# *Ship-Source Oil Pollution Fund*


The Administrator's Annual Report

2004-2005

Canada

Photo courtesy of Mike Grebler
Canadian Coast Guard ER
Showing MV Santa Emma, Cape Tormentine, New Brunswick
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CANADA

# Ship–Source Oil Pollution Fund

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## 2004 – 2005

Canada

The Honourable Jean Lapierre, P.C., M.P.
Minister of Transport
Ottawa, Ontario
K1A 0N5

Dear Mr. Lapierre:

It is an honour to submit the Annual Report for the Ship-source Oil Pollution Fund for the fiscal year ending March 31, 2005, to be laid before each House of Parliament, in accordance with Section 100 of the *Marine Liability Act*.

Yours sincerely,

Kenneth A. MacInnis, QC
The Administrator of the
Ship-source Oil Pollution Fund

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# Abbreviations of Proper Names used in this Report

| | |
|---|---|
| ABS | American Bureau of Shipping |
| ALERT | Atlantic Emergency Response Team |
| AMOP | Arctic Marine Oil spill Program |
| CCG | Canadian Cost Guard |
| CEDRE | Centre of Documentation, Research and Experimentation on Accidental Water Pollution |
| CEPA | Canadian Environmental Protection Act |
| CLC | Civil Liability Convention |
| CMAC | Canadian Marine Advisory Council |
| CMI | Comité Maritime Law International |
| CMLA | Canadian Maritime Law Association |
| COPE | Compensation for Oil Pollution in European Waters |
| CPA | Canada Port Authority |
| CSA | Canadian Shipping Act |
| CSO | Combined Sewer Outfalls |
| CWS | Canadian Wildlife Service |
| DFO | Department of Fisheries and Oceans |
| DNV | Det Norske Veritas |
| DWT | Deadweight Tonnage |
| EC | European Commission |
| ECAREG | Eastern Canada Vessel Traffic Services Regulations |
| ECRC | Eastern Canada Response Corporation |
| EEZ | Exclusive Economic Zone |
| ER | Emergency Response |
| EPA | Environmental Protection Agency |
| EU | European Union |
| FPSO | Floating Production, Storage and Offloading Units |
| FSU | Floating Storage Units |
| GT | Gross Tonnage |
| HELCON | Helsinki Convention |
| HNS | Hazardous and Noxious Substances |
| ICONS | International Commission on Shipping |
| ICS | International Chamber of Shipping |
| IMO | International Maritime Organization |
| IOPC | International Oil Pollution Compensation Fund |
| ISM | International Safety Management Code |
| I-STOP | Integrated Satellite Tracking of Polluters |
| ITOPF | International Tanker Owners Pollution Federation |
| LLMC | Limitation of Liability for Maritime Claim |
| LOU | Letter of Undertaking |
| MARPOL | Marine Pollution |
| MCTS | Marine Communication Traffic Services |
| MEPC | Marine Environment Protection Committee |
| MLA | Marine Liability Act |
| MOU | Memorandum of Understanding |
| MPCF | Maritime Pollution Claims Fund |
| MSC | Maritime Safety Committee |
| MT | Motor Tanker |
| MV | Motor Vessel |
| NASP | National Aerial Surveillance Program |
| NEIA | Newfoundland Labrador Environmental Industries Association |

| | |
|---|---|
| NOAA | National Oceanic and Atmosphere Administration |
| NRDA | Natural Resource Damage Assessment |
| NTCL | Northern Transportation Company Limited |
| OBO | Ore/Bulk/Oil |
| OCIMF | Oil Companies International Marine Forum |
| OPA | Oil Pollution Act |
| OPA 90 | Oil Pollution Act 1990 (US) |
| OSRL | Oil Spill Response Ltd |
| P&l Club | Protection and Indemnity (Marine Insurance) Association |
| PPM | Part per Million |
| PTMS | Point Tupper Marine Services Limited |
| REET | Regional Environmental Emergency Team |
| RINA | The Italian Classification Society |
| RO | Response Organization |
| SAR | Search and Rescue |
| SDR | Special Drawing Rights* |
| SITREP | Situation Report |
| SIMEC | Société d'Intervention Maritime, Est du Canada |
| SOLAS | International Convention for the Safety of Life at Sea |
| SOPF | Ship-source Oil Pollution Fund |
| STOPIA | Small Tankers Oil Pollution Indemnification Agreement |
| TC | Transport Canada |
| TCMS | Transport Canada Maine Safety |
| TOPIA | Tanker Oil Pollution Indemnification Agreement |
| TSB | Transportation Safety Board |
| UK | United Kingdom |
| US | United States |
| USCG | United States Coast Guard |
| VPA | Vancouver Port Authority |
| VPC | Vancouver Port Corporation |
| WCMRC | Western Canada Marine Response Corporation |

* The value of the SDR at April 1, 2005, was approximately $1.83491. This actual value is reflected in Figure 1 in Appendix D. Elsewhere in the report, for convenience, calculations may be based on the SDR having a nominal value of $2.

# Administrator's Communiqué

Canada has shown considerable foresight over the years in fashioning a unique well-functioning domestic compensation regime.

I am pleased to report that the Ship-source Oil Pollution Fund (SOPF) grew to some $ 339 million in March 31, 2005 from some $ 280.5 million on March 31, 1999. This rise of $59 million was achieved after paying out of the Fund all operating costs and expenses, all private and Government claims for Canadian incidents and all Canadian contributions to the International Fund.

## The Canadian Compensation Regime

Canada's national Fund, the SOPF, is liable to pay claims for oil pollution damage or anticipated damage at any place in Canada, or in Canadian waters including the exclusive economic zone, caused by the discharge of oil from a ship.

In addition, Canada is a Contracting State in an international compensation regime that mutualizes the risk of pollution (persistent oil) from sea-going tankers.

The SOPF is intended to pay claims regarding oil spills from ships of all classes – it is not limited to sea-going tankers.

The type of oil covered by the SOPF is also greater than under the International Civil Liability and Fund Conventions. It is not limited to persistent oil and includes petroleum, fuel oil, sludge, oil refuse and oil mixed with wastes.

The SOPF is also available to provide additional compensation (a third layer) in the event that compensation under the 1992 Civil Liability Convention (CLC) and the 1992 IOPC Fund Convention, with respect to spills in Canada from oil tankers, is insufficient to meet all established claims for compensation. (See Figure 1, Appendix D.)

During the fiscal year commencing April 1, 2005, the maximum liability of the SOPF is approximately $145 million for all claims from one oil spill.

The classes of claims for which the SOPF may be liable include the following:

- Claims for oil pollution damage;
- Claims for costs and expenses of oil spill clean-up, preventive measures and monitoring; and
- Claims for oil pollution damage and clean-up costs where the cause of the oil pollution damage is unknown and the Administrator of the SOPF has been unable to establish that the occurrence that gave rise to the damage was not caused by a ship.

A widely defined class of persons in the Canadian fishing industry may claim for loss of income caused by an oil spill from a ship.

The current statutory claims regime, on the principle that the polluter pays (subject to limitation of liability) has as it "four cornerstones":

1. All costs and expenses must be reasonable;
2. All clean-up measures taken must be reasonable measures;
3. All costs and expenses must have been actually incurred;
4. All claims must be investigated and assessed by an independent authority (the Administrator).

## The Rule of Law

The Administrator must act in accordance with the laws governing the operation of the SOPF - not arbitrarily nor in deference to external policies contrary to Canadian Law.

The Administrator is the Canadian official who directs payments of domestic claims and authorizes payments of Canadian contributions to the International Fund from the SOPF.

The Administrator is wholly accountable to Parliament for all payments out of the SOPF.

## A Successful Year

During the current year we handled some 72 active incidents files. Particularly, 12 Canadian claims totalling some $810,000.00 were settled and paid for some $592,000.00 plus interest (Section 3).

The SOPF continues to pay considerable contributions to the International Fund: $3.4 million this year, and a total of some $41.6 million since 1989.

With the 50 percent rise in compensation levels effective November 2003, the potential liability of the SOPF to the International Fund has increased significantly (See Figure 1, Appendix D).

## Quasi-Criminal Liability for Environmental Offences in Canada – Changes

On May 6, 2004, the Honourable David Anderson, Minister of the Environment, tabled new legislation (Bill C-34) to amend the *Migratory Birds Convention Act (1994)* and the *Canadian Environmental Protection Act (1999).*

As a result of the Dissolution of Parliament on May 23, 2004, the proposed legislation "died on the order paper". See the Administrator's Annual Report 2003-2004 at section 4.1.

