Federal Court  Cour fédérale

Date: 20220831

Docket: T-1375-21

Citation: 2022 FC 1249

Ottawa, Ontario, August 31, 2022

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

HAIDA TOURISM LIMITED PARTNERSHIP DBA WEST COAST RESORTS

Appellant

and

THE ADMINISTRATOR OF THE SHIP-SOURCE OIL POLLUTION FUND

Respondent

JUDGMENT AND REASONS

[1] This is a statutory appeal of decision of the Administrator [Administrator] of the Ship-Source Oil Pollution Fund [SOPF] brought pursuant to subsection 106(2) of the *Marine Liability Act*, SC 2001 c 6 [*MLA*]. The Administrator disallowed a claim filed pursuant to subsection 103(1) of the *MLA* by Haida Tourism Limited Partnership [Haida] with respect to its costs and expenses incurred to prevent, repair, remedy or minimize ship-source oil pollution damage.

Overview

[2] Haida was, at all material times, the owner and operator of an accommodation barge, the "Tasu I" (West Island 395, O.N. 323291) [Vessel], used as a sports fishing lodge. According to the claim submitted by Haida to the Administrator, on September 8, 2018, the Vessel came loose from its mooring buoy in Alliford Bay, Haidi Gwaii, and drifted to a grounding point in Bearskin Bay on Lina Island, British Columbia, where it released a mixture of gasoline and/or diesel [Incident]. The Vessel was the only ship involved in the Incident. Haida contacted the Canadian Coast Guard [CCG] to inform it of the Incident and, on or about September 9, 2018, made efforts to prevent, repair, remedy or minimize potential oil pollution damage resulting from the grounding.

[3] On December 27, 2018 counsel for Haida submitted a claim to the SOPF pursuant to paragraph 101(1)(b) of the *MLA* (subsequently reframed as a claim made under subsection 103(1) of the *MLA*) for the costs and expenses incurred by Haida to mitigate oil pollution damage. Haida claimed that the evidence pointed to an intentional and willful tampering of the Vessel's mooring lines by a third party with the intent to cause damage. It further claimed that this factual circumstance provided Haida, as the shipowner, with a defence under paragraph 77(3)(b) of the *MLA*. Accordingly, Haida claimed that it was entitled to be compensated by the SOPF for Haida's claimed expenses incurred to mitigate oil pollution damage from its own ship.

[4] By a Letter of Disallowance dated August 4, 2021, the Administrator denied Haida's claim.

[5] This appeal of the Administrator's decision is concerned only with a question of law. Specifically, it concerns the interpretation by the Administrator of section 103 of the *MLA* and whether that provision creates a right for a shipowner to recover costs and expenses incurred to prevent, repair, remedy or minimize potential oil pollution damage resulting from an incident caused solely by its own ship.

[6] The Administrator did not assess the issue of whether Haida has a valid defence to the otherwise strict liability of a shipowner for oil pollution damage and the costs and expenses incurred to prevent or mitigate same. However the parties agree that this issue, and other factual matters, are not relevant to the question of law that arise in this appeal.

Legislative Regime

[7] To provide some context to the Administrator's decision which is the subject of this appeal, as well as the parties' positions on appeal and my reasons that follow, it is helpful to first provide a summary overview of the *MLA* legislative regime. At the time of the Incident, the version of the *MLA* which came into effect on June 8, 2015 and remained in effect to December 12, 2018 was in force and applies to this appeal. That is the version referred to in these reasons unless otherwise noted.

[8] The *MLA* comprehensively addresses matters of maritime claims and liability. For example, Part 1 deals with personal injuries and fatalities, Part 2 with apportionment of liability, Part 3 with limitation of liability for maritime claims, Part 4 with liability for carriage of passengers by water and Part 5 deals with liability for carriage of goods by water.

[9] This appeal engages Part 6 – Liability and Compensation for Pollution and Part 7 - Ship-source Oil Pollution Fund of the *MLA*.

i. *MLA* Part 6

Part 6 – Division 1

[10] Division 1 of Part 6, Liability and Compensation for Pollution, is concerned with international conventions. Division 1 gives force of law to certain international conventions to which Canada is a contracting state, three of which are relevant to this matter:

a) *Bunkers Convention*

[11] *The International Convention on Civil Liability for Bunker Oil Pollution Damage*, 2001, concluded at London on March 23, 2001 [*Bunkers Convention*]. Articles 1 to 10 of the *Bunkers Convention* are set out in Schedule 8 of the *MLA* and have the force of law in Canada (*MLA* s 47(1), s 69). The *Bunkers Convention* applies any to seagoing vessel and concerns "pollution damage" caused by "bunker oil" which is defined as "any hydrocarbon mineral oil, including lubricating oil, used or intended to be used for the operation or propulsion of the ship, and any residues of such oil". That is, the *Bunkers Convention* applies not just to tankers and not just to persistent oil (*Bunkers Convention*, Article 1, ss 5, 9).

[12] Pursuant to subsection 71(a) of the *MLA*, the liability of the owner of a ship in relation to preventative measures , for the purposes of the *Bunkers Convention*, includes the costs and expenses incurred by the Minister of Fisheries and Oceans, a response organization within the

meaning of section 165 of the *Canada Shipping Act, 2001*, SC 2001, c 26 [*CSA*] and any other person in Canada or any person in a state, other than Canada, that is a party to that Convention, in respect of measures taken to prevent, repair, remedy or minimize pollution damage from the ship, including measures taken in anticipation of a discharge of bunker oil from it, to the extent that the measures taken and the costs and expenses are reasonable, and for any loss or damage caused by those measures.

b) *Civil Liability Convention*

[13] *The International Convention on Civil Liability for Oil Pollution Damage, 1992*, concluded at London on November 27, 1992, Article V of which was amended by the Resolution adopted by the Legal Committee of the International Maritime Organization on October 18, 2000 [*Civil Liability Convention*]. Articles I to XI, XII *bis* and 15 of the *Civil Liability Convention* are set out in Schedule 5 of the *MLA* and have the force of law in Canada (*MLA* s 47(1), ss 48). The *Civil Liability Convention* applies to sea going vessels constructed or adapted for the carriage of oil in bulk as cargo (primarily tankers) with respect to "pollution damage" cause by "oil" which is defined "as any persistent hydrocarbon mineral oil such as crude oil, fuel oil, heavy diesel oil and lubricating oil, whether carried on board a ship as cargo or in the bunkers of such a ship" (Article 1(1), 1(5),1(6)).

[14] Pursuant to section 51 of the *MLA*, the liability of the owner of a ship in relation to preventative measures for the purposes of the *Civil Liability Convention* includes the costs and expenses incurred by the Minister of Fisheries and Oceans, a response organization within the meaning of section 165 of the *CSA*, any other person in Canada or any person in a state, other

than Canada, that is a party to that Convention, in respect of measures taken to prevent, repair, remedy or minimize pollution damage from the ship, including measures taken in anticipation of a discharge of oil from it, to the extent that the measures taken and the costs and expenses are reasonable, and for any loss or damage caused by those measures.

c) *Fund Convention*

[15] *The International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992*, concluded at London on November 27, 1992, Article 4 of which was amended by the Resolution adopted by the Legal Committee of the International Maritime Organization on October 18, 2000 [*Fund Convention*]. Articles 1 to 4, 6 to 10, 12 to 15, 36 *ter*, 29, 33 and 37 of the *Fund Convention* are set out in Schedule 6 of the *MLA* have the force of law in Canada (*MLA* s 47(1), ss 57). The Supplementary Fund Protocol means the Protocol of 2003 to the Fund Convention, concluded at London on May 16, 2003 (s 47(1)). Articles 1 to 15, 18, 20, 24, 25 and 29 of the Supplementary Fund Protocol are set out in Schedule 7 of the *MLA* and have the force of law in Canada (s 63). The International Oil Pollution Compensation Supplementary Fund, 2003, [Supplementary Fund] is established by Article 2 of the Supplementary Fund Protocol.

Part 6 – Division 2

[16] Division 2, of Part 6 of the *MLA* is concerned with liability not covered by Division 1. That is, liability not addressed by the international conventions referenced in Division 1 of Part 6.

[17] Section 76 states that Division 2 applies in respect of actual or anticipated pollution damage, except for pollution damage covered by Division 1, irrespective of the location of the actual or anticipated discharge of the pollutant and irrespective of the location where any preventive measures are taken on Canada's territory or in Canadian waters; or, in Canada's exclusive economic zone.

