

VIA REGISTERED MAIL & EMAIL

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

RE: *Beverly Gaie* – Summerside Marina, NL – DOI: 3 October 2018

We have completed our investigation and assessment of the claim for \$151,648.78 (the “Claim”) that the Canadian Coast Guard (“CCG”) submitted¹ for costs and expenses incurred in relation to an oil pollution incident involving the approximately 50-foot wood and fibreglass former fishing vessel *Beverly Gaie* (the “Vessel”).² We find the Claim to be established, in part, in the amount of **\$9,614.71**. Accordingly, we hereby make an Offer of Compensation (the “Offer”) in that amount, plus accrued interest of \$410.75, pursuant to sections 105, 106, and 116 of the *Marine Liability Act* (the “MLA”). The amount of the Offer plus interest comes to \$10,025.46.

The following reasons are provided to explain the disparity between the amount claimed and the amount offered by the Administrator of the Ship-source Oil Pollution Fund (the “Administrator”), based on the facts, the law, and the evidentiary record before her. For context, the facts and applicable law are set out below prior to a description of the Administrator’s assessment and a breakdown of the Offer flowing therefrom.

I – The Facts

On 3 October 2018, CCG first learned about the Vessel from Summerside Marina (the “Marina”). The Marina had been regularly dewatering and monitoring the derelict and effectively abandoned Vessel, which was tied to its dock, for over two years. It had not been hauled out for at least two winters. No discharge of pollutants was reported, but the Marina estimated that at least 10 to 15 gallons of diesel were on board. CCG determined the Vessel posed a pollution threat based on the Marina’s reports of onboard pollutants and consistent water ingress.

The Marina identified the owner of the Vessel, though CCG initially struggled to locate and contact him. CCG finally spoke with the owner on 12 October 2018, advising him of the situation and directing him to produce a plan to “secure or remove” the Vessel by 16 October.

On 17 October 2018, the owner proposed a plan to CCG in which he would use an excavator to remove the Vessel from the water and a trailer to tow it away for disposal. CCG alleges it communicated this proposal to the Marina, which ultimately refused to accept it. The Marina

¹ The Claim was received by the Administrator of the Ship-source Oil Pollution Fund on 12 July 2019.

² The Canadian Register of Vessels lists the Vessel as the *Beverley Gaie* [sic], under the official number 345459.

denies that CCG informed it of this proposal or of any communications with the owner whatsoever.

On 19 October 2018, CCG informed the owner that his proposal was not acceptable. A CCG email further informed the owner that he was now obligated to provide a plan covering: (1) Removal and disposal of onboard pollutants; (2) Towing and removing the Vessel from the water; and (3) Ultimate disposal and/or transportation of the Vessel on land. CCG issued a notice under section 180 CSA to this effect as well.

On 24 October 2018, the owner sent CCG an email in which he proposed pumping onboard pollutants into a fuel cube for disposal in Clarenville. The Vessel would then be towed to a nearby beach, where he would haul it out with heavy equipment. Disposal arrangements were in progress.

The following day, CCG responded to the owner via email requesting clarification on towage arrangements and the location of the proposed haul out. CCG endorsed the plan to remove and dispose of onboard pollutants. The owner failed to respond to CCG or act as proposed, despite a further direction order under the CSA. CCG was unsuccessful in contacting him again.

On 7 November 2018, three CCG personnel arrived at the Marina to assess the situation. They found the Vessel to be in very poor condition. Water was noted in the fish holds, engine room, and forward portions of the Vessel. CCG personnel estimated 250 litres of diesel in fuel tanks and the presence of some additional oils on board. With no response from the owner by the deadline noted in its direction order, CCG began a formal response, ordering a Pardy's Waste Management and Industrial Services Ltd ("Pardy's") vacuum truck for the following day.