On October 26, 2004, during the next session of Parliament the legislation was re-introduced as Bill C-15 by the Honourable Stéphane Dion, Minister of the Environment. On May 19, 2005, Parliament passed the legislation. The Act was proclaimed in force as of June 28, 2005.

For an expert view of these changes see section 4.1 herein.

## European Union Directive on Ship-source Pollution Sanctions

On July 12, 2005, the EU Council adopted a Directive and a Framework Decision respecting ship-source discharges in violation of the laws of European Union Member States. Sanctions, including criminal sanctions, are to be imposed if the persons concerned have been found to have caused or participated in the act by intent or grossly negligent behaviour. The object of the Directive is to improve maritime safety and to enhance protection of the environment from pollution by ships. Other practical measures to this end are included in the Directive and Framework Decision, with an entry into force date of October 1, 2005. See document 92FUND/A.10/35 at www.iopcfund.org. To see the text visit http://www.europa.eu.int/scadplus/leg/en/lvb/l24123.htm. The final text as adopted shall be published in the Official Journal of the EU.

## Port Reception Facilities for oily waste

The Marine Environment Protection Committee (MEPC) of the International Maritime Organization (IMO) at its 53rd session from July 18-22, 2005, approved a format for reporting inadequacy of port reception facilities.

In a previous report MEPC states: "Port States failing to provide adequate reception facilities will make it harder to deal with the enforcement of ship's illegal discharge at sea."

Many migratory seabirds die each year as a result of ships deliberately dumping a mix of water and oil waste from engine room bilges. The ability of ships to comply with regulatory discharge requirements when in port depends largely upon the availability of adequate port reception facilities. The lack of reception facilities in many ports worldwide may contribute to pollution of the marine environment.

Transport Canada says it may now move forward on this issue. See section 4.5.1 herein.

## Changes to the International Regime – Impact on SOPF

As explained in section 4.6.1, Canada first became a Contracting State in the International Oil Pollution compensation Regime in 1989. The maximum level of compensation available per incident rose from some $120 million in 1989 to some $270 million in 1999.

Since November 1, 2003 some $372 million is currently available from the International Regime for a persistent (heavy) oil spill from a sea-going oil tanker.

Canada had the foresight to have an additional $145 million available from the SOPF for any such tanker spill, making for total compensation available – only in Canada - at some $517 million per incident for such spill.

As noted in section 4.6.2 now an "optional" third tier of compensation from a new International Supplementary Fund, is available for International Fund States (including Canada) that want it. States that opt for the Supplementary Fund will have available from the International Regime an aggregate amount of about $1.5 billion as compared to the current $372 million.

We are pleased with the positive developments that took place on the international front with respect to establishing the Supplementary Fund. The Canadian delegation position, which includes that of the Administrator of the SOPF, is supportive of the initiative to establish an "optional" Supplementary Fund under the International Regime. However, we understand that support for

the initiative does not imply a Canadian decision to join the Supplementary Fund now that it has come into force. Any decision, in Canada's interests, would be made by Cabinet. We are advised that any recommendation to Cabinet would be preceded by full and frank discussions involving both government agencies and non-government stakeholders with interests in the Canadian and international ship-source oil pollution regimes.

At the time, the purpose and reason for developing this "option" was nicely put in the ITOPF Review 2002:

> *"… the International Supplementary Fund, … would be available for ratification on an optional basis by States that are party to the 1992 CLC and Fund Convention. This Supplementary Fund was designed to meet the concerns of those States that continue to consider that the 50% increase in the CLC and Fund limits agreed by the IMO in October 2000 (effective 1st November 2003) might still be insufficient to meet all valid claims arising out of a major incident. It was also reasoned that this international Supplementary Fund would render unnecessary the European COPE Fund proposed by the European Commission in December 2000."*

Currently, a discussion paper prepared by Transport Canada officials on the subject, dated May 2005, is being circulated inviting comment by October 31, 2005.

Any proposal that Canada become a Contracting State to this "optional" Supplementary Fund has significant implications for the Federal Government, as discussed in section 4.6.2.

## Outreach

We continue to deepen our understanding of the perspectives of stakeholders in the Canadian regime, national and international. Some insights are highlighted in sections 4 and 5.

## Our Thanks

We acknowledge the assistance received from persons in both the private and public sectors as well as the International Fund. We are particularly pleased with the cooperation of Canadian shipowners, the oil industry, and the Canadian Maritime Law Association.

In closing, we are grateful for the support received, the challenges, successes and also the problems experienced this year which had to be addressed

We welcome any suggestions on how we can improve SOPF services.

# Summary

This annual report covers the fiscal year ended March 31, 2005. It describes Canada's domestic compensation regime. First, Canada's national Fund, the SOPF, covers ships of all classes as well as persistent and non-persistent oil and mystery spills. In addition, Canada is a Contracting State in an international compensation regime that mutualizes the risk of pollution (persistent oil) from sea-going tankers.

The financial status of the SOPF is reported, including claim settlements in Canada and the amount of payments by the SOPF to the international Funds. During the year, Canadian claims totalling approximately $ 810,385.13 before interest were settled and paid in the aggregate amount of $ 592,453.95 plus interest of $ 18,118.06. The Administrator recovered from third parties liable $ 60,000.00 respecting payments made out of the SOPF to some claimants. This year the Administrator paid the amount of $ 3,448,152.80 out of the SOPF to the 1992 IOPC Fund for incidents outside of Canada. As at March 31, 2005, the balance in the SOPF was $ 339,108,934.22.

The SOPF is liable to pay claims for oil pollution damage or anticipated damage at any place in Canada, or in Canadian waters including the exclusive economic zone of Canada, caused by the discharge of oil from a ship. Commencing April 1, 2005, the maximum liability of the SOPF for all claims from one oil spill is $145,322,882.40.

During the new fiscal year, the Minister of Transport has the statutory power to impose a levy for the SOPF of 43.58 cents per metric tonne of "contributing oil" imported into or shipped from a place in Canada in bulk as cargo on a ship. The levy is indexed to the consumer price index annually. No such levy (MPCF/SOPF) has been imposed since 1976.

Since 1989, the international IOPC Funds have received approximately $41.6 million out of the SOPF. Canada is currently a Contracting State to the 1992 international oil pollution compensation regime. As such, our national Fund, the SOPF, continues to have potential significant future liabilities to the IOPC Funds for foreign incidents.

This report outlines the status of pollution incidents – Section 3 - brought to the attention of the Administrator. The incident section indicates claims that have been settled, including claims that are in various stages of advancement. The current status of recovery actions by the Administrator against shipowners is also noted in the incident section.

During the fiscal year, the Administrator responded to all enquiries about compensation entitlement and investigated all claims resulting from oil pollution. The length of time taken to process the respective claims regarding identified ships depended on the completeness of the supporting documentation.

The Administrator continues his outreach initiatives by actively participating in conferences, seminars and workshops. He met with management personnel in federal departments, government agencies, and organizations of the marine industry.

These outreach initiatives (Section 5) included:

- Participating in meetings with senior representatives of the Department of Fisheries and Oceans, Transport Canada, and Environment Canada;

- Attending sessions of the Canadian Marine Advisory Council's National Conferences held in Ottawa;

- Attending the Marine Advisory Council (Northern CMAC) meetings held in Montréal;
- Participating in the Atlantic Regional Environmental Emergency Team (REET) meetings held in St. John's;
- Participating in a meeting held in Québec City between the Canadian Coast Guard's Environmental Response unit in Québec and Québec Ministère de la sécurité publique;
- Participating, with representatives from government agencies and the marine industry – including the USCG and ITOPF, in an On-Scene Commander Course for effective response to a significant oil spill incident held at the Canadian Coast Guard College;
- Attending the Comité Maritime International Conference held in Vancouver;
- Participating in the Transport Canada Marine Safety Investigators' Course in Ottawa;
- Participating in an international conference held at the Morris J. Wosk Centre for Dialogue, Simon Fraser University, Vancouver;
- Participating in the winter meeting of the New Brunswick Branch of the Canadian Bar Association held in Saint John;
- Attended a special meeting of the Eastern Admiralty Law Association held in Halifax;
- Speaking to the Shipping Law class at the Law School, Dalhousie University, Halifax;
- Attending the Canadian Maritime Law Association executive committee meetings held in Ottawa;
- Attending the Federal Judges Conference – Marine Law – held in Ottawa.

The focus of the Section 4 (Challenges and Opportunities) is the protection of the marine environment. This section highlights changes to the Canadian marine pollution laws.

