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VIA REGISTERED MAIL

Director, Operational Business
Canadian Coast Guard
200 Kent Street (5N177)
Ottawa, ON K1A 0E6

RE: Mystery spill (*M/V Maccoa*) – Port of Quebec, QC – DOI: March 8, 2017

We have completed our investigation and assessment of the claim for $11,139.48 (the "Claim") that the Canadian Coast Guard ("CCG") submitted for costs and expenses incurred in relation to its response, from March 8 to March 10, 2017, following an oil spill allegedly caused by the bulk carrier *Maccoa* in section 28 of the Port of Quebec.

On the face of the overall record – particularly the review decision of the Transportation Appeal Tribunal of Canada (TATC) in *M/V Maccoa v. Canada (Minister of Transport)*, 2018 TATCE 26, as well as the expert report produced by the shipowner – we find that no oil spill caused by a ship occurred in this case.

Consequently, in accordance with subsection 105(4) of the *Marine Liability Act*, S.C. 2001, c. 6 (the "*MLA*"), we dismiss the Claim.

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FACTS AND PROCEDURAL HISTORY

On March 8, 2017, the office of the Director of the Port of Quebec notified the CCG that an oil spill, possibly caused by the bulk carrier *Maccoa*, had occurred in section 28. Oil was discovered in the water, and on the ice between the wharf and the ship; there were also traces of oil on the wharf, as well as splashes of oil on the ship's hull.

The ship arrived at the port on March 1, 2017 and began to load its cargo on March 6, 2017.

Transport Canada (TC) and the CCG estimated that between 30 and 40 litres of heavy fuel oil or waste oil from sludge tanks were spilled in the port.

The CCG gradually mobilized its resources and monitored oil recovery measures taken by the Eastern Canada Response Corporation (ECRC), which was hired by the Quebec Port Authority (QPA).

During this time, TC took samples of oil from the water around the *Maccoa* and from its tanks. A marine surveyor from the firm Hayes Stuart, hired by the ship, was also on site to report on the situation.

The captain of the *Maccoa* denied that the oil came from his ship, which was detained.

On March 9, 2017, the *Maccoa* remained under detention while oil recovery measures were being performed by ECRC. At that time, the source of the oil had not yet been identified.

On March 10, 2017, the ship was allowed to sail, its hull having been cleaned.

Shortly after the ship's departure, a black sheen was observed at the mouth of the Saint-Charles River, in the Port of Quebec. This sheen was later found to be an optical illusion caused by a submerged layer of ice, which appeared darker than the water surrounding it.

The CCG mobilized its resources until it was later confirmed that the sheen was not an oil spill.

On June 16, 2017, the QPA submitted a claim to the Administrator of the Ship-source Oil Pollution Fund (hereinafter the "Administrator" and the "Fund"), pursuant to section 103 of the *MLA*.

On September 14, 2017 – before having obtained the documents from the shipowner and prior to being informed of the reasons for the aforementioned decision by the TATC – the Administrator made an offer of compensation to the QPA.

On September 27, 2017, the *Maccoa* was served with a notice of violation of the *Canada Shipping Act, 2001* (the "*CSA*") and its regulations, in relation to the occurrence of March 2017 in the Port of Quebec. TC imposed an Administrative Monetary Penalty (AMP) on the *Maccoa*.

On October 4, 2017, the QPA notified the Administrator of its acceptance of the offer of compensation. Obviously, the finding made today in response to the CCG's claim would also have applied to the QPA, if the same documents had been available to the Administrator when the CQPA's claim was assessed.

In October 2017, the Administrator issued a formal notice to the shipowner. At the same time, the shipowner attempted to obtain TC's case report and other documents, in order to assess the evidence against the ship. TC refused to disclose the requested documents. The Administrator obtained some of the documents by *subpoena* issued through her authority under the *Inquiries Act*, as part of her investigation of the QPA's claim. However, these documents were protected and the Administrator could not disclose them to the shipowner, in support of her claim.

In November 2017, being unable to obtain the documents directly from TC, the shipowner applied to the TATC for a review of the AMP. While procedures were ongoing before the TATC, the Administrator decided to stay her subrogatory action.

