Federal Court Cour fédérale

Date: 20220921

Dockets: T-1094-21
T-1104-21

Citation: 2022 FC 1310

Ottawa, Ontario, September 21, 2022

PRESENT: The Honourable Madam Justice Strickland

Docket: T-1094-21

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Appellant

and

THE ADMINISTRATOR OF THE SHIP-SOURCE OIL POLLUTION FUND

Respondent

Docket: T-1104-21

AND BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Applicant

and

THE ADMINISTRATOR OF THE SHIP-SOURCE OIL POLLUTION FUND

Respondent

JUDGMENT AND REASONS

Overview

[1] These proceeding involve statutory appeals brought pursuant to s 106(2) of the *Marine Liability Act*, SC 2001 c 6 [*MLA*] and, applications for judicial review, all arising from two decisions of the Administrator [Administrator] of the Ship-source Oil Pollution Fund [SOPF] disallowing claims made by the Canadian Coast Guard [CCG]. The CCG claims were made pursuant to s 103(1) of the *MLA* and sought compensation for costs and expenses incurred by the CCG to prevent anticipated oil pollution damage from incidents involving two vessels: the *Miss Terri* and the *Stelie II*. The Administrator found that the claims were made outside of the limitation period established by s 103(2)(a) of the *MLA* and disallowed them.

[2] The Applicant/Appellant [Canada] brought two appeals, one in respect of each vessel, pursuant to s 106(2) of the *MLA*, and also two applications for judicial review, one in respect of each vessel, challenging the Administrator's decisions. By orders of Prothonotary Aalto, dated July 16, 2021, both appeals were consolidated as Court File No. T-1094-21 and both applications for judicial review were consolidated as file Court File No. T-1104-21. It was also ordered that that Court Files Nos. T-1094-21 and T-1104-21 would be heard together.

Factual Background

Miss Terri

[3] According to the claim submission of the CCG to the Administrator, on February 23, 2018, the Harbour Master for Discovery Harbour, at Campbell River, British Columbia, reported to the CCG that the *Miss Terri*'s bilge pump was operating continuously due to an ingress of water. The Harbour Master, assisted by the CCG, installed additional bilge pumps to keep the vessel afloat. Initial efforts to contact the vessel owner were not successful and the Harbour Master continued to maintain a watch on the vessel. The bilge pumps were reported as pumping water for 30 minutes a day, twice a day. When the vessel owner was contacted, he was informed that he was responsible for mitigating the risk of a discharge of oil pollution and that he must submit a plan for doing so. The owner did not provide any mitigation plan.

[4] On September 11, 2018, a CCG Environmental Response [CCG ER] crew were at the Discovery Harbour marina responding to another incident. They observed the bilge pumps of the *Miss Terri* running 30 minutes of every hour. The vessel owner was advised of the situation but did not respond. On September 18, 2018, the Harbour Master reported that the bilge pumps were continuously pumping water and he could not continue to monitor the vessel and maintain the pumps. Due to the imminent threat of the *Miss Terri* sinking and polluting the marine environment, the CCG ER retained Saltair Marine [Saltair] which towed the *Miss Terri* to a facility at Ladysmith, British Columbia on September 19, 2018. The CCG ER also retained a marine surveyor, Building Sea Marine, to attend on the vessel.

[5] Further efforts to have the vessel owner take measures to mitigate the threat of marine pollution were unsuccessful. On November 1, 2018, Saltair reported to the CCG that the *Miss Terri* required constant pumping to keep it afloat. On November 6, 2018, the CCG instructed Saltair to remove the *Miss Terri* from the marine environment. On removal, the vessel was found to have significant hull damage below the waterline. The *Miss Terri* was deconstructed by Saltair between November 29, 2018 and December 14, 2018 at the CCG's expense. The CCG made a claim to the Administrator, by letter dated August 27, 2020, in the amount of $88,576.24. The submission's supporting materials included invoices from Saltair and a survey report entitled "'Miss Terri' Survey for Condition & Salvage Value" prepared by Building Sea Marine [*Miss Terri* Survey Report].

[6] By letter dated February 23, 2020, the Administrator wrote to the CCG informing it that the subject matter of the claim involved a novel issue of mixed fact and law. The Administrator stated that although the materials submitted by the CCG "do not directly document the discharge of oil from the vessel…a careful review of the evidence suggests that a discharge did occur. As a result of that probable determination, the claim was likely submitted to the Administrator after the applicable prescription date and should therefore be rejected". The Administrator attached a 24-page draft decision and invited the CCG to provide any submissions or feedback on the expected determination that the *Miss Terri* had discharged oil, as well as how the limitation period ought to be applied on the facts. By letter dated March 30, 2021, the CCG provided submissions in response to the Administrator's draft reasons.

[7] The Administrator issued a “Letter of Disallowance” on May 17, 2021 with respect to the CCG’s *Miss Terri* claim. This is one of the decisions that is the subject of an appeal and an application for judicial review now before me.

Stelie II

[8] According to the claim submission of the CCG to the Administrator, on March 23, 2016, Transport Canada [TC] was informed by the Royal Canadian Mounted Police [RCMP] that the *Stelie II* had broken free of its mooring at Northern Boat Repair Ltd.’s [NBR] facility in Port Saunders, Newfoundland and Labrador, during high winds and was starting to sink in the ice. The vessel was resting against an adjacent dock causing damage and a concern had also been raised about pollutants on board. TC contacted the CCG ER to inform it of the pollution potential.

[9] The CCG ER personnel attended on the vessel on March 25, 2016. The vessel was found with no mooring lines and a substantial starboard list. The CCG narrative reported that upon entry, a strong odour of diesel fuel was noted. The engine room was three-quarters full of water, and pollutants consisting of lube oil, hydraulic oil, diesel oil and debris were described as scattered everywhere. There were open trays with oil, buckets of oil, paint cans, fire extinguishers on deck, flares scattered about and other pollutants were reported as clearly visible even though the vessel had no lights or power. The CCG ER determined that the vessel posed an immediate potential pollution threat and the best immediate course of action would be to pump the ingress water out of the vessel. The CCG ER commenced dewatering the vessel on March 25,

2016. This was completed on March 26, 2016 at which time the vessel was lifted out of the water and stored at the CCG's expense.

[10] Various efforts to have the vessel owner take measures to mitigate the threat of marine pollution and assume financial and other responsibility for the vessel were unsuccessful.

[11] On March 29, 2016, and April 7, 2016, the CCG corresponded with the Administrator, alerting it to the situation. On March 8, 2018, at the request of the CCG, the Administrator wrote to the CCG advising, based on the CCG's representations that the *Stelie II* was not the source of a discharge of pollutants and the actions taken by the CCG were taken in regard to a threat of pollution, that the applicable limitation period before which the CCG could bring a claim to SOPF was five years from the date of the occurrence, represented as being March 24, 2016. Accordingly, the CCG's claim would be admissible until March 25, 2021.

[12] The CCG sent an "interim" submission to the Administrator on April 30, 2018, to be held in abeyance until such time as the response operations had been resolved. By email of July 5, 2018, the Administrator advised the CCG that the interim claim had not suspended or otherwise affected the limitation period. By reply email, counsel for the CCG confirmed that they shared this understanding.

[13] The *Stelie II* remained in storage for some time, in part due to an ownership dispute. The CCG retained TriNav Marine Design Inc. [TriNav] to conduct a vessel survey. TriNav completed its assessment of the vessel on August 18, 2016 and prepared a report entitled "'Stelie

II' Vessel Survey" dated September 23, 2016 [*Stelie II* Survey Report]. On October 26, 2016, the CCG ER hired vacuum trucks from Pardy's Waste Management and Industrial Service Limited [Pardy's] to remove pollutants on board the *Stelie II*. On February 14, 2018, the CCG deemed the vessel to be an unacceptable risk and that its deconstruction was the only feasible option to prevent future oil pollution to the marine environment. The *Stelie II* was deconstructed in August 2019 at the CCG's expense. The CCG made a claim to the Administrator in respect of its costs and expenses incurred with respect to the *Stelie II* in the amount of $114,897.43 on October 7, 2020.

[14] By email dated February 26, 2021, counsel for the Administrator wrote to counsel for the CCG, advising that the Administrator had concerns about the CCG's submission that the Administrator wished to bring to the CCG's attention and, that the concerns resulted in an invitation to submit supplementary documentation. The email states that "it appears to the Administrator that the STELIE II probably did in fact cause a discharge of oils at some point in late March of 2016". Counsel for the Administrator stated that while the evidence did not expressly record any such discharge, one might be reasonably inferred because the CCG's narrative reported that the *Stelie II* was listing severely with open trays and buckets of oil on its deck. This list may have caused some quantity of these oils to enter the water. Further, the CCG's documentation offered no explanation as to what was done with the presumably large volume of oily water pumped from the *Stelie II* on March 25 and 26, 2016. Without any evidence showing that this contaminated water was isolated and disposed of through appropriate waste streams, it appeared likely that some or all of it ended up in the waters of the harbour. This discharge would probably have resulted in oil pollution damage, which would engage the two-

year limitation period. This period would have expired in late March 2018. As a result, the claim might not be eligible for compensation. Counsel for the Administrator invited the CCG to present all relevant documentation in its possession, as well as any comment it may have, by March 31, 2021.

[15] Counsel for the CCG provided a response submission by email dated March 31, 2021.

[16] The Administrator issued a "Letter of Disallowance" dated May 26, 2021 with respect to the CCG's *Stelie II* claim. This is one of the decisions that is the subject of an appeal and application for judicial review now before me.

Relevant Legislation

Marine Liability Act, SC 2001 c 6* (*version in force from 2015-06-08 to 2018-12-12, the time period relevant to these matters)

> 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.
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> 103 (2) Unless the Admiralty Court fixes a shorter period under paragraph 111(a), a claim must be made
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> > (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.
>
> 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.

…

105 (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.

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).

Canada Shipping Act, SC 2001, c 26 [*CSA*]

180 (1) If the Minister of Fisheries and Oceans believes on reasonable grounds that a vessel or an oil handling facility has discharged, is discharging or may discharge a pollutant, he or she may

(a) take the measures that he or she considers necessary to repair, remedy, minimize or prevent pollution damage from the vessel or oil handling facility, including, in the case of a vessel, by removing — or by selling, dismantling, destroying or otherwise disposing of — the vessel or its contents;

(b) monitor the measures taken by any person or vessel to repair, remedy, minimize or prevent pollution damage from the vessel or oil handling facility; or

> (c) if he or she considers it necessary to do so, direct any person or vessel to take measures referred to in paragraph (a) or to refrain from doing so.

[17] Unless otherwise specified, all references to the *MLA* in these reasons are to the version that was in force at the time of the *Miss Terri* and *Stelie II* incidents, as set out above.

Decisions Under Review

The Miss Terri

[18] In the May 17, 2021 Letter of Disallowance, the Administrator determined that the limitation period under s 103(2)(a) of the *MLA* applied and had expired prior to the submission of the CCG's claim. Therefore, the submission was not admissible under s 103(1) of the *MLA*.

[19] After reviewing the narrative of the incident as submitted by the CCG, the Administrator stated that in determining which limitation period applied, it was important to first determine if there was a discharge of oil from the vessel. The Administrator noted the absence of an "explicit observation" of oil in the water originating from the vessel. However, this did not mean that no discharge occurred. There was indirect evidence of a discharge, or more likely multiple discharges, occurring prior to September 4, 2018. The Administrator stated it was more probable than not that rain water would have regularly entered the vessel, become contaminated with oil, and then been pumped overboard.

[20] The Administrator stated that the layout of the vessel and its physical condition provided important evidence. The *Miss Terri* Survey Report found that most of the paying compound was

missing, many of the (deck) planks had gone soft or were rotted entirely and that rain water could have penetrated most of the areas of the deck that were exposed to the elements. The Administrator found that that the surveyor's observations and conclusions with respect to the deck were likely correct and, on a balance of probabilities, that rain would have penetrated the deck and entered the below-deck spaces throughout the vessel, including the forward spaces.

[21] Further, the *Miss Terri* Survey Report also noted that the vessel's machinery space and forecastle bilges were "moderately fouled with oil" and photographs from that report showed oily bilges in the main engine, forecastle and stern gland areas of the vessel. Based on this, as well as photographs from Saltair, the Administrator stated that it was accepted that both the machinery space and the forecastle space were contaminated with oil such that water coming into contact with those spaces would be contaminated with oil. The Administrator noted that there was no evidence that the oily state of the vessel had changed between February 23, 2018 (when the CCG had first installed additional bilge pumps) and when it was inspected by Building Sea Marine (on September 18, 2018).

[22] Although there was no direct evidence as to what happened to the vessel between those dates, the Administrator had already determined that it was more likely than not that when rain fell on the vessel, the rain water penetrated the deck, became contaminated with oil and was then discharged from the aft pumps. Further, that it was "accepted" that between February 23 and September 3, 2018 there had been significant and multiple rainfalls. The Administrator received the CCG's submission on September 4, 2020 but concluded that the discharges of oil occurred prior to September 4, 2018.

[23] As the claim was not submitted within two years of those discharges, the Administrator stated that the shortest of the limitation periods under s 103(2) might apply and that an examination of whether the claim could be admitted under s 103(1) was required. The Administrator then embarked on a lengthy exercise of statutory interpretation of s 103(2)(a) and concluded that the provision imposes a limitation period of two years after the oil pollution damage occurs as a result of an initiating incident. It further concluded that all claims stemming from the same facts, and all claimants were therefore subject to the same limitation period.

[24] The Administrator stated that the final determination to be made was whether the discharges that occurred caused "oil pollution damage" as defined in s 91(1) of the *MLA* and, based on its prior findings of fact, concluded that the discharges prior to September 4, 2018 likely caused oil pollution damage. As a result, the s 103(2)(a) limitation period expired prior to September 4, 2020 and the CCG's claim was inadmissible under s 103(1).

[25] The Administrator then reviewed the response received from the CCG to the Administrator's February 23, 2021 correspondence providing its draft decision. The Administrator understood the CCG to make two primary points. First, that the CCG handled the incident in accordance with threat assessment criteria in accordance with the *CSA* and there was no evidence that a discharge occurred. The Administrator stated that the CCG's use of the *CSA* threat assessment was understandable but the Administrator did not agree that those criteria had any bearing on when the limitation period began to run. As such, the CCG's response did not alter the Administrator's factual determinations in that regard. Second, the CCG submitted that it was problematic for a claimant not to know when the limitation period begins to run. To this the

Administrator agreed that under its interpretation, a claimant might lose the right to claim as a result of not being aware of when the limitation period began to run and a claim might even be barred before a claimant suffers damage. However, in the Administrator's view, an alternative interpretation of s 103(2) allowing consideration of a claimant's knowledge and subjective beliefs in determining when the limitation period begins to runs was not available. The relevant limitation period is focused on events affecting the subject ship, rather than a claimant's role in those events. The Administrator concluded that its factual determinations and determinations of mixed fact and law did not change in light of the CCG's response.

The Stelie II

[26] In the May 26, 2021 Letter of Disallowance concerning the *Stelie II*, the Administrator determined that that the limitation period under s 103(2)(a) of the *MLA* applied and had expired prior to the submission of the CCG's claim. Therefore, the claim was not admissible under s 103(1) of the *MLA*.

[27] In support of that determination, the Administrator set out the exchanges between it and the CCG prior to its claim submission on October 8, 2020, including photographs provided by the CCG. The Administrator also noted the *Stelie II* Survey Report, which had been included with the CCG's claim submission, finding that certain passages of that report were relevant to the determinations of the Administrator. In particular, references to the presence of oily water in various spaces on board the vessel. The Administrator also noted that the CCG notes submitted with its claim indicated that a pumper truck had been on standby for March 25, 2016.

[28] The Administrator then described its February 26, 2021 letter to the CCG outlining the Administrator's concerns with the CCG's claim and the CCG's March 31, 2021 response. The Administrator described its investigation into whether a discharge had occurred, which was comprised of calls to the RCMP, who advised that none of its personnel were on scene, to the proprietor of the NBR facility who did not recall whether oil was visible in the harbour or on the ice around the *Stelie II* and, to Pardy's who neither confirmed nor denied having been on scene and refused to discuss its CCG contracts without authorization to do so.

[29] According to the Administrator, whether the claim was submitted within the limitation period was an issue that required significant factual and legal determinations. The Administrator noted that there was some ambiguity in s 103(2)(a) of the *MLA*, but that it would first address whether the incident resulted in a "discharge" of oil, because "oil pollution damage" as defined in the *MLA* cannot occur without a discharge of some volume of oil.

[30] The Administrator determined that it was probable that a discharge of oil occurred as a result of the incident and the response to the incident. The Administrator first found that it was likely that some oil from the open containers on the vessel's deck had escaped into the water. The *Stelie II* had begun to list on March 23 or March 24, 2016, and continued to do so until the pumping operation on March 25, 2016. Photographs on the record showed nothing in the vessel's configuration that would have prevented oil stored in open containers on deck from escaping into the water while the vessel leaned heavily to starboard. Further, the containers themselves would have inevitably slid and jostled as the vessel listed. Second, stormy weather, which the Administrator stated it had determined was violent enough to sever the vessel's mooring lines,

caused the vessel to drift through ice and impact the other side of the dock facility. The Administrator noted that none of the photographs depicting the vessel's starboard side and adjacent harbour ice appeared to show signs of escaped oils, however, that the absence of visual evidence was not wholly determinative of the issue. The Administrator stated that if a discharge had occurred, any resulting hydrocarbon staining may not be readily apparent from photographs taken from a distance and that any discharge may have been somewhat dispersed during the storm.

[31] In addition to the likely discharge from the containers on deck, the Administrator pointed to the fact that there had been significant water ingress into the *Stelie II*'s engine room (and other below-deck spaces) which was pumped directly from the engine room into the harbour. Referring to the CCG narrative, the *Stelie II* Survey Report, and photographs showing that sorbent materials were used in deconstruction, the Administrator found that the volume of water pumped overboard would have been substantial, that the water levels would have largely submerged the vessel's machinery, and that the water within the vessel's engine room must have been contaminated. While the CCG had submitted that the intake hose was placed deep within the vessel during dewatering so as not to discharge the oil which was floating on the surface of the water within the vessel, the Administrator stated that it did not have the benefit of a direct witness's account as to what was done. Further, the CCG had claimed deconstruction costs, which are allowable if the vessel itself poses a threat of oil pollution, such as when a wooden vessel is so saturated with oil that, if submerged, its timbers would discharge oil. That being the case, submerging a hose deep into the water inside the engine room would not necessarily be sufficient to avoid a discharge of oil. The Administrator found that even if the oil on the surface

of the water inside the *Stelie II* had been successfully avoided, it would not be safe to conclude that no discharge occurred.

[32] The Administrator stated that, notwithstanding the CCG's position as to a lack of observation of a discharge and the positioning of the intake hose during dewatering, given the large volume of water pumped out and the contaminated state of the *Stelie II*, it was determined that a discharge occurred during the pumping operation. The oil in the open containers also had to be taken into account and this bolstered the determination that a discharge occurred during or before the CCG's response on March 25 and 26, 2016.

[33] The Administrator then referenced its interpretation of s 103(2)(a) in the *Miss Terri* matter. First noting that the appropriate reading of s 103(2)(a) results in a limitation period of two years after the first instance of "oil pollution damage" that occurs as a result of an underlying incident and all claims stemming from the same facts are therefore subject to the same limitation period. Second, that the appropriate threshold for determining whether "oil pollution damage" as having occurred is very low.

[34] The Administrator determined, on the balance of probabilities, that the discharge or discharges that that occurred between March 23 and 26, 2016, caused oil pollution damage. Therefore, the s 103(2)(a) limitation period expired at some time between March 23 and 26, 2018. As the claim was not submitted within two years of those dates, the claim was inadmissible under s 103(1), and was disallowed.

Issues

[35] In my view, the issues in these matters can be appropriately framed as follows:

1. Are challenges to the decisions of the Administrator disallowing the claims, based on the limitation periods in s 103(2) of the *MLA*, properly taken as applications for judicial review or, as statutory appeals under s 106(2) of the *MLA*?

2. What is the applicable standard of review?

3. Did the Administrator commit a reviewable error in finding that the s 103(2)(a) limitation period applied and that the CCG was out of time to file a claim pursuant to s 103(1) with respect to either or both of the *Miss Terri* or the *Stelie II* claims?

Issue 1: Are these matters properly heard as applications for judicial review or as statutory appeals pursuant to s 106(2) of the *MLA*?

[36] Given the uncertainty as to the appropriate procedure, and erring on the side of caution, Canada filed both applications for judicial review (one in respect of each vessel), and appeals (one in respect of each vessel). The parties submit that direction from the Court is required to determine whether Canada's challenges to the decisions of the Administrator – and future challenges to decisions disallowing claims based on the limitation periods – should proceed as applications for judicial review or as appeals.

[37] I agree with the parties that this issue requires resolution as, on an immediate basis, it impacts the standard(s) of review applicable to the substantive issue of whether the Administrator erred in finding that the CCG's claims were not made within the applicable limitation period. I also agree with Canada that resolving this issue now may prevent future claimants from missing the 30-day filing timeframe for judicial review on the belief that the 60 day timeframe for a statutory appeal applies.

Canada's position

[38] Canada submits that many statutes provide for both appeal and judicial review mechanisms in different contexts, indicating two roles for reviewing courts. Further, it is notable that statutory appeal mechanisms are often circumscribed, limiting the types of questions on which a party may appeal, and that the existence of such a circumscribed right of appeal does not preclude judicial review of those aspects of such decisions to which the appeal mechanism does not apply. On review of such questions to which the statutory appeal does not apply, the presumptive standard of review of reasonableness applies (citing *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 52 [*Vavilov*]).

[39] Canada submits that on a plain reading the appeal mechanism in s 106(2) of the *MLA* allows the Court to consider "only" the matters listed in s 105(3), which do not include consideration of a challenge to the Administrator's determination on a time limitation. Canada submits that it therefore appears that such a challenge would properly proceed as a judicial review on the reasonableness standard.

The Administrator's position

[40] The Administrator submits that s 106(2) of the *MLA* is ambiguous and therefore requires statutory interpretation.

[41] The Administrator states that on a "strictly literal interpretation" of s 106(2), an appeal can be taken following either an offer of compensation or the disallowance of a claim. However, that the *right* of appeal under s 106(2) is not restricted – only the *issues* the Court can consider are restricted. That is, the right of appeal appears to be broader than the scope of review during an appeal. The Administrator submits that this is potentially problematic as, in the normal course, the right to judicial review arises only when a party has exhausted all other avenues of review. Under s 106(2), the right of statutory appeal covers all conceivable issues arising with respect to a disallowance but, ultimately, given the restricted scope of review, the Court may lack jurisdiction to afford the remedy sought. Thus, the only recourse is judicial review, which must be commenced within 30 days, as opposed to the 60-day period for filing an appeal. The Administrator submits that these deadlines mean that claimants erring on the side of caution would need to pre-empt the possible failure of an as-yet unfiled appeal by filing a judicial review application within 30 days – but doing so would, as noted above, be technically premature.

[42] The Administrator submits that an interpretation which would allow issues for which no remedy appears to be available by way of s 106(2) (i.e. those issues that required consideration of matters outside the s 105(3) factors) to proceed immediately to judicial review is also problematic as the same fact set could lead to dismissal for two different reasons – one of which

might be covered by the right of appeal and the other by judicial review. This, in turn, could lead to two different proceedings reviewing the administrative decision, and potentially the same facts, on different standards of review.

[43] The Administrator submits that a purposive reading of ss 103 to 106 of the *MLA* can avoid this uncertainty in the application of s 106(2). This would entail reading the reference in s 105(3) to "loss, damage, costs or expenses referred to in subsection 103(1)" as also including the limitation periods in s 103(2) on the basis that s 103(2) is intrinsically linked to s 103(1) in that it specifies when "loss, damage, costs or expenses" may be claimed. In turn, this would avoid any uncertainty concerning s 106(2).

[44] The Administrator also suggests that there is some historic support for its proposed interpretation. This is because before the *MLA* came into force, the SOPF was governed by the *CSA*. Subsection 710(1) of the version of the *CSA* then in effect was analogous to *MLA* sections 103(1) and (2). In the *CSA*, the predecessor of ss 103 and 105 were built into a single section. Thus, the restriction on the Administrator's authority when investigating and assessing a claim did not give rise to difficulty in the context of a limitation period because the claims provision which it pointed to, s 710(1), included the limitation periods. In turn, the appeal provision, s 711(2), therefore also permitted an appeal of claims dismissed due to missed limitation periods. The Administrator submits that a review of Hansard does not indicate that there was an intention by Parliament to change how the former s 710 was to function when it was removed from the *CSA* to the *MLA* and suggests that this change, that is, the removal of the limitation period provisions from the claims provision, may have been inadvertent.

[45] The Administrator submits that "[a]n interpretation that treats subsection 103(2) as modifying 103(1), such that it comes within the jurisdictional provision [s 105(3)] and therefore the appeal provision [s 106], therefore has considerable merit".

Analysis

[46] The principles of statutory interpretation that have application in this matter are well established by the jurisprudence of the Supreme Court of Canada. When interpreting a statute, "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 Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para 21, 1998 CanLII 837 (SCC), referencing Elmer Driedger in *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) 87; *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 26 [*Bell ExpressVu*]).

[47] This was subsequently restated and elaborated upon in *Trustco v Canada*, [2005 SCC 54 [*Trustco*]:

> 10 It has been long established as a matter of statutory interpretation that "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": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on

> the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[48] Further, any ambiguity must be "real", that is, the words of the provision must be reasonably capable of more than one meaning. However, the entire context of a provision must also be considered before it can determined if it is reasonably capable of multiple interpretations. "It 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, 171 DLR (4th) 733, emphasis added in *Bell ExpressVu*). In every case, the Court must undertake a contextual and purposeful approach and then determine if there is ambiguity (*Bell ExpressVu* at para 30). The Court should therefore "suspend judgment on the precise scope" of the words at issue until the words can be "weighed in the light of successive circles of context" (*Bristol-Myers Squibb Co v Canada (Attorney General)*, 2005 SCC 26 at paras 43-44).

[49] In this matter, s 106(2) of the *MLA* provides that a claimant may appeal the adequacy of a settlement offer or the disallowance of a claim but, in an appeal from the disallowance of a claim, the Court "may consider only the matters described in paragraphs 105(3)(a) and (b)".

[50] Section 105 concerns the Administrator's duties when a claim for compensation is received under s 103(1). Under s 105(1) the Administrator must do two things: investigate and assess the claim; and make an offer of compensation to the claimant for whatever portion of the

claim the Administrator finds to be established. The Administrator is explicitly limited by s 105(3) in what factors or matters it may consider when doing so:

> (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.

[51] I first admit to some initial doubt as to whether all of the potential procedural uncertainties raised by the Administrator serve to make s 106(2) as ambiguous as the Administrator asserts. However, concern as to the operation of s 106(2) is demonstrated by the very fact that Canada in these matters filed both appeals and applications for judicial review to err on the side of caution.

[52] I also agree with Canada that on a plain reading of s 106(2), it is clear that on appeal the Court can only consider the two matters specified in s 105(3) – and that these do not include limitation periods – which are found in s 103(2). On its face, and read in isolation, this would suggest that these proceedings should be heard as applications for judicial review. However, this is not necessarily sufficient to dispose of the matter, as demonstrated by the Supreme Court of Canada's decision in *McLean v British Columbia (Securities Commission)*, 2013 SCC 67:

> [42] Beginning with the ordinary meaning of "the events", on the surface it would appear that "the even[t]" giving rise to a proceeding under s. 161(6)(d) is the fact of "ha[ving] agreed with a securities regulatory authority" to be subject to regulatory

> action. By ordinary meaning, I refer simply to the "natural meaning which appears when the provision is simply read through" (*Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724, at p. 735). The ordinary meaning would thus appear to support the Commission's interpretation.
>
> [43] However, satisfying oneself as to the ordinary meaning of the phrase "is not determinative and does not constitute the end of the inquiry" (*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 48). Although it is presumed that the ordinary meaning is the one intended by the legislature, courts are obliged to look at other indicators of legislative meaning as part of their work of interpretation. That is so because [w]ords that appear clear and unambiguous may in fact prove to be ambiguous once placed in their context. The possibility of the context revealing a latent ambiguity such as this is a logical result of the modern approach to interpretation.
>
> (*Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141, at para. 10)
>
> [44] That possibility is realized here. Though the ordinary meaning seems apparent enough, digging deeper into the context and purpose of the provision casts some doubt on that conclusion — and introduces the possibility of another reasonable interpretation.

[53] Ultimately, I am persuaded that s 106(2), viewed in the context of related provisions in s 105(3) and 103(1) and (2), gives rise to latent ambiguity. That is, the "matters" referred to in s 106(2) are explicitly only those described in s 105(3)(a) and (b). Paragraph 105(3)(a) concerns whether a claim is "for loss, damage, costs or expenses referred to in subsection 103(1)". The ambiguity pertains to whether s 103(2), which contains the limitation periods applicable to claims made under in s 103(1), is integral to, or included within or modifies the reference to "loss, damage, costs or expenses in subsection 103(1)" and is to be assessed as an aspect of a s 103 claim.

[54] In terms of context, as the Administrator describes in its written submissions, s 103(1) allows claimants who have suffered loss or damage or incurred costs or expenses referred to in s 51, 71 or 77 of the *MLA*, Article III of the Civil Liability Convention or Article 3 of the Bunkers Convention in respect of actual or anticipated oil pollution damage, to file a claim directly with the Administrator. Subsection 105(1) requires the Administrator, upon receipt of such a claim, to investigate and assess it and, make an offer of compensation for whatever portion is determined to be established. If the offer is accepted, the Administrator becomes subrogated to any rights of the claimant to the extent of the compensation payment (s 106(3)(c)). The Administrator is also obliged to take all reasonable measures to recover the amount of the compensation payment from the polluting ship owner or others who are liable (s 106(3)(d)). This is sometimes called the "first recourse" compensation regime as s 103(1) allows claimants to present their claims without first having to commence an action against the ship owner (as would be required pursuant to s 101 and 109 of the *MLA*, often referred to as the "last recourse" regime).

[55] Thus, ss 103 to 106 provide claimants with an avenue by which claims can be quickly and directly resolved by the Administrator. This is reflected in s 105(3), which limits the factors the Administrator may consider when investigating and assessing s 103(1) claims.
This context and purpose of the "first recourse" regime is relevant to the question of whether s 103(2) in integral to s 103(1).

[56] In that regard, it is of note that the Administrator's investigation and assessment are undertaken as the first procedural step on receipt of a claim. However, there is no explicit provision within ss 103 to 106 as to how and when the s 103(2) limitation periods are to be

assessed with respect to a s 103(1) claim. The only connection to the limitation periods is the reference to s 103(1) contained in s 105(3)(a). There is also no express authority by which the Administrator may disallow or otherwise invalidate a claim on the ground it is outside of a limitation period. Nor does the scheme contain any provision suggesting that a claim made outside a limitation period should be dealt with by a process other than through a disallowance after investigation and assessment by the Administrator.

[57] Further, it would seem apparent that in many cases, to make a determination of which limitation period applies (whether s 103(a) or (b)) and whether a claim falls within that limitation period, the Administrator may be required to receive, consider, and weigh evidence to determine whether and, if so, when oil pollution damage occurred.

[58] All of this suggests that the Administrator's determination of whether a claim falls outside of a limitation period is to be made "when investigating and assessing a claim", and not outside of that process.

[59] Looked at from a different perspective, if a plain reading of s 106(2) does not include a right of appeal against the application of a limitation period because it is not a s 105(3) matter, then this must also mean that the Administrator does not have the authority pursuant to s 105(3) to decide on the application of limitation periods during the investigation and assessment stage of a s 103(1) claim. Theoretically, this could imply that the Administrator would have to consider the limitation period as part of some sort of pre-investigation screening process, finding that the claim is not eligible without "disallowing" the claim.

[60] In that event, a decision based on the limitation period would not trigger the appeal remedy in s 106(2), avoiding some of the concerns of the Administrator, such as a multiplicity of proceedings on different standards of review, as the Administrator would not have made a decision on the merits of the claim, and it would allow a claimant to apply for judicial review of that determination without making an appeal under s 106(2). However, as noted above, it is not clear how the Administrator could render a determination on the appropriate limitation period without receiving and considering evidence as to whether a discharge of oil occurred and, if so, when it occurred, without using their powers of investigation and assessment in s 105(1) and 105(2). Nor does anything in the "first recourse" scheme, or otherwise in Part 7 of the *MLA*, authorize such a process.

[61] I am also somewhat persuaded by the Administrator's submission regarding the historical development of the scheme. The "claims" provision (now s 103(1)) was previously contained in the same section as the "limitations" provision (s 103(2)) – both were included in s 710(1) of the *CSA*. The previous version of s 105(3) was found in s 710(4) of the *CSA*, which referred back to "matters covered by subsection (1)". The appeal provision, s 711(2), allowed the Court to concern itself "only with the matters described in paragraphs 710(4)(a) and (b)" – this included "matters covered by subsection (1)" including whether the claim fell within the limitation periods. Given the context of the "first recourse" scheme, and in the absence of any indication of an intent by Parliament to sever the limitation period from the matters that the Administrator can consider pursuant to s 105(3), and consequently limiting the right of appeal, the foregoing supports an interpretation of ss 103 to 106 that maintains consistency with the prior version of the scheme.

[62] Given the above, and keeping in mind that the interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the *MLA* as a whole, I agree in principle with the Administrator's submission that the s 103(2) limitation period provisions should be interpreted as "modifying" s 103(1) – that is modifying *when* the losses set out in s 103(1) are eligible for compensation, and *when* they are outside of the scope of s 103(1) claims. However, I would put this otherwise. Being that the "matters" referred to in s 106(2) include the investigation and assessment (by the Administrator) of the s 105(3)(a) factor – whether a claim is for loss damage, costs or expenses referred to in s 103(1). Of practical necessity, this must also include an assessment of the s 103(2) limitation periods applicable to the s 103(1) claim. Were it not so, s 103(2) would, in effect, be an orphan provision. (See *ATCO Gas & Pipeline Ltd v Alberta (Energy & Utilities Board)*, 2006 SCC 4 at paras 51, 73; *Montreal (City) v 2952-1355 Quebec Inc*, 2005 SCC 62 at para 34; (at 291-3.)

[63] That is, I agree with the Administrator that s 103(2) is correctly interpreted such that the Administrator considers the limitation period *as part of the claim*. On that interpretation, the limitation periods in s 103(2) fall under the Administrator's scope of authority in s 105(3), and therefore under the Court's scope of review in s 106(2).

[64] Accordingly, I conclude that these matters should proceed as an appeal pursuant to s 106(2) of the *MLA*.

Issue 2: Standard of review

Canada's position

[65] Canada submits that, if considered as an application for judicial review, all issues before the Court relate to the substance of the Administrator's decision, and should be reviewed on the presumptive standard of reasonableness (citing *Vavilov* at paras 16, 23-32). However, if the matters proceed by way of appeal, questions of fact and mixed fact and law are assessed on a standard of palpable and overriding error, while issues of law (including questions of statutory interpretation and the scope of a decision maker's authority) are assessed on the correctness standard (citing *Housen v Nikolaisen*, 2002 SCC 33 at paras 8, 10, 19, 26-37 [*Housen*]). Canada submits that the application of s 103 to a set of facts is a question of mixed fact and law. However, the Administrator's findings were "infected or tainted" by a mischaracterization of the legal test - an erroneous understanding of the standard to apply in determining whether oil pollution damage "occurs". Therefore, the Administrator's reliance on this standard is reviewable on the correctness standard (citing *Housen* at paras 33-35).

Administrator's position

[66] The Administrator agrees with the statement of the substantive issue identified by Canada in its submissions – being whether the Administrator appropriately found that the CCG was out of time to file a claim pursuant to s 103(2) of the *MLA* for either or both vessels. However, the Administrator submits that Canada's written argument raises other issues, which the Administrator identifies, and submits that these are questions of law or mixed fact and law to

which the correctness standard applies on appeal, or the reasonableness standard applies on judicial review. The Administrator also submits that Canada's challenge distills into a challenge of the finding that a discharge of oil occurred, which is a finding of fact and should be reviewed as such.

Analysis

[67] As I have found that these matters should be heard as a statutory appeals, appellate standards of review apply.

[68] Where the legislature has provided a statutory appeal mechanism from an administrative decision to a court, this signals the legislature's intent that appellate standards apply when a court reviews the decision (*Vavilov* at para 17). "This means that the applicable standard is to be determined with reference to the nature of the question and to this Court's jurisprudence on appellate standards of review" (*Vavilov* at para 37). On appeal, questions of law are reviewable on the correctness standard, findings of fact and findings of mixed fact and law without an extricable legal question are reviewable on the standard of palpable and overriding error (*Housen* at paras 10, 19, 26-37; *Vavilov* at para 37).

Issue 3*:* Did the Administrator commit a reviewable error in finding that the s 103(2)(a) limitation period applied and that CCG was out of time to file a claim pursuant to s 103(1)?

Canada's position

[69] Canada frames its arguments in the context of statutory interpretation. Canada states it specifically takes issue with how the Administrator interpreted and applied the word "occurs" as found in s 103(2)(a) and (b) of the *MLA*. Canada submits that the ordinary meaning of "to occur" does not import speculation or weighing of probabilities as to what might have happened: either an event took place, or did not (or it is not possible to say). On a plain reading, s 103(2)(a) refers to oil pollution that actually or demonstrably occurred and does not refer to what might have occurred or probably occurred from the perspective of the Administrator. The standard, or basis in evidence, required to determine whether an event – oil pollution damage – occurred must be grounded in the actual evidence before the Administrator not in assumptions, probabilities, or in the taking of something equivalent to judicial notice. Canada submits that a requirement of "actual evidence" supports the goals of the *MLA* and the purpose of limitation periods, both generally and in relation to fund related provisions of the *MLA*.

[70] Canada submits that the purpose of time limitations more generally further supports a reading of "occurs" in favour of requiring "actual evidence". Limitations require that the date a limitation period accrues is fundamentally knowable, whether or not the claim has been discovered by a potential claimant (referencing *Cholmondeley (Marquis) v Clinton (Lord)* (1820), 2 Jac & W 1, 37 ER 527 (Ch); and *M(K) v M(H)*, [1992] 3 SCR 6 at para 24, SCJ No 85). However, the Administrator's interpretation of s 103(2)(a) means that the date when the

limitation period accrues will often be unknowable to claimants and to the Administrator, which vitiates the purposes of limitation.

[71] Further, Canada submits that the Administrator's interpretation would also lead to absurd consequences, rendering the 5-year limitation period effectively moot in a wide range of situations thereby defeating the legislature's choice to provide a longer limitation period for claims based on anticipatory action. Canada submits that on its interpretation of "occurs" – requiring actual evidence of oil pollution damage – if there is no evidence of oil pollution damage, then s 103(2)(a) does not apply and s 103(2)(b) can be relied on. By contrast, the Administrator interprets "occurs" to require only speculation on what occurred and then infers that where there is observed risk, there is likely already oil pollution damage, thus permitting the Administrator to bypass the 5-year limitation period.

[72] Canada submits that the language of the *MLA* and the *CSA* align. The *MLA* refers to "occurrence" in respect of which "oil pollution damage is anticipated". The term "anticipated" reflects s 180 of the *CSA*, which provides the Minister with the discretion to determine whether a vessel "may" discharge a pollutant. The limitation period accrues when something happened or was observed that caused the Minister to believe on reasonable grounds that there "may" be a discharge. It is the belief of the Minister, not of the Administrator, that is important. In situations involving the CCG, the s 103(2)(b) limitations clock starts running when the CCG determines its should act pursuant to s 180 of the *CSA*.

[73] Canada submits that whether oil pollution occurred is an important distinction in the *MLA* and a determination that must be made on "actual evidence", rather than on the Administrator's subjective decision making.

Administrator's position

[74] The Administrator rejects what it describes as Canada's exhaustive efforts to twist the meaning of "occur" such that it becomes something other than a synonym for "happen". However, the Administer addresses some of the points raised by Canada. The Administrator submits that it applied the correct standard of proof in determining which limitation period applies. That is, the Administrator determined whether oil pollution damage occurred based on the balance of probabilities, which is the only standard for civil matters (citing *FH v McDougall*, 2008 SCC 53 [*McDougall*]). The Administrator states that it relied on indirect, or circumstantial, evidence to infer that a discharge of oil occurred in both cases. Inferring that a discharge had occurred was appropriate on that evidence and Canada's submissions that there was no "actual evidence" are not accurate.

[75] The Administrator also submits that courts regularly apply limitation periods without identifying precisely when a limitation period began to run (referencing *Wewaykum v Canada*, 2002 SCC 79 at paras 127, 129 [*Wewaykum*]; *Deng v Canada*, 2019 FCA 312 at para 31 [*Deng*]). The practice of fixing the latest possible date on which some pivotal event happens is long-established and logically sound.

[76] The Administrator submits that the limitation period in s 103(2)(a) operates even when the claimant does not know when damage occurred. The Administrator rejects Canada's submission that the limitation period for anticipatory measures does not begin to operate until the Minister determines that there is a risk that a ship may discharge oil. It points out that an argument by Canada that a limitation period should not apply until such time as the Minister believed the relevant ship was likely to cause pollution damage was rejected by this Court in *Canada v JD Irving*, [1999] 2 FC 346 [*Irving Whale*]. While that decision concerned provisions of the *CSA* which have since been moved to the *MLA* in amended form, the reasoning in the *Irving Whale* remains good law and is logically sound.

Analysis

[77] Before beginning this analysis, I note that Canada agrees with the Administrator that, for the purposes of the *MLA*, to the extent that "oil pollution damage" may have an oil discharge threshold, that threshold is very low. Canada does not suggest that in these cases there was some discharge and that it was too minor to be considered "oil pollution damage". Rather, Canada takes the position that in these cases there was no discharge.

[78] I next reproduce s 103(2) of the *MLA* here for ease of reference:

> 103 (2) Unless the Admiralty Court fixes a shorter period under paragraph 111(a), a claim must be made
>
> > (a) within two years after the day on which the oil pollution damage occurs and five years after the occurrence that causes that damage; or
> >
> > (b) if no oil pollution damage occurs, within five years after the occurrence in respect of which oil pollution damage is anticipated.

[79] In my view, for the reasons that follow, it is clear that the distinction between the application of either of the two s 103(2) limitation periods is a purely factual distinction. That is, quite simply, whether or not oil pollution damage occurred. Here, the parties agree that if any oil entered the water, then oil pollution damage can be assumed. Therefore, whether or not oil pollution entered the marine environment is a factual determination that is to be made by the Administrator. It is the determination of that question that will dictate which of the two s 103(2) limitation periods apply.

[80] On that basis, it is not necessary to embark upon a statutory interpretation of the word "occurs" as found in s 103(2)(b), as CCG submits. However, I will address some of the points arising from or raised by Canada in its statutory interpretation analysis. The most significant of these is the standard of proof which the Administrator is entitled to utilize when determining if a discharge of oil pollution occurred.

i. Standard of proof

[81] Read in whole, it is apparent that Canada's interpretation argument is really an argument about the standard of proof that the Administrator may apply. This is reflected in Canada's position that on its interpretation of "occurs" – requiring "actual evidence" of oil pollution damage – if there is no "actual evidence" of oil pollution damage, then s 103(2)(a) does not apply and s 103(2)(b) can be relied on. Canada asserts that the Administrator must only rely on direct evidence (witness statements or observations) in making factual findings as to whether there was a discharge of oil. Canada rejects, as speculation, findings of fact based on other

evidence and asserts that this evidence cannot be utilized by the Administrator in making a s 103(2) determination.

[82] As stated above, the Administrator is authorized and required by s 105(1) of the *MLA* to investigate and assess s 103(1) claims, and to determine what portion of them are established. Part 7 of the *MLA*, and more specifically the ss 103 to 106 "first recourse" regime, like other administrative regimes, serves to "set up and empower the administrative decision-maker to find the facts, apply the law and make a decision" (*'Namgis First Nation v Canada (Fisheries and Oceans)*, 2019 FCA 149 at para 5; *Canada (Attorney General) v Kattenburg*, 2021 FCA 86 at para 17; *Assn of Universities & Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22 at para 17*; Hoang v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 1133 at para 12; *Bernard v Canada Revenue Agency*, 2015 FCA 263 at para 17).

[83] I agree with the Administrator that when it is tasked with making findings of fact, as it is required to do in determining whether the claim is for loss, damage, costs or expenses referred to s 103(1), including which limitation period applies pursuant to s 103(2), the Administrator must do so on the balance of probabilities. In *McDougall*, the Supreme Court of Canada found that the balance of probabilities is the only standard of proof in civil cases (at para 40). The Court then referred to the judge's task when making findings of fact:

> [46] Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff,

> it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.
>
> …
>
> [49] In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. *In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred*.
>
> [emphasis added]

[84] It is also well established that the standard of proof of a balance of probabilities also applies to administrative decision making that is civil in nature, absent legislation indicating otherwise (Donald J M Brown & John M Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Thomson Reuters Canada, 2022) at § 12:7; Sara Blake, *Administrative Law in Canada*, 7th Ed (Canada: LexisNexis) at § 2.16; *PSAC v Canada Post*, 2011 SCC 57 at para 1 wholly adopting the dissenting reasons of Justice Evans *in PSAC v Canada Post*, 2010 FCA 56 at para 205; *Stetler v Ontario (Agriculture, Food & Rural Affairs Appeal Tribunal*, [2005] OJ No 2817, 141 ACWS (3d) 157 (Ont CA) at para 79; *Pacasum v Canada (Minister of Citizenship & Immigration*, 2008 FC 822 at para 22).

[85] Even in a non-adversarial proceeding, such as the determination of a claim under s 103(1) of the *MLA*, the evidence must still be assessed. This is demonstrated by the requirement of s 105(1) that the Administrator investigate and assess such claims considering the factors set out in s 105(3), as well as s 105(2), pursuant to which the Administrator has the powers of a commissioner under Part 1 of the *Inquiries Act*, RSC, 1985, c I-11 when investigating and

assessing a claim. If the Administrator has assessed the evidence and finds that an event is "more likely than not" to have occurred, it should make a finding of fact in that regard.

[86] In addition to assessing the evidence to determine what it establishes directly, the Administrator, as an administrative decision maker, is also entitled to make factual inferences based on the evidence before it. Inferences must be reasonable and logical, drawn from facts accepted by the decision maker and made by applying an inductive reasoning process. The facts that provide the basis for the inference must be established by evidence, not speculation (*Teva Canada Limited v Pfizer Canada Inc.*, 2017 FC 526 at para 22; *K (K) v Canada (Minister of Citizenship and Immigration)*, 2014 FC 78 at para 61). In *Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 [*Magonza*], in the context of discussing the concept of the sufficiency of evidence, Justice Grammond addressed reliance on indirect or circumstantial evidence:

> [32] The last concept I wish to discuss is that of "sufficiency" of the evidence. The use of this concept, especially if it is meant to require several pieces of evidence to prove a fact, may be surprising. After all, the law does not require that facts be proved by more than one witness. When a contract is filed in evidence, or a witness testified that he saw the accused discharge a firearm on the victim, those facts are proven. But these are cases of direct evidence. *Where the evidence is indirect or circumstantial, however, the fact-finder must rely on inferences, weigh each piece of evidence and decide whether the cumulative weight of all the evidence is sufficient to warrant a finding that the disputed fact exists.*
>
> [emphasis added]

[87] And, as stated by the Manitoba Court of Appeal in *R v McIvor*, 2021 MBCA 55:

> [19] *It is the role of the trial judge to make findings of fact and, from those facts, to draw factual inferences.* As it is not the role of appellate courts to retry cases, those factual findings and conclusions or inferences are entitled to deference on appeal and

> "are not to be reversed [on appeal] unless it can be established that the trial judge made a 'palpable and overriding error'" (see *Housen v Nikolaisen*, 2002 SCC 33 at para 10; see also para 25; *HL v Canada (Attorney General)*, 2005 SCC 25 at para 74; and *R v Clark*, 2005 SCC 2 at para 9).
>
> [emphasis added]

[88] The Supreme Court of Canada in *Housen* discussed the deference to be afforded to a trial judge's factual findings and factual inferences:

> 22 Second, with respect, we find that by drawing an analytical distinction between factual findings and factual inferences, the above passage may lead appellate courts to involve themselves in an unjustified reweighing of the evidence. Although we agree that it is open to an appellate court to find that an inference of fact made by the trial judge is clearly wrong, we would add the caution that *where evidence exists to support this inference, an appellate court will be hard pressed to find a palpable and overriding error. As stated above, trial courts are in an advantageous position when it comes to assessing and weighing vast quantities of evidence. In making a factual inference, the trial judge must sift through the relevant facts, decide on their weight, and draw a factual conclusion. Thus, where evidence exists which supports this conclusion, interference with this conclusion entails interference with the weight assigned by the trial judge to the pieces of evidence.*
>
> 23 We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the <u>inference-drawing process itself</u> is palpably in error that an appellate court can interfere with the factual conclusion. *The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts.* As we discuss below, it is our respectful view that our colleague's finding that the trial judge erred by imputing knowledge of the hazard to the municipality in this case is an example of this type of impermissible interference with the factual inference drawn by the trial judge.
>
> [underlining in original, emphasis in italics added]

[89] Courts have confirmed that this approach also applies to the appeal of a decision made by an administrative decision maker (*Vavilov* at para 37; *Moffat v Edmonton (City) Police Service*, 2021 ABCA 183 at para 42; *Yee v Chartered Professional Accountants of Alberta*, 2020 ABCA 98 at para 29).

[90] This jurisprudence stands in contrast to Canada's submissions asserting that the Administrator cannot rely on any evidence and cannot draw any conclusions from any evidence unless it is "actual evidence" – meaning a direct witness observation that supports that fact. To the contrary, the jurisprudence confirms that indirect or circumstantial evidence can properly support the making of a factual inference, which should generally be treated by reviewing courts in the same way as a direct factual finding (*Housen* at para 22).

[91] This is especially true, and especially necessary, where there is an evidentiary gap. While Canada submits that such a gap makes the fact or event in issue "inherently unknowable", it is the role of the decision maker to assess the evidence and come to a conclusion about what actually occurred, based on whether it is "more likely than not" (*McDougall* at paras 46, 49; *Magonza* at para 32). While it is true that a decision maker cannot speculate as to what occurred, they are entitled to extrapolate or infer from known facts in order to determine that a related event occurred. Thus, in the matters before me, although a discharge of oil may not have been directly observed, the Administrator was entitled to consider other evidence that was before it to assess whether it was more likely than not that oil was nevertheless discharged without being observed.

[92] Therefore, the Administrator correctly identified the balance of probabilities as being the applicable standard of proof when making its factual determinations. The Administrator was also entitled to make inferences of fact based on the evidence before it and did not err by taking that approach to the evidence.

[93] While Canada submits that there was no "actual evidence" upon which the Administrator could make a factual finding as to whether a discharge of oil occurred, i.e. direct observation of a discharge, as will be discussed below, the Administrator had before it other evidence such as survey reports and the CCG's narrative of events. The Administrator was entitled to make findings of fact and to make factual inferences based on that evidence. Such inferences can be determinative.

ii. *Section 180 of the* CSA

[94] Canada submits that in situations involving actions to prevent oil pollution damage "there is necessarily a clear start date: the date the party taking the anticipatory action believed on reasonable grounds they should act" and that the limitation period starts to run when something happened or was observed to cause the Minister to reasonably believe that there may be a discharge. Canada submits that it is the belief of the Minister that is important, not the belief of the Administrator and that this interpretation of s 103(2)(b) is demonstrated by s 180 of the *CSA*.

[95] I do not agree with Canada's submission.

[96] First, s 103(2) says nothing about the belief of the claimant at the time they incurred the loss, damage, costs or expenses for which they seek compensation under s 103(1).

[97] Second, s 103(2) must be viewed in context. That context is that claims made by a "person" who has suffered loss or damage or incurred costs and expenses as set out in respect of actual or anticipated pollution damage may file a claim with the Administrator for such loss, damage, costs or expenses pursuant to s 103(1). Upon receipt of a s 103 claim, the Administrator must investigate and assess it and make an offer of compensation to the claimant for whatever portion of it that the Administrator finds to be established considering the factors set out (ss 105(1) and (3)). As I have found above, the determination of a limitation period under a s 103(2) is to be considered by the Administrator as a part of a s 103(1) claim. In other words, *it is part of the role of the Administrator to assess which limitation period applies* (by determining if oil pollution damage occurred) and if a claim falls with or outside that limitation period.

[98] Third, as to section 180(1) of the *CSA*, this states as follows:

> 180 (1) If the Minister of Fisheries and Oceans believes on reasonable grounds that a vessel or an oil handling facility has discharged, is discharging or may discharge a pollutant, he or she may
>
> > (a) take the measures that he or she considers necessary to repair, remedy, minimize or prevent pollution damage from the vessel or oil handling facility, including, in the case of a vessel, by removing — or by selling, dismantling, destroying or otherwise disposing of — the vessel or its contents;
> >
> > …
>
> (c) if he or she considers it necessary to do so, direct any person or vessel to take measures referred to in paragraph (a) or to refrain from doing so.

[99] Canada submits that s 103(2)(b) of the *MLA* refers to the "occurrence" in respect of which "oil pollution damage is anticipated". Further, that the term "anticipated" reflects s 180 of the *CSA* which gives the Minister the discretion to determine whether a vessel "may" discharge a pollutant.

[100] However, s 180(1) serves only to grant the Minister the *power* to take anticipatory measures or to direct others to do so. Nothing more. It is correct that if the CCG takes such measures based on the Minister's s 180 belief, the CCG can seek to be compensated by the Administrator, pursuant to s 103(1), for loss, damage, costs or expenses incurred. However, there is no direct link between s 180 of the *CSA* and the s 103(2)(b) limitation provision. Had Parliament wished to do so, it could have effected a limitation period specific to claims for *CSA* s 180 anticipatory responses. Alternatively, it could have specified that, in the event that the Minister makes a determination, pursuant to s 180 of the *CSA*, that anticipatory action is required, then the longer limitation period found in s 103(2)(b) will automatically apply – regardless of whether a discharge is ultimately found to have occurred or not. Similarly, s 103(2)(b) does not contain a presumption whereby claimants taking anticipatory measures will be presumed to have prevented oil pollution damage – and thereby entitled to rely on the longer s 103(2)(b) limitation period (unlike, for example, s 105(4), which presumes that the occurrence that is the subject of a s 103(1) claim was caused by a ship – unless the Administrator is satisfied on the evidence that the occurrence was not caused by a ship in which event the Administrator may dismiss the claim). However, Parliament did not choose to make any such provisions.

[101] Nor am I persuaded by Canada's submission that by reading s 103 of the *MLA* and s 180 of the *CSA* in the whole context of the compensation scheme for oil pollution damage, it is clear that Parliament intended to provide the Minister with more time to submit claims for compensation when action is taken to prevent oil pollution damage, thus meeting Canada's commitments under the international conventions. In fact, more time is allocated pursuant to s 103(2)(b) – but that provision only applies if there is no oil pollution damage.

[102] I also agree with the Administrator that the decision in *Irving Whale* is of some assistance in this matter. In 1970, the barge *Irving Whale* sank causing a major oil pollution incident. Small quantities of oil continued to leak intermittently from the barge over the next 26 years. In 1992, a report recommended immediate preventive action as there was a serious risk of a massive escape of oil. In 1996, the barge was raised and the subject action was commended the following year. One of the issues in that action was whether the claim against SOPF was time-barred by s 710(1)(a) of the version of the *CSA* then in force (the *CSA* s 710(1) wording being identical to that found in s 677(1) of the *CSA*). Section 677(1) of that version of the *CSA* is similar to s 77(1) of the *MLA*, and s 710(1) of that version of the *CSA* is similar to the s 103 regime found in the *MLA* (s 103, 105 and 106). The Court found that its s 667(1) analysis applied equally to its s 710(1) analysis concerning the SOPF.

[103] In *Irving Whale*, the defendants' position was that s 677(10) provided two different limitation periods. The first, set out in s 677(10)(a), applied where pollution damage had occurred: the time limitation being three years from the date of the damage and six years from the occurrence that caused such damage. They asserted that since pollution damage

unquestionably occurred, all claims were statute-barred at the latest by November 1973. In any event, even if it should be found that s 677(10)(*a*) was, for some reason inapplicable, s 677(10)(b) enacted a six-year prescription which ran from the date of "the occurrence". The word "occurrence" in s 677(10)(*b*) had the same meaning as it did in s 677(10)(a) and the operative date was that of the event which caused or could have caused pollution damage to occur, namely the sinking.

[104] In its response in the *Irving Whale*, Canada made many arguments that are similar to those it now makes before me. The Court rejected these arguments. It found that there was no doubt that the meaning suggested by the defendants – that s 677(10) provided two different prescriptive periods and because there had been oil pollution damage s 667(1)(a) applied – was correct. Subsection 667(1) dealt with claims both for pollution damage and for preventive measures. Because pollution damage occurred at the time of the sinking of the *Irving Whale*, s 667(10)(a) applied. However, even if it were assumed that s 667(10)(b) applied, the two uses of the word "occurrence" in immediate proximity to one another in the same subsection must have the same meaning. That meaning could only be an event which causes or is likely to cause pollution damage. Considering in the broader context of the history of the provisions, including adoption by Canada of the Civil Liability Convention and the 1971 Fund Convention and the establishing of the SOPF, did not alter that interpretation.

[105] In the context of the circumstances of that matter, the Court also found that the triggering of the limitation period depended on the timing of the occurrence, not on the belief of the Minister:

> [21]….. If there was to be a separate prescriptive period for each separate preventive measure which the Minister, in his sole discretion decides to take, there would, in fact, be no limitation period at all except one that was wholly dependent upon the Minister's will. That cannot be the law. The proper application of the discoverability principle in this case calls for time to start running from the moment that the government acquired the knowledge that the wreck was lying on the seabed and had discharged, was discharging and was likely to discharge oil. That was in 1970.

[106] I acknowledge that it is entirely possible that when – based on the information then available to the Minister – the Minister makes a determination under s 180(1) of the *CSA* that there may be a discharge and that a response is required, it may subsequently be determined that a discharge had, in fact, already occurred. For example, a ship that was in peril may have already sunk or discharged oil. However, in that event, when or whether the Minister subjectively believed a discharge may occur is not relevant to the question of which limitation period applies. This is determined by the factual question of whether a discharge occurred.

[107] In sum, I do not agree with Canada that because s 180 of the *CSA* permits the Minister to direct that anticipatory measures be taken when the Minister reasonably believes that a discharge of a pollutant may occur, that this belief serves to engage the s 103(b) limitation period. The distinction between the two limitations periods is not based on the claimant’s circumstances or identity, it remains a factual one – dependent on whether oil pollution damage occurred.

[108] In my view, the Administrator correctly interpreted s 103(2) such that the limitation period contained in s 103(2)(a) applies when oil pollution damage has occurred for which a claim is made under s 103(1). The limitation period contained in s 103(2)(b) applies where no oil pollution damage has occurred and the s 103(1) claim arises from presentative measures expended in response to anticipated oil pollution damage. The determination of which limitation period applies is purely a factual determination based on whether or not oil pollution damage occurred. That determination is made by the Administrator.

iii. Purpose of MLA and of limitation periods, interpretive presumptions and absurd results

[109] While Canada made lengthy submissions on these points, they can be dealt with briefly.

[110] Canada argues that to the extent that it may sometimes be uncertain whether oil pollution damage may have occurred without being observed or detected before a response measure was taken, the purpose of the compensation regime (the polluter pays principle and the related international conventions) strongly supports the application of s 103(2)(b) in those circumstances.

[111] I am not persuaded that the Administrator's interpretation of s 103(2) – being that which limitation period applies is a factual determination made, on the balance of probabilities, of whether or not oil pollution damage occurred – is contrary to the polluter pays principle or the international conventions, the specified provisions of which conventions have the force of law in Canada by way of the *MLA*. Nor that there is ambiguity as to how s 103(2)(a) and (b) should be

interpreted thereby giving rise to an interpretive presumption in favour of Canada permitting its claim to proceed, as Canada submits.

[112] Canada's submissions asserting that the Administrator's approach would lead to absurd consequences are premised on Canada's interpretation of "occurs" as requiring "actual evidence" of oil pollution damage. As such, according to Canada, if there is "no evidence" of oil pollution damage then s 103(2)(a) does not apply and s 103(2)(b) applies. That aspect of Canada's submission will be dealt with below in the specific context of each claim. Here it is sufficient to say that I do not agree with Canada's assertion that the Administrator interprets "occurs" to require only speculation on what occurred, without observation or detection, and inferring that where there is observed risk, there is likely already oil pollution damage. I do not agree that the Administrator used the risk that caused the anticipatory action as "evidence" that oil pollution damage already occurred – thereby permitting the Administrator to bypass the 5-year limitation period and defeat the purpose of s 103(2)(b) as Canada submits. This was not the approach taken by the Administrator.

[113] Canada also submits that by transferring risk of oil pollution damage into probability of oil pollution damage – shifting the analysis to a 2-year limitation period by speculating on what may have occurred – introduces "unknowable time lines". Canada concedes that situations involving "actual" oil pollution damage may involve damage or an event that is difficult to date. Those circumstances attract the 2-year limitation period and careful analysis by the Administrator to determine the proper start date of the limitation period. However, where there is "no evidence" of oil pollution damage, but the Administrator nonetheless arbitrarily imposes a

date at which it is assumed oil pollution damage probably began, then the Administrator can avoid compensating victims by requiring them to prove that a discharge did not occur.

[114] Again, however, Canada's position here is based on its view that the Administrator was limited to considering only direct evidence as to the observation of discharges of oil, and was not entitled to make factual inferences based on other evidence before it. However, as I have found above, whether there was a discharge of oil is question of fact that must be answered by the Administrator while investigating and assessing the claim. A claimant wishing to rely on the 5-year limitation period must provide sufficient evidence with its claim submission to convince the Administrator that it is more likely than not that no discharge occurred. Otherwise, they must hedge their bets by making a claim within the shorter 2-year period provided for in s 103(2)(a) to be sure that their claim will be admissible.

[115] Finally, as to the date of the occurrence, the Administrator may be faced with sporadic observations or evidence with significant temporal gaps. In those circumstances, it may not be possible to identify exactly when oil pollution damage occurred. The Administrator does not err in law where it identifies, based on the evidence, that a particular moment is a *terminus ante quem*: a moment before which oil pollution was likely to have occurred. Where the Administrator is satisfied on a balance of probabilities that the oil pollution damage did occur, and that it occurred more than two years prior to the filing of the claim, this is sufficient to dismiss the claim pursuant to s 103(2)(b).

iv. Assessment of the evidence and decisions on the merits

[116] This leads to the main question at issue in this matter, being whether the Administrator made a reviewable error in finding that discharges of oil had occurred and, therefore, that s 103(2)(a) of the *MLA* applied and the CCG's s 103(1) claims were ineligible for compensation since they were made outside that limitation period.

Canada's position

[117] With respect to the *Miss Terri*, Canada acknowledges that in challenging a decision of the Administrator, the focus would normally be on the Administrator's final reasons. However, Canada submits that the Administrator dismissed the CCG's submissions made in response to the Administrator's draft reasons and simply "removed a number of problematic paragraphs, conclusions, and phrases that CCG had taken issue with". According to Canada, the removed portions of the draft reasons informed the Administrator's decision and must be taken into account.

[118] Canada submits that the most important conclusion made by the Administrator is its admission that "[n]owhere in the evidence or the narrative is there an explicit observation of oil in the water originating from the vessel". According to Canada, this ought to have been the end of the analysis as there is no "actual evidence" of oil pollution damage, thus s 103(2)(b) limitation period should have been applied. Canada submits that even on the standard of "likelihood", the evidence does not meet that standard. Further, Canada submits that in the draft reasons, to overcome the lack of actual evidence, the Administrator conceived of a "washing

mechanism" to explain the lack of observed oil in the water. Further, accepting the Administrator's reasoning regarding the triggering date of the limitation period would mean that the Administrator could have determined "that the limitations clock began to run on (or "before") almost any date, even many years prior". As there was no actual evidence of oil pollution damage, and the Administrator could not reasonably rely on floating, unspecific dates for possible occurrences to deny claims.

[119] With respect to the *Stelie II*, Canada submits that the Administrator accepted that there was no direct evidence of oil discharge. In light of the CCG's credible evidence that it acted in anticipation of oil pollution damage and no discharge occurred, this should again have been the end of the analysis and the s 103(2)(b) limitation period should have been applied to permit the CCG's claim. Instead, the Administrator speculated whether a discharge may have occurred regardless of the CCG's evidence, which it otherwise accepted. Canada submits that if the Administrator's approach is accepted, "the limitation period for claims for compensation begins to accrue at an unknowable time subject to the whims of the Administrator".

[120] Canada dismisses the Administrator's findings about open oil containers on deck because the Administrator describes no mechanism for this oil to find its way into the harbour, as opposed to contained areas of the vessel, and because there is no evidence that a spill from those containers actually occurred. Canada submits that while the Administrator appears to have accepted the CCG's evidence that the intake hose was placed deep enough in the *Stelie II* so as not to discharge the oil floating on the surface of the ingress water, the Administrator displayed a clear tendency to grasp for any theory that would cast doubt upon the CCG's version of events

and deny its claim. Specifically, that because the vessel's timbers were found on deconstruction to be generally contaminated by oil, the timbers would have discharged oil into the water within the vessel which would have been pumped into the harbour.

[121] Canada submits that while the evidence may have "cast doubt" about whether a discharge occurred, the evidence fell well short of evidence that a discharge actually occurred. In such situations the purpose of the *MLA* and its limitation periods required that a 103(2)(b) apply. Canada further submits that the secondary finding regarding the likely spill of open oil containers was presented only to "bolster" the Administrator's primary position regarding the pumping operations; this suggests that the Administrator was primarily interested in casting doubt on the CCG's account of events and developing any theory available to deny the CCG's claim. This is the positioning of an adversarial litigant and not in keeping with the nature and purpose of the SOPF. Canada submits that the Administrator insists that unless each of its theories about possible oil pollution discharges are disproven, they should be assumed to have occurred, which frustrates the purpose of SOPF and is untenable at law. Canada submits that this approach demonstrates reviewable error.

Administrator's position

[122] The Administrator submits that the balance of probabilities standard was the correct standard and was applied in determining that oil discharges were "probably" or "likely" caused by both vessels. The Administrator properly assessed and relied upon indirect or circumstantial evidence in order to make factual inferences; the overall conclusion that oil was discharged was appropriate on the evidence. The Administrator's conclusions resulted from a weighing of the

evidence and arguments, including the absence of recorded observations of oil discharge. The Administrator submits that Canada merely disagrees with the Administrator's weighing of the issues and the ultimate conclusions – but that this is insufficient to overturn the underlying decisions.

[123] With respect to the *Miss Terri*, the ship's bilge pumps had been operating excessively for months. There was also extensive evidence of oil contamination in areas of the vessel underneath a deck which would allow significant quantities of rain water to enter, and the bilge systems in those areas were observed to be oily. The Administrator inferred that water which entered these contaminated areas during rainy weather had then been pumped overboard by the bilge pumps which were frequently operating to keep the vessel afloat. The Administrator submits that, absent allegations of bias or procedural unfairness, it is not appropriate to look behind the decisions under appeal. However, any changes between the draft reasons and the final reasons were made in response to the CCG's submissions that factual findings should be grounded in the evidence. In that light, removal of the impugned sections of the draft reasons reflects the fact that there were no observations of the *Miss Terri* at the critical time for the purposes of the limitation period (between February 23, 2018 and September 4, 2018).

[124] With respect to the *Stelie II*, the Administrator submits that it formed the suspicion that water ingress was pumped directly from the engine room into the harbour. There was little evidence on the point but, in correspondence between counsel, the CCG admitted that the suspicion was well founded. There was, therefore, an obvious inference that a discharge of oil had occurred which Canada purported to dispel by asserting that various techniques had been

successfully used to prevent any oil from being discharged. The CCG's submission without evidence was not accepted and the Administrator concluded that pumping the water ingress into the harbour also resulted in a discharge of oil.

Analysis

[125] In these matters, Canada's basic and underlying premise is that the Administrator's interpretation of s 103 of the *MLA* was not correct because, to find that oil pollution occurred, there must be some "actual evidence" of an occurrence. As I have found above, Canada's position that the Administrator is limited to a consideration of direct evidence – witness observation – to make a factual determination that a discharge of oil pollution occurred is not well founded. Further, the Administrator correctly identified the standard of proof applicable to findings of fact or factual inferences as the balance of probabilities.

[126] Therefore, this is also not a circumstance, as Canada submits, where the mischaracterisation of a legal test can be said to have "infected or tainted" underlying findings of fact to which a legal test is applied, and therefore that the interpretation of the evidence as a whole can be rejected absent a palpable and overriding error and the correctness standard applied (referencing *Housen* at para 33-35; but see also *Teal Cedar Products Ltd v British Columbia*, 2017 SCC 32 at para 43-44).

Miss Terri

[127] In my view, the Administrator did not commit a palpable and overriding error in finding that the *Miss Terri* probably discharged oil prior to September 4, 2018 and, therefore, that the s 103(2)(a) limitation period applied.

[128] The Administrator referred to the *Miss Terri* Survey Report, submitted by the CCG, in reaching the conclusion that it was more probable than not that a discharge, or more likely multiple discharges, occurred prior to September 4, 2018, as a result of rain water entering the vessel, becoming contaminated with oil and then pumped overboard.

[129] The *Miss Terri* Survey Report section concerning the hull and deckhouse includes that:

> The deck remains as laid fir planks that are caulked and payed. Most of the paying compound appears to be missing across the decks and there are many places where the deck planks are locally going soft &/or actively rotting.

[130] The section of the survey report concerning the internal condition and machinery of the vessel includes the finding that the machinery space and foc's'le bilges "are moderately fouled with oil".

[131] The report includes a summary, as follows:

> Significant Aspects to Condition:
>
> 1. Planking along the port side at or just above the waterline has significant soft spots along the plank seams and sections of seams in way with missing paying compound and the caulking very loose such that a knife or slim

> screwdriver can easily be buried to the depth of the planking.
>
> 2. The regular cycling of the bilge pumps in the aft hold indicate either a general state of advancing underwater seam and caulking degradation or an area of plank damage.
>
> 3. The hull has possibly been externally impacted on port side, aft of amidships to disturb the planking and ribs and fracture the fish-hold linings in way.
>
> 4. The state of the exterior decks all around the vessel allow rain water to easily enter the hull in significant quantities.
>
> 5. Various aspects to the vessel's piping systems, outfit and condition are considered to combine such that leaking into any of the normally watertight spaces can eventually back-flood into all of the spaces and essentially, the hull is one big flotation space without any watertight separation remaining.
>
> ……

[132] The Administrator found the state of the deck to be important and referred to the finding above by the surveyor that the "state of the exterior decks all around the vessel allow rain water to easily enter the hull in significant quantities". The Administrator also included photographs of the deck taken from the survey report and found that based on these, the surveyor's observations and conclusions with respect to the vessel's deck were "likely correct". Based on this, the Administrator found that, on the balance of probabilities, when rain fell on the vessel it would have penetrated the deck, entered the below-deck spaces throughout the vessel.

[133] The Administrator also noted that *Miss Terri* Survey Report informed that the machinery space and forecastle bilges were "moderately fouled with oil" and that photographs from that report showed oily bilges in the main engine, forecastle and stern gland areas of the vessel.

Photographs taken by Saltair during the course of deconstruction of the vessel showed the condition of the vessel, including the presence of oily contaminants, oily debris, and oil-saturated wood (all of the referenced photographs are included in the Administrator's decision). Based on this, the Administrator accepted that both the machinery space and the forecastle space were contaminated with oil such that water coming into contact with those spaces would also become contaminated by oil. Further, the Administrator noted that there was no evidence that the oily state of the vessel significantly changed between February 23, 2018 and when it was surveyed on September 18, 2018.

[134] The Administrator noted that when the CCG ER arrived at Discovery Harbour on February 23, 2018, the vessel's pumps were operating continuously. The CCG placed additional pumps on board. The Administrator acknowledged that there was no direct evidence as to what happened to the vessel between then and September 2018. However, the Administrator had already found that it was more likely than not that when rain fell on the vessel that it penetrated the deck, became contaminated with oil and then was then discharged by pumps located in the stern of the vessel. The Administrator also accepted that between February 23 and September 3, 2018, significant rainfall would have occurred at the vessel's location on multiple occasions. Therefore, it was more likely than not that discharges of oil pollution would have occurred many times prior to September 2018.

[135] It is also of note that the CCG's narrative, submitted in support of its claim, reports that the *Miss Terri's* bilge pumps were operating continuously on February 23, 2018 to keep the vessel afloat. After additional bilge pumps were installed by the CCG ER, water ingress

continued, and the pumps were reported to be pumping water 30 minutes a day, twice a day. The situation degraded over time, and by September 11, 2018, pumps were operating 30 minutes of every hour. By September 18, 2018, the pumps were again operating continuously to discharge water ingress. The Administrator also noted there were multiple and significant rainfalls between February 23 and September 3, 2018. While it is not apparent from the record where this information came from, it is not challenged by Canada.

[136] The Administrator noted that there was no evidence that the state of the vessel, its layout, or its oily state changed significantly after February 23, 2018, when the bilge pumps were installed and September 18, 2018, when it was inspected by the marine surveyor. In other words, the Administrator was aware that the condition of the vessel on September 18, 2018 was not direct evidence of its condition prior to September 4, 2018 (the date two years before CCG submitted its claim).

[137] Regardless, the above was all evidence that supported the Administrator's inference that water ingress through the decks into the below-deck spaces would have become contaminated by oil and then been pumped overboard by the bilge pumps at least once, and likely on multiple occasions, by September 4, 2018.

[138] I note that Canada's response to the draft decision of the Administrator does not take issue with the findings of the *Miss Terri* Survey Report or the Administrator's reliance on those findings. Instead, counsel took the view that when the vessel was assessed on February 23, 2018, monitoring or a response were not effected because the CCG ER did not consider that the vessel

reached the threat level of "may discharge" as set out in s 180 of the *CSA*. Further, Canada noted that that the CCG's actions at that time were not a response but, even if the Administrator thought otherwise, since no pollution was observed at that time, the 5-year limitation period (s 103(2)(b)) should apply commencing to run on February 23, 2018. Further, when circumstances changed in September 2018, the CCG responded and took steps to mitigate the risk. No pollution was observed at that time. Therefore, the 5-year limitation period should apply commencing on September 18, 2018. In short, the CCG's position was that because no oil pollution damage was observed, the 5-year limitation period applied.

[139] In its decision, the Administrator acknowledged the CCG's position that it handled the incident in accordance with threat assessment criteria in accordance with the *CSA* and the CCG's position that there was no evidence that a discharge occurred. The Administrator stated that the use of the *CSA* threat assessment by the CCG was understandable but the Administrator did not agree that those criteria had any bearing on when the limitation period began to run. The Administrator further noted that the CCG's response did not alter the Administrator's factual determinations in that regard.

[140] As discussed above, in its submissions in this matter, Canada relies primarily on the lack of "actual evidence" of a discharge of oil pollution, challenges the utilization of the balance of probabilities standard by the Administrator and the Administrator's reliance on other sources of indirect evidence in making inferences of fact. It does not take issue with the content of the *Miss Terri* Survey Report or other evidence relied upon by the Administrator in making its factual inferences. Indeed, Canada "agrees that the evidence demonstrates the vessel itself was in poor

shape… was contaminated with oil and at risk of sinking" based on the CCG ER's observations and those of the surveyor. Canada submits that "despite the clear evidence that the hull itself was contaminated with oil, no one – and this includes the CCG personnel, various harbour masters, and the marine surveyors – noted *any oil in the water*". Also, while Canada takes issue with the "washing mechanism" theory of events advanced by the Administrator in the draft decision – "to overcome the lack of actual evidence" – this theory of events was removed from the final decision.

[141] Canada also submits that from February 2018 until the vessel was removed from the water, it was being closely observed either by the CCG, a harbour master (February 23 – September 18, 2018) or by Saltair (September 18, 2018 to November 6, 2018 when the vessel was removed from the water). However, the narrative submitted by the CCG to the Administrator places the CCG ER on scene on only two dates – February, 23, 2018 and, in relation to another matter, September 11, 2018. The CCG's response to the Administrator's draft reasons states that there was no monitoring/response by the CCG following February 23, 2018 because the vessel did not reach the threat level of "may discharge" at that time. The CCG did not provide any further information or evidence from the harbour master describing its monitoring of the vessel or confirming, for example, that a daily observation was made and that there was no discharge of oil pollution from the vessel.

[142] The difficulty here is that the CCG, in responding to the Administrator's draft reasons, did not provide further information to confirm that the vessel was closely monitored on a daily basis and that no discharge occurred. Nor did the CCG dispute that there was rain ingress

through the vessel's deck into oiled spaces below and that water ingress was being pumped overboard by bilge pumps in the vessel's stern. Despite its expertise, the CCG also did not put forward a technical explanation of why, in that circumstance, oil would not have been pumped overboard. Rather, the CCG's position is simply that if no one observed oil in the marine environment then the Administrator cannot prove that it happened because the Administrator is not entitled to make inferences of fact based on the evidence before it. As discussed above, I do not agree with that position.

[143] Finally, although the Administrator did not specify the date on which it became more likely than not that a discharge occurred, it was not merely speculating or relying on a "floating" date in order to deny the claim as Canada asserts. The Administrator did not need to make a specific finding on whether the discharge(s) occurred on September 3, 2018 or at some point prior to that, as it was not consequential for the success of the CCG's claim, and would not impact the result (*Wewaykum* at paras 127, 129*; Deng* at para 31). Canada's submission, that the Administrator could choose any arbitrary past date and say that an oil discharge occurred at that time, is without merit. The Administrator was required to, and did, base its inferred findings of fact as to the timeline of the discharge(s) on the evidence before it.

[144] In conclusion, given the foregoing, I am "hard pressed" to find a palpable and overriding error (*Housen* at paras 22-23) in the Administrator's determination. The Administrator assessed and weighed the available evidence as to the condition of the vessel and the environmental conditions at the relevant times in determining whether a discharge occurred. This is not reliance on "speculation" or on "no evidence" – rather, it was an informed factual inference based on the

evidence before the Administrator, which evidence is not challenged by Canada. There was no reviewable error in this approach and Canada has not demonstrated that the Administrator made a palpable and overriding error when inferring that a discharge of oil pollution occurred prior to September 4, 2018.

Stelie II

[145] In my view, the Administrator also did not commit a palpable and overriding error in determining, with respect to the *Stelie II*, that a discharge of oil likely occurred between March 23, 2016 and March 26, 2016. The Administrator pointed to two potential sources of discharge of oil. The first being the possibility of discharge out of the open containers and trays of oil on the vessel's deck when the vessel listed, drifted across the dock facility, and impacted the dock on the opposite side. The second being the discharge of oily water during the dewatering operation on March 25-26, 2016.

[146] The information as to the state of the vessel came from the CCG's narrative filed in support of its claim. This narrative advised that the *Stelie II* had broken its moorings during high winds, had a substantial list and was resting against an adjacent dock. The CCG ER personnel gained access on March 25, 2016 encountering a strong odour of diesel fuel. The CCG also reported that the engine room was three-quarters full of water, "pollutants consisting of lube oil, hydraulic oil, diesel oil and debris scattered everywhere. There were open trays with oil, buckets of oil,… and other pollutants clearly visible…".

[147] The Administrator advised the CCG of its concerns by email from its counsel to the CCG's counsel, referring to the CCG's narrative. The Administrator noted that according to the narrative, the vessel was listing severely with open trays and bucket of oil on its deck. The Administrator stated that the severe angle of the list may have caused some quantity of these oils to enter the water. Also, in particular, the CCG's submitted documentation offered no explanation as to what was done with the presumably large volume of water pumped from the vessel on March 25-26, 2016. Without any evidence showing that this contaminated water was isolated and disposed of through appropriate waste streams, it appeared likely that some or all of it ended up in the waters of the harbour. Such a discharge of oily water would probably have resulted in oil pollution damage as contemplated under Part 7 of the *MLA* thereby engaging the 2-year limitation period which would have expired in late March 2018. Counsel for the Administrator invited the CCG to provide all relevant documentation and any comments that it might have in response to this concern.

[148] In response, counsel for the CCG advised that the suction hose on the intake side of the pump was placed deep into the vessel to remove sea water but not the oil that was floating on the surface and, at no time during the dewatering process was oil or oily water observed. Counsel further advised that the CCG did not observe discharge from open trays or buckets and to its knowledge, such a discharge did not occur. Had it occurred, this would have been obvious on the white ice covering the harbour. Counsel for the CCG stated that if the Administrator had evidence of pollution in the harbor during its response, then it would appreciate disclosure of same. Further, counsel for the CCG advised that it was the CCG's position that any factual

findings of the Administrator must be grounded in the evidence presented. The CCG submitted no further documentation with the response.

[149] The Administrator found, on a balance of probabilities, that some of the oil observed in open containers on deck escaped. This finding was based on the information that the vessel was subject to a storm that was violent enough to cause the vessel's mooring lines to sever and for it to drift laterally though the ice about 60' and impact the other side of the dock facility; the vessel had a substantial list; and the photographs on the record showed nothing in the vessel's configuration that would have kept the oil in open containers on the vessel's deck. In other words, if oil spilled out of the containers due to the storm and list, there was no evidence that it was physically constrained from entering the harbour. The Administrator acknowledged the CCG's response that none of the five photographs depicting the vessel's starboard side and the adjacent harbour ice appeared to show signs of an escape of oil, but found that any staining may not have been apparent from the photographs as they were taken from a distance and that any discharge may have been somewhat dispersed during the storm. As to the CCG's counsel's response that a discharge would have been visible on the harbour ice, the Administrator found this to be difficult to reconcile with the fact that the *Stelie II* and the harbour ice moved. The ice covering the harbour would not have been wholly contiguous through March 23-25, 2016 as the vessel travelled though the ice pushed by wind or waves.

[150] I note that in its submissions before me, Canada does not assert that it was not possible that oil could have escaped from the open containers on deck during the storm and/or because of the list. Rather, Canada submits that while the Administrator pointed to the vessel's

configuration as not foreclosing a spill, the Administrator "describes no mechanism for oil onboard the vessel to find its way into the harbour as opposed to contained areas of the vessel". Yet the Administrator alerted the CCG to this concern and the CCG, in its response and in support of its claim, did not provide an explanation of how escaped oil on deck would have found its way into a contained area rather than, for example, through a scupper or other deck opening intended to allow water on deck to be cleared. Nor did the CCG offer any other reason why the oil in open containers would not have spilled as a result of the storm and list. In that regard, I note that one of the photographs included in the Administrator's decision depicts a shallow, open tray apparently containing oil, situated on the listing deck.

[151] Instead, Canada asserts that while a spill not being foreclosed by the evidence may cast doubt for the Administrator, it does not change the fact that there is no evidence whatsoever that a spill from the containers on deck "actually occurred".

[152] The onus was on the CCG to support its claim for compensation. Here, the Administrator considered all of the evidence with respect to the containers of oil on deck and made an inference, on the balance of probabilities, that some of that oil escaped. It may well have been that this occurred before the CCG ER arrived on scene and that the CCG ER personnel did not observe the discharge – but the logical inference arising from the evidence that there were open containers of oil on the deck of the vessel which had been adrift during a storm and had taken on a significant list is that some of that oil found its way into the marine environment. In the CCG's response to the concern raised by the Administrator, the CCG offered no explanation as to how any spilled oil would find its way into a contained area of the vessel rather than into the harbour.

[153] In my view, Canada has not demonstrated that the Administrator made a palpable and overriding error in making the inference, based on the evidence before it, that on a balance of probabilities, oil would likely be displaced from open containers on the deck of the vessel, as a result of the storm and/or the vessel's substantial list, and found its way into the marine environment.

[154] That said, the Administrator's further inference that pumping water from the engine room of the *Stelie II* directly into the harbour was likely to have discharged some oil is not as clear.

[155] In making this finding, the Administrator referred to: the CCG's narrative indicating that "[t]he engine room was three-quarters full of water, pollutants consisting of lube oil, hydraulic oil, diesel oil and debris were scattered everywhere"; the *Stelie II* Survey Report indicating that at the time of the survey, the lazarette, engine room, and fish hold were all partially filled with fuel and oily liquids which suggested to the Administrator that the ingress was moving freely between the vessel's compartments carrying oil contamination along with it; the documentation provided by the CCG indicating that water was pumped from the vessel's engine room where much of its machinery was submerged and would have been releasing oils; the CCG's narrative and the *Miss Stelie* Survey Report indicating water levels that would largely have submerged the vessel's machinery resulting in the seepage of some volume of lubricating oil; that it was evident that at least some diesel fuel had escaped from the vessel's tanks; and, photographs showing that sorbent materials were used during the deconstruction and some of the vessel's internal planks and bilge appeared to have been oiled. Given the foregoing, the Administrator found that the water in the engine room must have been contaminated.

[156] The Administrator also acknowledged the CCG's response, which states that "[a]t **no time** during the dewatering process was oil or oily water observed" and that during the response a "number of locals were on the wharf observing the operations and at no time did anyone observe oil on the ice in the harbour". The Administrator stated that this did not make it clear whether any witness observed the whole of the operation and confirmed this that no oil was discharged – but failed to record such observations at the time – or whether the CCG was merely asserting that the CCG personnel would have seen a discharge while they were undertaking other tasks.

[157] The Administrator did not accept that an absence of an observation of a discharge would lead to a determination that no discharge of oil occurred.

[158] As to the dewatering operation, the Administrator acknowledged the explanation provided by the CCG's counsel as to the placement of the intake hose deep within the vessel so as not to discharge oil floating on the surface of the water within the vessel but stated that it did not have the "benefit of a direct witness's account as to what was done".

[159] The Administrator also noted that much of the CCG's claimed costs and expenses were for the deconstruction of the *Stelie II*. The Administrator stated that compensation for such costs may be available where a wooden ship is so saturated with oil that, if submerged, its timbers would discharge oil. The Administrator stated that the CCG appeared to take the position that the *Stelie II* was in such a state even after all water had been pumped from it. That being the case, submerging a hose deep into the water inside the engine room of the vessel would not necessarily

be sufficient to avoid a discharge of oil and that photographs depicted a significant containing presence of oil in the vessel.

[160] I note here that the CCG narrative indicates that efforts to sell the vessel were unsuccessful and that this was likely due to the fact that the vessel was in poor condition with oil-soaked timbers and was unlikely to be seaworthy. Further, the CCG could not continue to incur storage fees and, given the remaining inaccessible oil pollutants on board and the oils soaked timbers, the CCG deemed the vessel to be an unacceptable risk to the environment and that deconstruction was the only feasible option.

[161] Moreover, in its written submissions, Canada does not dispute that the timbers were oiled. Rather, Canada asserts that there is no evidence of continuous discharge or that discharge occurred at all during the pumping operations. There may, or may not, be merit to that position. I note that the role of the oiled timbers was not raised by counsel for the Administrator in its letter to the CCG's counsel raising the Administrator's concerns. Nor did the CCG's response to the Administrator address the timbers, although their state was known to the CGG. Instead, the CCG asserted that no discharge was observed and – as it submits in the submissions before me – that it responded professionally by utilizing appropriate methods.

[162] In this matter, the Administrator considered the statement of counsel for the CCG as to the positioning of the intake hose but, in essence, afforded this little weight in the absence of any direct accounts as to what had been done. Given the evidence supporting the contaminated state of the water in the engine room, the Administrator inferred that a discharge of oil had occurred

during dewatering, even though the CCG took the position that such a discharge had not been observed and that the positioning of the intake hose would not have discharged the oil floating on the surface.

[163] Again, the problem here is that the Administrator advised the CCG of its concerns – other than the oiled timbers – and invited the CCG to provide supplementary documentation to support its claim. The CCG responded by way of its counsel's email. That response did not provide any further documentation in support of the CCG's claim, including, for example, statements from the responders addressing the Administrators concerns, describing their actions and any monitoring during the dewatering operation, their direct observations and, explaining why in their professional view the Administrator's concerns were not well founded. The CCG could have also identified the observers referred to in the email from its counsel and obtained or reported on their statements as to how long they observed the dewatering and what they observed. Had the CCG provided further documentation, the outcome may have been different.

[164] I also do not agree with the CCG's submission before me that its counsel's responding email is equivalent to or as good as the submission or further documentation or evidence from the CCG – given that what the Administrator offered was specifically the opportunity to provide further supporting documentation. I appreciate that in the normal course of such claims, the CCG relies upon its narrative contained in its claim submission, as it did in these cases. The difference here is that the Administrator went back to the CCG identifying its concerns and providing the opportunity to provide responding supporting documentation, but none was submitted.

[165] That said, I am troubled by the fact that the state of the oiled timbers was not raised as a concern by counsel for the Administrator in the letter to counsel for the CCG. However, Canada has not suggested that it was denied procedural fairness and the CCG was aware of the oiled timbers when its counsel responded to the Administrator.

[166] The Administrator's reasons also suggest that this was an additional finding – being that "even if" the oil on the surface of the waters inside the *Stelie II* had been successfully avoided, it would not "be safe" to conclude that no discharge occurred. This does not appear to be a finding based on the balance of probabilities. It is also not clear to me from the Administrator's reasons that it did – or did not – accept that if the intake hose had been positioned as the CCG described, then oil would not have been discharged during the dewatering as a result. The Administrator only states that it did not have the benefit of a direct witness's account as to what was done. The Administrator appears to have afforded this explanation little weight in the absence of such an account.

[167] Ultimately, the Administrator concluded that regardless of CCG's position as to the placement of the intake hose, given the large volume of water pumped and the contaminated state of the *Stelie II*, that a discharge occurred during the pumping operation. This was in addition to, or "bolster[ed]" the determination that a discharge had also occurred during or before the CCG's response from the open oil containers on deck.

[168] While the Administrator's reasons lacked clarity in regard to the role of the oiled timbers, considering the evidence that the Administrator assessed and weighed in whole, I am not

persuaded that the Administrator made a palpable and overriding error in determining that a discharge of oil occurred during the dewatering process. The Administrator's reasons demonstrate that it assessed the available evidence, inferred from the evidence that a discharge occurred, and found the responding submissions insufficient to lead it to a different conclusion. Also, in any event, its finding that a discharge occurred from the open containers of oil on deck would have been sufficient to ground the application of the s 103(2)(a) limitation period.

Conclusion

[169] For the reasons above, I find that the Administrator did not err in its determination that discharges of oil pollution had occurred and, therefore, the limitation period under s 103(2)(a) of the *MLA* applied and had expired prior to the submission of the CCG's claims for each of the *Miss Terri* and the *Stelie II*. In the result, the CCG's s 103(1) claims for compensation were precluded as they were made outside the applicable limitation period.

[170] By way of a few, final observations, I feel compelled to note that based on the written and oral submissions before me, there appears to be considerable animosity between the CCG and the Administrator. This is unfortunate. I also do agree with Canada that the Administrator cannot simply advance theories of what might have happened. The abandoned "washing mechanism" theory included in the draft reasons would fall into that category. I am also inclined to think that if the Administrator is relying on internal technical advice to ground a concern that the Administrator chooses to raise with the claimant, then that this advice should be disclosed to the party making the s 103 claim so that, if they deem it appropriate, they can provide a responding technical response. It seems unlikely that the Administrator is relying on its own

technical expertise to identify concerns with claims. Further, while the onus lies on the claimant to establish its claim, if the Administrator is departing from its traditional approach in relying on narratives contained in claims submission, as Canada suggests, then the Administrator should make this very clear to all claimants, as well as exactly what level of supporting information the Administrator now expects to receive (for example, statements of participants or observers in the absence of an observation or monitoring logs in the event that the occurrence of discharge is at issue). These observations are offered in the hope that a better working relationship between the CCG and the Administrator may be achieved in the future.

Costs

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

[172] 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)).

[173] 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 T-1094-21 AND T-1104-21

THIS COURT'S JUDGMENT is that

1. The appeals are 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-1094-21
STYLE OF CAUSE:	HER MAJESTY THE QUEEN IN RIGHT OF CANADA v THE ADMINISTRATOR OF THE SHIP-SOURCE OIL POLLUTION FUND
AND DOCKET:	T-1104-21
STYLE OF CAUSE:	HER MAJESTY THE QUEEN IN RIGHT OF CANADA v THE ADMINISTRATOR OF THE SHIP-SOURCE OIL POLLUTION FUND
PLACE OF HEARING:	BY VIDEOCONFERENCE USING ZOOM
DATE OF HEARING:	JULY 13, 2022
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	SEPTEMBER 21, 2022

APPEARANCES:

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