On May 19, 2005, Parliament passed legislation, Bill C-15 and Act to amend the *Migratory Bird Convention Act, 1994* and the *Canadian Environmental Protection Act, 1999*. The amendments expand the application of both the Acts to ship-source oil pollution. Bill C-15 was proclaimed into force as of June 28, 2005.

Included in the text of this report are updates on various issues surrounding the illegal discharge at sea of ship-generated oily waste. The question of marine waste reception facilities in Canadian ports is also addressed.

The report takes note of the "Baltic Strategy" that provided incentive for ships to retain oily bilge water and residue onboard for disposal in port rather than dumping it at sea. Under the Baltic Strategy a "no-special-fee" system has been designed to encourage the use of port reception facilities. This means fees covering the cost of reception, handling and final disposal of the ship-generated waste are included in the harbour fee. As a result, there is no good reason for not using the port reception facilities.

The Administrator follows closely the progress on these issues, because of the problem of mystery spills and the resulting chronic problem of oiled seabirds, particularly in eastern Canada.

The ongoing work by Environment Canada officials to establish a national framework for implementing an environmental damage assessment protocol is noted. Since Treasury Board approved the Environmental Damage Fund, personnel in Environment Canada have organized and hosted seminars and workshops to develop a nationally consistent approach to handle environmental issues.

The report also outlines how compensation for environmental damages is handled differently under the *MLA*, the 1992 CLC, the 1992 IOPC Fund Convention, and the US OPA 90.

Changes to the 1992 international compensation regime and the impact on the SOPF are explained. On November 1, 2003, the 1992 IOPC regime increased its liability and compensation limitation amount by 50.37 per cent for each oil tanker spill incident. Currently, under the 1992 Civil Liability and the 1992 IOPC Fund Conventions there is approximately $372 million of coverage. Consequently, in Canada, the aggregate amount of funds available to cover an oil tanker spill is now approximately $517 million, including the SOPF.

The status of the International Oil Pollution Compensation Supplementary Fund – "optional" third tier – is updated in the report. This Supplementary Fund Protocol entered into force on March 3, 2005.

It is for Cabinet to decide whether or not Canada becomes a Contracting State to the "optional" third tier – in addition to being a 1992 IOPC Fund Contracting State. We are advised that prior to any such proposal going to Cabinet there would be broad consultations with the public and private sectors, government agencies and the marine industries before any decision is taken.

Currently, a discussion paper prepared by Transport Canada dated May 2005 is being circulated to the marine industry for comment.

During the year the Administrator, as a member of the Canadian delegation, attended and reported on the Executive Committee and the Assembly sessions of the international Funds held at IMO headquarters in London. Excerpts from his report on these proceedings are contained in Appendices B and C.

# 1. Responsibilities and Duties of the Administrator

The Administrator, appointed by the Governor-in-Council:

- Holds office during good behaviour and, as an independent authority, must investigate and assess all claims filed against the Ship-source Oil Pollution Fund (SOPF), subject to appeal to the Federal Court of Canada;

- Offers compensation to claimants for whatever portion of the claim the Administrator finds to be established and, where a claimant accepts an offer, the Administrator directs payment to the claimant out of the SOPF;

- Prepares an annual report on the operations of the SOPF, which is laid before Parliament by the Minister of Transport;

- Has the powers of a Commissioner under Part 1 of the *Inquiries Act*;

- May take recourse action against third parties to recover the amount paid from the SOPF to a claimant and may also take action to obtain security, either prior to or after receiving a claim;

- Becomes a party by statute to any proceedings commenced by a claimant against the owner of a ship, its insurer, or the International Oil Pollution Compensation (IOPC) Funds, as the case may be;

- Has the responsibility under the *Marine Liability Act (MLA)* to direct payments out of the SOPF for all Canadian Contributions to the IOPC Funds (such contributions are based on oil receipts in Canada reported by the Administrator to the Director of the IOPC Funds); and

- Participates in the Canadian Interdepartmental Committee and joins the Canadian delegation to meetings of the Executive Committee and the Assembly of the IOPC Funds.

# 2. The Canadian Compensation Regime

The SOPF came into force on April 24, 1989, by amendments to the *CSA*. The SOPF succeeded the Maritime Pollution Claims Fund (MPCF), which had existed since 1973. In 1989, the accumulated amount of $149,618,850.24 in the MPCF was transferred to the SOPF.

Effective August 8, 2001, the SOPF is governed by Part 6 of the *Marine Liability Act (MLA)* Statutes of Canada, 2001, chapter 6.

The SOPF is a special account established in the accounts of Canada upon which interest is presently credited monthly by the Minister of Finance.

A levy of 15 cents per tonne was imposed form February 15, 1972, until September 1, 1976, during that period a total of $34,866,459.88 was collected and credited to the MPCF from 65 contributors. Payers into the MPCF included oil companies, power generating authorities, pulp and paper manufacturers, chemical plants and other heavy industries.

During the fiscal year commencing April 1, 2005, the Minister of Transport has the statutory power to impose a levy of 43.58 cents per metric tonne of "contributing oil" imported into or shipped from a place in Canada in bulk as cargo on a ship. The levy is indexed annually to the consumer price index.

No levy has been imposed since 1976.

The SOPF is liable to pay claims for oil pollution damage or anticipated damage at any place in Canada, or in Canadian waters including the exclusive economic zone of Canada, caused by the discharge of oil from a ship.

The SOPF is intended to pay claims regarding oil spills from all classes of ships. The SOPF is not limited to sea-going tankers or persistent oil, as is the 1992 IOPC Fund.

The SOPF is also intended to be available to provide additional compensation (a third layer) in the event that funds under the 1992 Civil Liability Convention (CLC) and the 1992 IOPC Fund Convention, with respect to spills in Canada from oil tankers, are insufficient to meet all established claims for compensation (See Figure 1, Appendix D).

During the fiscal year commencing April 1, 2005, the maximum liability of the SOPF is $145,322,882.40 for all claims from one oil spill. This amount is indexed annually.

The classes of claims for which the SOPF may be liable include the following:

- Claims for oil pollution damage;
- Claims for costs and expenses of oil spill clean-up including the cost of preventative measures; and
- Claims for oil pollution damage and clean-up costs where the identity of the ship that caused the discharge cannot be established (mystery spills).

A widely defined class of persons in the Canadian fishing industry may claim for loss of income caused by an oil spill from a ship.

The present statutory claims regime of Part 6 of the *MLA*, on the principle that the polluter should pay, has as its four cornerstones:

- All costs and expenses must be reasonable;
- All clean-up measures taken must be reasonable measures;
- All costs and expenses must have actually been incurred; and
- All claims must be investigated by an independent authority (the Administrator).

Experience shows that the investigation and assessment of claims is expedited when claimants provide convincing evidence and written explanations. This includes various justifications by the On-Scene Commander (OSC) and proof of payment, etc. Detailed logs and notes by the OSC and others are invaluable in facilitating the settlement and payment of claims. It is essential that the measures taken and the costs and expenses incurred are demonstrably reasonable. The claim should be presented in a timely manner.

## SOPF: A Fund of Last Resort

The *MLA* makes the shipowner strictly liable for oil pollution damage caused by his ship, and for costs and expenses incurred by the Minister of Fisheries and Oceans and any other person in Canada for clean-up and preventive measures.

As provided in the *MLA*, in the first instance, a claimant can take action against a shipowner. The Administrator of the SOPF is a party by statute to any litigation in the Canadian courts commenced by a claimant against a shipowner, its guarantor, or the 1992 IOPC Fund. In such event, the extent of the SOPF's liability as a last resort is stipulated in section 84 *MLA*.

The Administrator also has the power and authority to participate in any settlement of such litigation, and may make payments out of the SOPF as may be required by the terms of the settlement.

A response organization (RO) as defined in the *CSA* has no direct claim against the SOPF, but it can assert a claim for unsatisfied costs and expenses after exhausting its right of recovery against the shipowner.

## SOPF: A Fund of First Resort

The SOPF can also be a fund of first resort for claimants, including the Crown.

