



LETTER OF DISALLOWANCE

Ottawa, 26 May 2021
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CCG File:

BY EMAIL

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

RE: FV *Stelie II* — Port Saunders, Newfoundland and Labrador
Incident date: 2016-03-23

SUMMARY AND DISALLOWANCE

[1] This letter responds to a submission made by the Canadian Coast Guard (the “CCG”) with respect to the fishing vessel *Stelie II*, which sustained hull damage and caused an oil pollution incident on 23 March 2016, at Port Saunders, Newfoundland and Labrador (the “Incident”).

[2] On 8 October 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”) totalling \$114,897.43 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, and the CCG’s claim is accordingly disallowed.

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

EXCHANGES BETWEEN THE CCG AND THE FUND PRIOR TO 8 OCTOBER 2020

[5] Some details of the Incident and the response thereto were described to the Fund by the CCG well before the latter submitted its claim. A number of exchanges between the Fund and the CCG ensued. As the claim is disallowed based on the operation of the applicable limitation period, those exchanges are described below.

[6] The CCG first informed the Fund of the Incident by telephone on 29 March 2016. It was communicated that the *Stelie II*, a 90-foot fishing vessel containing oil pollutants, had broken free of its moorings and sustained hull damage, that the owner of the vessel was uncooperative, and that the CCG had intervened to remove the vessel from the water. Later the same day, the CCG provided the following details via email:

There was no oil visible in the water because the water is covered with ice. There was however a strong smell of diesel. CCG saw diesel oil, lubricating oil, hydraulic oil. There is also sludge oil in the bilge combined with ice and slush. Total quantity of pollutants is unknown at this time.

The vessel was listing and the port side¹ rail was close to the water so there was no other options than quickly remove it from the water. It was therefore placed on a private property but it cannot stay there forever. And now, as mentioned, CCG will assess options to deal with the vessel.

[7] Further detail came via email directly from one of the CCG responders on 7 April 2016:

[The *Stelie II*] had a severe STBD list. We [...] boarded the vessel and confirmed that the engine room was $\frac{3}{4}$ full of water and scum of oil on top of the ice. Also there was a strong smell of Diesel and several part buckets of oil and paint cans scattered about on the vessel. [...]

[8] There were further exchanges between the Fund and the CCG with respect to the Incident over the months that followed, and 14 colour photographs were sent to the Fund on 7 March 2018.

Figures 1 and 2: Screen captures of date-stamped photographs received by the Fund on 7 March 2018

[9] Also on 7 March 2018, following a telephone conversation between Legal Counsel to the Fund and the CCG, Counsel to the CCG wrote in an email, “Further to our discussion, our operations person in the region confirmed that there was no spill of pollutants from the *Stelie II*; the action was taken in regard to a threat of pollution.”

¹ In light of the evidence that follows, this reference to the vessel’s port side is considered to be an error: the vessel was in fact listing to starboard.

[10] At the request of the CCG, on 8 March 2018, the Administrator sent a letter to the CCG via email that read in part as follows:

Following your discussions with my counsel, I have made the following Determination in the matter of the [CCG's] forthcoming claim in relation to the *Stelie II* occurrence.

Section 103(2)(b) of the [MLA] provides that, where no discharge or spill occurs, a claim must be brought to the Administrator of the Ship-source Oil Pollution Fund [...] within five years of the occurrence.

Based on CCG's representations that the *Stelie II* was not the source of a discharge of pollutants and, rather, that actions by CCG were taken in regard to a threat of pollution, I determine that the applicable limitation period before which CCG can bring a claim to the Fund is 5 years from the date of the occurrence, represented to us as being 24 March 2016. Accordingly, CCG's claim is admissible until 25 March 2021.

[11] Later the same day, the CCG inquired whether the Administrator would accept an "interim" claim that included the CCG's response costs and expenses to that date, to be followed with a second submission once all of the CCG's expected costs, including those associated with the planned deconstruction of the vessel, had been incurred. The Fund responded that no "advanced judging" would be conducted by the Administrator, nor could any "partial payout" issue until the complete submission had been received. The CCG's 20 March 2018 response expressed that it was the CCG's "preference in this case to hand in the interim claim, acknowledging that it won't be addressed until the vessel is finally disposed of."

