emergency removal contract. The CCG chose Wills Marine based on their proximity to the Vessel and history of successful salvages.

Between 18 and 22 January 2018, Wills Marine tried to assess the Vessel for salvage purposes but could not do so because of poor weather conditions. During this time, the CCG continued its efforts to locate the owner of the Vessel. On 23 January 2018, the CCG made contact with the owner, via email. The CCG asked him to prepare a response plan for the Incident, which the CCG subsequently rejected as insufficient.

Due to ongoing poor weather, salvage efforts could not begin on 24 January 2018, but they did proceed the next day. CCG personnel assisted with the effort by pumping the Vessel, and a diving subcontractor was ultimately successful in raising the Vessel. The same day, the Vessel was removed from the water. On 26 January 2018, the Vessel was transported to Wills Marine facilities in Comox by Bowline Boat Moving Ltd.

Between 26 January 2018 and 4 February 2018, the CCG attempted to have the owner agree to cover the cost of the removal operation. The owner either refused or did not respond. On 5 February 2018, the CCG decided to have the Vessel deconstructed,

determining that it would pose a pollution threat if put back in the water. According to the CCG submission, because the Vessel had partially sunk, most or all of its interior was coated with oily waste, and its fuel tanks contained an unknown quantity of seawater mixed with pollutants.

The marine survey report

The CCG submission includes a marine survey report prepared by Building Sea Marine Services. The report bears the date 11 February 2018. According to the report, the surveyor inspected the Vessel on 26 January 2018, after it was refloated. The CCG has provided an email from the surveyor to the leader of the CCG response to the Incident that preceded delivery of the formal report. In the email, although the surveyor mentions the possibility of an old fuel tank aboard the Vessel, he does not mention oil contamination.

Likewise, the survey report only mentions oil once, noting that lubricant oil was not present on the Vessel because all mechanical components except a drive shaft and part of a prop had been previously removed. The report notes that the surveyor did not verify whether any fuel tanks remained aboard the Vessel. While the survey indicates that the Vessel was a risk to the environment, it does not specify the nature and extent of the risk.

The narrative appears to confirm the presence of water in the Vessel's fuel tanks, but there seems to be no substantiation for this in the rest of the claim submission.

Daily alert

The claim submitted by the CCG includes a daily alert about the Vessel that seems to contradict part of the submitted narrative. An email dated 3 December 2019 states that Wills Marine was contracted to remove the Vessel's portable tanks and outboard motor; however, according to the narrative, the CCG initially retained Wills Marine to raise and remove the Vessel from the water.

Travel expense reports

The travel expense reports that the CCG submitted suggest that the CCG response was spread between several concurrent incidents. The reports claim \$734.30 in expenses for a CCG staff member to attend to the site of the Incident, but the travel request name is "RESP to Comox Various Incident – Jan 23-25." Notably, according to the CCG submission, the date of the Incident was 17 January 2018, but the expense reports for the CCG officers' travel costs are for 23 to 25 January 2018.

DETERMINATIONS AND FINDINGS

The CCG submission presents potentially eligible claims under section 103 of the MLA

The Incident resulted in costs and expenses to carry out measures to avoid or minimize oil pollution damage in Canadian waters or internal seas. As a result, claims arising from the Incident are potentially eligible for compensation.

The CCG is an eligible claimant for the purposes of section 103 of the MLA. The submission arrived prior to the limitation periods set out under subsection 103(2).

Some of the claimed costs and expenses arise from what appear to be reasonable measures taken to “prevent, repair, remedy or minimize” oil pollution damage from a ship, as contemplated under Part 6, Division 2 of the MLA, and are therefore eligible for compensation.

Accordingly, the submission presents claims that are potentially eligible for compensation under s. 103 of the MLA.

The pollution threat posed by the Vessel

The first indication of the release of hydrocarbon pollutants from the Vessel was the presence of an oily sheen in the surrounding water and the smell of pollutants reported by the search and rescue respondents when they arrived at the site of the Incident on 17 January 2018. Although tarps covered much of the Vessel’s cockpit, portable containers and an outboard motor were visible. Severe weather conditions prevented the team from reaching the Vessel, which was stranded against the seaward side of the breakwater. Once it was determined that there were no people aboard the Vessel, the team departed the scene. They most likely would have been responsible for securing the Vessel to the breakwater.