On 8 November 2018, Pardy's arrived on scene. According to the CCG Incident Narrative, "personnel assisted the vacuum truck in removing pollutants from the vessel, including fuel tanks, engine steering system, and all lines and filters, totalling approximately 1,000 litres [*sic*]. Pollutants still remained in the fuel tanks, engine base, hydraulic lines and tank." The Incident Narrative also references an oily bilge. CCG determined that the Vessel remained likely to sink and pollute, resolving to remove it from the water and have it dismantled. CCG took measures to limit the ingress of water before departing the scene.

CCG made continued efforts to contact the Vessel's owner, informing him by email on 16 November 2018 that the Vessel would be sold or destroyed unless he intervened. In the absence of CCG personnel, the Marina continued to monitor and dewater the Vessel, but ultimately had to stop due to safety concerns.

CCG personnel returned to the scene on 17 November 2018, dewatering the Vessel and clearing snow from deck spaces. This was done regularly until 1 December, with up to 500 gallons of water being pumped off the Vessel each day.

Meanwhile, CCG engaged Public Services and Procurement Canada ("PSPC") to arrange an emergency towage contract, subject to approval by Transport Canada ("TC"). In response to a proposed plan, on 19 November 2018, TC informed CCG that a commercial tug would be required to tow the Vessel. This caused delays. Ultimately, on 24 November, CCG entered into a towage contract with Sealand Diesel Services Ltd ("Sealand"). The 244 GT tug *R J Ballott*

would transit to Summerside Marina from Springdale on 25 November to tow the roughly 25 GT Vessel.

The *R J Ballott* departed as scheduled, but arrival was twice delayed by heavy seas. The tug finally arrived on the morning of 28 November 2018, but weather delays persisted. The tow of the Vessel was not underway until 1 December, arriving at Port Saunders the following morning. The Vessel was immediately removed from the water there by Northern Boat Repair Ltd (“NBR”). Before departing the scene, CCG personnel instructed NBR to crib the Vessel at its facility pending a professional survey.

CCG engaged TriNav Marine Design Inc (“TriNav”) to survey the Vessel to determine whether it had any residual value. The survey was done on 12 December 2018, and the report that issued to CCG was dated 14 December. Neither the survey report nor the attached 19 pages of photographs suggest the presence of any residual pollutants on board the Vessel. TriNav concluded that the Vessel had no useful life remaining and no residual value.

Based on the TriNav survey findings, CCG instructed NBR to proceed with deconstruction, which was completed by 4 January 2019. A final note in the CCG Incident Narrative reads “The [Vessel’s] timbers and wood contained pollution and all the tanks and machinery were removed during the dismantling to eliminate the threat of pollution.”

II – The Law

In assessing this Claim, we have noted that the majority of the CCG response — up to and including the TriNav survey — occurred prior to 13 December 2018. This portion of the response is thus subject to the substantive provisions of the *Canada Shipping Act, 2001* (the “CSA”) and the *MLA* as they were at the time. Unless otherwise noted, all references to these statutes herein refer to them as they were before the changes introduced in Bill C-86 came into force.

Under paragraph 180(1)(a) CSA, CCG, acting through the Minister of Fisheries and Oceans, enjoys broad discretionary powers that allow it to remove and deconstruct any vessel that it believes on reasonable grounds poses a pollution threat. Prior to 13 December 2018, those powers applied when CCG believed a vessel was *likely* to discharge pollutants. Since 13 December, those powers have applied in situations where CCG believes a vessel *may* discharge pollutants.

The belief on reasonable grounds threshold has both subjective and objective elements. This means that in order to legitimately exercise its powers under paragraph 180(1)(a) CSA, CCG must genuinely believe that a given vessel poses a pollution threat. Its conduct should be consistent with such belief. In addition, the objective element requires that a hypothetical, informed observer would be likely to concur with the CCG pollution threat assessment.

Even where it can demonstrate it had the power to take given measures, CCG is not automatically entitled to recover the costs and expenses associated with taking those measures. In order to be compensated for costs and expenses associated with the use of its powers under the CSA, CCG must demonstrate a right to recover under the *MLA*. Under subsection 77(1) *MLA*, the Administrator only compensates CCG for the exercise of its powers to the extent that the measures taken and their associated costs are reasonable.