[12] The CCG's "interim" submission was received by the Fund on 1 May 2018. The cover letter read, in part, "this is a preliminary claim which can be held in abeyance until such time that the situation [with the *Stelie II* response operation] is resolved. The second part of the claim will be forwarded to you at a later date."

[13] On 5 July 2018, the Fund wrote the following to the CCG:

we just want to make sure that CCG is aware that the "interim claim" as it was called is not yet formally a "claim" made to the Administrator. It will become a claim only at such time as CCG brings forward Part 2 of the documentation.

[...] Time bar is not suspended or otherwise affected by the interim filing.

[14] The CCG replied, expressing that it shared the understanding put forward by the Fund.

[15] As it was understood that the documents submitted to this point were not intended to be treated as a claim under section 103 of the MLA, the Administrator carried out no investigation and assessment of the 1 May 2018 submission. The contents of the “interim claim” do not merit description in this letter, as they are superseded by the more comprehensive submission received on 8 October 2020.

THE SUBMISSION RECEIVED ON 8 OCTOBER 2020

[16] The submission received on 8 October 2020 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 disallowance of the CCG’s claim, they are reviewed below.

The narrative and photographs

[17] According to the narrative, on 23 March 2016, the Royal Canadian Mounted Police (the “RCMP”) informed Transport Canada that the 25.57-metre wooden fishing vessel *Stelie II* had broken free of its moorings at the Northern Boat Repair Ltd. (“NBR”) facility at Port Saunders, Newfoundland and Labrador. The vessel had been tied up there for an extended period. During high winds, it had gone adrift and developed a list. It appeared to be sinking in icy waters. The Incident was reported to CCG Environmental Response (“ER”).

[18] The ER Duty Officer contacted the individual thought to be the owner of the *Stelie II*. That person advised that the vessel’s engine had been dismantled and onboard oils had been removed.

[19] On 24 March 2016, the ER Duty Officer again spoke with the individual thought to be the owner of the *Stelie II*. That individual denied ownership, pointing instead to his brother. A Notice under the *Canada Shipping Act, 2001*, SC 2001, c 26 was sent to the brother, outlining his responsibilities under that Act and giving him 24 hours to address any pollution threat posed by the *Stelie II*. Three ER personnel were dispatched from St. John’s to conduct an assessment on the vessel. They overnighted in Wiltondale, arriving at Port Saunders on the morning of 25 March 2016.

Figure 3: Screen capture of a captioned photograph from the narrative

[20] The narrative continues, with respect to 25 March 2016:

Upon arrival, the ER personnel [...] found the vessel with no mooring lines and a substantial starboard list. ER personnel gained access to the vessel and completed an assessment. Just as the ER personnel gained entry to the vessel, there was a strong odour of diesel fuel present. The engine room was three-quarters full of water, pollutants consisting of lube oil, hydraulic oil, diesel oil and debris were scattered everywhere. There were open trays with oil,

buckets of oil, paint cans, fire extinguishers on deck, flares scattered about and other pollutants clearly visible even though the vessel had no lights or power. ER determined that the vessel posed a potential pollution threat and the best immediate course of action would be to pump out the water from the vessel.

A discussion took place between ER personnel, the ER Superintendent and the proprietor [of the NBR facility]. The vessel had previously taken on water most likely from damage as a result of vessel rubbing/chafing against the dock for months. It would not be possible to lift the vessel out of the water in its current condition with the travel lift at the [NBR facility]. CCG had not been given any evidence that they could rely on the owner(s) to properly monitor the vessel or take action to prevent future pollution threats. Since the vessel would need to be monitored and constantly pumped out, the best and most cost-effective course of action determined at the time to prevent pollution was to have the vessel lightered and then lifted out of the water in order to avoid future sinking, causing pollution in the marine environment. This harbour also has a number of sensitivities such as restricted shellfish growing areas, seafood processing facility and 3 archeological sites. The ice present in the area also was a consideration. Hydrocarbons tend to resist weathering when spilled in ice, therefore potentially prolonging their effects.