The CCG issued a contract to Wills Marine to remove the Vessel’s portable containers and outboard motor when weather conditions permitted. Wills Marine was also tasked with refloating the Vessel and removing it from the water, as the CCG was initially unable to locate the Vessel’s owner. According to the CCG submission, Wills Marine was chosen due to their proximity to the vessel and history of successful salvages.

Apparently, the owner could not be located and contacted before 23 January. This is significant, as shipowners can provide an estimate of the type, quantity, and location of pollutants onboard a vessel. Because the owner of the Vessel had not been reached at the time, it is reasonable to accept that the initial actions taken by the CCG, namely contracting with Wills Marine, were intended as preventative measures to address a threat of oil pollution.

However, the CCG’s rationale for determining the magnitude of the oil pollution threat that the Vessel posed is unclear. When the CCG contracted with Wills Marine, information

about the presence of pollutants onboard the Vessel was limited to an oily sheen and smell in the vicinity and the observation of portable containers and an outboard motor on the Vessel. Nobody was able to board the Vessel due to poor weather conditions.

A further assessment of the Vessel was made after it had been removed from the water. The narrative states that the CCG determined that the Vessel was in disrepair and would pose a further pollution threat if put back in the water, that the Vessel's interior was coated in oily waste, and that its fuel tanks contained unknown quantities of oily seawater. The tanks were likely the source of the pollutants causing the oily sheen and smell that the search and rescue team noted on 17 January 2018; however, there is no evidence in the CCG submission that the tanks were pumped after the Vessel was removed from the water.

Due to the weather, no major salvage operations could be undertaken before 25 January 2018, eight days after the Incident was reported. By that time, it has not been established that any of the limited amount of pollutants aboard the Vessel would have remained. It is considered probable that anything present had already been dispersed into the environment. While the CCG report of oil coating the interior of the vessel is noted, the evidence does not establish that it was, itself, an oily waste. It has not been established that the Vessel itself was an ongoing pollution threat.

Inspection of the vessel

A survey was carried out by Building Sea Marine. The CCG submission indicates that the purpose of the survey was to assess the condition and salvage value of the Vessel. The survey does not focus on the presence of oil onboard the Vessel or the threat of oil pollution that the Vessel posed.

The fact that the survey did not involve confirming the quantity of oil pollutants onboard the Vessel supports a determination that the survey was not a measure taken with respect to a threatened discharge of oil from the Vessel. It is determined that the survey report was procured by the CCG for other purposes. It would have been reasonable for the CCG to produce a short narrative supported with photos rather than incurring the costs of a marine survey.

CLAIM AND OFFER DETAILS

The CCG submission breaks down the claim for costs and expenses into several categories. This section of the offer letter reviews each of those categories in detail and provides reasons as to why portions of the claim have been allowed or disallowed.

According to s. 51, 71, and 77 of the MLA, both the measures taken to respond to an oil pollution incident and the resulting costs must be reasonable in order to trigger the liability of the SOPF. In each portion of the CCG claim below, it will be mentioned whether both factors have been established.

Most of the costs for contract services arise from contracts with Wills Marine and Pacific Pro Dive for services related to the raising and salvage of the Vessel. A small portion of the costs arises from the survey of the Vessel conducted by Building Sea Marine.

Specifically, the CCG entered into an emergency contract with Wills Marine for \$9,800.64. According to the CCG submission, the Statement of Work called for Wills Marine to remove pollutants onboard the Vessel, refloat the Vessel, and remove it from the water. A copy of the Statement of Work was not included in the CCG submission, despite being necessary for a full assessment of the claim. In response to inquiries on this topic from the office of the Administrator, the CCG confirmed that the Statement of Work was issued verbally and that there is no written copy.

Additionally, after the eight days between the issuance of the contract to Wills Marine and the salvage operation, it has not been established that the small quantity of pollutants onboard the Vessel would have remained there, rather than having been dispersed in the water. As such, it has not been established that the Vessel could reasonably be considered a pollution threat at the time of the salvage operation. This measure, beyond initial preventative actions, is considered to have been related primarily to wreck removal rather than a response to a pollution threat.