There are thus two main hurdles to overcome before a CCG claim can be compensated by the Administrator. First, the measures taken and claimed for must be grounded in law, meaning that they must represent a legitimate exercise of CSA powers. Second, the measures claimed for and their associated costs must be reasonable in the circumstances from an oil pollution prevention perspective. Both of these hurdles place an evidentiary burden on CCG.

III – Assessment Overview

We are satisfied on the record that CCG's initial response, up to and including the Pardy's operation of 8 November 2018, was tied to a demonstrated pollution threat and reasonable in the circumstances.

On first learning of the Vessel's situation, CCG recognized that it posed a pollution threat, initially attempting to deal with the situation remotely by sparking the owner to action. Though the exact circumstances are not clear to the Administrator, the initial CCG plan was not met with success. The Vessel remained in the water, and it remained a modest pollution threat. By 25 October, it became clear to CCG that the owner could not be relied upon to take action as directed. CCG personnel arrived on scene, assessed the situation, and determined to have the Vessel pumped of pollutants.

In its Incident Narrative, and elsewhere in its Claim documentation, CCG contends that the Vessel remained an oil pollution threat after the Pardy's operation. On the overall weight of the evidence presented by CCG, we cannot agree.

First, we note that CCG personnel dewatered the Vessel regularly from 17 November 2018 through 1 December. If, as CCG submits, the Vessel at this stage remained a pollution threat due to residual oils and an oily bilge, the water ingress was likely to have become at least moderately contaminated. There is no evidence, however, that the hundreds of gallons of water pumped from the Vessel daily were oiled to any degree. Nothing on the record indicates that this water went anywhere but overboard. If CCG personnel believed the water ingress was contaminated, it is not easy to accept that they would have pumped it into the sea. Furthermore, nothing on the record suggests that CCG personnel used any sorbent materials in the course of their response.

Second, and as already addressed in the Facts section above, there is no indication that the TriNav surveyor found any residual onboard pollutants or oil saturation during his December 2018 survey, after the Vessel had been removed from the water. This further calls into question the assertions contained in the Incident Narrative. While the survey was not expressly commissioned for the purpose of a pollution threat assessment, it is unlikely that a surveyor tasked with a general appraisal would decline to comment on oil saturation in the Vessel's bilge or timbers.

We therefore find that CCG lacked reasonable grounds to believe that the Vessel posed a pollution threat, as required by the CSA to justify a continued response, from 8 November 2018 onward.

In light of our finding, it follows that none of the measures taken by CCG personnel after the Pardy's operation of 8 November 2018, and none of the additional contract services engaged, were reasonable from an oil pollution prevention perspective. We find on the evidence, and on

the lack of any compelling evidence suggesting otherwise, that all of these measures were taken to address concerns other than oil pollution.

IV – Assessment Detail

What follows is closely informed by our finding, detailed above, that the measures taken by CCG after the 8 November 2018 pumping operation were of a non-compensable character.

Schedule 1 – Materials and Supplies

CCG claimed \$415.58 for various materials and supplies related to keeping the Vessel afloat from 8 November through 3 December 2018, including registered postage for a letter sent to the Vessel's owner on 16 November. We find that none of the materials and supplies purchased after 8 November were reasonably connected to pollution prevention. While CCG spent \$123.50 on 8 November for tarp, strapping, and rope to cover the Vessel's open fish hold, it is clear from CCG time sheets that these purchases occurred after the Vessel had been pumped of pollutants by Pardy's: this measure was intended to help keep the Vessel afloat after CCG personnel left the scene. Accordingly, none of the expenditures claimed under this Schedule are established.

Schedule 2 – Contract Services

CCG let four contracts in the course of its response to the Vessel, totalling \$106,009.35: (1) Pardy's was paid \$694.60 to pump and dispose of 1,000 litres of waste oils and contaminated water; (2) Sealand was paid \$67,275.00 to tow the Vessel; (3) TriNav was paid \$3,539.75 to survey the Vessel; and (4) NBR was paid \$34,500.00 to remove the Vessel from the water, store it, and ultimately deconstruct it. Of these claimed amounts, we find \$694.60 to be established, representing the amount claimed for the Pardy's pumping operation.