The review hearing was held on May 29 and 30, 2018, in Quebec City.

On August 27, 2018, the TATC dismissed the AMP imposed by the Minister of Transport, as the evidence did not show that the *Maccoa* discharged a pollutant in violation of the *MLA et al*.

On August 28, 2018, the Administrator obtained a copy of the TATC's decision. The same day, counsel for the shipowner forwarded to the Administrator a copy of his expert report, as well as a copy of an email from the Minister's counsel conceding that he would not recommend that the Minister appeal the decision – the pollutant originated from the wharf. As a result, the Administrator decided to treat the case as a mystery spill, that is to say a spill caused by an unidentified ship, and discontinued her recovery action against the shipowner.

On February 12, 2019, the CCG submitted its Claim to the Administrator, pursuant to section 103 of the *MLA*, to recover costs and expenses related to the occurrence involving the *Maccoa*. The Administrator began her investigation and assessment of the Claim.

On February 19, 2019, as required by the rules of procedural fairness, counsel for the Administrator disclosed to the CCG the TATC's decision, the aforementioned email from the Minister's counsel, the shipowner's expert report, as well as documents from the QPA that could affect or prejudice its Claim, in order to give the CCG the opportunity to review them, provide additional written submissions, and produce additional evidence if the CCG deemed it necessary. In particular, counsel for the Administrator urged the CCG to provide written submissions on the issue of whether there was sufficient evidence to conclude that the spill originated from the wharf, and that it was not a mystery spill. If it were to be found that the spill emanated from the wharf, the Claim would be dismissed.

On March 5, 2019, the CCG provided the Administrator with additional written submissions.

DISMISSAL OF THE CLAIM

Subsection 105(4) of the *MLA* provides that, when a claim is filed under section 103 of the *MLA*, a claimant is not required to show that the loss, damage, costs or expenses were caused by a ship. However, the Administrator must dismiss a claim if he or she is satisfied that the evidence shows, on a balance of probabilities, that the loss, damage, costs or expenses incurred as a result of the oil pollution did not originate from a ship:

> **Cause of occurrence**
> (4) A claimant is not required to satisfy the Administrator that the occurrence was caused by a ship, but the Administrator shall dismiss a claim if he or she is satisfied on the evidence that the occurrence was not caused by a ship.

In this case, the Administrator is satisfied that none of the costs and expenses included in the Claim resulted from an occurrence caused by a ship.

This finding will be analyzed in two steps. Firstly, the costs and expenses incurred after the ship's departure were caused by the reflection of ice on the water, and were not the result of an oil spill caused by a ship. Secondly, the totality of the evidence shows that the oil which led to the environmental response in section 28 of the Port of Quebec was more likely to have originated from the wharf, rather than the *Maccoa* or any other ship.

THE BLACK SHEEN

In its claim and additional written submissions, the CCG admits that the remobilization of its resources on March 10, 2017, after the *Maccoa* had sailed, was not because of an oil spill, but the result of an error due to an optical illusion caused by submerged ice, creating an impression of a black sheen on the water. However, the CCG submits that if it had not remobilized its resources, and the sheen had turned out to be an oil spill, the ensuing response would have been much more costly.

While we agree on this point, we are unable to compensate the CCG. Subsection 105(4) of the *MLA* is clear. The Administrator must dismiss a claim (or part of a claim) if the evidence shows that the occurrence was not caused by a ship. In this case, the sheen could not have originated

from a ship, since it was not even made up of oil. Consequently, we dismiss all costs and expenses related to the remobilization of the CCG's resources on March 10, 2017.

SPILL ORIGINATING FROM THE WHARF

The CCG's initial response on March 8, 2017 could only have been caused by one of the following three situations:

1. a spill originating from the *Maccoa*;
2. a spill originating from an unidentified ship, other than the *Maccoa*; or
3. a spill from a non-marine source, in this case the wharf.