ER personnel dewatered the vessel as much as possible using a 4” pump, a 2” pump, electric submersible pump and a generator to supply power for the electric pump. Although efforts were made to remove pollutants from the vessel, some remained on board in inaccessible areas and it was not safe to stay onboard.

Figure 4: Screen capture of a captioned photograph from the narrative

[21] On 26 March 2016, “ER personnel finished dewatering the vessel and [...] the proprietor [of the NBR facility], used his longliner to break the ice from the lift area to tow the *F/V Stelie II* into position. The vessel was lifted out and placed in blocking provided by [NBR...]”. The ER personnel departed Port Saunders the following morning, but the CCG remained in contact with the apparent owner of the vessel, attempting to recover costs and solicit action.

[22] On 4 April 2016, the CCG “contacted TriNav Marine Design to request a quote for a vessel survey. The survey would provide ER with an independent opinion on the pollutants and the condition of the vessel in order to inform the best and most cost-efficient way forward.”

[23] Having received neither payment nor additional correspondence from the owner, the CCG arranged for the *Stelie II* to be surveyed on 18 August 2016.

[24] On 26 October 2016, “CCG ER hired vacuum trucks from Pardy’s Waste to remove pollutants on board. A total of 25,300 litres of oil and water was removed from the vessel on that day. However, additional quantities remained onboard due to inaccessibility.”

[25] The *Stelie II* remained in storage for some time, in part due to an ownership dispute that resulted in Federal Court proceedings and the arrest of the vessel. Ultimately, the vessel was released from arrest following a third-party motion by the CCG.

[26] In August of 2019, the vessel was deconstructed at the CCG’s expense. In support of its decision to deconstruct the *Stelie II*, the CCG narrative cites “remaining inaccessible oil pollutants on board” as well as “oil-soaked hull timbers”. A CCG ER employee traveled to Port Saunders to observe and photograph the deconstruction process while it was ongoing.

Figures 5, 6, 7, and 8: Screen captures of captioned photographs from the narrative

Cost summary

[27] The CCG submission summarizes claimed costs as follows:

		<u>SCH</u>
MATERIALS AND SUPPLIES	\$ 6,187.69	<u>1</u>
CONTRACT SERVICES	\$ 92,783.96	<u>2</u>
TRAVEL	\$ 4,163.18	<u>3</u>
SALARIES - FULL TIME PERSONNEL	\$ 1,901.20	<u>4</u>
OVERTIME - FULL TIME PERSONNEL	\$ 8,543.57	<u>5</u>
OTHER ALLOWANCES	\$ -	<u>6</u>
SALARIES - CASUAL PERSONNEL	\$ -	<u>7</u>
SHIPS' COSTS (EXCL. FUEL & O/T)	\$ -	<u>8</u>
SHIPS PROPULSION FUEL	\$ -	<u>9</u>
AIRCRAFT	\$ -	<u>10</u>
POLLUTION COUNTER-MEASURES EQUIPMENT (PCME)	\$ 23.70	<u>11</u>
VEHICLES	\$ 851.58	<u>12</u>
ADMINISTRATION	\$ 442.56	<u>13</u>
	<hr/>	
TOTAL CCG COST OF INCIDENT	<u>\$ 114,897.43</u>	

Figure 9 – Screen capture of the cost summary

Additional documentation

[28] The submission includes seven Personnel and Equipment Daily Logs from the CCG’s response. The entry for 26 March 2016 indicates that CCG personnel pumped water from the engine room of the *Stelie II* prior to its removal from the water.

[29] The submission also includes a three-page TriNav Marine Design Inc. (“TriNav”) survey report. The report itself is undated, but it indicates that the *Stelie II* was surveyed on 18 August 2016 while on blocks. Included with the TriNav report are 13 pages of black and white photographs of the *Stelie II*. The low reproduction quality of these photographs renders them unhelpful. Certain passages from the TriNav report are relevant to the determinations made in this decision letter:

At the time of the survey, the vessel’s lower spaces including the lazarette, engine room and fish hold were partially filled with fuel and oily liquids. [...]

The engine room vents [...] were corroded and broken and leaking water into the interior spaces and accommodations. [...]