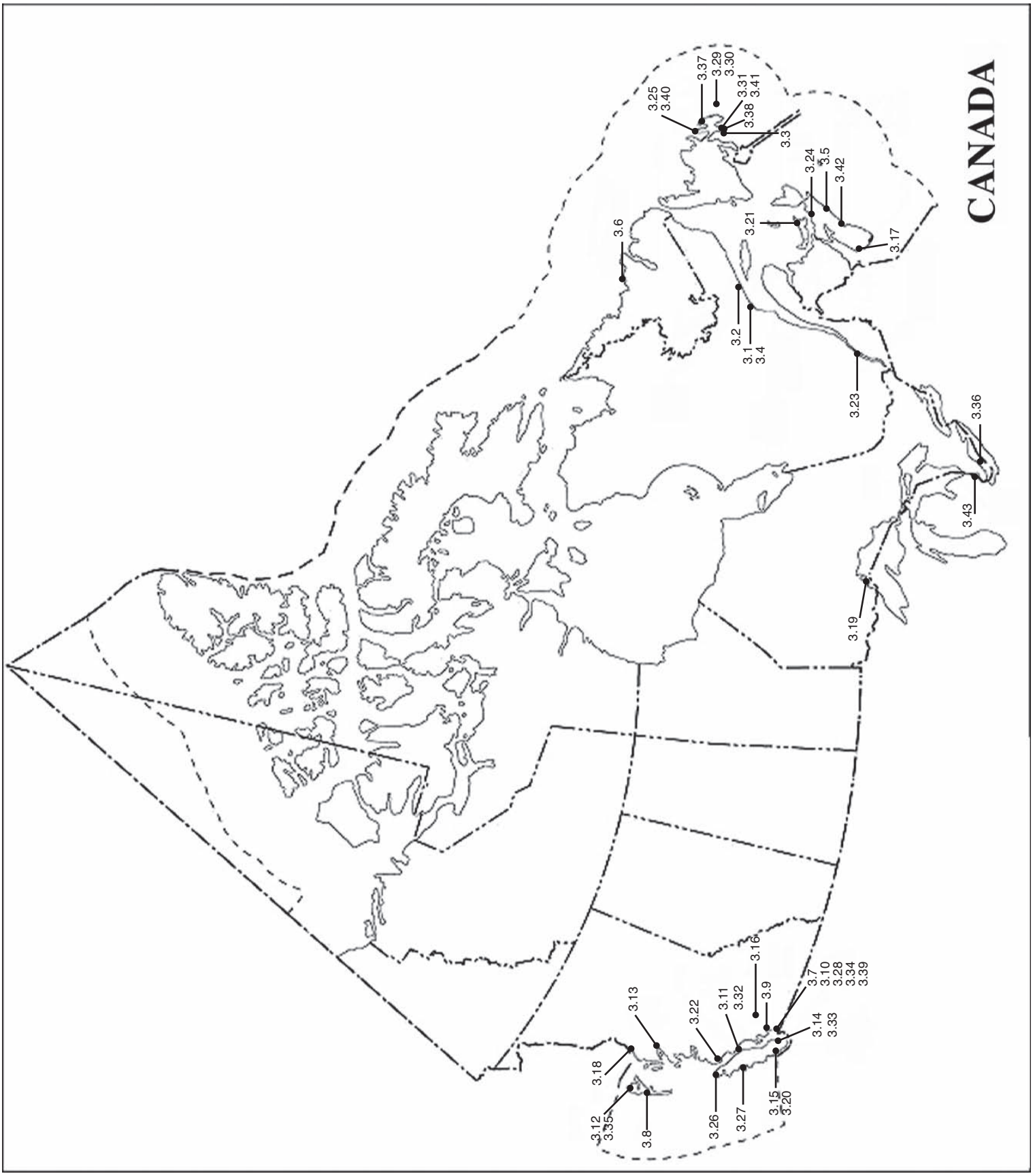
As provided in section 85 *MLA*, any person may file a claim with the Administrator of the SOPF respecting oil pollution loss or damage or costs and expenses, with one exception. An RO, established under the *CSA*, has no direct claim against the SOPF.

The Administrator, as an independent authority, has a duty to investigate and assess claims filed against the SOPF. For these purposes, he has the powers to summon witnesses and obtain documents.

The Administrator may either make an offer of compensation or decline the claim. An unsatisfied claimant may appeal the Administrator's decision to the Federal Court of Canada within 60 days.

When the Administrator pays a claim, he is subrogated to the rights of the claimant and is obligated to take all reasonable measures to recover the amount of compensation paid to claimants from the shipowner or any other person liable. As a consequence, the Administrator is empowered to commence an action *in rem* against the ship (or against the proceeds of sale, if the ship has been sold) to obtain security to protect the SOPF in the event that no other security is provided. The Administrator is entitled to obtain security either prior to or after receiving a claim, but the action can only be continued after the Administrator has paid claims and has become subrogated to the rights of the claimant.

As indicated above, the Administrator has a duty to take reasonable measures to recover from the owner of the ship, the IOPC Fund, or any other person, the compensation paid to claimants from the SOPF. This includes the right to prove a claim against the Shipowner's Limitations Fund set up under the 1992 CLC.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# 3. Canadian Oil Spill Incidents

During any particular year the SOPF receives many reports of oil pollution incidents from a variety of sources, including individuals who wish to be advised if they are entitled under the CSA/MLA, to be considered as potential claimants as a result of oil pollution damage they have suffered. Many of the incidents have not yet, or will not be, the subject of a claim. Such incidents are not investigated by the Administrator. The information herein is that provided to him. The Administrator is aware that many more oil pollution incidents are reported nationally. Many of those reported are very minor (sheens). Others involved greater quantities of oil but are not brought to the attention of the Administrator because they were satisfactorily dealt with at the local level, including acceptance of financial responsibility by the polluter.

During the current year, the SOPF handled some 72 active incident files. Of these, 44 are reported on in this section because they involved either claims to the SOPF or were of specific interest because of the circumstances surrounding them.

Locations of incidents are indicated on map opposite.

## 3.1 Haralambos (1996)

On February 27, 1997, the Administrator received a claim from the Crown to recover the CCG costs and expenses, stated to amount to $73,483.00, incurred in the clean-up of oil found on the beaches of the lower St. Lawrence River, south-west of Port Cartier, Quebec. The claim was presented as a mystery spill.

The oil had been found coming ashore on the beaches on December 3, 1996, by residents of the small community of Rivière Pentecôte, who informed the authorities. Officials arrived and confirmed the pollution. Contractors were engaged and commenced work on December 5, 1996; the task was completed to the satisfaction of the authorities on December 9, 1996. It is reported that 103 barrels of oil and oily material were collected for disposal.

The Administrator investigated the circumstances of the oil and found that TCMS had thoroughly investigated two oil spills within Port Cartier Harbour that had occurred on November 19 and November 25, 1996, respectively. These spills had involved the 63,078 gross ton Cypriot flag bulk carrier *Haralambos*. The ship had come into the harbour on November 18, and the next day there was an oil spill. The ship had then gone out to anchor off Port Cartier awaiting cargo, and had come back in again on November 25, when the second spill of oil occurred. It was found that one of the topside water ballast tanks had a corrosion hole through to a fuel tank, which accounted for the loss of oil. The shipowner undertook to pay for the cost of the clean-ups within the harbour. On November 30, 1996, the *Haralambos* sailed for Iran.

In the course of his investigation, the TCMS surveyor took oil samples, and also compared the results with the analysis of the oil subsequently found on the beaches at Rivière Pentecôte. It was found that oil from the harbour matched the oil from the beaches. Accordingly, on December 4, 1997, the Administrator forwarded the claim to representatives of the ship's P&I Club in Canada for direct payment to the Crown.

On May 22, 1998, counsel for the P&I Club replied to the Administrator denying liability of the *M.V. Haralambos* for the claim, stating that without more concrete evidence, they cannot recommend that the ship accept responsibility for this pollution.

On November 17, 1998, the Administrator authorized an interim payment to the Crown of 75 per cent of its claim, amounting to $55,112.25, plus interest of $6,874.94. The Administrator continued his investigation to obtain further evidence regarding the claim.

A further analysis of oil samples was made, this time a direct comparison of a sample taken from the beach at Rivière Pentecôte with samples from the *Haralambos*' contaminated wing tank. Dated February 23, 1999, the analysis concluded that these samples were "very similar". To further assess the probability of the *Haralambos*, while off Port Cartier, being the origin of the oil, a hind cast trajectory study was carried out on behalf of the SOPF by the Institut Maurice-Lamontagne of Mont-Joli, Quebec. Dated August 23, 1999, in summary the hind cast report found:

- that if a ship off Port Cartier released oil on November 19, 1996, the oil would have passed out into the Gulf;
- on the other hand, if a ship off Port Cartier released oil on November 25, 1996, the conditions were such that oil could have traveled to the general area of the beaches involved in the incident.

