Office of the Administrator of the Ship-source Oil Pollution Fund

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Bureau de l'administrateur de la Caisse d'indemnisation des dommages dus à la pollution par les hydrocarbures causée par les navires

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DECISION LETTER

Ottawa, 19 March 2021
SOPF File: 120-835
CCG File:

BY EMAIL

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

RE: MV ATREVIDA— Maple Bay, British Columbia
Incident date: 2018-12-20

SUMMARY AND OFFER

[1] The Office of the Administrator of the Ship-Source Oil Pollution Fund (the "Fund") received a claim submission from the Canadian Coast Guard (the "CCG") on 23 December 2020. The submission presented a claim to the Administrator of the Ship-source Oil Pollution Fund in relation to the grounding of the M/V ATREVIDA (the "Vessel") on 20 December 2018 near Arbutus Point, in Maple Bay, British Columbia (the "Incident").

[2] On December 20th, 2018, the Canadian Coast Guard ("CCG") was alerted as to a 60-foot ex-ferry that had discharged oil into waters near Maple Bay, British Columbia. The CCG took measures in response, and incurred costs and expenses in the process. It seeks compensation of $223,719.10.

[3] Claims submitted to the Administrator pursuant to s. 103 of the *Marine Liability Act*, SC 2001, c.6, as amended (the "MLA") must be received within two years of the occurrence of oil pollution damage. While the application was dated 14 December 2020, and presumably was sent on that day, it did not arrive at the office of the Administrator until 23 December 2020. As a result, for the reasons set forth hereunder, the claim submission must be rejected.

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THE FACTS FROM THE SUBMISSION RECEIVED

[4] On 20 December 2018, the CCG was alerted as to a 60-foot ex-ferry that ran aground near Maple Bay, British Columbia. The ex-ferry was the Vessel (the M/V TREVIDA).

[5] When emergency response crews first arrived, the Vessel was at a 45-degree angle and there was a sheen in the water around it. The sheen on the water is the beginning of the pollution event. Three emergency response crew arrived from Victoria but determined that the weather conditions were too poor to address the pollution event. At this date, unsuccessful attempts were made to contact the owner.

Figure 1- Photograph excerpted from the CCG narrative showing the Vessel

[6] The Vessel's hull was deforming on the rocks under its own weight. This deformation heightened the pollution risk. It was believed that the boat could break apart if it was not raised properly, causing a discharge of oil pollution into the marine environment.

[7] On 27 December 2018, the owner of the Vessel said he would take responsibility for it and submit a plan for its deconstruction. As of 8 January 2019, the owner still had not provided a plan for the deconstruction of the Vessel.

[8] On 8 January 2019, the CCG heard from two contractors who were available to deconstruct the vessel. Heavy Metal began the salvage operation on January 14th.

[9] The salvage operation included the use of a number of pieces of heavy machinery. This included a tugboat, a barge with an excavator, an empty barge to place the salvage materials on, and a boom to contain the debris during the deconstruction.

[10] On 15 January 2019, the contractors continued to deconstruct the Vessel. Three CCG staff continued to monitor the operation. During the day the contractors removed 2 fuel tanks and recovered more than 300 liters of fuel.

[11] The following day, on 16 January 2019, four members of the CCG arrived to transfer 800 liters of fuel into barrels. Then, on 17 January 2019, three crew arrived by boat to supervise the last day of the salvage operation and a fourth crew member arrived in a Ford F-350. Once the operation was completed, the CCG cleaned up the remaining debris and towed the equipment.

THE APPLICABLE LAW

[12] While the claim submission indicates that it is submitted under both s. 101 and s. 103 of the MLA, none of the criteria for a claim under s. 101 are established on the documents provided. In any event, the Administrator cannot render a decision under

s. 105 with respect to liability under s. 101 of the MLA. While settlement discussions can take place with respect to a prospective s. 101 claim, no compensation can be paid under that regime unless a court claim is initiated as described at s. 109 of the MLA. In this case, it does not appear that such a court claim has been filed. Therefore, this submission is not being treated as a claim under s. 101 at this time.

[13] Under s. 103(1) of the MLA, the Administrator may investigate and assess claims submitted to her. This CCG claim submission was received as a s. 103 claim and has been evaluated for admissibility on that basis.

[14] When it arrived, it appeared that the claim submission may have arrived outside of the statutory prescription period.

[15] Section 103(2) of the MLA requires claims with respect to oil pollution to be made to the Administrator within 2 years of the pollution incident:

Limitation or prescription period **(2)** The 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. **Multiple occurrences** **(2.1)** For the purposes of subsection (2), if an incident as a result of which oil pollution damage occurs or in respect of which oil pollution damage is anticipated consists of a series of occurrences, the period of five years referred to in that subsection begins on the day of the first occurrence in that series.	**Prescription** **(2)** 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. **Plusieurs faits liés au même événement** **(2.1)** Pour l'application du paragraphe (2), lorsque des dommages dus à la pollution par les hydrocarbures ou des dommages prévus résultent d'un événement constitué d'un ensemble de faits, le délai de cinq ans court à compter du premier de ces faits.

DETERMINATIONS: APPLYING THE FACTS TO THE LAW

What is the prescription period?

[16] Section 103(2) of the Marine Liability Act states that a claim must be made within two years of an oil pollution incident. When the pollution results from a series of occurrences, then the period begins on the day of the first occurrence.

[17] In the case at hand, the first occurrence occurred no later than 20 December 2018. According to the CCG's documents, that is the first day the CCG responded to the incident and identified a "sheen" on the water.

[18] The two-year statutory prescription period began running on 20 December 2018.

Determining the date of the claim

[19] The claim submission was dated and presumably mailed on or about 14 December 2020. The claim was not received on behalf of the Administrator until 23 December 2020. The CCG has confirmed that only a physical copy of the claim was sent; no electronic version was sent.

[20] It must be determined on what date the claim was "made" pursuant to s. 103(2) of the MLA. That is, whether the claim was made the date it was mailed or the date it was received.

[21] The postal acceptance rule, a common law contractual doctrine, should not be applied with respect to the filing of claims with the Administrator. An analogous issue was considered by the Federal Court of Canada in *Lukaj v Canada (Citizenship and Immigration)*, 2013 FC 8. At paragraphs 16 to 26 of his decision, Chief Justice Crampton rejected the applicability of the postal acceptance rule in the context of a sponsorship application apparently sent, but not received, before a deadline to make the application. The applicability of the postal acceptance rule was rejected for reasons including the statutory (rather than contractual) nature of the *Immigration and Refugee Protection Act*, SC 2001, c 27. In the result, the application was made when it was received, rather than upon being sent. Similar reasoning should be applied to the MLA and submissions under s. 103.

[22] As well, non-compliance with a limitation period should not be readily excused.

[23] Limitation statutes are to be strictly construed: *Berardinelli v. Ontario Housing Corp.*, [1979] 1 S.C.R. 275. This means that, in principle, the two-year limitation period should not be extended by exercise of discretion.

[24] The rule from *Berardinelli* can be relaxed in certain contexts. As the Supreme Court of Canada stated in *Novak v. Bond*, [1999] 1 SCR 808, "Arbitrary limitation dates have been discouraged in favour of a more contextual view of the parties' actual circumstances. To take just one example, it has been well-recognized that it is unfair for the limitation period to begin running until the plaintiff could reasonably have discovered that he or she had a cause of action". However, in the case at hand, the commentary from the SCC in *Novak v. Bond* does not assist the CCG. The CCG discovered their cause of action at the beginning of the environmental response, on 20 December 2018. Therefore, even applying a contextual approach, the prescription period should be applied.

[25] Other decision-making bodies, such as the Federal Court and the Ontario Court of Appeal, have stated that when filing a statement of claim, or another court document, the documents have to be received before the prescription date: *928412 Ontario Limited v. Canada*, 1997 CanLII 5103 (FC); *Cheong v. Ontario (Minister of Finance)*, 2004 CanLII 17750 (ON CA). This is consistent with the law cited at paragraph [23] that limitations should be strictly construed to encourage timely dispute resolution.

[26] For the foregoing reasons, it is determined that the claim submission was not made within the prescription period under s. 103(2) of the MLA, and that deadline cannot be extended as a matter of discretion, even if the Administrator had such a power.

[27] The claim submission is therefore dismissed as inadmissible.

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[28] You have 60 days upon receipt of this Decision to appeal it to the Federal Court. If you wish to appeal the Decision, 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