[18] Section 77 of the *MLA* imposes strict liability on a shipowner for oil pollution damage from their ship as well as for the costs and expenses incurred by the Minister of Fisheries and Oceans, a response organization within the meaning of section 165 of the *CSA* or, any other person in Canada in respect of measures taken to prevent, repair, remedy or minimize oil pollution damage from the ship, including measures taken in anticipation of a discharge of oil from it, to the extent that the measures taken and the costs and expenses are reasonable, and for any loss or damage caused by those measures (s 77(1)). Owners are also strictly liable for environmental damage (s 77(2)).

[19] This strict liability of a shipowner under section 77 of the *MLA* is subject to certain limited exceptions:

> (3) The owner's liability under subsections (1) and (2) does not depend on proof of fault or negligence, but the owner is not liable under those subsections if they establish that the occurrence
>
> > (a) resulted from an act of war, hostilities, civil war or insurrection or from a natural phenomenon of an exceptional, inevitable and irresistible character;
> >
> > (b) was wholly caused by an act or omission of a third party with intent to cause damage; or
> >
> > (c) was wholly caused by the negligence or other wrongful act of any government or other authority that is responsible

> for the maintenance of lights or other navigational aids, in the exercise of that function.

[20] Similar shipowner liability provisions are found in both the *Civil Liability Convention* and the *Bunkers Convention*:

> The *Civil Liability Convention*, Article III, states:
>
> > 1 Except as provided in paragraphs 2 and 3 of this Article, the owner of a ship at the time of an incident, or, where the incident consists of a series of occurrences, at the time of the first such occurrence, shall be liable for any pollution damage caused by the ship as a result of the incident.
> >
> > 2 No liability for pollution damage shall attach to the owner if he proves that the damage:
> >
> > > (a) resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character, or
> > >
> > > (b) was wholly caused by an act or omission done with intent to cause damage by a third party, or
> > >
> > > (c) was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.
> >
> > 3 If the owner proves that the pollution damage resulted wholly or partially either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person, the owner may be exonerated wholly or partially from his liability to such person.
> >
> > ……..

[21] Article 3 of the *Bunkers Convention* states:

> Liability of the Shipowner
>
> 1 Except as provided in paragraphs 3 and 4, the shipowner at the time of an incident shall be liable for pollution damage caused by

> any bunker oil on board or originating from the ship, provided that, if an incident consists of a series of occurrences having the same origin, the liability shall attach to the shipowner at the time of the first of such occurrences.
>
> 2 Where more than one person is liable in accordance with paragraph 1, their liability shall be joint and several.
>
> 3 No liability for pollution damage shall attach to the shipowner if the shipowner proves that:
>
> > (a) the damage resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or
> >
> > (b) the damage was wholly caused by an act or omission done with the intent to cause damage by a third party; or
> >
> > (c) the damage was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.
>
> 4 If the shipowner proves that the pollution damage resulted wholly or partially either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person, the shipowner may be exonerated wholly or partially from liability to such person.
>
> …….

[22] I note in passing here that a shipowner also has the right to limit its liability, based on the tonnage of the ship (*MLA*, Part 3, referring to the *Convention on Limitation of Liability for Maritime Claims, 1976*, concluded at London on November 19, 1976, as amended by the Protocol, Articles 1 to 15 of which Convention are set out in Part 1 of *MLA* Schedule 1 and Article 18 of which is set out in Part 2 of Schedule 1 of the *MLA*).

ii. *MLA* Part 7

[23] Part 7 of the *MLA* continues the SOPF and provides for the appointment, by the Governor in Council, of its Administrator and Deputy Administrator. Part 7 applies to oil pollution damage, defined as "in relation to a ship, means loss or damage outside the ship caused by contamination resulting from the discharge of oil from the ship". "Oil" is defined as "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" (s 91(1)).

[24] With respect to the liability of the SOPF, the *MLA* states as follows:

> Liability of Ship-source Oil Pollution Fund
>
> 101 (1) Subject to the other provisions of this Part, the Ship-source Oil Pollution Fund is liable for the matters referred to in sections 51, 71 and 77 in relation to oil, Article III of the Civil Liability Convention and Article 3 of the Bunkers Convention if
>
> > (a) all reasonable steps have been taken to recover payment of compensation from the owner of the ship or, in the case of a ship within the meaning of Article I of the Civil Liability Convention, from the International Fund and the Supplementary Fund, and those steps have been unsuccessful;
> >
> > (b) the owner of a ship is not liable by reason of any of the defences described in subsection 77(3), Article III of the Civil Liability Convention or Article 3 of the Bunkers Convention and neither the International Fund nor the Supplementary Fund are liable;
> >
> > (c) the claim exceeds
> >
> > > (i) in the case of a ship within the meaning of Article I of the Civil Liability Convention, the owner's maximum liability under that Convention to the extent that the excess is not recoverable from

the International Fund or the Supplementary Fund, and

(ii) in the case of any other ship, the owner's maximum liability under Part 3;

(d) the owner is financially incapable of meeting their obligations under section 51 and Article III of the Civil Liability Convention, to the extent that the obligation is not recoverable from the International Fund or the Supplementary Fund;

(e) the owner is financially incapable of meeting their obligations under section 71 and Article 3 of the Bunkers Convention;

(f) the owner is financially incapable of meeting their obligations under section 77;

(g) the cause of the oil pollution damage is unknown and the Administrator has been unable to establish that the occurrence that gave rise to the damage was not caused by a ship; or

(h) the Administrator is a party to a settlement under section 109.

…..

Action by Administrator

102 (1) If there is an occurrence that gives rise to the liability of an owner of a ship under section 51, 71 or 77, Article III of the Civil Liability Convention or Article 3 of the Bunkers Convention,

(a) the Administrator may, either before or after receiving a claim under section 103, commence an action *in rem* against the ship that is the subject of the claim, or against any proceeds of sale of the ship that have been paid into court; and

(b) subject to subsection (3), the Administrator is entitled in any such action to claim security in an amount not less than the owner's maximum aggregate liability determined in accordance with section 71 or 77, or Article V of the Civil Liability Convention.

Subrogation

(2) The Administrator may continue the action only if he or she has become subrogated to the rights of the claimant under paragraph 106(3)(c).

…..

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.

……

Administrator's duties

105 (1) On receipt of a claim under section 103, the Administrator shall

> (a) investigate and assess it; and
>
> (b) make an offer of compensation to the claimant for whatever portion of it that the Administrator finds to be established.

Administrator's powers

(2) For the purpose of investigating and assessing a claim, the Administrator has the powers of a commissioner under Part I of the *Inquiries Act*.

Factors to be considered

(3) When investigating and assessing a claim, the Administrator may consider only

> (a) whether it is for loss, damage, costs or expenses referred to in subsection 103(1); and
>
> (b) whether it resulted wholly or partially from
>
> > (i) an act done or omitted to be done by the claimant with intent to cause damage, or

(ii) the claimant's negligence.

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.

When claimant at fault

(5) The Administrator shall reduce or nullify any amount that he or she would have otherwise assessed in proportion to the degree to which he or she is satisfied that the claim resulted from

(a) an act done or omitted to be done by the claimant with intent to cause damage; or

(b) the claimant's negligence.

Offer of compensation

106 (1) If the Administrator makes an offer of compensation to a claimant under paragraph 105(1)(b), the claimant shall, within 60 days after receiving the offer, notify the Administrator whether they accept or refuse it and, if no notification is received by the Administrator at the end of that period, the claimant is deemed to have refused the offer.

Appeal to Admiralty Court

(2) A claimant may, within 60 days after receiving an offer of compensation or a notification that the Administrator has disallowed the claim, appeal the adequacy of the offer or the disallowance of the claim to the Admiralty Court, but in an appeal from the disallowance of a claim, that Court may consider only the matters described in paragraphs 105(3)(a) and (b).

Acceptance of offer by claimant

(3) If a claimant accepts the offer of compensation from the Administrator,

(a) the Administrator shall without delay direct payment to be made to the claimant of the amount of the offer out of the Ship-source Oil Pollution Fund;

(b) the claimant is then precluded from pursuing any rights that they may have had against any person in respect of matters referred to in sections 51, 71 and 77, Article III of the Civil Liability Convention and Article 3 of the Bunkers Convention in relation to the occurrence to which the offer of compensation relates;

(c) the Administrator is, to the extent of the payment to the claimant, subrogated to any rights of the claimant referred to in paragraph (b); and

(d) the Administrator shall take all reasonable measures to recover the amount of the payment from the owner of the ship, the International Fund, the Supplementary Fund or any other person liable and, for that purpose, the Administrator may commence an action in the Administrator's or the claimant's name, including a claim against the fund of the owner of a ship established under the Civil Liability Convention and may enforce any security provided to or enforceable by the claimant.