The invoice submitted by Wills Marine does not provide a breakdown of actions and costs per day. It attributes 24 total hours for logistics, recovery, removal, deconstruction, and disposal of the Vessel at a rate of \$85 per hour. In light of the conclusion reached above, there was very little for Wills Marine to do until 25 January due to weather conditions. It is, however, reasonable to conclude that Wills Marine would have checked on the Vessel daily over six days (17 to 22 January, when the CCG officers arrived). Allowing one hour per day at \$85 per hour, the cost attributed to this task would total \$510 for six hours. The remainder of the work was primarily related to wreck removal and not established as a reasonable response to an oil pollution threat. **Accordingly, a total of \$535.50 (\$510 plus 5% GST) is accepted as reasonable for the CCG contract with Wills Marine.**

Because the contract with Pacific Pro Dive was primarily related to wreck removal rather than a response to a threat of oil pollution, this cost is not established as reasonable in the circumstances.

As mentioned, Building Sea Marine conducted a survey of the Vessel. The CCG did not request that the type(s) and quantities of pollutants onboard the Vessel be determined. The survey report mentions only that the main engine and gearbox had been removed previously, and the pictures taken confirm that the survey of the Vessel was not required as a response to an oil pollution threat. The survey report is not relevant to a determination of the extent of the pollution threat that the Vessel posed. Accordingly, the cost of the marine survey by Building Sea Marine is not established as reasonable.

The contract services claims in the CCG submission and the portion of costs that are established as reasonable are summarized in the table below:

Table 1 – Description of contractor costs and claim amounts

Invoice	Description	Claimed	Established
Wills Marine Supply	Monitor and refloat Vessel, extract pollutants, remove Vessel from water.	\$9,800.64	\$535.50
Pacific Pro Dive	Salvage operations	\$12,626.25	\$0
Building Sea Marine	Survey of the Vessel	\$1,020.60	\$0
Total contractor expenses		\$23,447.49	\$535.50

The contractor portion of the submission is allowed, in part, in the amount of \$535.50.

Schedule 3 – Travel

Claim: \$2,156.74

The CCG’s response to the Incident was conducted concurrently with its response to another incident, reported on 20 January 2018. This incident involved the pleasure craft *Tinker II*, which had run aground in Campbell River, BC. Three CCG ER officers drove from Victoria to Comox on 23 January 2018, towing a PRV I and bringing miscellaneous portable equipment. Given that the CCG had already awarded the work contract to Wills Marine based on their close proximity to the Vessel and their history of successful salvages, it was unnecessary for the CCG to bring equipment. Additionally, the *Tinker II* had been removed from the beach in Campbell River on 22 January, before the officers’ departure from Victoria. Therefore, it was unnecessary for three officers to travel to Comox or Campbell River.

The CCG ER requirement for the officers to assess and oversee the salvage operation is accepted as reasonable. It is noted, however, that the *Tinker II* was surveyed prior to the officers’ arrival. It would have been reasonable for one officer (GT-04) to drive a

government vehicle to Comox and Campbell River for four days (23-26 January). Three of these days (23, 25, and 26) were attributed to the present claim, while the 24th was attributed to the *Tinker II* claim. Accordingly, the travel costs for one CCG officer in the present claim are accepted as reasonable and established at \$734.30. The travel costs for the two other CCG officers were unreasonable in the circumstances and are not accepted.

The travel portion of the submission is allowed, in part, in the amount of \$734.30.

Schedule 4 – Salaries: Full Time Personnel

Claim: \$2,918.03

Three CCG officers attended at Comox on 23, 25, and 26 January 2018. The pay rate for each of these officers is \$43.23 per hour, and the salary costs claimed by the CCG arise from their work on the three above days for 7.5 hours per day. The salary costs for one officer are accepted as reasonable; however, it was unnecessary to send three officers, as the CCG had already contracted with Wills Marine to have the Vessel removed from the water. Additionally, it has not been established that when the officers left for Comox on 23 January 2018, there would not have been a significant amount of pollutants remaining onboard the Vessel. While it was reasonable for the CCG to monitor the salvage operation, one officer could have carried out this function.