It goes without saying that the first situation, put forward by the CCG in its claim, cannot be accepted. The CCG acknowledged it in its additional written submissions. The TATC dismissed the AMP imposed by the Minister of Transport because the evidence did not show that the *Maccoa* discharged oil in section 28 of the Port of Quebec, and the Minister did not appeal the decision. Furthermore, the TATC explicitly found at paragraph 24 of its decision that the spill was not caused by the *Maccoa*. In the absence of more compelling or new evidence, it would be inappropriate for the Administrator to substitute her finding for the one which is at the core of the TATC's decision.

That leaves the second and third situations.

The CCG's claim was initially treated as a *prima facie* case of a mystery spill. However, once the investigation began, the TATC's decision, the expert report produced by the shipowner and the QPA's claim had to be taken into consideration.

Although the Crown is indivisible, the Administrator disclosed to the CCG documents or portions of documents from third parties which could affect its Claim, in accordance with rules of procedural fairness (see *Canada v. Canada (Ship-source Oil Pollution Fund)*, 2008 FC 1094). In disclosing this information, the Administrator indicated to the CCG that it would be relevant to make written submissions on the possibility that this evidence could lead the Administrator to conclude that the spill did not originate from a ship, but from the wharf, which would render the CCG's Claim inadmissible.

In response to the disclosure of these documents, the CCG submitted primarily that it is the Administrator's responsibility to "establish" that the occurrence which gave rise to the costs and expenses was not caused by a ship. More specifically, the CCG submitted that (1) no other possible source of pollution was confirmed in the field; (2) the marine surveyor from Hayes Stuart only "assumed" that the spill originated from the wharf; and (3) the report from the QPA stated that there was no trace of oil on the wharf and, therefore, the Claim should be established – subject to the usual assessment of the reasonability of measures taken and of resulting costs and expenses.

It goes without saying that the TATC's finding alone does not result in the dismissal of the CCG's Claim. As noted above, pursuant to subsection 105(4) of the *MLA*, the Administrator shall dismiss a claim only if he or she is satisfied that the evidence shows, on a balance of probabilities, that the occurrence was not caused by a ship.

However, the TATC commented further on the source of the spill.

At paragraph 29 of its decision, referring to photographs of the wharf contained in the expert report, the TATC found compelling the fact that traces of a black oily substance under the drain pipes came from above, that is to say from the wharf, and not from below, since black splashes were visible on the ice build-up between the wharf and the ship, as well as on the ship's hull. These were probably caused during a grain loading operation prior to March 8, 2017. We agree with this finding from the shipowner's expert report. In our opinion, the oil splashes that led to the environmental response could not possibly have been the result of a spill caused by a ship.

Furthermore, at paragraph 32 of its decision, the TATC disproved the Minister's theory that if a spill had occurred on the wharf prior to March 8, 2017, particularly during refueling operations on March 6, 2017, it would necessarily have been discovered by employees of the Port of Quebec. The QPA indicated that the ship was refueled with light diesel fuel that was pinkish in colour, not black.

Moreover, disclosed portions of the QPA's claim show that vessels that were close to the *Maccoa* were berthed for the winter. Consequently, we fail to see how they could have caused the spill that was discovered on March 8, 2017.

In the absence of evidence showing that the oil recovered in the water, in section 28 of the port, was different from the traces and splashes of oil found on the wharf, on the ice and on the ship, we conclude that it was the same oil.

For all these reasons, we are satisfied that the evidence shows, on a balance of probabilities, that the spill which led to the environmental response of March 8, 2017 originated from the wharf, and was not caused by a ship.

Consequently, pursuant to subsection 105(4) of the *MLA*, we also dismiss the CCG's Claim for costs and expenses incurred before it remobilized its resources on March 10, 2017.

The Claim is therefore disallowed in its entirety.

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Pursuant to subsection 106(2) of the *MLA*, you have 60 days upon receiving this notification to appeal the disallowance of the claim, by filing a notice of appeal in the Federal Court naming the Administrator as a respondent, in accordance with sections 335, 337 and 338 of the *Federal Courts Rules*, SOR/98-106.

Yours sincerely,

Anne Legars, LL.M., C.A.E.
Administrator, Ship-source Oil Pollution Fund