An agreement on quantum had been reached with the Crown, which reduced their claim by $1,975.89. On March 28, 2000, the Administrator arranged to pay the outstanding balance of the Crown's claim, less taxes, a further $7,396.09, plus interest of $1,611.41. On the question of taxes, these had been incorrectly calculated in the Crown's original claim and the Administrator agreed to consider this final outstanding amount on being presented with the correct calculation. The Crown having submitted correct tax calculations to the amount of $3,374.70, the Administrator on May 9, 2000 directed the payment of this amount to the Crown plus interest of $773.05.

Representatives of the ship-owner have raised questions regarding the most recent oil analysis and the trajectory study results. However, they did agree to an extension of time for commencing a court action. Discussions continue between the Administrator, counsels for the parties, and principals representing the ship-owner, in the hope of concluding this oil pollution compensation recovery claim.

The *Haralambos* returned to Canada in May 2000. The Administrator obtained a Letter of Undertaking (LOU) for $125,000.00.

Subsequently, the Administrator commenced an action against the ship in the Federal Court, to which a defense was filed.

In the meantime, on November 3, 2000, it was reported that the Haralambos had been purchased by Chinese principals for breaking-up.

On December 19, 2001, the Administrator was required to attend an Examination for Discovery by the defendant's counsel.

No settlement having been reached between the parties by April 15, 2004, the Administrator instructed his counsel to proceed to trial.

On June 15, 2004, prior to the trial hearing, the Administrator accepted an offer to settle in the amount of $50,000.00. The $50,000.00 has been credited to the SOPF.

## 3.2 Gordon C. Leitch (1999)

The Administrator has closed his file.

The *Gordon C. Leitch* is a 19,160 gross ton Canadian Great Lake vessel and, on March 23, 1999, she was berthed at an iron ore facility in Havre-Saint-Pierre, Quebec, on the lower north shore of the St. Lawrence River. When moving the vessel she was caught by the strong wind and hit a dolphin, cracking the hull and releasing an estimated 49 tonnes of heavy fuel oil. The owners directed the clean up with contractors, under CCG guidance and making use of CCG materials and equipment.

The CCG reported that their costs and expenses of $233,065.00 were paid by the owners. Armed with this knowledge of settlement the Administrator's Annual Report (2000 – 2001) noted that he had closed his case file on the incident.

On March 22, 2002, counsel for the *Conseil des Innus de Ekuanitshit* and all the members of the Ekuansitshit Indian Band, filed an action in the Federal Court of Canada against the owners of the *Gordon C Leitch*, and others and the IOPC

Fund. The action claimed the sum of $539,558.72 for stated damages for the local Indian Band due to the *Gordon C Leitch* incident.

The IOPC Fund has been removed as a defendant in the action and the SOPF is now a party by statute to the action.

A pretrial teleconference between the various parties and Mr. Justice Hugesson was held on October 15, 2003 at which future actions and target dates were set.

A further teleconference was held on November 27, 2003 at which deadlines were set for the production of written representations with a hearing to be held on January 14, 2004.
This hearing took place as scheduled before Mr. Justice Hugesson who made it clear that liability of the SOPF under Section 84 of the MLA, could not be contemplated now because the conditions precedent had not yet been satisfied. He also indicated that a claim under Section 88 could exist against the SOPF, but even there, the claim would be proscribed since no claim was filed within the three years from the mishap.

It is understood that settlement negotiations between the plaintiff and the shipowner are continuing at year-end.

## 3.3 Sam Won Ho (1999)

This vessel was originally a South Korean freezer fishing trawler and had been sold to new owners and berthed in Long Harbour, Newfoundland, where she was being converted to a barge.

On April 12, 1999, the vessel sank at its berth with resulting oil pollution. The CCG responded to the spill and incurred stated costs and expenses in the amount of $99,878.55, which amount was claimed from the SOPF on December 29, 1999. On March 2, 2000, the CCG advised that the claim had been revised to $96,856.92.

The claim was investigated by the Administrator to verify the established and non-established items. An all inclusive offer of settlement was made in the amount of $80,000.00, which was accepted by the CCG. Payment was directed on March 3, 2000.

It should be noted that this vessel was involved in a previous pollution incident at Long Harbour in July 1997, which resulted in a claim to the SOPF, reported in the 1997-98 Annual Report under the name of *Sin Wan Ho*.

There was further pollution from this wreck on April 24, 2000 and a claim from the Crown on behalf of the CCG in the amount of $45,809.19 was received on December 6, 2000. This claim was assessed and the established amount of $36,084.47 plus interest of $2,343.53 was paid on February 7, 2001.

On January 5, 2001, EC had laid charges involving the release of oil pollution, connected with this incident, pursuant to section 36(3) of the *Federal Fisheries Act*. The Administrator had an observer at the trial for the alleged infringement of the Fisheries Act. The Administrator had an observer at the trial for the alleged infringement of the Fisheries Act. The trial started on August 23, 2001, and continued at various dates, the latest being held on March 18, 2004 at which closing arguments by the Crown and Defense were heard. With these concluded, the Court reserved judgment until June 4.

In the meantime, counsel for the Administrator filed a Statement of Claim in the Federal Court of Canada on April 8, 2002, against the three parties claiming the recovery of $117,384.47, plus interest. The SOPF Affidavit of Documents was sworn on October 31, 2002.

In a decision dated October 15, 2004, the Provincial Court of Newfoundland and Labrador found that a limited company was in control of the vessel at the time of the sinking, such that it was convicted for permitting the deposit of a deleterious substance into a fish habitat contrary to section 36(3) of the *Fisheries Act*. The decision does not reach any clear conclusions on the ownership of the vessel at the time of the sinking.

At year end counsel for the Administrator was pursuing the possibility of settlement of the Administrator's action with counsel for the company, after having agreed with the latter to request the Federal Court extend the deadline for completion of discovery examinations, as a result of which that Court ordered discoveries be completed by June 30, 2005.

## 3.4 Mystery Oil Spill - Port Cartier, Quebec (2000)

The CCG issued a Sitrep advising that oil pollution was found in the water between the Greek flag 81,120 gross ton bulk carrier *Anangel Splendour*, and the quay, alongside at Port Cartier, Quebec, on May 12, 2000, and extending some 200 meters ahead. There were two other vessel movements within the harbour over a similar period as the discovery of the oil spill.

Port Cartier is a private harbour of the Compagnie minière Québec Cartier (CMQC). The port authorities took charge of the clean up, in the presence of the CCG. The TCMS took oil samples. The oil resembled fuel oil and the quantity spilled was estimated at approximately 900 litres.

CMQC obtained a LOU from counsel for the *Anangel Splendour* to cover the costs and expenses of the clean up. It was stated that TCMS also required a LOU from the ship to cover any possible fine. The *Anangel Splendour* denied that she was the origin of the oil and sailed on May 15, 2000.

On January 31, 2001, the Administrator received a claim from the Crown on behalf of the CCG to recover their costs and expenses, stated to amount to $4,076.08. The claim was being assessed, however, an offer of settlement was withheld pending results of the investigation into the origin of the spill.

In the meantime, counsel for CMQC submitted a claim on behalf of that port company, amounting to $249,137.31, stated to have been incurred by them cleaning-up the oil pollution in this incident. The claim was received by the Administrator on April 30, 2001. On July 27, 2001, a further claim was received from counsel for CMQC amounting to an additional $10,878.08, stated to be for the recovery of their legal fees in connection with this incident. These legal expenses were rejected.

The Administrator wrote to CMQC's counsel on November 28, 2001, with a list of questions which had arisen in his investigation and assessment of the claims. Replies to these questions were received on March 22, 2002, and at the same time corrected a stated error in one of the invoices submitted in the claim, increasing the claim by a further $1,746.63.

A key issue in this case was whether or not the oil came from a shore-based operation. It was reported that over a similar time frame to the incident, Environment Quebec was investigating a source of contamination coming from ashore in Port Cartier.

Following a lengthy investigation by the SOPF, CCG, TCMS and Environment Quebec, the Administrator was not satisfied that the occurrence was not caused by a ship.

Accordingly, settlements were made with CMQC in the amount of $242,427.45 together with interest of $42,335.13 and CCG in the amount of $3,776.05 together with interest of $638.82. Both payments were made.

Following further analysis of the oil samples the Administrator is proceeding with a cost recovery action against the ship-owner in the Federal Court.

Since April 2004, there has been discovery of documents between the parties. On February 1, 2005, counsel for the Defendants carried out an examination for discovery of the Administrator, in order to seek evidence to contradict the Administrator's allegations on liability and quantum.

The Administrator's recovery action in the Federal Court continues.

## 3.5 Lavallee II (2002)

The *Lavallee II* was built in 1942 as an American wooden minesweeper but, latterly, has been employed as a herring seiner and then as a herring transporter. The vessel is 254 gross ton and would, if operating, require to be registered. At the time if the incident, she was on a beach, unregistered, at Ecum Secum, Nova Scotia, where she remained for the last 18 months. On March 8, 2002, it was reported that oil was being released from the vessel into the harbour. The CCG responded on the same day and absorbent boom was deployed. It was found that the engine-less, engine room was flooded. The harbour, in season, houses live lobster in cages and supports a rockweed harvest.

The CCG employed contractors who removed the some 10,000 litres of diesel from fuel tank inside the vessel. The hull was holed. A private surveyor, employed by the CCG, concluded that the vessel had no value. It was proposed that the most economic solution to the alleged continuing potential for oil pollution was to break-up the vessel on site. The question of breaking up the vessel raised the issue of toxicity of the paint aboard, some of which was found to exceed provincial limits for disposal in landfill sites. This matter was resolved as a result of further testing.

By early April of 2002, draft contract specifications had been made for removal of the still contaminated vessel. Comments were invited on the document by all interested parties at the Federal and Provincial level and also the SOPF. The final specification was issued in late May, and on June 5, 2002, potential contractors were invited to the site in order to assess the work. Theses quotes were received on the bid closing date of June 18 and the successful bidder was awarded the contract on June 19, 2002.

Work to remove the vessel commenced on July 10, 2002, under the supervision of the CCG. The Administrator's surveyor was also in attendance during the operation. By July 26, 2002, the vessel and associated debris had been removed from the site and disposed of and the area was restored to an acceptable condition with no sign of any residual oil contamination.

A claim from the CCG for their costs and expenses in the amount of $213,053.94 was received by the Administrator on January 28, 2003.

Because the SOPF had been privy to all aspects of the situation, there were only a few items to resolve and an offer of settlement was made to the CCG on February 27, 2003. The Administrator received acceptance of the offer on March 4, 2003 and payment of the assessed cost of $212,126.10 plus interest of $7,404.98 to the CCG was authorized on March 6, 2003.

In his letter of offer the Administrator noted:

"N.B.:

1. The Administrator wishes to stress that the conclusion arrived at is based on a special circumstances of this case. The present determination should not be taken as an acknowledgement that, in the future, any expenses associated with the removal or destruction of a ship will automatically be accepted as a valid claim.

2. The application of the proceeds from the sale or other disposal of a ship and its contents is important in all incidents in light of the express provisions in subsection 678(2) CSA. Complete transparency by the claimant and its contractor(s) in their respective contractual arrangements is essential, particularly for the assessment of claims."

The Administrator is pleased to note the cooperation that was extended to him by the CCG Maritimes Region throughout the incident and which very much assisted his investigation and assessment of the claim.

The Administrator's counsel commenced a recovery action in the Supreme Court of Nova Scotia on February 11, 2005, pursuant to MLA subsection 87(3).

## 3.6 Mystery Spill, Hopedale, Newfoundland and Labrador (2002)

On July 9, 2002 it was reported that six fishing vessels berthed at the wharf in Hopedale had experienced oil pollution that was coming from the seabed. An RCMP officer investigated the spill and it was reported that there was a 45 gallon drum on the bottom in about 10-15 feet of water and some 10-15 feet from the edge of the wharf. It appeared that the drum was releasing what looked like thick black oil.

The CCG and EC responded to the incident and the drum was recovered from the water and samples of its contents taken on July 13, 2002.

The Administrator concurred that the recovered drum should be transported in an over pack drum by coastal ship to St. Johns for further investigation.

In the meantime information was passed to the affected fishermen on making a claim to the SOPF should this be required.

In a report dated August 21, 2002 it was stated that analysis of the oil showed it to be a mixture of diesel and bunker fuel

The Administrator engaged local counsel and a marine surveyor in regard to the ongoing investigation as to the drum's origin.

A claim in the amount of $21,698.16 was made by the CCG on July 7, 2003 for their costs and expenses in responding to this incident.

Investigations had indicated that there was a United States Air Force base and DEW Line Station at Hopedale from 1951 to 1968 and archived photographs show oil drums both on the harbour ice to mark an aircraft runway and also stacked on the wharf.

On December 9, 2004, the Administrator advised the CCG that its claim was rejected on the ground that: (a) no oil pollution damage had arisen from a ship but rather from a drum lying on the bottom of the harbour; (b) based on the evidence, the Administrator was satisfied that the drum did not come from a ship.

The Administrator noted that the available evidence supports the view that the time the drum had remained under water was greater than five years. As such, even if it is assumed that the drum was being discharged from a ship when it fell into the water, the claim in any event would be proscribed by subsection 85(2) of the *Marine Liability Act*. See also Canada v. J.D. Irving Ltd et al, [1999] 2 F.C. 346, paragraphs 11 and 19.

The Administrator has closed his file.

## 3.7 Jolie Vie (2002)

This 34 foot cabin cruiser ran aground in Bedwell Bay, British Columbia during the early hours of August 10, 2002. The four persons on board, including two children, were rescued by the CCG Deep Cove lifeboat.

The vessel sustained underwater damage to her bow and was partially submerged by the stern. She had on board an unknown quantity of diesel fuel.

The owner had contracted a pleasure craft salvage company to refloat the vessel. The TCMS duty officer responded to the incident and arranged to have the West Coast Response Organization mobilized and rig a containment boom around the vessel. The ship-owner was advised that he would be liable for the incurred costs.

By late afternoon, the vessel had been re-floated and towed to a local marina where it was lifted from the water and placed ashore.

Efforts by TCMS to recover the costs of the Response Organization from the ship-owner were of no avail and on February 20, 2003 the Administrator received a claim from the TCMS in the amount of $5,551.22.

The Administrator made the necessary applications to the Federal Court of Canada on May 5, 2003 and arrested the vessel.

The TCMS claim was investigated and assessed by the Administrator and an offer of settlement was made on July 9, 2003 in the amount of $3,479.53. This was accepted and payment of this sum and $86.37 in interest was authorized on July 30, 2003.

Given that the costs of proceeding with an application for judgment and sale of the defendant vessel would probably exceed the value of the vessel, counsel for the Administrator requested the Court that the Administrator's action be dismissed without costs. On September 13, 2004, the Court so ordered.

The Administrator has closed his file.

## 3.8 Silver Eagle (2003)

This fishing vessel had broken loose from her mooring lines on January 25, 2003 during severe weather and ran aground in Cumshewa Inlet, British Columbia. The vessel was lying on her side and there was loss of oil. The ship-owner was attempting to salvage the vessel. The area is home to a fish hatchery and fish pens.

The CCG took over the operation on January 30, 2003. A contracted salvage team arrived on site February 1, 2003 and by the following day had re-floated the vessel, cleaned both it and the grounding area. The vessel was towed to Queen Charlotte City on February 3, 2003 and berthed at the Small Craft Harbour.

The vessel's engine had pumped the bilges and caused an oil sheen in the harbour on February 6, 2003 which was contained by an absorbent boom. The following day the CCG Auxiliary Unit 64 deployed a containment boom and removed the absorbent boom.

On February 17, 2003 the Administrator engaged counsel to contact the insurers to obtain a letter of undertaking (LOU) in favour of the SOPF and the Crown.

A Statement of Claim by the Crown in the amount of $103,458.84 was filed in the Federal Court on November 27, 2003 naming the ship as defendant. The Administrator was also named as a Party by Statute and filed his Statement of Defence on December 17, 2003.

To enable insurers of the vessel to consider settlement it was necessary to obtain evidence from the salvage team that had been contracted by the CCG. By March 19, 2004, the salvage contractor provided answers to the insurers' questions. On July 22, 2004, the Administrator reviewed the report of the insurers' surveyor which recommended a reduction of $26,721.91 in contractor's costs. Counsel for the Crown indicated acceptance of the surveyor's findings. Following negotiations the matter was settled by owners and insurers paying the Crown $66,356.03.

On March 7, 2005, the Federal Court granted an order by consent dismissing the Crown's action of November 27, 2003 without costs to any party as if after a trial on the merits.

The Administrator has closed his file.

## 3.9 Northern Light V (2003)

On February 3, 2003 it was reported that this vessel, a converted cable layer of 634 GT was abandoned and listing at anchor in Baynes Sound, British Columbia.

Two days later the vessel was inspected by CCG, TCMS and the Provincial Ministry of Aquaculture Food and Fisheries. The hull was found to be badly rusted with signs of severe wastage at the draft level with an unknown quantity of oil and other unknown chemicals onboard.

Baynes Sound is said to be a principal shellfish and fisheries habitat and of great economic importance to British Columbia.

A detailed inspection and survey of the vessel was carried out by the CCG and a nautical surveyor acting on behalf of the Administrator on February 14, 2003.

It was concluded that the vessel was in imminent danger of sinking because of the condition of the hull and therefore posed a considerable threat of oil pollution.

The vessel was towed to Ladysmith on February 22, 2003 and boomed off. The CCG began soliciting bids for oil removal and breaking up of the vessel since it was not possible to dump the vessel. The CCG contractor had pumped off easily accessible oil on arrival at Ladysmith.

A contract was issued on March 28, 2003 by the CCG and work began on oil removal from the vessel and removal of oil contaminated material.

The SOPF received a claim from the CCG on January 16, 2004 in the amount of $257,387.65 to cover the costs and expenses involved in responding to the incident.

The Administrator investigated and assessed the claim and on March 9, 2004 made an offer of settlement for the whole amount of the claim which was accepted by the CCG on March 11, 2004. On March 16, 2004 the Administrator authorized payment of $257,387.65 together with interest of $12,534.14.

At the year end the Administrator was considering possible recovery under subsection 87(3) of the MLA.

## 3.10 Sandpiper (2003)

This vessel is an old dredge and was berthed at the disused Pacific Cannery Dock in Steveston Harbour, British Columbia.

During the night of April 17, 2003, the *Sandpiper* sank at her berth and oil was released into the water. The Steveston Harbour Authority (SHA), was notified and the following morning clean up commenced with the assistance of the CCG.

The CCG took over the cleanup on April 25, 2003 with a Response Order dated that day.

On May 7, 2003 the ship-owner and a salvage crew were on site and preparing to raise the dredge. This was accomplished on May 12, 2003.

The SHA submitted a claim to the SOPF on July 9, 2003 in the amount of $1,587.53 for their response activities which was investigated and assessed by the Administrator.

An offer of settlement was made to SHA which was accepted and payment of $1,517.93 plus interest of $524.25 was authorized on July 16, 2003.

Given the totality of information provided by the SHA with their claim the task of investigation and assessment was made straight forward.

On January 29, 2004 a claim was received from CCG in the amount of $20,151.97 for their costs and expenses in responding to the incident.

The Administrator investigated and assessed the claim and made an offer of settlement on March 4, 2004.

Payment of $20,151.97 plus interest of $831.38 was authorized on March 16, 2004.

At the year end the Administrator was considering possible recovery measures pursuant to MLA subsection 87(3).

## 3.11 Beaufort Spirit (2003)

It was reported to the CCG that this vessel was leaking oil into the waters of the Nanoose First Nations Marina at Lantzville, Nanoose Bay, British Columbia on May 11, 2003. The next day the CCG and TCMS met with the owner to inspect the vessel which was an old riveted construction steel tug built in about the late 1940s and in poor condition.

The owner was advised to plug the leak which he did with a metal plate and rubber gasket and was also instructed by the CCG to do further work on the vessel's tanks and bilges to ensure that there was no future threat of pollution.

On January 20, 2004 the CCG received a further report that the vessel was in a state of disrepair and at risk of leaking oil into the marine environment. The next day the vessel was towed to Ladysmith and inspected by CCG who discovered on board a container/tank with 1000 gallons of oil and some 25 pails that were leaking oil onto the deck of the vessel. The vessel was also beginning to list.

On January 22, 2004 the CCG took over the incident with a Response Order and the Administrator engaged a surveyor to advise him on the condition of the vessel. His inspection on January 28, 2004 revealed that the vessel was a non-operable floating derelict and that there was a considerable risk of oil pollution, particularly if she sank at her moorings. The tug had meantime been surrounded by an oil containment boom.

By February 6, 2004 all the oil drums, cans and propane tanks had been removed from the vessel by the CCG contractor who had also pumped oily water from the hull.

After receiving several bids, the CCG selected a contractor to demolish/break up the vessel and resolve the remaining pollution problem. By March 28, 2004, the vessel had been broken up and disposed of.

On July 11, 2004, the CCG submitted a claim on the SOPF for $132,775.12 respecting its costs and expenses in this matter.

On September 29, 2004, the Administrator requested further information from the CCG respecting its claim. By letter dated November 19, 2004, the CCG provided some of the information requested but refused to provide copies of tender documents respecting the contract for the breakup of the vessel.

On December 10, 2004, the Administrator wrote to the CCG reminding them of his powers of investigation under Part I of the *Inquiries Act*, pursuant to subsection 86(2) of the *Marine Liability Act* (MLA) and, on the evidence available, offered compensation in the amount of $109,220.00 plus interest, in settlement of the CCG claim.

By letter dated January 14, 2005, the CCG requested a "clarification" of the SOPF position with respect to the use of the "firm price" contracting approach used in this case by the CCG for the breakup of the vessel.

The Administrator replied to the CCG on February 15, 2005, noting the provisions of sections 85 and 86 of the MLA and Part I of the *Inquiries Act*. He reminded the CCG that: (1) All costs and expenses must be reasonable; (2) All measures taken must be reasonable measures; (3)

All costs and expenses must have been actually incurred; (4) All claims on the SOPF must be investigated and assessed by an independent authority (the Administrator) who then offers compensation for whatever portion of the claim he finds to be established.

The Administrator noted that whilst a 1993 amendment to the CSA gave Canada the right to claim directly on the SOPF for the first time, it conferred no special status for claims filed by Canada as compared to claims filed by others. In particular, in order for the Administrator to find a claim, or portion thereof, to be established, under section 86 of the MLA, it is essential that the measures taken and the costs and expenses claimed are demonstrably reasonable.

Regarding the "fixed price" contracting approach used by the CCG in this case, the Administrator wrote: "Whilst the Administrator cannot dictate the measures and other actions (including cost control) a claimant takes in any given situation, one must not forget that a contract, "fixed price" or otherwise, by and of itself, does not relieve any claimant from the above requirements. We note in the *Sea Shepherd II* claim, for example, that other types of contracts may be employed, i.e. "ceiling price" or "cap". We trust that DFO/CCG considers and then informs PWGSC of the recovery process [claiming from the SOPF] referred to above, if such is contemplated, before deciding on the appropriate instrument to employ in a given situation."

On February 22, 2005, the CCG accepted the Administrator's offer of compensation. On February 23, 2005, the Administrator directed that $113,971.50 be transferred from the SOPF to the credit of DFO/CCG including $4,751.50 in interest.

At year end the Administrator was considering his recovery options pursuant to MLA subsection 87(3).

## 3.12 Pender Lady (2003)

The CCG received a report on June 23, 2003 that this vessel was sinking and listing to port. It was determined that the *Pender Lady* was an old British Columbia Ferry, built in 1923, and together with another old ferry named *Samson IV*, was moored at Naden Harbour on the north end of the Queen Charlotte Islands, British Columbia and used as a fishing lodge with paying guests. These guests were safely taken ashore by the CCGC *Arrow Post* and transported to Masset.

The next day, June 24, 2003, CCG response personnel were on scene and the vessels were boomed off. The stern of the *Pender Lady* had sunk in the early morning hours and later that day had completely sunk and released oil into the water.

The owner had pointed out to the CCG that the vessel had, at some time in the past, been stuffed full of foam plastic blocks below decks, presumably to add buoyancy and maintain the vessel afloat. Pumps, including those of the *Arrow Post*, had been unable to reduce the flooding which indicated a non-watertight hull condition.

It is noted that the vessel was, at the time of the incident, still on the Canadian Ship Registry but had not apparently been subjected to TCMS inspection and safety surveys for a considerable time.

The CCG took over the incident and engaged a contractor. The Administrator engaged his own marine surveyor to advise him on the operation. It was discovered that the *Samson IV* was in the same condition as the *Pender Lady*, even down to the foam blocks for buoyancy.

It was decided that the only way to rectify the pollution problem was to totally demolish both vessels and dispose of them as recoverable scrap or by burning onshore and this was done. At the same time, work crews were recovering oil from the water as it was released and also cleaning up the shoreline as necessary.

It is appreciated that the work on the vessels involved considerable hazard to the response workers because of the condition of the vessels. All work was completed by the end of August 2003.

The CCG submitted a claim to the SOPF dated February 11, 2004 for their costs and expenses in responding to the incident, in the amount of $2,101,017.72.

The Administrator investigated and assessed the claim and on March 31, 2004 made an offer of settlement which was accepted by the CCG that same day. On April 1, 2004, payment of $1,659,663.06, which included interest, was authorized.

Note: This case shows the threat to the environment and the economic losses caused by derelict vessels. In this year and the previous year payments from the SOPF respecting such vessels exceeded some $2.8 million dollars.

In this case the derelict vessel also had paying guests aboard. In such cases it may only be a matter of time before there is serious personal injury or loss of life caused by the capsizing or sinking of such vessels.

The Administrator is of the view that, while there are mandated obligations of government to ensure the safety of vessels and the people on board them, it is essential that these rules and regulations be strictly applied in all cases to prevent unnecessary dangers to both the environment and persons.

At year end the Administrator was considering possible recovery measures pursuant to MLA subsection 87(3).

## 3.13 Mystery Spill, Grenville Channel, British Columbia (2003)

On September 20, 2003, the United States Coast Guard Cutter *Maple* was transiting Grenville Channel, BC and reported that they had seen an oil slick off Lowe Inlet. The incident was investigated by the CCGS Tanu and samples of the oil were obtained on September 23, 2003. It was reported that these samples were similar to crude oil in odor and consistency but that there was no apparent source and clean up was not required.

In early October, a commercial airline pilot reported that he had seen further pollution in the area that was “quite thick”.

CCG responded and sent personnel to the site which was in a very remote area and not easily accessible. The presence of the slick was confirmed and some 3 miles of shoreline had been impacted. Again, no source was found and the CCG suspected that the oil could be surfacing from an old wreck.

Arrangements were made by the CCG to have the area surveyed by a remote control underwater vehicle and on October 30, 2003 an old wreck was located with oil escaping from cracks in the hull. At the same time, clean up crews were working to remedy the shoreline contamination. By the middle of November, divers had plugged areas of the wreck’s hull that were breached to stop the escape of oil.

Investigations by the CCG indicate that the source may be that of the *Brigadier General M.G. Zalinski*, a United States Army Transportation Corps vessel that was wrecked on September 20, 1946.

At year-end the CCG is monitoring the situation, responding to oil leakage as necessary and working on a plan to remove all oil from the wreck.

The Administrator awaits developments.

## 3.14 Mary Todd (2003)

This seine fishing vessel sank off the Fisherman's Wharf in Tsehum Harbour, British Columbia on October 5, 2003 with resulting oil pollution. The CCG responded and ascertained that the owner was unable to respond to the incident. The vessel was boomed off by the CCG and was raised by a CCG Contractor on October 6, 2003.

The *Mary Todd* was taken to the shipyard at Mitchell Island and lifted from the water thereby eliminating the threat of future oil pollution.

On June 28, 2004, a claim on the SOPF was received from the CCG in the amount of $18,336.77 for its costs and expenses in this incident.

On July 15, 2004, the Administrator directed payment to DFO/CCG in the amount of $18,336.77 plus $691.05 interest.

At year end the Administrator was considering his recovery options pursuant to MLA subsection 87(3).

## 3.15 Black Dragon, (Heung Ryong) (2003)

This was an old Chinese flag fishing vessel of some 120 feet in length involved in the smuggling of illegal immigrants to the West Coast at the end of 1999 and had been seized by the authorities and tied up at Port Alberni, British Columbia. The *Black Dragon* had been sold by Crown Assets.

Over the ensuing years the vessel had been moored at several locations and was in a dilapidated condition. She eventually ended up moored to a DND Navy buoy in Mayne Bay and several federal and provincial agencies had voiced concern on the overall situation.

On October 26, 2003 the vessel sank in about 120 feet of water and was boomed off by the CCG Bamfield lifeboat crew.

The CCG engaged a contractor to raise the vessel and work commenced on November 7, 2003. The Administrator had engaged his own marine surveyor to attend on site. Initial efforts over the next two days to conduct the lift were unsuccessful and it was apparent that the 200 ton capacity lifting derrick was not sufficient. Also the vessel was firmly stuck in the very soft mud bottom.

Heavier equipment was on site November 28, 2003 and salvage preparations began. The vessel was raised with great difficulty on December 5, 2003 and over the next two days water and mud was pumped out of the vessel and some hull repairs made in preparation for the tow to Ladysmith for disposal.

On December 9, 2003 while under tow and in a position off Johnstone Reef the vessel sank again. It is understood that the CCG will not undertake further action regarding this sinking. On February 3, 2004 a claim was received from the CCG in the amount of $728,797.28 to cover the costs and expenses incurred for their response to the incident.

The circumstances of this occurrence involved considerable investigation and assessment by the Administrator and on March 30, 2004 he made an offer of settlement which was accepted by the CCG that same day. Payment of $568,749.63 plus interest of $8,897.00 was also authorized on that date in full and final settlement.

The Administrator has closed his file.

On January 5, 2005, the Administrator received notice of a claim on the SOPF from the Toquaht First Nation, Ucluelet, British Columbia, for oil pollution damage from the Black Dragon. It is alleged that damage to clams occurred as a result of the Black Dragon being towed, partially submerged, to the mouth of Pipestem Inlet, Toquaht Bay, Barkley Sound, after its raising and prior to its tow to Ladysmith.

On January 13 & 18, 2005, the Administrator requested further information from the Toquaht First Nation respecting the claim.

On February 3, 2005, counsel for the Administrator wrote to the CCG advising of the claim and requesting documents and information regarding the incident and related operations. By year end the CCG had provided some of the information asked for.

The Administrator's investigation of the Toquaht Nation' s claim continues.

## 3.16 Anscomb (2004)

This vessel had served as a provincially owned ferry on Kootenay Lake, British Columbia until April 2003 when she was sold.

On January 11, 2004 the vessel sank in deep water with resulting oil pollution.

The Provincial Ministry of Water, Air and Land Protection (WLAP) assumed lead agency status and provided the initial cleanup procedures and hired a contractor. Work was done on cleaning up oil surfacing from the sunken vessel, recovering contaminated debris and shoreline cleanup.

On January 23, 2004 the CCG took over the lead agency status from WLAP. With the bulk of the work completed the contractor was stood down on January 28, 2004 and the work of incinerating contaminated debris, oiled absorbent pads and boom maintenance was conducted by CCG personnel. It had been determined that salvage of the sunken vessel was not feasible. Work was terminated on February 2, 2003, there being no recoverable oil at the site.

On March 11, 2003 the CCG submitted a claim in the amount of $29,753.68 for their costs and expenses. This was assessed by the Administrator and an offer of settlement made on March 24, 2004 which was accepted. Payment of $24,316.40 plus interest of $195.23 as authorized on March 25, 2004.

On March 25, 2004 a claim of $23,024.54 was made by the Provincial WLAP for their costs and expenses associated with the initial incident response. This was assessed and an offer of settlement made and accepted on March 26, 2004. Payment of $22,524.54 plus interest of $250.09 was authorized.

On September 28, 2004, pursuant to MLA subsection 87(3), counsel for the Administrator filed a statement of claim in the Federal Court in Vancouver to commence a recovery action. Consequently, the ship *DPW No.590* was arrested on October 4, 2005, as a sistership of the Anscomb. The arrest took place on Kootenay Lake, near the city of Nelson, British Columbia.

On February 17, 2005, the Federal Court ordered default judgement against the Anscomb and the *DPW No. 590* for an amount of liability to be determined.
On March 10, 2005, counsel for the *Anscomb* served the Administrator's counsel with a notice of a motion to be heard on March 14, 2005, to have the default judgment and the arrest of the DPW No.590 set aside, and for leave to file a defence. At year end the hearing of the motion had been adjourned.

The Administrator's recovery action continues.

## 3.17 Ronald M (2004)

On August 12, 2003, the CCG was informed that the fishing vessel *Ronald M* was in poor condition and in danger of sinking alongside Long Wharf in Digby, Nova Scotia. DFO Digby was asked to monitor the vessel's condition.

On July 28, 2004, the CCG first expressed concern for the vessel's condition vis à vis the local marine environment and operations at the wharf.

On November 17, 2004, TCMS, after inspecting the vessel, advised that the vessel posed an environmental risk of pollution if not rectified soon.

The CCG determined that if timely action was taken to remove pollutants and oily debris at an estimated cost of $15,000.00 this could preclude another incident like the Forrest Glen (see Administrator's Annual Report 2002-2003, section 3.65) which cost approximately $240,000.00.

The CCG contracted for the removal of pollutants and oily debris. