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LETTER OF DISALLOWANCE

Ottawa, 17 May 2021
SOPF File: 120-869-C1
CCG File:

BY EMAIL

Manager, Response Services and Planning
Canadian Coast Guard
200 Kent Street (5N167)
Ottawa, Ontario K1A 0E6

RE: FV *Miss Terri* — Discovery Harbour, Campbell River, British Columbia
Incident date: 2018-02-23 (stated as 2018-09-18 in the submission)

SUMMARY AND DISALLOWANCE

[1] This letter responds to a submission from the Canadian Coast Guard (the "CCG") with respect to the fishing vessel *Miss Terri* (the "Vessel"), which was involved in an incident at Discovery Harbour, in Campbell River, British Columbia (the "Incident").

[2] On 4 September 2020, the office of the Administrator of the Ship-source Oil Pollution Fund (the "Fund") received a submission from the CCG on behalf of the Administrator. The submission advanced claims under sections 101 and 103 of the *Marine Liability Act*, SC 2001, c 6 (the "MLA") totaling $88,576.24 for costs and expenses arising from measures taken by the CCG to respond to the Incident.

[3] The submission has been reviewed and a determination with respect to its claims has been made. It is determined that the limitation period under paragraph 103(2)(a) of the MLA arose prior to the submission of this claim to the Administrator. The submission is therefore not admissible under subsection 103(1) of the MLA.

[4] Detailed reasons for the disallowance are set forth below, along with a description of the relevant evidence and some procedural history.

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THE SUBMISSION RECEIVED

[5] The submission includes a narrative that describes events relating to the Incident. It also includes a summary of the costs and expenses that the CCG claims and corroborating documents. To the extent that the narrative and corroborating documents are relevant to the determination, they are reviewed below.

The narrative

[6] On 23 February 2018, CCG pollution report 0178 was issued at 0820 PST. The report was issued in response to a communication received from the harbour master at Discovery Harbour, in Campbell River, British Columbia. The harbour master reported that the Vessel's bilge pump was pumping continuously due to an ingress of water. A CCG crew attended the scene in response.

[7] With assistance from the CCG crew, the harbour master installed additional bilge pumps to keep the Vessel afloat. With the additional pumps placed by the CCG, the Vessel's pumps were operating 50% of the time.

[8] After placing the pumps, the CCG demanded that the owner provide a plan to deal with the Vessel. No plan was provided to the CCG. There is no evidence that the owner took any steps to rectify the difficulties experienced by the Vessel.

[9] On 11 September 2018, a CCG Environmental Response ("ER") crew attended at Discovery Harbour in Campbell River, British Columbia, on another matter. While there, the ER crew took note of the Vessel (the *Miss Terri*). It was observed that the Vessel's bilge pumps were running for 30 minutes every hour.

[10] The CCG ER Duty Officer made telephone contact with the owner of the Vessel, advising that the Vessel was experiencing a high volume of water ingress. The owner was, at the time, at sea aboard another vessel. The owner was advised that the CCG would likely have the Vessel towed to a facility where it could be properly monitored and quickly removed from the marine environment, if that was required.

[11] On 18 September 2018, the Discovery Harbour harbour master contacted the CCG again to advise that the Vessel's bilge pumps were continuously pumping water and he could not continue to maintain them. The CCG considered that the Vessel was an imminent pollution threat. They retained a local contractor, Saltair Marine Services Ltd. ("Saltair") to tow the Vessel.

[12] On 19 September 2018, Saltair towed the Vessel to Ladysmith, where it had to be monitored 24 hours a day. The CCG spoke with the owner, who remained at sea. He advised that he would return the first week of October to deal with the Vessel.

[13] The narrative reports that the CCG made efforts to convince the owner of the Vessel to take responsibility for it, but the owner failed to take the Vessel or provide a plan.

[14] On 6 November 2018 the CCG concluded that the owner would not take responsibility for the Vessel. The CCG instructed its contractor, Saltair Marine, to remove

the Vessel from the marine environment. Upon removal, it was discovered that he Vessel had extensive damage below the waterline, attributed to marine life activity and rot.

[15] On 29 November 2018 Saltair began preparing the Vessel for deconstruction. Deconstruction was completed on 14 December 2018.

[16] The narrative reports that the owner was difficult to deal with throughout, including threatening legal action against CCG personnel.