…..

Proceedings Against the Owner of a Ship

Proceedings against owner of ship

109 (1) If a claimant commences proceedings against the owner of a ship or the owner's guarantor in respect of a matter referred to in section 51, 71 or 77, Article III of the Civil Liability Convention or Article 3 of the Bunkers Convention, except in the case of proceedings based on paragraph 77(1)(c) commenced by the Minister of Fisheries and Oceans in respect of a pollutant other than oil,

(a) the document commencing the proceedings shall be served on the Administrator by delivering a copy of it personally to him or her, or by leaving a copy at his or her last known address, and the Administrator is then a party to the proceedings; and

(b) the Administrator shall appear and take any action, including being a party to a settlement either before or after judgment, that he or she considers appropriate for the proper administration of the Ship-source Oil Pollution Fund.

> If Administrator party to settlement
>
> (2) If the Administrator is a party to a settlement under paragraph (1)(b), he or she shall direct payment to be made to the claimant of the amount that the Administrator has agreed to pay under the settlement.

[25] It is worth noting here, for future ease of reference, that matters referred to in sections 51, 71 or 77 of the *MLA*, Article III of the *Civil Liability Convention*, and Article 3 of the *Bunkers Convention* are frequently referenced together in Part 7 of the *MLA*. Each of these provisions concern shipowner liability for costs and expenses incurred in respect of measures taken to prevent repair, remedy or minimize pollution damage from the ship [also referred to collectively in these reasons as the Liability and Damages Provisions]:

- *MLA* section 51: the liability of the shipowner in relation to preventative measures, for the purposes of the *Civil Liability Convention*, includes costs and expenses incurred (by the Minister of Fisheries and Oceans; a response organization; or, any other person as set out) in respect of measures taken to prevent repair, remedy or minimize pollution damage from the ship, including anticipatory measures (s 51(a));

- *MLA* section 71: the liability of the owner of a ship in relation to preventative measures, for the purpose of the *Bunkers Convention*, also includes costs and expenses incurred (by the Minister of Fisheries and Oceans; a response organization; or, any other person as set out) in respect of measures taken to prevent repair, remedy or minimize pollution damage from the ship, including anticipatory measures; costs and expenses in respect of preventive or response measures (s 71(a));

- *MLA* s 77: the owner of a ship is liable for oil pollution damage from the ship and for costs and expenses in respect of measures taken to prevent, repair, remedy or minimize oil pollution damage from the ship, including measures taken in anticipation of a discharge of oil from it (s 77(1)(a)-(b));

- Article III(1) of the *Civil Liability Convention*: except as provided in Article III(2) and (3), the owner of a ship shall be liable for any pollution damage caused by the ship as a result of the incident, and:

- Article 3(1) of the *Bunkers Convention*: except as provided in Article 3(3) and (4), the owner of a ship shall liable for pollution damage caused by any bunker oil on board or originating from the ship.

Decision Under Review

[26] The Administrator's decision is 28 pages long, much of which is devoted to describing the procedural history of Haida's claim, the operation of Part 6 of the *MLA* and related international conventions, Part 7 of the *MLA* and, the Administrator's understanding of the operation of the liability regime as a whole.

[27] The Administrator noted that Haida had initially framed its claim under section 101 but later asserted that this was based on its view that claimants under subsection 103(1) had to establish that they met the criteria set out in section 101. The Administrator permitted Haida to re-categorize its claim as a claim under subsection 103(1), but found that Haida's view that a claimant under subsection 103(1) is held to any of the section 101 criteria is incorrect. The Administrator pointed out that subsection 103(1) of the *MLA* expressly provides claimants with a route to accessing compensation that stands "in addition to any rights against the [SOPF] under section 101". For this, and other reasons, the Administrator found that subsection 103(1) constitutes an independent and separate mechanism for claims. Further, Haida's interpretation would mean that a claimant was required to establish one of the criteria under section 101(1) in order to make a claim under subsection 103(1). This would greatly reduce the circumstances in

which the subsection 103(1) scheme is available to those affected by oil pollution, thereby reducing access to justice by imposing an additional burden on claimants. The Administrator rejected Haida's interpretation of the interplay between section 101(1) and subsection 103(1) based on the text of those provisions and the purpose and functions of Parts 6 and 7 of the *MLA* as a whole.

[28] The Administrator stated that subsection 103(1) permits claims where persons affected by a spill have suffered loss, damage, costs or expenses as described in certain provisions of Part 6 of the *MLA* (apparently referring to sections 51, 71 and 77 of the *MLA*, the *Civil Liability Convention*, or the *Bunkers Convention*). The Administrator stated that, "in all cases, the provisions referenced by subsection 103(1) are focused on the liability of a shipowner. This makes it conceptually challenging to understand how a shipowner might be entitled to make a subsection 103(1) claim".

[29] The Administrator noted Haida's apparent answer to this, being the submission made by its counsel that "one must not confuse liability of the shipowner under s 77 with reference to 'costs and expenses' under s 77. They are 2 separate things". The Administrator found this proposed interpretation to be problematic.

[30] The Administrator found that, to the extent that the *Bunkers Convention* had application, Article 3, which states that "the shipowner at the time of the incident shall be liable for pollution damage", could not be read to divorce shipowner liability from pollution damage. The Administrator did not accept that by referencing Article 3 of the *Bunkers Convention* in

subsection 103(1) of the *MLA*, Parliament intended that loss, damage, costs and expenses to be severable from a shipowner's liability. That is, for the purposes of claims brought under subsection 103(1) of the *MLA*, the loss, damage, costs or expenses "as referred to" in Article 3 of the *Bunkers Convention* could not be separated from the shipowner's liability. Moreover, because a shipowner cannot be liable to itself, it cannot incur "costs and expenses as referred to in Article 3 of the Bunkers Convention". Therefore, Article 3 does not provide a shipowner with a pathway to make a claim to the Administrator under subsection 103(1).

[31] The Administrator similarly found that the explicit references to "costs and expenses" in section 77 of the *MLA* , when read in their entire context, and taking into account all of the characteristics of those costs and expenses, do not provide a mechanism for shipowners to make a claim under subsection 103(1), as this would require an arbitrarily selective reading of section 77 to sever all references to a shipowner's liability. While a shipowner could suffer oil pollution damage and incur response-related costs and expenses stemming from an incident caused by its own vessel, an owner cannot suffer the "loss, damage, costs and expenses referred to in paragraphs 77(1)(a) through (c) because those are damages for which an owner would presumptively be liable, and no entity can be liable to itself".

[32] With respect to the interaction of subsection 77(5) and subsection 103(1) of the *MLA*, the Administrator noted that subsection 77(5) allows a shipowner who has established a limitation fund to set off some of its own response costs against its maximum liability to others. By itself, subsection 77(5) does nothing to give an owner a right to recover from other parties. However, the Administrator found that there was some ambiguity in the interaction between subsections

77(5) and 103(1) of the *MLA*. The Administrator therefore proceeded to interpret those provisions, citing the approach set out in *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27 at para 21 [*Rizzo & Rizzo*].

[33] The Administrator reasoned that if Haida was correct that shipowners were allowed to claim under subsection 103(1), then this would not be limited to "innocent" shipowners because subsection 105(3) limits what the Administrator may consider in investigating and assessing claims to whether the claim is for loss, damage, costs or expenses referred to in subsection 103(1) and whether it resulted wholly or partially from an act done or omitted to be done by the claimant with the intent to cause damage or, the claimant's negligence. Thus, under the *MLA*, the Administrator has no authority to consider whether the shipowner may be entitled to a defence to liability, that is, whether it is "innocent". Accordingly, even "non-innocent" shipowners would be eligible to claim under this avenue.

[34] The Administrator pointed out that Haida's interpretation would impair the operation of other parts of the statutory scheme, both within and outside of the *MLA*. For example, shipowners of larger vessels are required by section 167 of the *CSA* to have a standing oil pollution response arrangement with a response organization certified by Transport Canada. The owners of such vessel are very likely to incur response costs following an incident, which costs are typically insured (the Administrator noted that liability insurance is mandatory for vessels larger than 1000 gross tonnage, and many smaller vessels voluntarily carry such coverage). It would not make sense to allow shipowners to make claims to the Administrator for costs which are required to be insured against. Further, if Haida's interpretation was correct, any shipowner

who was forced to pay a response organization's expenses could claim reimbursement for those expenses under subsection 103(1), whereas the response organization itself could not because response organizations are prohibited from making section 103 claims, by subsection 103(3). The Administrator concluded that preferring the interests of polluting shipowners (even innocent ones) over response organizations was at odds with the purpose and objectives of the *MLA*.

[35] The Administrator found that Haida's interpretation of subsection 103 would also eclipse the operation of subsection 77(5), which allows shipowners to claim against their own security in equal ranking with other claims against that security. If Haida's interpretation were correct, shipowners would not need to claim against their security at all, and could instead seek compensation for the full amount from the Administrator. The Administrator found that this cannot have been Parliament's intention in enacting subsection 77(5), which "appears to be the only possible point of entry for shipowners under subsection 103(1)". The Administrator also noted that an even more incongruous result arising from Haida's interpretation would be where a shipowner responds to an oil pollution incident and fully indemnifies the affected parties, as there would be nothing to stop that shipowner, or its insurer, from agreeing to pay the claims, taking an assignment of the rights of the indemnified parties, then presenting a claim to the Administrator under subsection 103(1) for the entirety of its own response as well as for the claims it was responsible for under Part 6 of the *MLA*. Accordingly, the Administrator concludes that, "[t]o the extent that Parts 3 and 6 of the *MLA* are designed to make shipowners pay to the limit of their liability, irrespective of their negligence, that objective would fail in cases of non-negligence".

[36] The Administrator then conducted a comparison between the SOPF and the International Oil Pollution Compensation Funds, which it described as instructive but inherently limited. Essentially, the Administrator found that it lacks the power to consider whether a shipowner my be entitled to a defence when assessing and investigating a subsection 103(1) claim, regardless of the liability scheme upon which such a claim is founded. In contrast, the international funds have a clear mandate to consider shipowner "innocence" under Article 4(1)(a) of the Fund Convention 1992. The mechanical structure needed to address claims by innocent shipowners is not present in Part 7 of the *MLA*.

[37] Finally, the Administrator discussed the potential for disparate outcomes depending on the kind of ship involved in a subsection 103(1) claim. The Administrator did not accept that this was Parliament's intent and found that it was more probable that no shipowners are intended to be eligible to make claims to the Administrator for expenses incurred in responding to an incident solely involving their own ship.

Issue and standard of review

[38] The issue in this appeal is a discrete one which, in my view, can be framed as whether the Administrator erred in interpreting subsection 103(1) of the *MLA* as not allowing a shipowner to make a claim for compensation for its costs and expenses incurred to prevent, repair, remedy or minimize ship-source oil pollution damages, resulting from an incident that was caused solely by its own ship.

[39] The parties agree that the only substantive issue before the Court is a question of law, and that a standard of correctness applies to that issue.

[40] In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the Supreme Court of Canada held that a statutory appeal mechanism signals the legislature's intent that appellate standards apply when a court hears an appeal from an administrative tribunal (*Vavilov* at para 17). "This means that the applicable standard is to be determined with reference to the nature of the question and to…jurisprudence on appellate standards of review" (*Vavilov* at paras 37, 49). The correctness standard applies in answering pure questions of law, including questions of statutory interpretation (*Housen v Nikolaisen*, 2002 SCC 33 at paras 8-9).

[41] Accordingly, given that this matter is brought pursuant to an appeal mechanism set out in subsection 106(2) of the *MLA*, I agree with the parties that the standard of correctness applies.

Analysis

Haida's position

[42] Haida's position is premised on its submission that there is an interplay between section 101 and subsection 103(1) of the *MLA*.

[43] Haida submits that on a plain reading of subsection 103(1) of the *MLA* there is nothing to preclude a shipowner that has a defence to liability from making a claim under that provision. Section 101 sets out the SOPF's liabilities, which include matters referred to in Article 3 of the

Bunkers Convention and sections 71 and 77 of the *MLA*, if the shipowner is not liable by reason of any of the defences described in section 77(3). That is, the owner is not liable if they establish that the occurrence was wholly caused by an act or omission of a third party with intent to cause damage (s 77(3)(b)) and, under Article 3(3)(b) of the *Bunkers Convention*, a shipowner will not be liable for pollution damage if the shipowner proves that the damage was wholly caused by an act or omission done with the intent to cause damage by a third party.

[44] Haida submits that the Administrator erred in finding, regardless of which liability regime applies, that it is inconsistent with the principles of statutory interpretation to read subsection 103(1) in isolation from references to shipowner liability. Haida submits that the liability of a shipowner under the *Bunkers Convention* and the liability of the SOPF are separate matters, except with respect to section 102 of the *MLA*. Haida further submits that its claim against the SOPF is not under the *Bunkers Convention* or section 77 of the *MLA*, which Haida asserts only apply to the SOPF's ability to recover under section 102.

[45] Haida submits that the Administrator's interpretation of subsection 105(3) of the *MLA* is wrong because it fails to incorporate the effect of section 102 of the *MLA* and because a consideration under paragraph 105(3)(a) of whether a claim is for loss, damage, costs or expenses referred to in subsection 103(1) includes a determination of whether those costs are referred to in section 71 (*Bunkers Convention*) or section 77 – both of which permit for a determination of the shipowner's liability. Therefore, according to Haida, the factors to be considered under subsection 105(3)(a) and subsection 106(2) include a consideration of the factors giving rise to the liability of the SOPF under section 101. Section 102 permits the SOPF

to bring a subrogated claim against a shipowner with no defence while a shipowner with a defence is not subject to a subrogated claim. According to Haida, section 102 "closes the loop" for shipowners without a defence under section 71 or 77.

[46] Haida asserts that the Administrator's interpretation of the "matters referred to" in sections 71 and 77 of the *MLA* and Article 3 of the *Bunkers Convention,* as found in subsection 101(1) of the *MLA*, as pertaining to the liability of the shipowner in respect of such matters, is nonsensical. The proper interpretation would be that where a shipowner is not liable, the SOPF is liable for the matters referred to, being the reasonable costs and expenses of responding to a pollution or potential pollution event.

[47] Haida submits that the Administrator's interpretation, which precludes an innocent shipowner from claiming compensation from the SOPF, defeats the purpose and objectives of the *MLA*. Haida submits that the overall purpose of Parts 6 and 7 of the *MLA* is to protect the marine environment, and to ensure that those who suffer loss or damage or voluntarily expend resources to prevent or cleanup oil pollution damage are compensated. Shipowners are usually first on the scene of a pollution event but are not obliged to contract with others and incur expenses, and therefore, shipowners and their insurers who are precluded from compensation are unlikely to incur those expenses. Additionally, a shipowner who has a defence under the *MLA* is "not technically a polluter" so compensating the innocent shipowner does not impair the "polluter pays" principle. Haida further relies on *British Columbia v the Administrator of the Ship-source Oil Pollution Fund*, 2019 BCCA 232 [*BC v SOPF*], to submit that the *MLA* is not a pure polluter pays regime.

SOPF's position

[48] The Administrator submits that Part 6 of the *MLA* imposes strict liability on shipowners for damages caused by ship-source oil pollution incidents – subject to limited defences and limitations on liability based on tonnage.

[49] The Administrator submits that Part 7 of the *MLA* provides for alternate routes to compensation for those who suffer damages described at Part 6. At the time of the Incident, these were section 109 of the *MLA* which makes the Administrator a party to lawsuits brought against shipowners so as to address the SOPF's liability established by subsection 101(1); subsection 103(1) which allows claimants who suffer damages described in Part 6 or the conventions to present those damages directly to the Administrator; and a Part 7 compensation mechanism in subsection 107(3) with respect to losses related to fisheries.

[50] The Administrator's position is that subsection 101(1) has no bearing on the function of subsection 103(1) and is irrelevant to the appeal.

[51] However, in response to Haida's submissions, the Administrator notes that together sections 101 and 109 of the *MLA* implement what is sometimes referred to as the "Last Recourse" [Last Recourse] claims regime, where a claimant must first fail to recover from the shipowner before compensation is available from the SOPF. Section 101(1) is not, by itself, a method of claiming compensation. It lacks an internal mechanism by which compensation can be accessed. While subsection 101(1) makes the SOPF "liable", the fund is not a legal person with

the capacity to sue or be sued. However, as a result of section 109, the SOPF's lack of legal personality does not prevent the Last Recourse regime from functioning. Section 109 establishes a procedure for accessing the SOPF's liability. Although Haida's submissions suggest that it has some claim against SOPF based on subsection 101(1), the Administrator submits that it is not evident how Haida, as the owner of the ship involved in the Incident, might sue itself so as to trigger section 109 of the *MLA* allowing its claim to be adjudicated.

[52] The Administrator submits that, in addition to the Last Recourse regime, Part 7 of the *MLA* provides for what is sometimes referred to as the "First Recourse" [First Recourse] claims regime, so named because compensation for damages is sought directly from the Administrator without the prerequisite of an unsuccessful effort against the shipowner. The First Recourse regime is accessed by way of subsection 103(1). Subsection 103(1) claims are addressed in accordance with sections 105 and 106 of the *MLA* which set out the procedure, substantive rights, and the Administrator's assessment and investigation obligations, powers and criteria. The Administrator submits that sections 105 and 106 apply only to claims founded on section 103, as explicitly stated in subsection 105(1). Section 106 is wholly dependant on section 105. Together with section 103, sections 105 and 106 enact a comprehensive claims regime. The Administrator's obligation to compensate claimants under the First Recourse regime does not stem from the liability of the SOPF under subsection 101(1). Rather, it arises from a compulsion to reach a decision and perhaps make an offer of compensation under paragraph 105(1)(b). As such, the Administrator submits that it is difficult to understand how Haida expects to benefit from paragraph 101(1)(b) of the *MLA* in the context of a section 103 claim. There is no mechanism under section 105 by which the Administrator can consider any of the criteria in

subsection 101(1). In essence, Haida demands that its liability, or lack thereof, be considered within a regime which goes straight to damages.

[53] The Administrator submits that as the owner of the only ship involved in the Incident, Haida could not have suffered damages as referred to in subsection 103(1) of the *MLA*. Section 103 does not, by itself, identify what kind of damages qualify for compensation. Instead, it refers to other provisions – which are the same provisions that establish the strict liability regime for shipowners. Specifically, section 103 allows for claims by persons who have "suffered loss or damage or incurred costs and expenses referred in section 51, 71 or 77 of the *MLA*; Article III of the *Civil Liability Convention*; or Article 3 of the *Bunkers Convention*" (the Liability and Damages Provisions), all of which make the owner of a ship strictly liable to others for pollution damages. Subsection 103(1) directs itself to Part 6 and the conventions, which provide the entry point into an entitlement to compensation. Subsection 103(1) does not itself create a new class of persons who can recover. Rather, it expands the avenues of recovery for an existing class of persons – those who might otherwise recover from a shipowner. The Administrator submits that Haida's interpretation of subsection 103(1) seeks to divorce the damages in those provisions from their context – a shipowner's liability – but this is at odds with the modern approach to statutory interpretation. If subsection 103(1) were intended to work as Haida submits, there would be no reason for it to point to the Liability and Damages Provisions where the broader definition of "pollution damage" would be sufficient or even preferable.

[54] The Administrator also submits that subsection 105(3) prevents it from assessing shipowner "innocence" within the First Recourse regime and that this is problematic for Haida's

interpretation. There is no framework for this assessment within the First Recourse regime. Haida's proposed solution, that the Administrator could subrogate against ship owners, would mean that in this case the Administrator should pay nearly $2.0 million to Haida's UK insurers with the idea of then suing them to determine if the payment had been properly made. This does violence to the meaning of the word "subrogated" as well as to the text of subsection 106(3). Subrogation occurs where one party suffers a loss and is indemnified for it by another party. The indemnifier then acquires the indemnified party's rights against third parties respecting the loss. A claimant ship owner possesses no right of recovery against itself to be conveyed to the Administrator – thus, subrogation is not a solution.

[55] The Administrator also submits that, in the absence of genuine ambiguity between two or more plausible interpretations of a statute, the Court need not resort to external interpretive aids (referencing *CanadianOxy Chemicals Ltd. v Canada (Attorney General*), [1999] 1 SCR 743). In this matter, Haida has not identified a genuine ambiguity in the text of Part 7 and, therefore, it inappropriately advances policy arguments. The Administrator submits that its own interpretation is cohesive, aligns with the purposes of Parts 6 and 7 of the *MLA* and therefore, its interpretation should be adopted by the Court.

Analysis

[56] For the reasons that follow, I find that the Administrator was correct in its interpretation of subsection 103(1) of the *MLA*; that is, shipowners are not eligible to claim compensation from the SOPF under subsection 103(1) where they are the owner of the only ship involved in an incident. Accordingly, the Administrator was also correct in denying Haida's claim.

[57] The Supreme Court of Canada has held that the modern approach expressed by Elmer Drieger in *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87 is the preferred approach to statutory interpretation. That is:

> 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.

(*Rizzo & Rizzo* at para 21; *Bell ExpressVu Ltd Partnership v Rex*, 2002 SCC 42 at para 26 [*Bell ExpressVu*]; *Trustco v Canada*, 2005 SCC 54 at para 10 [*Trusctco*]).

[58] The "interpretation of a statutory provision must be made according to a textual, contextual and purposeful analysis to find the meaning that is harmonious with the Act as a whole" (*Trustco* at para 10). Further, the modern approach "recognizes the important role that context must inevitably play when a court construes the written words of a statute" (*Bell ExpressVu* at para 27).

[59] The entire context of a provision must also be considered before it can determined if it is reasonably capable of multiple interpretations (i.e. it is ambiguous). However, "[i]t is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids" (*Bell ExpressVu* at para 29 citing *Canadian Oxy Chemicals Ltd v Canada (Attorney General)*, 1999 1 SCR 743 at para 14, emphasis added in *Bell ExpressVu*).

[60] The text of subsection 103(1) states:

> 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 expense.

[61] In its decision, the Administrator acknowledged that shipowners are not explicitly precluded as "persons" who may claim compensation under subsection 103(1). The Administrator looked to the context of subsection 103(1) within the *MLA*, the conventions and other related statutes to interpret that provision; that is, the Administrator's analysis engaged "successive circles of context" (*Bristol-Myers Squibb Co v Canada (Attorney General)*, 2005 SCC 26 at paras 43-44).

Objects and purpose of the MLA

[62] The Administrator interpreted of the purpose of Parts 6 and 7 of the *MLA* as being to establish shipowner liability for ship-source oil pollution and to provide compensation to persons who suffer such oil pollution damage on a "polluter pays" model.

[63] In my view, this is abundantly clear from a plain reading of Parts 6 and 7 of the *MLA*. In other words, there is textual support for the Administrator's interpretation. The Liability and Damages Provisions (sections 51, 71, and 77 of the *MLA*; Article III of the *Civil Liability Convention*; and Article 3 of the *Bunkers Convention*) found in Part 6 create an interwoven, international, strict liability regime whereby shipowners are presumptively, that is strictly, liable

for oil pollution damage and related costs and expenses, including mitigative or preventative measures, arising from a discharge or anticipated discharge from their ship. Those provisions are also referred to in Part 7 of the *MLA*, in section 101 and subsection 103(1), which permit persons who incur such ship source oil pollution damage to claim compensation either from the shipowner or the SOPF.

[64] With respect to Part 7, the Federal Court of Appeal in *Adventurer Owner Ltd v Canada*, 2018 FCA 34 [*Adventurer Owner Ltd*] held:

> [44] Part 7 of the MLA is entitled "Ship-source Oil Pollution Fund." Its main purpose is to establish (or continue as the SOPF exists since 1989) a Canadian compensation scheme based on the "polluter pays" principle to compensate the victims of oil pollution by ship, subject to certain conditions and limitations, including time limitation to present their claim.

[65] The Administrator submits that this is the underlying principle of the whole legislative scheme.

[66] Haida appears to dispute this, relying on *BC v SOPF*. There, the Administrator claimed reimbursement from the province of British Columbia [Province], as the owner of a polluting vessel, for expenses the SOPF had incurred pursuant to the *MLA*. Ownership in the vessel had vested in the Province when the company that had owned the vessel dissolved. The case is primarily concerned with the question of whether the trial judge erred with respect to the dissolution of the company that previously owned the vessel.

[67] The British Columbia Court of Appeal noted that the Province's argument turned on the acceptance of the proposition that the *MLA* was intended to enact a "polluter pays" regime. The Province agued, in part, that the trial judge should have exercised his discretion to order the restoration of the dissolved company, with prejudice, based on the purpose of the *MLA*, which purpose the Province asserted was to enforce a "polluter pays" approach to environmental protection. The British Columbia Court of Appeal held:

> [22] In my view, the chambers judge was correct to reject that proposition. The plain wording of the *Act* imposes liability for the cost of preventative measures on the owner at the time the preventative measures are taken. Unlike the legislation in issue in *Tundra Turbos*, it does not impose liability "absolutely, retroactively and jointly and separately" upon responsible persons. While the *Marine Liability Act* imposes liability upon persons whose fault or neglect cause death, personal injury or property damage (Parts 1 and 2, subject to the limitations described in Parts 3-5), the liability for the expense of measures taken to prevent or minimize pollution damage is not described in relation to fault or neglect, it is an incident of ownership. The imposition of liability on the person who has the rights of the owner of the ship with respect to its possession and use at the time clean up expenses are incurred is consistent with the objective of preventing and minimizing oil pollution damage.

[68] It further held that the Province was liable for the damages caused by the ship, notwithstanding that it was an owner by operation of law only and had no part in causing the oil pollution damage.

[69] In my view, *BC v SOPF* supports the Administrator's position, in the matter before me, that Parts 6 and 7 of the *MLA* focus on the liability of shipowners, not because of their fault or "non-innocence", but rather because of their status as shipowners. That is, their strict liability for

oil pollution damage, as described in the Liability and Damages Provisions, arises as an incident of being a shipowner.

[70] It is also not entirely clear to me that the British Columbia Court of Appeal actually found that the polluter pays principle is not an underlying principle of the *MLA*. In any event, I agree with the Federal Court of Appeal in *Adventurer Owner Ltd* in that the main purpose of Part 7 of the *MLA* is to permit SOPF to administer a compensation scheme that is based on the polluter pays principle.

[71] In that regard, in its written submissions referencing *BC v SOPF,* Haida states that the *MLA* provisions dealing with SOPF "must not be construed as strictly a polluter pays regime". When appearing before me it became apparent that, in Haida's view, the polluter pays principle would only have application in circumstances where absolute liability applies, not in circumstances of strict liability, as is the case with Parts 6 and 7 of the *MLA*. This is, perhaps, the distinction suggested by the British Columbia Court of Appeal in *BC v SOPF*.

[72] Haida's view that the Part 6 and 7 regime is not one of a polluter pays regime appears to be intended to support its submission that under the strict liability regime it has a defence and, therefore, it is not a "polluter" and as such, it need not "pay". Alternatively, as stated in its written submissions, it is intended to support the position that a shipowner having a defence under the *MLA* is "not technically 'a polluter' and compensating such an innocent shipowner cannot possibly impair the polluter pays principle". Yet, this latter submission seems to suggest that Haida actually accepts that the polluter pays principle applies. Further, the suggestion that

Haida is not technically a polluter is of no merit. Haida does not deny that the discharge was from its ship.

[73] As found by the Administrator, shipowner liability for oil pollution is strict, subject to certain narrow defences available to shipowners against such claims. It is not at all apparent to me that a strict liability regime cannot also be based on the polluter pays principle. To the extent that this is what Haida is suggesting, I disagree.

[74] In my view, the Administrator correctly interpreted the purpose of Parts 6 and 7 of the *MLA* as establishing strict shipowner liability for ship source oil pollution and to provide compensation to persons who suffer such oil pollution damage based on a "polluter pays" model.

[75] Parts 6 and 7 are not, as Haida suggests, primarily aimed at anticipatory protection of the environment. In that regard, Haida also submits that consideration must be given to whether the purpose and objectives of the *MLA* are served or impaired by an interpretation that would preclude an "innocent" shipowner (i.e. one who has a defence under paragraph 101(1)(b)) from claiming compensation under the *MLA*. Amongst other things, Haida suggests that shipowners and their insurers who are precluded from compensation are unlikely to incur pollution response costs thereby putting the environment at risk.

[76] The Administrator submits that Haida is in fact making an impermissible policy argument. I tend to agree. However, to the extent that Haida is suggesting that shipowners and their insurers would fail to commence an immediate response to ship-source oil pollution

emanating from their vessel – on the premise that the occurrence was wholly caused by an act or omission of a their party with the intent to cause damages but the shipowner would not be able to recover those costs and expenses from the SOPF – this would not seem to be the approach that would be taken by either a responsible shipowner or a responsible insurer. Nor was it the response of Haida.

[77] More significantly, and as the Administrator pointed out when appearing before me, pursuant to subsection 180(1) of the *CSA*, if the Minister of Fisheries and Oceans believes on reasonable grounds that a ship has discharged, is discharging or may discharge a pollutant, the Minister can take the measures set out which include directing any person or ship to take measures to repair, remedy, minimize or prevent pollution damage from the ship. Persons or ships complying with such a direction shall be compensated by Canada – other than the operator of the discharging ship. Failure to respond to such a direction is an offence (*CSA*, s 183(1)(l)). Moreover, if a ship is required to have a shipboard oil pollution emergency plan, then the ship is required to take reasonable measures to implement the plan in respect of an oil pollution incident, failure to do so is also an offence (*CSA*, ss 188, 191(1)(b)).

[78] In short, I do not agree with Haida that the primarily purpose of Parts 6 and 7 of the *MLA* is the anticipatory protection of the environment. The MLA is not dedicated environmental protection legislation. Haida's argument that the purpose and objects of Parts 6 and 7 of the MLA would be defeated if shipowners and their insurers, who are precluded from compensation because they would be unlikely to incur pollution response costs thereby putting the environment at risk, ignores that shipowners who decline to respond to an oil pollution occurrence from their

own ship potentially put themselves at a much wider range of risks than merely not being able to claim compensation under subsection 103(1) of the *MLA* from the SOPF.

Separate claim processes – subsection 101(1) and subsection 103

[79] The Administrator also interpreted subsection 101(1) and subsection 103(1) as providing discrete avenues by which a person who incurs ship-source oil pollution damage, including related costs and expenses, can seek compensation, as subsection 101(1) and subsection 103(1) are not interdependent and operate independently of each other. That is, even if as Haida submits, it has a defence under subsection 101(1)(b) of the *MLA* to its strict liability for oil pollution, this does not make Haida eligible to receive compensation for its own costs and expenses incurred in responding to the Incident by way of a claim made under subsection 103(1) of the *MLA*.

[80] For the reasons that follow, I find that the Administrators interpretation of these provisions is correct.

[81] Subsection 101(1) sets out the circumstances in which the SOPF will be liable for the matters referred to section 51, 71 and 77 of the *MLA*, Article III of the *Civil Liability Convention* and Article 3 of the *Bunkers Convention*. In essence, the SOPF will assume what would otherwise have been the liability of the polluting shipowner in circumstances where recovery from the shipowner is precluded by any of the circumstances listed in paragraphs 101(1)(a) to (h). These circumstances include: where recovery from the polluting shipowner has been attempted but has not been successful; the shipowner has a specified defence; the claim exceeds

the shipowner's limitation of liability; or the shipowner is financially unable to meet its specified obligations. In effect, subsection 101(1) serves to protect and compensate claimants in the event that the polluting shipowner does not, or in the case of a defence, is not required to, meet its strict liability obligations with respect to oil pollution mitigation.

[82] As the Administrator points out, subsection 101(1) does not provide the mechanism or process by which such a claim can be made against the SOPF. Rather, this mechanism is found in subsection 109(1) which specifies that if a claimant commences proceedings against the owner of a ship in respect of a matter referred to in section 51, 71 or 77 of the *MLA* (excepting 77(1)(c) which is not relevant to this matter), Article III of the *Civil Liability Convention* or Article 3 of the *Bunkers Convention*, then the document commencing the proceeding must be served on the Administrator who must appear and take any action, including being a party to a settlement, either before or after judgement, that the Administrator considers appropriate for the administration of the SOPF.

[83] I do not agree with Haida's submission that under subsection 101(1) of the *MLA*, an action can be commenced directly against the SOPF for the matters referred to the Liability and Damages Provisions if the owner of the ship is not liable by reasons of any of the defences available to the shipowner, including s 77(3)(b) of the *MLA* or Article 3(3)(b) of the *Bunkers Convention*.

[84] The liability of the SOPF under subsection 101(1) arises when a claimant has brought an action against the polluting shipowner seeking compensation but, for the reasons set out in

paragraphs 101(1)(a) to (h), the claimant is precluded from recovery. As such, as the Administrator describes it, this is a claim of Last Recourse as a claimant must first attempt to recover from the shipowner before compensation is available from the SOPF. However, as the Administrator found, Haida, as the owner of the polluting ship, cannot sue itself. Thus, Haida cannot trigger section 109 – which is the entry point for the Administrator – permitting it to participate in the action commenced by the claimant and respond to the SOPF's subsection 101(1) liabilities.

[85] Conversely, subsection 103(1) is concerned with claims filed directly with the Administrator.

[86] Subsection 103(1) explicitly states that "*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 expense" (emphasis in italics added).

[87] Subsection 105(1) states that that when the Administrator receives a claim under section 103, the Administrator shall investigate and assess it (s 105(1)(a)) and make an offer of compensation to the claimant for whatever portion of the claim that the Administrator finds to be established (s 105(1)(b)). When investigating and assessing a claim, the Administrator may only consider: whether the claim is for loss, damage, costs or expenses referred to in subsection

103(1) and, whether it resulted wholly or partially from an act or omission of the claimant with intent to cause damage or the claimant's negligence (s 105(3)).

[88] If the Administrator makes an offer of compensation to a claimant under paragraph 105(1)(b) and the offer is accepted, then under paragraph 106(3)(c), the Administrator is, to the extent of the payment to the claimant, subrogated to any right of the claimant referred to in paragraph 106(3)(b), that is, any right the claimant might otherwise have had against any person in respect to the matters referred to in sections 51, 71 and 77 of the *MLA*, Article III of the *Civil Liability Convention* and Article 3 of the *Bunkers Convention*. The Administrator must then take all reasonable measures to recover the amount of the payment from the shipowner, the International Fund, the Supplementary Fund or any other person liable, and the Administrator may commence an action in the its name or the claimant's name for this purpose (s 106(3)(d)).

[89] Thus, the subsection 103(1) claim regime is comprised of subsections 103(1), 105(1), and paragraphs 106(3)(c) and (d). There is no provision in subsection 103(1) whereby the criteria set out in subsection 101(1) – which engage the SOPF's liability with respect to actions brought by claimants against shipowners – play a role in the Administrator's decisions to compensate claims made directly to it by way of subsection 103(1).

[90] In my view, on a plain reading of subsection 101(1), subsection 103(1) and the above described related provisions, the Administrator correctly interpreted subsection 101(1) and subsection 103(1) as being separate and discrete avenues by which claimants may seek compensation for oil pollution damage and related costs and expenses. More specifically, Haida

brought its claim under subsection 103(1) of the *MLA*. Nothing in that provision suggests that Haida's assertion that it has a defence pursuant to paragraph 101(1)(b) is a factor that comes into play when the Administrator is assessing a claim made under subsection 103(1).

[91] I agree with the Administrator that this alone is dispositive of Haida's appeal.

[92] However, I will address some of Haida's submissions concerning its view that there is a demonstrated interplay between subsection 101(1) and subsection 103(1).

No interplay between subsections 101(1) and 103(1)

[93] As a preliminary point, I note that the only reference to section 101 in subsection 103(1) is the statement that subsection 103(1) is *in addition to* any right against the SOPF under section 101 and that a person who has suffered loss or damage or incurred costs or expenses referred to in the Liability and Damages Provisions in respect of actual or anticipated oil pollution damage *may file a claim with the Administrator* for the loss, damage, costs or expenses under section 101. This is not suggestive of an interdependence of those provisions. Additionally, while both subsection 101(1) and subsection 103(1) contain references to the Liability and Damages Provisions, such a structure would not be necessary if subsection 103(1) was dependent on or connected to subsection 101(1). If that was the intent, then subsection 103(1) could simply refer to "the matters referred to in section 101". For example, this approach was taken in subsection 105(3) of the *MLA*. There, paragraph 105(3)(a) states that when investigating and assessing a claim the Administration may consider only "whether it is for loss, damage, costs or expenses referred to in subsection 103(1)". This use of statutory language demonstrates the relationship

between sections 103 and 105 and that the scheme in subsection 103(1) runs separately and in addition to the liability of the SOPF as set out in subsection 101(1). Subsection 103(1) is not dependent on the SOPF's liability pursuant to subsection 101(1).

i. Section 105

[94] Haida submits that the Administrator's interpretation of section 105(3)(a) is flawed. According to Haida, the Administrator's consideration of a claim made under subsection 103(1) includes a determination of whether the costs and expenses claimed are referred to in section 71 (*Bunkers Convention*) or section 77. Haida submits that sections 71 and 77 allow for a determination of a shipowner's liability. Therefore, the "factors to be considered" under paragraph 105(3)(a), and by this Court under subsection 106(2), include a consideration of the factors giving rise to the liability of the SOPF under subsection 101(1).

[95] A plain reading of subsection 105(3) does not support Haida's interpretation. Under subsection 105(1), when the Administrator receives claim made under subsection 103(1), the Administrator must do two things: i) investigate and assess that claim and ii) make an offer of compensation to the claimant for whatever portion of it that the Administrator finds to be established. Subsection 105(3) outlines the scope of what the Administrator may consider when doing so:

> Factors to be considered
>
> (3) When investigating and assessing a claim, the Administrator may consider only
>
> > (a) whether it is for loss, damage, costs or expenses referred to in subsection 103(1); and

> (b) whether it resulted wholly or partially from
>
> (i) an act done or omitted to be done by the claimant with intent to cause damage, or
>
> (ii) the claimant's negligence.
>
> ….

[96] Relatedly, section 106(2) deals with appeals from section 103 decisions by the Administrator:

> 106(2) A claimant may, within 60 days after receiving an offer of compensation or a notification that the Administrator has disallowed the claim, appeal the adequacy of the offer or the disallowance of the claim to the Admiralty Court, but in an appeal from the disallowance of a claim that Court may consider only the matters described in paragraphs 105(3)(a) and (b).

[97] Subsection 105(3) expressly limits what factors the Administrator can consider when assessing a claim made under subsection 103(1). Liability of the shipowner is not one of those factors. Subsection 103(1) permits a person who has suffered loss or damage or incurred costs or expenses referred to in section 51, 71 or 77 of the *MLA*, Article III of the *Civil Liability Convention* or Article III of the *Bunkers Convention* to file a claim for the loss, damage, costs or expenses directly with the Administrator. This is premised on the shipowner's strict liability. It is because of this presumptive strict liability that the Administrator, when addressing a subsection 103(1) claim, need not assess shipowner liability. Conversely, to engage the liability of the SOPF and the participation of the Administrator subsection 101(1) claims require claimants to first commence an action against the polluting shipowner to address liability – in the course of which the shipowner can assert any available defence. Subsection 103(1), unlike subsection 101(1), does not require the claimant to establish the liability of a shipowner. Indeed, under subsection

105(4) a claimant is not even required to satisfy the Administrator that the occurrence was caused by a ship – although the Administrator must dismiss a claim if not satisfied on the evidence that it was not.

[98] Haida also submits that the argument that the Administrator and the Court are, pursuant to subsections 105(3) and 106(2), without authority and therefore unable to consider whether the shipowner has established a subsection 77(3) defence to its subsection 77(1) strict liability obligations, is simply wrong and contrary to the jurisprudence. In that regard, Haida footnotes *The Administrator of the Ship-source Oil Pollution Fund v Beasse*, 2018 FC 39 [*Beasse*].

[99] However, in *Beasse* the Administrator had brought a motion for summary judgment with respect to a subrogated action against the shipowner. Justice Manson identified the issues before him as being whether summary trial was appropriate under Rule 216 of the *Federal Courts Rules* and, if so, whether summary judgement should be granted. In considering whether the matter should proceed by way of summary judgment, Justice Manson found that the Administrator had established that the expenses incurred due to pollution were caused by the first sinking of the vessel [First Sinking]. He stated that he agreed with the Administrator that the onus then shifted to the defendant shipowner to prove its defence of third party responsibility under paragraph 77(3)(b) of the *MLA*. Justice Manson found that "[t]he Defendant has *failed to raise a genuine issue for trial* based on purely speculative conjecture of a third party causing the First Sinking, when the facts indicate on a balance of probabilities no such activity occurred" (at para 42, emphasis in italic added). The obligation of the defendant shipowner "to put its best foot forward" had not been met. Justice Manson concluded that there was no useful purpose in

proceeding to trial as the evidence would shed no better light on the facts concerning the First Sinking than was already before him. There was no evidence to support a finding of third party involvement to justify a defence under paragraph 77(3)(b) of the *MLA* and, accordingly, that it was in the interest of justice for the Court to decide the matter by way of summary judgment.

[100] It is significant to note that *Beasse* is not a case where a claim for compensation was made to the Administrator under subsection 103(1) of the *MLA* and was denied, giving rise to an appeal to the Court under subsection 106(2) of the *MLA*, which is the situation before me. Rather, in *Beasse*, the CCG had presented a claim to the Administrator for its costs and expenses incurred in responding to the incident. The Administrator paid the claim and commenced a subrogated action against the shipowner. It appears that the shipowner then raised a paragraph 77(3)(b) defence (that the occurrence was wholly caused by an act or omission of a third party with intent to cause damage) to its strict liability *in response to that subrogated action*.

[101] I do not understand *Beasse* as standing for the proposition that on an appeal brought pursuant to subsection 106(2) of the *MLA*, this Court may consider the subsection 77(3) or other defences available to the shipowner and, by extension, that the Administrator can consider such defences as factors under subsection 105(3).

[102] To summarize, Haida's submission that the "factors to be considered" under paragraph 105(3)(a) must include a consideration of the factors giving rise to the liability of the SOPF under section 101(1) because sections 71 and 77 allow for a determination of a shipowner's a liability is directly contradicted by the express wording of subsection 105(3). Moreover, *Beasse*

does not support Haida's submission. Haida's submission is also at odds with the intent of subsection 103(1), which is to permit claimants to make a direct claim to the Administrator. Such claims can be quickly resolved by a consideration of only the limited factors set out. To import a requirement that the Administrator must also assess shipowner liability and any available defences to its strict liability would defeat the intent of the subsection 103(1) compensation scheme and ignores that subsection 103(1) operates on the premise of presumed shipowner strict liability. Nor does subsection 103(1) provide a framework pursuant to which the Administrator could perform such an assessment.

ii. Section 102

[103] Haida asserts that the Administrator's interpretation of subsection 103(1) omitted any reference to section 102 of the *MLA*. According to Haida, section 102 permits a right of recovery against a shipowner who has no defence to a claim. Haida submits that section 102 "renders any claim by a shipowner with no defence meaningless as any claim by such a shipowner would be met by a section 102 subrogation claim," while "a shipowner with a defence [i.e. an 'innocent' shipowner] is not subject to a subrogation claim". Accordingly, Haida submits, it is important to consider section 102 "when assessing the interplay between ss.101 and 103" and yet, the Administrator's interpretation of subsection 103(1) of the *MLA* failed to take this into account. Haida submits that the right of subrogation under section 102 "closes the loop" for shipowners without a defence under section 71 or 77.

[104] As I have found above, there is no interplay between subsection 101(1) and subsection 103(1) of the *MLA*.

[105] In any event, subsection 102(1) provides that if there is an occurrence that gives rise to the liability of an owner of a ship under section 51, 71 or 77 of the *MLA*, Article III of the *Civil Liability Convention* or Article 3 of the *Bunkers Convention*, the Administrator may, either before or after receiving a claim under section 103, commence an action *in rem* against the ship. However, the Administrator may only continue that action if they have become subrogated to the rights of the claimant under paragraph 106(3)(c). Paragraph 106(3)(c) specifies that if a claimant accepts an offer of compensation from the Administrator then the Administrator is, to the extent of the payment to the claimant, subrogated to any right of the claimant referred to in paragraph 106(3)(b) – that is, any right the claimant might have otherwise had against any person in respect to the matters referred to in sections 51, 71 and 77 of the *MLA*, Article III of the *Civil Liability Convention* and Article 3 of the *Bunkers Convention*.

[106] The Administrator points out that subsection 105(3) precludes the Administrator from making a determination of a shipowner's liability. In other words, there is no framework for assessing shipowner liability in the context of the assessment of a subsection 103(1) claim. The Administrator does not agree that this lack of a framework is cured, as Haida submits, by way of subrogation.

[107] In my view, Haida's interpretation of the role and application of section 102 is contrived and does not reflect the purpose and scheme of a subsection 103(1) claim. That scheme is that if the Administrator, having assessed a claim made directly to it – which assessment does not include a consideration of liability – makes an offer of compensation, then the Administrator becomes subrogated to the rights of the claimant and may seek to recover the amount paid as

compensation (ss 103(1), 105(1), 105(3) 106(1), 106(3)(b)-(d)). More specifically, the Administrator is required to take all reasonable steps "to recover the amount of the payment *from the owner of the ship*" or the International Fund, the Supplementary Fund or any other person liable. Moreover, the Administrator may commence an action in the Administrator's name or the name of the claimant for this purpose (s 106(3)(d)). In the normal course, the shipowner will be the target of the subrogated action as the shipowner is strictly liable for the oil pollution damage and related costs and expenses. At that stage, the shipowner could assert any defence it might have (*Beasse*).

[108] Subection 103(1) is the First Recourse direct claim to the Administrator and any related subrogation action by the Administrator simply does not work in a situation where the claimant *is* the strictly liable polluting shipowner. First, the Administrator is highly unlikely to pay a claim of compensation to a strictly liable polluting shipowner given the strict liability scheme of Parts 6 and 7 and the underlying polluter pays principle. Second, even if it did, that shipowner cannot assign to the Administrator its subrogated right to sue itself. Thus, the Administrator would be effectively precluded from bringing a subrogated action and meeting its obligation to take all reasonable measures to recover the sums paid out as compensation. Third, to suggest that the Administrator would instead commence an action against the polluting shipowner to determine if, under section 77, the shipowner has a defence to the claim and is therefore entitled to keep the compensation paid in respect of the occurrence, falls outside the scheme of subsection 103(1) claims and incorrectly imports a liability criteria and assessment that is not a part of that process. It is also not apparent from the legislation that the Administrator would have the authority to do so.

[109] Accordingly, I find that the Administrator's interpretation of subsection 103(1) was not rendered incorrect by failing to refer to section 102. Given that pursuant to subsection 105(3), the Administrator is precluded from making a determination of a shipowner's liability, section 102 has no application, nor does section 102 serve to import a post settlement polluting shipowner's liability determination into the subsection 103(1) direct claim process.

Conclusion

[110] Although the parties made various other submissions, I need not address each of these as they are, in essence, encompassed within or resolved by my reasons above. I would also add that the Administrator's decision not only correctly interpreted subsection 103(1) but was comprehensive in its reasoning.

[111] I find that the Administrator correctly interpreted subsection 103(1) of the *MLA* to be a distinct claim process than that set out in subsection 101(1). Subsection 103(1) claims are made directly to the Administrator who is explicitly permitted to investigate and assess such claims considering only the two factors set out in subsection 105(3) – neither of which include whether a shipowner has a defence to its strict liability. This interpretation is also consistent with the objective and purpose of Parts 6 and 7 of the *MLA*. That is, that shipowners are held to be strictly liable for ship-source oil pollution and the underlying concept of "polluter pays". Section 103(1) operates on the premise that shipowners are presumptively strictly liable. It serves as a first recourse compensation regime which permits those who have suffered loss or damage or incurred costs or expenses referred to in section 51, 71 or 77 of the *MLA*, Article III of the *Civil Liability Convention* or Article 3 of the *Bunkers Convention* to make claims directly to the

Administrator. A polluting shipowner cannot import a defence to liability available under the subsection 101(1) compensation regime to enable it to claim compensation under subsection 103(1). The Administrator correctly interpreted subsection 103(1) of the *MLA* as not creating a right for a shipowner to recover costs and expenses incurred to prevent, repair, remedy or minimize potential oil pollution damage resulting from an incident caused solely by its own ship.

Costs

[112] Both parties sought costs but neither made submissions as to quantum.

[113] Pursuant to Rule 400(1) of the *Federal Courts Rules*, SOR/98-106, the Court has full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid. In exercising that discretion the Court may consider the factors set out in Rule 400(3), which include: the result of the proceeding; the importance and complexity of the issues; whether the public interest in having the proceeding litigated justifies a particular award of costs; any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding; and, any other matter that the Court considers relevant. The Court may fix all or part of any costs by reference to Tariff B and may award a lump sum in lieu of, or in addition to, any assessed costs (Rule 400(4)).

[114] In this matter, I am of the view that an award costs to the Administrator, as the successful party, based on Column III of Tariff B is appropriate.

JUDGMENT IN T-1375-21

THIS COURT'S JUDGMENT is that

1. The appeal is dismissed; and

2. Costs in favour of the Administrator based on Column III of Tariff B.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1375-21
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