Schedule 3 – Travel

CCG claimed \$14,880.03 for travel expenses associated with nine different personnel. The claimed amounts span two separate periods: \$2,458.30 was claimed in connection with 6 through 9 November 2018; \$12,421.73 was claimed for the period of 16 November through 3 December. Under this Schedule we find the amount of \$2,458.30 to be established, representing travel expenses incurred during the 6 through 9 November period. During this period, CCG personnel travelled to the Marina, assessed the Vessel, oversaw the Pardy's operation, and returned to St John's.

Schedule 4 – Salaries – Full Time Personnel

CCG claimed \$12,327.93 for regular salaries, representing work done by nine personnel in alignment with the description contained in our assessment of Schedule 3, above. For the same reasons as those set out above, we find the salaries claimed for three personnel from 6 through 9 November 2018 to be established. This amount totals \$2,904.08.

Schedule 5 – Overtime – Full Time Personnel

CCG claimed \$13,464.98 for the overtime of the nine personnel who attended the Vessel. Following the same breakdown applied in our assessment of Schedules 3 and 4 above, we find the amount of \$2,177.89 to be established under this Schedule.

Schedule 11 – Pollution Counter-measures Equipment

CCG claimed \$694.45 for five days' use of a response trailer, on 6, 7, 8, 9, and 16 November 2018. We find that the use of the trailer from 6 through 9 November was reasonable and prudent. Accordingly, we find the amount of \$555.56, representing four days' use, to be established under this Schedule.

Schedule 12 – Vehicles

CCG claimed \$2,908.37 for vehicle usage in the course of its response. \$688.61 was claimed for the period of 6 through 9 November 2018 and \$2,219.76 was claimed for the period of 16 November through 3 December. In accordance with our findings in the Schedules above, we find the amount of \$688.61 to be established under this Schedule.

Schedule 13 – Administration

CCG claimed \$948.09 in administration costs, at a rate of 3.09% of the total amounts claimed for materials and supplies, travel, and salaries (including the employee benefits plan). The Administrator previously accepted an administration rate of 2.53% as reasonable, and she is currently awaiting additional CCG submissions on this new, higher rate. Until such time as we find the new rate to be reasonable, we will continue to apply the existing rate of 2.53%.

Taking into account the reductions made under Schedules 1, 3, and 4, the application of the 2.53% administration rate yields an established amount of \$135.67 under this Schedule.

We look forward to receiving notification of your acceptance so that payment can be made without delay. In considering this Offer, kindly note that you have 60 days upon receipt to notify the undersigned whether you accept it. Alternatively, you have 60 days upon receiving this Offer to appeal its adequacy in the Federal Court. The *MLA* provides that if no notification is received at the end of the 60-day period, you will be deemed to have refused the Offer.

If you accept this Offer, the *MLA* provides that upon payment to you the Administrator becomes subrogated to your legal rights with respect to this matter, to the extent of her payment.

Yours sincerely,

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

Encl: Appendix (1)

Cc: Superintendent, Environmental Response, Atlantic Region
Manager, Operational Service Delivery

Appendix: Summary Assessment Table

Schedule	Claimed	Established
1 – Materials and Supplies	\$415.58	\$0.00
2 – Contract Services	\$106,009.35	\$694.60
3 – Travel	\$14,880.03	\$2,458.30
4 – Salaries – Full Time Personnel	\$12,327.93	\$2,904.08
5 – Overtime – Full Time Personnel	\$13,464.98	\$2,177.89
11 – Pollution Counter-measures Equipment	\$694.45	\$555.56
12 – Vehicles	\$2,908.37	\$688.61
13 – Administration	\$948.09	\$135.67
Total in Principal	\$151,648.78	\$9,614.71
Accrued Interest		\$410.75
Grand Total		\$10,025.46