PRELIMINARY DETERMINATIONS AND THE STATE OF THE VESSEL

[17] All submissions to the Administrator are subject to statutory limitation periods of various lengths, the details of which will be discussed in the Determinations and Findings section, below.

[18] In determining which limitation period applies, it is important to first determine if there was a discharge of oil from the Vessel.

[19] Nowhere in the evidence or the narrative is there an explicit observation of oil in the water originating from the Vessel. However, the lack of an observed discharge does not mean that no discharge occurred.

[20] In this case, indirect evidence that a discharge, or more likely multiple discharges, occurred prior to 4 September 2018. Put briefly, it is more probable than not that rainwater would have entered the Vessel with some regularity, become contaminated with oil and then pumped overboard. Evidence of such discharges of oil is detailed in the two sections that follow, alongside relevant determinations of fact.

The layout of the Vessel and its physical condition provide important evidence

[21] The CCG submission includes a survey report prepared by Building Sea Marine ("BSM").

[22] A BSM surveyor attended the Vessel on 18 September 2018 while it was in the water at Discovery Marina. A report was prepared based on the surveyor's inspection of the Vessel. The report, dated 5 October 2018, is included in the CCG submission.

[23] The report includes several observations which provide useful evidence as to the state of the Vessel, as well as the general layout of its internal spaces.

[24] The Vessel's above-deck areas included a wheelhouse forward and an accommodation space aft of the wheelhouse. The accommodation space ran approximately to midship, leaving a large, open working deck aft, with hatches to access the fish holds at its centre.

[25] Below deck, fore to aft, there was a forecastle space, a machinery space (with an engine and fuel tanks at port and starboard), fish holds, and finally a lazarette/steering gear

space. The forecastle space was accessed via the machinery space, which itself was accessed from above via vertical companionway ladder.

[26] Relating the above- and below-deck spaces to each other, the forecastle space would seem to have been below the wheelhouse, while the accommodation space was above the machinery space, as established by the location of the ladder, which ran between the two spaces.

[27] The state of the deck is important. According to the surveyor retained by the CCG, the deck was in poor condition throughout. Most of the paying compound was missing and many of the planks had gone soft or rotted entirely. The survey report states that rainwater could have penetrated most of the areas of the deck exposed to the elements:

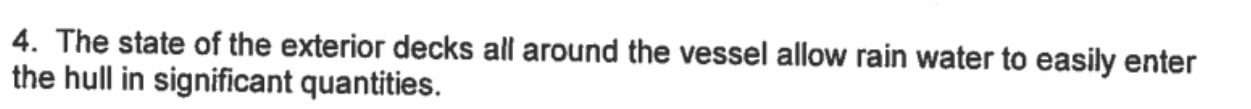
4. The state of the exterior decks all around the vessel allow rain water to easily enter the hull in significant quantities.

Figure 1 - Excerpt from page 6 of the BSM survey report

[28] A number of photographs of the Vessel's deck planking accompany the survey report:

Figure 2 - Photographs of degraded deck planking from page 8 of the photos section of the BSM survey report
Figure 3 - Photographs of degraded deck planking from page 9 of the photos section of the BSM survey report
Figure 4 - Photographs of degraded deck planking from page 10 of the photos section of the BSM Survey Report

[29] Based on the photographs at Figures 2 through 4, it is determined that the surveyor's observations and conclusions with respect to the Vessel's deck were likely correct.

[30] On the balance of probabilities, when rain fell upon that Vessel, the rain would have penetrated the deck, entering the below deck spaces throughout the Vessel. This includes the forward spaces which are the subject of the next section of this decision.

[31] There is one additional relevant finding with respect to the layout of the Vessel. All of the functional pumps aboard the Vessel were located in the lazarette/steering gear space (i.e. at the stern or rear of the Vessel). While it appears that features in the Vessel's engine room might have, at one point, allowed water to be pumped from the Vessel, that equipment was not functional at the relevant times.

[32] Finally, there is no evidence that the state of the Vessel or its layout changed significantly after 23 February 2018 (when the pumps were installed) and 18 September 2018 when it was inspected by the marine surveyor.

The forward internal spaces of the Vessel were contaminated with oil

[33] A significant portion of the claimed expenses arise from the deconstruction of the Vessel.

[34] The deconstruction of a vessel can represent an admissible expense where the vessel itself poses an oil pollution threat. For example, compensation for deconstruction costs may be available where a wooden vessel is so saturated with oil that, if submerged, its timbers would discharge oil into the water. Often, such saturation results from build-up of oily sludge and debris in a vessel's bilge spaces.

[35] In this case, there is evidence that the Vessel itself posed an oil pollution threat.

[36] The BSM survey report notes that the Vessel's machinery space and forecastle bilges were "moderately fouled with oil". Photographs 41, 42, 46 and 47 from that report show oily bilges in the main engine, forecastle, and stern gland areas of the Vessel:

Figure 5 - Photographs taken from page 22 of the photos section of the BSM survey report
Figure 6 - Photographs taken from page 25 of the photos section of the BSM survey report

[37] Saltair, the contractor that carried out the deconstruction of the Vessel, also took photographs in the course of its work. These photographs show the condition of the Vessel, including the presence of oily contaminants, oily debris, and oil-saturated wood:

Figure 7 - Photographs and captions prepared by Saltair
Figure 8 - Photographs and captions prepared by Saltair, showing oil-saturated wood
Figure 9 - Photographs and captions prepared by Saltair, showing oil-saturated wood
Figure 10 - Photographs and captions prepared by Saltair, showing oil-saturated wood

[38] Based on the foregoing, it is accepted that the both the machinery space and the forecastle space were contaminated with oil, such that water coming into contact with those spaces would become contaminated by oil.

[39] There is no evidence that the oily state of the Vessel significantly changed between 23 February 2018 and when it was inspected by the marine surveyor.

DETERMINATIONS AND FINDINGS

The CCG submission presents potentially eligible claims under subsection 103(1)

[40] Under the subsection 103(1) mechanism, claimants may submit claims directly to the Administrator. Such submission must be evaluated against several statutory criteria before the substance of the claim may be investigated and assessed.

[41] In this case, the Incident resulted in oil pollution damage suffered, or the threat of such damage, within the territorial seas or internal waters of Canada, as well as in costs and expenses to carry out measures to mitigate further damage. As a result, claims arising from the Incident are potentially eligible for compensation.

[42] The CCG is an eligible claimant for the purposes of section 103 of the MLA.

[43] 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 potentially eligible for compensation.

[44] The claim is therefore admissible, subject to the intervention of any applicable limitation period. In this case, whether the claim was submitted prior to the appropriate limitation period under subsection 103(2) of the MLA is an issue which requires significant factual and legal determinations.

Submissions under subsection 103(1) are subject to a limitation period

[45] Subsection 103(1) of the MLA, as it was at the time of the Incident, provides:[1]

Claims filed with Administrator

103 (1) In addition to any right against the Ship-source Oil Pollution Fund under section 101, a person who has suffered loss or damage or incurred costs or expenses referred to in section 51, 71 or 77, Article III of the Civil Liability Convention or Article 3 of the Bunkers Convention in respect of actual or anticipated oil pollution damage may file a claim with the Administrator for the loss, damage, costs or expenses.

Dépôt des demandes auprès de l'administrateur

103 (1) En plus des droits qu'elle peut exercer contre la Caisse d'indemnisation en vertu de l'article 101, toute personne qui a subi des pertes ou des dommages ou qui a engagé des frais mentionnés aux articles 51, 71 ou 77, à l'article III de la Convention sur la responsabilité civile ou à l'article 3 de la Convention sur les hydrocarbures de soute à cause de dommages — réels ou prévus — dus à la pollution par les hydrocarbures peut présenter à l'administrateur une demande en recouvrement de créance à l'égard de ces dommages, pertes et frais.

[46] Claims made under subsection 103(1) of the MLA are subject to the limitation periods set out in subsection 103(2):

Limitation period

(2) Unless the Admiralty Court fixes a shorter period under paragraph 111(a), a claim must be made

(a) within two years after the day on which the oil pollution damage occurs and five years after the occurrence that causes that damage; or

(b) if no oil pollution damage occurs, within five years after the occurrence in respect of which oil pollution damage is anticipated.

Délais

(2) Sous réserve du pouvoir donné à la Cour d'amirauté à l'alinéa 111a), la demande en recouvrement de créance doit être faite :

a) s'il y a eu des dommages dus à la pollution par les hydrocarbures, dans les deux ans suivant la date où ces dommages se sont produits et dans les cinq ans suivant l'événement qui les a causés;

b) sinon, dans les cinq ans suivant l'événement à l'égard duquel des dommages ont été prévus.

[47] The language of the limitation period provisions requires analysis if, on the facts, there was oil pollution damage more than two years before the claim was submitted to the Administrator.

[48] Because oil pollution damage cannot occur without a discharge of oil, it must first be determined whether a discharge occurred as a result of the Incident.

This claim was submitted more than two years after a discharge likely occurred

[49] When the CCG arrived at Discovery Harbour on 23 February 2018, the Vessel's pumps were operating continuously. The CCG placed additional pumps aboard the Vessel. No direct evidence is available as to what happened to the Vessel in between this time and September of 2018. However, as determined previously it is more likely than not that when

[1] All references to the MLA herein are to the version that was in force at the time of the Incident.

rain fell on the vessel, water penetrated the deck, became contaminated with oil, and was then discharged from the Vessel via the pumps located at the Vessel's rear.

[50] Further, it is accepted that during 23 February and 3 September 2018, significant rainfalls would have occurred at the Vessel's location on multiple occasions.

[51] In the results, it is determined that, more likely than not, discharges would have occurred many times prior to September of 2018.

[52] The Administrator received the CCG submission in this matter on 4 September 2020. It has been concluded that discharges of oil occurred prior to 4 September 2018.

[53] As the claim was not submitted within two years of these discharges, the shortest of the limitation periods under subsection 103(2) might apply. An examination of whether the claim can be admitted under subsection 103(1) is needed.

The English version of the limitation period is ambiguous and requires interpretation

[54] The English version of the limitation period at subsection 103(2) is challenging to apply.

[55] The presence of the word "the" before "oil pollution damage" in paragraph 103(2)(a) ("within two years after the day on which the oil pollution damage occurs") creates confusion. "The" is a definite article, typically used for a concept which has already been introduced. As used in paragraph 103(2)(a), however, it is not on its face clear what "the" refers to. It might refer to the specific damage that is the subject of a claim. Alternatively, it might refer to a singular event where a discharge causes oil pollution damage.

[56] If the former is the appropriate interpretation, different claims stemming from the same occurrence could be subject to different limitation periods. Conversely, the latter interpretation would apply the same limitation period to all claims stemming from the same circumstances. Both interpretations bring their own set of complications, and statutory interpretation is required to resolve the ambiguity, as well as to determine the appropriate threshold for what constitutes "oil pollution damage".

The principles of statutory interpretation

[57] The goal of statutory interpretation is to establish the meaning of the words in a statute. This involves coming to an understanding of the statute's intent. With respect to how to arrive at that intent, the Supreme Court of Canada endorses the approach suggested by Elmer Driedger, namely:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and

> ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[2]

[58] It is not enough to arrive at the plain meaning of the words used. The object and intention of Parliament in passing the MLA must be considered, and recognition must be given to the context in which the words at issue are employed.

Applying the principles of statutory interpretation to the limitation period at paragraph 103(2)(a)

[59] While what is meant by "the oil pollution damage" as used in paragraph 103(2)(a) is not clear, other parts of the MLA provide context which assist in establishing an appropriate interpretation. On that point, subsection 91(1) is pertinent. It includes three relevant definitions:

> **discharge**, in relation to oil, means a discharge of oil that directly or indirectly results in the oil entering the water, and includes spilling, leaking, pumping, pouring, emitting, emptying, throwing and dumping.
>
> […]
>
> **oil** means oil of any kind or in any form and includes petroleum, fuel oil, sludge, oil refuse and oil mixed with wastes but does not include dredged spoil.
>
> **oil pollution damage**, *in relation to a ship, means loss or damage outside the ship caused by contamination resulting from the discharge of oil from the ship.*

[60] Precisely the same definition of "oil pollution damage" is found at section 75 of the MLA, which section also provides a slightly different definition of "discharge". The context of these alternative definitions matters. Section 75 of the MLA sets the definitions which apply to section 77, the primary vehicle by which the MLA imposes liability on shipowners for ship-source oil incidents in Canadian waters.[3] Subsection 103(1) refers to section 77, providing that a claim arising under section 77 also constitutes a basis for a claim made to the Administrator.

[61] The difference in the definition of "discharge" at section 75, as compared to the one at subsection 91(1), is the replacement of the word "oil" with "pollutant", which is also a defined term at section 75 [emphasis added]:

> **discharge**, <u>in relation to a pollutant</u>, means a discharge of a <u>pollutant</u> that directly or indirectly results in the <u>pollutant</u> entering the water, and

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[2] *Re Rizzo & Rizzo Shoes Ltd*, [1998] 1 SCR 27 at para 21, citing Elmer A. Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87.

[3] The MLA incorporates into Canadian law the International Convention on Civil Liability for Oil Pollution Damage, 1998 and the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001. Both conventions also impose liability on the owner of a ship for certain types of ship-source oil incidents. The scope of the incidents covered by the conventions is narrower than that set by subsection 77(1), namely incidents involving a tanker vessel carrying heavy oil as a cargo or a vessel which can be considered to be seagoing or seaborne.

> includes spilling, leaking, pumping, pouring, emitting, emptying, throwing and dumping.
>
> **pollutant** means oil and any substance or class of substances identified by the regulations as a pollutant for the purposes of this Part and includes
>
> > **(a)** a substance that, if added to any waters, would degrade or alter or form part of a process of degradation or alteration of the waters' quality to an extent that their use would be detrimental to humans or animals or plants that are useful to humans; and
> >
> > **(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 waters' quality to an extent that their use would be detrimental to humans or animals or plants that are useful to humans.

[62] The above provides some useful insight into what constitutes "loss or damage" under both the definition of "pollution damage" and "oil pollution damage", albeit in an oblique fashion.

[63] The definition of "pollutant" at section 75 establishes a threshold which must be met before a substance can be considered a pollutant. Namely, where a substance would degrade or contribute to the degradation of waters to the extent that those waters would be detrimental to humans or animals or plants that are useful to humans, it is a "pollutant" which can then be discharged from a ship, potentially causing loss or damage that can be considered "pollution damage".

[64] While it is not clear that the above threshold is meant to apply to oils, all of which are pollutants, the threshold is nevertheless informative about what "loss or damage outside the ship" means in the subsection 91(1) definition of "oil pollution damage". If a substance that qualifies as a "pollutant" is discharged from a ship, it flows logically that some degree of "loss or damage" to the quality of the immediate marine environment will occur, making the applicable threshold a relatively low one.

[65] Further, the definition of "pollutant" indicates that "loss or damage" need not befall property or a person's income in order for "pollution damage" to have occurred. Rather, the focus is on environmental degradation that could potentially have an effect on humans, animals, or useful plants.

[66] Because the definitions of "pollution damage" and "oil pollution damage", as they appear respectively at section 75 and subsection 91(1), are so similar, it is considered that the same meaning of "loss or damage" must have been intended as between them. Therefore, the threshold for "pollution damage" is useful for determining what level of environmental impact is required for a discharge of oil to be considered "oil pollution damage".

[67] Additional interpretive aide can be found in section 77, which contains a limitation period of its own at subsection 77(6):

> **(6)** No action lies in respect of a matter referred to in subsection (1) unless it is commenced
>
> **(a)** if pollution damage occurs, within the earlier of
>
> **(i)** three years after the day on which the pollution damage occurs, and
>
> **(ii)** six years after the occurrence that causes the pollution damage or, if the pollution damage is caused by more than one occurrence having the same origin, six years after the first of the occurrences; or
>
> **(b)** if no pollution damage occurs, within six years after the occurrence.

[68] Subsection 77(6) refers to "pollution damage", and not "oil pollution damage". These terms have separate but similar definitions at section 75, which are, respectively, very similar and identical to the definition of "oil pollution damage" at subsection 91(1). Because section 77 imposes liability only with respect to oil, and because the definition of "pollutant" includes oil, it is considered that the use of "pollution damage" in subsection 77(6) must include "oil pollution damage".

[69] The limitation provision at subparagraph 77(6)(a)(i) includes the same "the" which is troublesome in subsection 103(2), but its use at subparagraph 77(6)(a)(i) causes no interpretive difficulty. This is because paragraph 77(6)(a), which immediately precedes subparagraph 77(6)(a)(i), uses the phrase "if pollution damage occurs". Thus, the use of a definite article is appropriate, as it clearly refers to the already introduced "pollution damage", which may or may not have occurred.

[70] This would be consistent with "pollution damage" for the purposes of section 77 being a singular event occurring within the context of an incident as a whole, rather than a discrete event peculiar to each claimant. All claimants are therefore subject to the same limitation clock. Once *any* pollution damage has occurred, the limitation period under subparagraph 77(6)(a)(i) begins to run.[4] All claimants must then initiate their claims against the shipowner within three years of that event, or perhaps sooner.[5] Under this interpretation, once an event of "pollution damage" has occurred, further causally related instances of "pollution damage" are not relevant to the operation of the limitation period under subsection 77(6).

[71] Parallels can be seen as between subsections 77(6) and 103(2), and one of the salient differences between the two provisions is easily explained.

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[4] Subparagraph 77(6)(a)(ii) operates where an "occurrence" (or series of "occurrences") does not immediately result in pollution damage. It imposes an absolute limit of six years after the first occurrence. If pollution damage were to occur four years after the initiating occurrence, then a claim must be brought within the following two years, notwithstanding that subparagraph 77(6)(a)(i) provides three years after the event of oil pollution damage. The absolute limitation period at subparagraph 77(6)(a)(ii) takes precedence.

[5] See discussion of delayed pollution damage following an initiating occurrence at *ibid*.

[72] The basic subsection 77(6) limitation periods are three and six years, depending on whether pollution damage occurs.[6] Under subsection 103(2), the basic limitation periods are two and five years, or one year shorter than under subsection 77(6). The difference in the quantity of time has an important result.

[73] Under Part 7 of the MLA, the Administrator becomes subrogated to a claimant's rights and is mandated to pursue recovery from liable persons.[7] In that context, the two- and five-year limitation periods under subsection 103(2) require, in most cases, that claims be submitted to the Administrator early enough that the Administrator will have a minimum of one year to process and pay the claim, then initiate a subrogated recovery against the shipowner under section 77. This puts the "polluter pays" principle into effect while also ensuring that compensation is available to those affected by ship-source oil pollution without regard for the financial wherewithal of the shipowner.

[74] This potential for harmonious function of different parts of the MLA indicates that the limitation periods at subsections 77(6) and 103(2) should be interpreted to function in substantially the same way, but for their different lengths. This supports an interpretation of "the oil pollution damage" within subsection 103(2) as working the same way as under subsection 77(6).[8] That is, that "oil pollution damage" is a singular event and, once it occurs, the two-year limitation period under subsection 103(2) begins to run.

[75] It must be noted that the English versions of subsections 77(6) and 103(2) do have an important distinction. Paragraph 77(6)(a) provides an antecedent use of "if pollution damage occurs", which makes subparagraph 77(6)(a)(i) work as described above. That antecedent usage does not exist within subsection 103(2). The use of different wording as between sections with otherwise similar functions often suggests that Parliament intended a different function.

[76] However, with respect to these two provisions of the MLA, it is not accepted that a difference in function was intended. The absence of an antecedent use of "oil pollution damage" renders subsection 103(2) confusing and ambiguous, rather than clearly establishing a different function. Furthermore, the antecedent phrase *is* present in the French version of the statute, in both provisions. In French, paragraph 103(2)(a) provides [emphasis added] "s'il y a eu des dommages dus à la pollution par les hydrocarbures, dans les deux ans suivant la date où ces dommages". This indicates that the omission of "if pollution damage occurs" from paragraph 103(2)(a), in English, is an artifact of drafting or translation. It is therefore considered unlikely that Parliament intended for subsection 103(2) to operate differently than subsection 77(6).

[77] In the result, it is concluded that subsection 103(2)(a) imposes a limitation period of two years after oil pollution damage occurs as a result of an initiating incident.[9] All

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[6] Although, as noted at n 4, there can be complications when pollution damage occurs more than three years after the initiating occurrence.
[7] MLA, s 106(3)(c).
[8] While the two terms are distinct, in that the subsection 77(6) usage of "pollution damage" is clearly subject to a threshold, in terms of function outside of that threshold they can and should be interpreted the same way.
[9] The reasoning in n 4 applies to the two-year period as well, meaning it will be shortened where the oil pollution damage occurs more than three years after the initiating occurrence.

claims stemming from the same facts, and all claimants, are therefore subject to the same limitation period.

Applying the law to the facts

[78] It has previously been concluded that the Vessel likely caused a discharge of oil prior to 4 September 2018. This claim was not received by the Administrator within two years of that date.

[79] The final determination to be made is whether the discharges that occurred caused "oil pollution damage" as that term is defined at subsection 91(1) of the MLA. Noting the prior discussion of the lack of a threshold on "oil pollution damage" within subsection 91(1), as well as the significantly oiled state of at least portions of the Vessel, it is determined that the discharges prior to 4 September 2018 likely caused "oil pollution damage".

[80] In the result, the limitation period set out at paragraph 103(2)(a) expired prior to 4 September 2020. The CCG's submission is therefore inadmissible as a claim to the Administrator under subsection 103(1).

Submissions received from the CCG

[81] On 23 February 2021, a draft decision letter in this matter was sent by the Administrator to the CCG for comment. This was done to allow the CCG to provide comment on what appeared to be a novel issue of mixed fact and law: namely, the determination that oil pollution damage occurred more than two years before the submission of a claim, but where the exact date and timing of the discharge were not known, and how the limitation period should be applied on the facts.

[82] The CCG provided a response on 30 March 2021. The Administrator is grateful for comments provided.

[83] The response was as follows:

> This response follows your February 23, 2021 draft letter of Disallowance and Dismissal for the expenses incurred by the Canadian Coast Guard (Coast Guard) in regard to its involvement with the incident captioned above and our claim of $88,576.24.
>
> At the outset, we wish to note our understanding that any appeal period would begin from the date of a final letter of disallowance and not from the February 23, 2021 draft letter.
>
> First, your letter concludes that after review of the evidence, the *F/V Miss Terri* "likely discharged oil". Second, the Administrator believes the incident date to be some unspecified time before February 23, 2018 and as a result the claim should be rejected because it was submitted after the two year limitation date. We will endeavor to respond to these two issues below.

On February 23, 2018, Coast Guard received a report of potential pollution from the Discovery Harbour about *Miss Terri's* poor condition. Coast Guard (Campbell River Lifeboat Station crew) was on site to assess the situation and worked with the Harbour Master to ensure the vessel's pumps kept working so that the vessel remained afloat. This type of assessment is routine Coast Guard business and it is sometimes conducted by a different Coast Guard program, in this case the Search and Rescue program. Coast Guard (Campbell River Lifeboat Station crew) made efforts to convince the owner to take responsibility for the vessel, but he failed to provide a plan. The vessel continued to be monitored by the Harbour Master until such time the owner could rectify the problem. No pollution damage was observed at this time.

It is not unusual for vessels to navigate in Canadian waters loaded with hydrocarbons as cargo, waste, propulsion fuel or any combination thereof. With appropriate ship management and good seafaring practices in place, Coast Guard does not consider such vessels as a threat to pollute and they do not warrant any sort of response or monitoring by Coast Guard. These ship management practices deal with hull integrity and also with a management component – up-keep, human attention/intervention – that can eliminate, delay, or slow the threat of polluting below a response threshold. Should any of those practices and/or circumstances change Coast Guard re-evaluates the situation. When Coast Guard first assessed the *Miss Terri* case, it was satisfied that the vessel had appropriate ship management practices in place (as the Harbour Master continued to maintain a watch on the vessel), and the vessel did not reach the threat level of "may discharge", as set out in s. 180 of the *Canada Shipping Act* (CSA). As such, the vessel did not necessitate any Coast Guard monitoring or response.

Coast Guard staff did conduct an assessment of the vessel on February 23, 2018 however there was no monitoring/response from Environmental Response personnel at this time because Coast Guard considered the vessel did not reach the threat level of "may discharge", as set out in s. 180 of the CSA. If the SOPF believes these activities to be a response (which is denied), and considering that no pollution damage was observed at this time, then the limitation period in this case should be five years after the occurrence, in this case February 23, 2018, the date Coast Guard conducted its assessment.

In September 2018 circumstances changed and Coast Guard received a new report of potential pollution. Coast Guard based the claim's date of incident on this second pollution report because, up until that point, the vessel was being monitored by the Harbour Master and Coast Guard did not consider that the vessel "may discharge". On September 18, 2018, the Harbour Master advised he would not be able to continue to monitor the vessel on a consistent basis. The owner of the vessel was at sea and unable to take responsibility of the vessel. The threat level of the vessel sinking increased, above the "may discharge" threshold. If the pumps were to fail, without anyone there to remedy the situation, the vessel would surely sink. It was at this point that the Coast Guard took action. No pollution was

observed at this time, therefore all measures were taken to mitigate the pollution threat.

Looking at the limitation period set out in para. 103(2)(a), for the purposes of *F/V Miss Terri*, the threat of potential pollution starts on September 18, 2018. As such, Coast Guard has not submitted any expenses for February 2018. The facts as outlined in the incident narrative back to February 2018 have no bearing on Coast Guard's actions in September 2018 other than being able to explain a change that resulted in Coast Guard initiating an immediate response. No pollution was observed by Coast Guard during response activities for the *F/V Miss Terri*. Coast Guard believes that the limitation period in this case should be five years after the occurrence, in this case September 18, 2018, the date Coast Guard concluded that the vessel posed a pollution threat that required a response.

The Coast Guard also notes that the Administrator bases conclusions regarding the limitation period on its theory of what may possibly have occurred (e.g. "may nevertheless have occurred…"). It is the Coast Guard's position that any factual findings must be clearly grounded in the evidence presented.

The Coast Guard is concerned about the implications of the SOPF's position that the limitation period begins to run on the date of a possible discharge, regardless of whether there is evidence on the record of a discharge, or whether the claimant was ever aware of such a discharge or involved at that time. Such a position would seem to require all claimants to undertake to become aware of the full history of the vessel, and could lead to a claim being disallowed if there was a possible discharge prior to any involvement of the claimant. This result would run counter to the intent of cost recovery in the Marine Liability Act, as some claimants would not be able to recover their costs if there happened to be a discharge before their involvement. It could also be very onerous on claimants, particularly smaller claimants, to have to engage in this type of inquiry.

Coast Guard also notes that the SOPF is unable to point to any specific date of the alleged "likely discharge", from which the limitation period would begin to run. From a procedural fairness standpoint, it is unclear how the Coast Guard or another claimant could ever know with certainty whether a vessel has ever discharged oil at some point in the past and when that occurred, and therefore know what the limitation period is.

In sum, because no pollution damage was observed throughout the response, it is Coast Guard's position that the claim for the *F/V Miss Terri* is not statute barred as the appropriate limitation period is 5 years from the incident date of September 18, 2018. In the alternative, if the SOPF believes that the measures Coast Guard took on February 23, 2018 constitute a response towards mitigating an oil pollution threat, then the appropriate limitation period is 5 years from February 23, 2018. If the SOPF has evidence of pollution damage in the harbour during the response for the *F/V Miss Terri*, Coast Guard would appreciate disclosure of the evidence.

[84] From the above, the CCG's primary points are understood as twofold:

- The CCG handled this incident in accordance set with threat assessment criteria set in accordance with the *Canada Shipping Act, 2001,* SC 2001, c 26, as amended (the "CSA") and there is no evidence of an observation that a discharge occurred; and

- It is problematic for a claimant to not know when the limitation period begins to run.

[85] On the first point, the use by the CCG of threat assessment criteria found in the CSA is understandable. The Administrator does not agree, however, that those criteria bear on the when the limitation period begins to run under subsection 103(2) of the MLA. The submissions from the CCG do not alter the factual determinations leading to a finding that oil pollution damage occurred prior to 4 September 2018.

[86] With respect to the second point made by the CCG, the Administrator agrees that under her interpretation, a claimant may lose out on a right to claim as a result of not being aware of when the limitation period began to run. In fact, on the Administrator's interpretation, a claim might be barred even before a claimant even suffers damage. However, the Administrator is not of the view that an alternative interpretation of subsection 103(2) of the MLA, which would allow consideration of a claimant's knowledge and subjective beliefs in determining when the limitation period begins to run, is available. The relevant limitation period is focused on events affecting the subject ship rather than a claimant's role in those events.

[87] In the result, the Administrator's factual determinations and determinations of mixed fact and law do not change in light of the submission from the CCG.

[88] The claim submission is disallowed.

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[89] In considering this Letter of Disallowance, please observe the following options and time limits that arise from section 106 of the *MLA.*

[90] Pursuant to s. 106(2) of the MLA, an appeal may be taken from a disallowance of a claim to an Admiralty Court within 60 days of receipt of the disallowance. This letter includes a disallowance of a claim. If you wish to appeal the disallowance, 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 on 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.

Yours sincerely,

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