The travel costs for the two other CCG officers were unreasonable in the circumstances and are not accepted.

The salary portion of the submission is allowed, in part, in the amount of \$972.68.

Schedule 5 – Overtime: Full Time Personnel

Claim: \$1,945.08

The overtime costs are for the three CCG officers who responded to the Incident. The CCG claims for 3.5 hours of overtime on 23 January, 5 hours on 25 January, and 3.5 hours on 26 January. As noted above, the nature of the Incident required only one CCG officer to attend at the scene; therefore, overtime costs for one officer are accepted as reasonable. The overtime costs for the two other officers were unreasonable in the circumstances and are not accepted.

The overtime portion of the submission is allowed, in part, in the amount of \$648.36.

Schedule 11– Pollution Counter Measures Equipment

Claim: \$179.87

The CCG had no need to bring equipment to the site of the Incident, as Wills Marine was fully capable of providing everything required to refloat and remove the Vessel from the water.

The Pollution Counter Measures Equipment portion of the submission is disallowed.

Schedule 12 – Vehicles

Claim: \$230.14

The daily charge-out rate and mileage costs align with those of a standard light vehicle and are accepted as reasonable. The costs for the use of one vehicle for two days were reasonable for the purposes of monitoring the response to the Incident.

The vehicle portion of the submission is allowed in its entirety in the amount of \$230.14.

Schedule 13 – Administration

Claim: \$116.09

These costs were applied to the travel and salary expenses. A discrepancy was found in assessing the costs in this schedule. Namely, the salary cost used in the CCG’s calculation was lower than the total salary cost calculated in Schedule 4, resulting in a slightly lower administrative cost. However, this discrepancy is inconsequential, as the accepted administrative costs are based on the accepted travel and salary costs, which total \$1,706.98. At a rate of 2.53%, the established administrative costs total \$43.19.

The administrative portion of the submission is allowed, in part, in the amount of \$43.19.

OFFER SUMMARY AND CLOSING

The following table summarizes the claimed and allowed expenses with respect to this claim:

Description	Claim	Offer
Contract Services	\$23,447.49	\$535.50
Travel	\$2,156.74	\$734.30
Salaries	\$2,918.03	\$972.68
Overtime	\$1,945.08	\$648.36
Pollution Counter Measures Equipment	\$179.87	\$0.00
Vehicles	\$230.14	\$230.14
Administration	\$116.09	\$43.19
Total	\$30,993.44	\$3,164.7

Table 2 - Summary of claims made and allowed

Costs and expenses in the amount of \$3,164.17 are accepted and will be paid together with statutory interest calculated at the date of payment if the Offer is accepted.

In considering this Offer, please observe the following options and time limits that arise from section 106 of the MLA.

You have 60 days upon receipt of this Offer to notify the undersigned whether you accept it. You may tender your acceptance by any means of communication by 16:30 Eastern Time on the final day allowed. If you accept this Offer, payment will be directed to you without delay.

Alternatively, you have 60 days upon receipt of this Offer to appeal its adequacy to the Federal Court. If you wish to appeal the adequacy of the Offer, pursuant to Rules 335(c), 337, and 338 of the *Federal Courts Rules*, SOR/98-106 you may do so by filing a Notice of Appeal in Form 337. You must serve it upon the Administrator, who shall be the named Respondent. Pursuant to Rules 317 and 350 of the *Federal Courts Rules*, you may request a copy of the Certified Tribunal Record.

The MLA provides that if no notification is received by the end of the 60-day period, you will be deemed to have refused the Offer. No further offer will issue.

Finally, where a claimant accepts an offer of compensation from the Fund, the Fund becomes subrogated to the claimant's rights with respect to the subject matter of the claim. The claimant must thereafter cease any effort to recover for its claim, and further it must cooperate with the Fund in its subrogation efforts.

Yours sincerely,

Mark A.M. Gauthier, B.A., LL.B
Deputy Administrator, Ship-source Oil Pollution Fund