The fish hold had approximately two feet of oily water present. The fish hold was inaccessible.

The engine space was inaccessible due to the presence of oily water and diesel fumes. The engine was partially submerged at the time of the survey. An oily water line was visible on the generator near the entrance, approximately 24” from the deck head, indicating that the engine compartment was submerged. [...]

[30] Finally, four pages of handwritten notes apparently recorded by the responding CCG personnel are included. An entry dated 24 March 2016 indicates that a Pardy’s Waste Management and Industrial Services Ltd. (“Pardy’s”) pumper truck had been placed on standby for Good Friday, which fell on 25 March 2016:

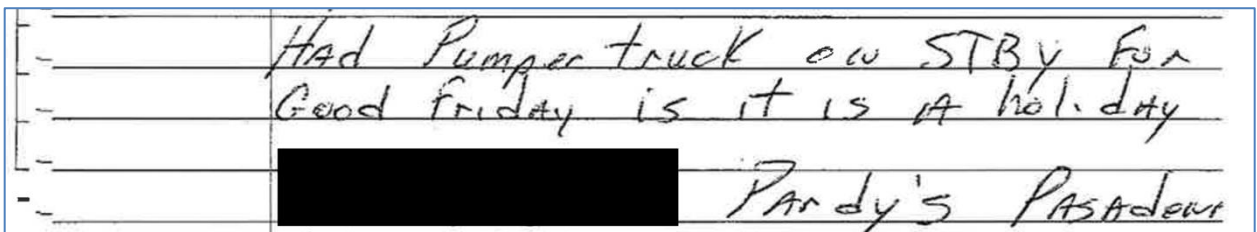


Figure 10 – Screen capture from CCG notes dates 24 March 2016 (name of Pardy’s contact redacted)

CORRESPONDENCE WITH THE CLAIMANT

[31] The Administrator began investigating and assessing the submission of 8 October 2020 on receipt. During that process, a concern arose that the *Stelie II* had in fact discharged oil as a result of the Incident.

[32] On 26 February 2021, the Fund sent the following inquiry to CCG Counsel:

The Administrator has concerns about the [CCG's *Stelie II*] submission [...]. These concerns result in an invitation to submit supplementary documentation.

The claim documentation before the Administrator indicates that the CCG first learned of the Incident on 23 March 2016. The Vessel had reportedly broken free of its moorings in icy waters and sustained damage. When CCG Environmental Response personnel assessed the Vessel on 25 March 2016, they observed that it was listing heavily. They were able to board it, however, observing open trays and buckets of oils on its deck. They also observed that its interior spaces were substantially full of water that had mixed with oil. They proceeded to pump off some quantity of this water before having the Vessel removed and placed on the hard on 26 March 2016.

The CCG first informed the Fund of the Incident and the CCG's response on 29 March 2016. Over the next few years, correspondence on the matter was periodically exchanged between the CCG and the Fund. On 7 March 2018, the CCG stated to the Fund that the Vessel had not been the source of a discharge of pollutants.

Following receipt of the 8 October 2020 submission, the Administrator began her investigation and assessment. At this stage, it appears to the Administrator that the STELIE II probably did in fact cause a discharge of oils at some point in late March of 2016.

Though the evidence expressly records no such discharge, one may be reasonably inferred. As noted above, according to the CCG's narrative, the Vessel was listing severely with open trays and buckets of oil on its deck. The severe angle of the list may have caused some quantity of these oils to enter the water. Furthermore, and in particular, the CCG's documentation offers no explanation as to what was done with the presumably large volume of oily water pumped from the Vessel on 25 and 26 March 2016. Without any evidence showing that this contaminated water was isolated and disposed of through appropriate waste streams, it appears likely that some or all of it ended up in the waters of the harbour. Such a discharge of oily water would probably have resulted in "oil pollution damage", as contemplated under Part 7 of the MLA, thereby engaging the two-year limitation period, which would have expired in late March of 2018. As a result, it is considered that the subject claim may not be eligible for compensation in any amount.

In light of the preceding paragraphs, we invite the CCG to present all relevant documentation in its possession, as well as any comment it may have, by 31 March 2021.

[33] CCG Counsel responded on 31 March 2021:

During the assessment of the *Stelie II* incident, CCG concluded that the vessel was about to sink and release pollutants into the marine environment. It was critical to either lift the vessel out of the water or stop the water ingress. Because divers were unavailable and the harbor was covered with ice, the only option to stop the threat of pollution was to lift the vessel out of the water. In order to safely lift the vessel, water was pumped from the vessel to lighten it. The suction screen/suction hose on the intake side of the pump was placed deep into the vessel to remove the sea water and not the oil that was floating on the surface. This technique is used very often to remove sea water to lighten a ship/vessel, without pumping the oil during salvage operations. The sea water was released into the harbor. At **no time** during the dewatering process was oil or oily water observed, including on March 25 and 26, 2016. Coast Guard did not observe discharge from open trays or buckets and to its knowledge such discharge did not occur. Any oil or oily water would have been very obvious on the white ice that was covering the harbour. Later when the vessel was out of the water, the pollutants onboard the vessel were removed with a vacuum truck. CCG conducted a detailed assessment looking for pollutants on the white ice that covered the harbour. If pollutants had been observed at any time the ER team would have mounted a response to recover the pollutants using safe, reasonable and appropriate actions. During the response to the incident a number of locals were on the wharf observing the operations and at no time did anyone observe oil on the ice in the harbour.

CCG's mandate is protection of the marine environment and the ER Atlantic Region response team takes great pride in the commitment to this mandate for all Canadians. CCG removed the vessel from the water to protect the marine environment because it was damaged and would eventually sink at the dock and pollute the harbour. The owner was unwilling to respond to the incident so CCG responded and removed the damaged vessel. The actions of CCG for this incident were reasonable and appropriate to mitigate the pollution threat. If the SOPF has evidence of pollution in the harbour at Port Saunders, NL during the response to the FV *Stelie II* CCG would appreciate disclosure of the evidence.

We would also note that the Coast Guard's position is that any factual findings made by the SOPF must be clearly grounded in the evidence presented. Coast Guard would also be concerned if the

SOPF takes the position that the limitation period begins to run from an unknowable date of a possible past discharge. [...]

[34] The above response from Counsel did not include further documentation.

INVESTIGATION

[35] In the course of the investigation of the CCG's submission, the Fund contacted the Port Saunders RCMP detachment and the proprietor of the NBR facility in an attempt to better understand whether the Incident may have resulted in a discharge of oils. The RCMP confirmed that none of its personnel had been on scene, and the proprietor of the NBR facility did not recall whether oils were visible in the harbour or on the ice around the *Stelie II*.

[36] The Fund also contacted Pardy's. Prior to the CCG's statement of 31 March 2021, it was considered possible based on the handwritten note at Figure 10 that Pardy's personnel from Pasadena may have been on scene at Port Saunders with a pumper truck at the relevant times. Pardy's neither confirmed nor denied having been on scene and refused to discuss its CCG contracts without specific authorization.

DETERMINATIONS AND FINDINGS

The CCG claims to the Administrator under two distinct regimes

[37] The MLA provides two primary mechanisms by which the Administrator may pay claims:

- Subsection 101(1), which imposes liability on the Ship-source Oil Pollution Fund for oil pollution damages caused by a ship if any of a selection of criteria is met; and
- Subsection 103(1), which permits claims to be submitted directly to the Administrator, regardless of whether any of the subsection 101(1) criteria are met.

[38] The CCG has advanced its present submission under both of the above provisions.

[39] Under the MLA, the Administrator's decision-making powers do not apply to claims under subsection 101(1). The Administrator will entertain settlement discussions with respect to potential subsection 101(1) claims but cannot make determinations about those claims. For that reason, the CCG's subsection 101(1) claim is not further discussed in this letter.

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

[40] Under the subsection 103(1) mechanism, claimants may submit claims directly to the Administrator. On receipt of a submission under subsection 103(1), the Administrator

conducts an investigation and assessment, rendering a decision and paying compensation where appropriate. Subsection 103(1) claims are subject to a number of eligibility criteria, which are discussed below.

[41] 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] Given that the *Stelie II* may have been a “seagoing vessel” or a “seaborne craft” for the purposes of the Bunkers Convention, and given that some of the costs incurred by the CCG may have been incurred with respect to “preventive measures” as contemplated under that Convention, it is considered that it and Part 6, Division 1 of the MLA may apply in place of Part 6, Division 2.

[45] 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.

The operation of the limitation period applicable to claims under subsection 103(1) of the MLA

[46] Subsection 103(1) of the MLA, as it was at the time of the Incident, provides:²

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.

[47] Claims under subsection 103(1) of the MLA are subject to the time limits set out under subsection 103(2):

² All references to the MLA herein are to the version that was in force at the time of the Incident.

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.

[48] There is some ambiguity in in the English version of paragraph 103(2)(a) that requires analysis if, on the facts, the Incident caused “oil pollution damage” more than two years before the Administrator received the CCG’s 8 October 2020 submission. The presence of the word “the” before “oil pollution damage” in paragraph 103(2)(a) creates confusion. “The” is a definite article, typically used to refer to a concept which has already been introduced. But as used in paragraph 103(2)(a), it is not on its face clear what the definite article refers to. It might, for instance, 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. Notably, this ambiguity is not present in the French version of the same provision, meaning that the latter interpretation is probably more appropriate.

[49] Before the above ambiguity is addressed, however, it is necessary to first determine whether the Incident resulted in a “discharge” of oil. This is because “oil pollution damage”, as defined under the MLA, cannot occur without a discharge of some volume of oil. Subsection 91(1) defines “discharge” as “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”, and “oil pollution damage” as “loss or damage outside [a] ship caused by contamination resulting from the discharge of oil from the ship.”

It is probable that a discharge of oil occurred as a result of the Incident and the response thereto

[50] When CCG personnel arrived at Port Saunders on the morning of 25 March 2016, they found the *Stelie II* listing heavily to starboard. While the CCG has provided no photographs of the vessel from that morning, prior to the beginning of the pumping operation, it is more probable than not that the vessel was resting even lower in the water at that time than is depicted at Figure 3, a photograph taken on the evening of 24 March 2016.

[51] CCG personnel observed open buckets and trays of oil on the deck of the vessel (see Figure 2). For two reasons, it is determined on the balance of probabilities that some of these oils escaped.

[52] First, the *Stelie II* began to list on 23 or 24 March 2016 and continued to do so until the pumping operation that began on 25 March 2016. The photographs on record show nothing in the vessel’s configuration that would have kept oil in open containers on the vessel’s deck on board while the vessel leaned heavily to one side. Furthermore, the containers themselves would inevitably have slid and jostled as the vessel listed.

[53] Second, the *Stelie II* drifted some distance prior to the arrival of CCG personnel at Port Saunders. Stormy weather caused the vessel to break free of its mooring lines on 23 March 2016, drift through ice, and impact the other side of the dock facility, moving laterally through ice and water a distance of perhaps 60 feet (see Figures 1 and 3, the former of which appears to show the vessel’s severed mooring lines across the dock facility from its ultimate resting place). Nothing is known of the storm conditions and how long they persisted (there is a gap in the pertinent Environment Canada historical weather data), but it is determined that the storm involved some violence for it to have severed the mooring lines used to secure the vessel.

[54] None of the five photographs depicting the vessel’s starboard side and the adjacent harbour ice appear to show signs of an escape of oils, a point made by CCG Counsel in the 31 March 2021 letter to the Fund. But the absence of visual evidence is not wholly determinative of the issue. If a discharge did in fact occur, any resulting hydrocarbon staining may not be readily apparent in photographs taken from a physical distance, as were all of the photographs showing the vessel’s starboard side. Furthermore, any discharge may have been somewhat dispersed during the storm.

[55] CCG Counsel takes the position that any discharge would have been visible on the surface of the “white ice that covered the harbour”. This assertion is difficult to reconcile with the fact that both the *Stelie II* and the harbour ice moved. The ice covering the harbour could not have been wholly contiguous from 23 through 25 March 2016, as the *Stelie II* travelled through it, pushed by wind, waves, or a combination of the two.

[56] The below diagram shows the situation of the *Stelie II* from 23 March 2016 through 24 March 2016. The vessel is understood to have broken free of its moorings at “Dock A” on 23 March 2016 and travelled through harbour water and ice to rest at “Dock B”, sometime on or before 24 March 2016. It remained there into 25 March 2016, and perhaps into the following day too.

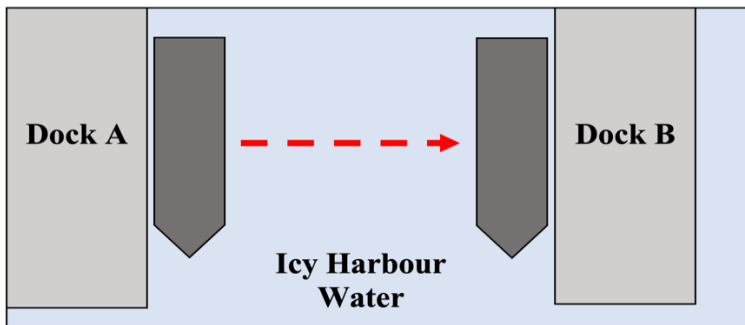


Diagram 1 – The situation of the *Stelie II* on 23 and 24 March 2016

[57] The likelihood of a discharge from the open containers on the deck of the *Stelie II* does not stand on its own. There was a second event which could easily have led to a discharge of oil into the water.

[58] When CCG personnel boarded the *Stelie II* on 25 March 2016, they smelled diesel and observed that “The engine room was three-quarters full of water, pollutants consisting of lube oil, hydraulic oil, diesel oil and debris were scattered everywhere.” TriNav later

noted that water ingress had reached many (if not all) of the lower internal spaces of the vessel, and reference to oils in those spaces, including the fish hold, suggests that the ingress was moving freely between the vessel's compartments, carrying oil contamination along with it. In any event, the documentation provided by the CCG indicates that water was pumped from the vessel's engine room, where much of its machinery was submerged and would have been releasing oils.

[59] During the initial stages of investigation and assessment, it was initially thought that the CCG may have pumped the water ingress from the *Stelie II* into a Pardy's pumper truck that had evidently been placed on standby (see Figure 10). This is not what happened. According to the CCG's statement of 31 March 2021, the pumping operation of 25 and 26 March 2016 discharged water from the vessel into the harbour.

[60] In the photograph at Figure 1, taken on 25 March 2016, a green hose is visible extending from the port side of the vessel onto the dock ("Dock B", as shown in Diagram 1). It is probable that this hose was attached to the 4-inch pump referred to in the narrative. While the pump itself is not visible in the frame of the image, it is concluded that the water pumped from the *Stelie II* was discharged over the other side of the dock, opposite the vessel. None of the photographs provided by the CCG depict this arrangement, nor do they show the water or ice across the dock from the *Stelie II*, where the discharge must have occurred. Rather, the arrangement is inferred from the available evidence.

[61] The volume of the water pumped overboard would have been substantial—several feet from the engine room alone. Based on the later Pardy's pumping operation, which removed just two feet of oily water from the lower portions of the vessel while it was on land, the volume of water pumped overboard in March 2016 must have exceeded 25,000 litres. The narrative and the TriNav survey report cite water levels that would have largely submerged the vessel's machinery. As has already been noted, this would have resulted in the seepage of some volume of lubricating oils. Furthermore, it is evident that at least some diesel fuel had escaped the vessel's tanks. Finally, the photographs at Figures 5 through 8 show that sorbent materials were used during the vessel's deconstruction: some of its internal planks and its bilge appear to have been oiled. Given its exposure to various types of free oils on all sides, the water within the vessel's engine room must have been contaminated.

[62] The letter from CCG Counsel asserts that CCG personnel and other unnamed witnesses did not observe oil entering the harbour as a result of the pumping operation. The letter does not make clear whether any witness observed the pumping operation throughout and confirmed there was no oil (but failed to record said observations at the time), or whether the CCG is merely asserting that CCG personnel would have seen a discharge while they were undertaking other tasks.

[63] The letter from CCG Counsel asserts, "At **no time** during the dewatering process was oil or oily water observed" [emphasis in the original], and that as a consequence, it should be determined that no discharge occurred. There is a distinction between an observed lack of discharge and the lack of an observation of a discharge. The latter is much weaker, and this appears to be what the CCG is asserting. As such, the assertion that the

absence of an observation should lead to a determination that no discharge of oil occurred is not accepted.

[64] The CCG also takes the position that when its personnel pumped water overboard from the *Stelie II*, the intake hose was placed deep within the vessel so as not to discharge the oil which was floating on the surface of the water within the vessel. The Administrator does not have the benefit of a direct witness's account as to what was done.

[65] On this point it is also noted that much of the CCG's claimed costs and expenses are for the deconstruction of the *Stelie II*. 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. The CCG appears to take the position that the *Stelie II* was in such a state even after all water had been pumped from it.

[66] That being the case, submerging a hose deep into the water inside the engine room of the *Stelie II* would not necessarily be sufficient to avoid a discharge of oil. The CCG's own position would seem to be that its timbers continued to discharge oil, and, as has been noted, the photographs included in the submission depict a significant continuing presence of oil in the vessel. Thus, even if the oil on the surface of the water inside the *Stelie II* had been successfully avoided, it would not be safe to conclude that no discharge occurred.

[67] In the result, notwithstanding the CCG's position as to a lack of observation of a discharge and the positioning of the intake hose, given the large volume pumped and the contaminated state of the *Stelie II*, it is determined that a discharge occurred during the pumping operation. The oil in open containers on the deck of the vessel must also be taken into account, and this bolsters the determination that a discharge occurred during or before CCG's response of 25 and 26 March 2016.

The submission was received more than two years after a discharge occurred

[68] The present submission was received on 8 October 2020. It has been concluded that a discharge occurred as a result of the Incident sometime between 23 and 26 March 2016. As the claim was not submitted within the shortest of the limitation periods which might apply, it is necessary to examine whether the claim can be admitted under subsection 103(1).

The appropriate interpretation of paragraph 103(2)(a) applied to the facts

[69] The Administrator recently made determinations with respect to the appropriate interpretation of paragraph 103(2)(a) of the MLA, including the appropriate threshold to apply when considering whether "oil pollution damage" has occurred for the purposes of that provision. Those determinations can be found in the decision issued on 17 May 2021 in respect of the CCG's claim stemming from an incident involving the fishing vessel *Miss Terri*.³ The relevant determinations therein are briefly summarized below.

³ See in particular paras 54–77 of the *Miss Terri* decision.

[70] First, the appropriate reading of paragraph 103(2)(a) results in a limitation period of two years after the first instance of “oil pollution damage” occurs as a result of an underlying incident. All claims stemming from the same facts are therefore subject to the same limitation period.

[71] Second, the appropriate threshold for determining whether “oil pollution damage” has occurred for the purposes of subsection 103(2) is very low. A discharge leading to oil contamination that degrades water quality is all that is required. This standard does not hinge on whether or not meaningful damage to the environment or to property actually occurs.

[72] It has previously been concluded that the *Stelie II* caused a discharge or discharges of oil sometime between 23 and 26 March 2016. The present submission was not received by the Administrator within two years of those dates.

[73] The final determination to be made is whether the discharge or discharges that occurred caused “oil pollution damage” as that term is defined at subsection 91(1) of the MLA. Given the low threshold set out above, and noting in particular the significantly oiled state of the engine room of the *Stelie II* in March 2016, it is concluded on the balance of probabilities that the discharge or discharges in question caused “oil pollution damage”, and that this damage first occurred sometime between 23 and 26 March 2016.

[74] In the result, the limitation period set out at paragraph 103(2)(a) expired at some time between 23 and 26 March 2018. The CCG’s submission is therefore inadmissible as a claim to the Administrator under subsection 103(1).

[75] The claim submission is disallowed.

CLOSING

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

[77] Pursuant to subsection 106(2) of the MLA, an appeal may be taken from a disallowance of a claim to the Federal Court within 60 days of receipt of the disallowance. 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,

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Deputy Administrator, Ship-source Oil Pollution Fund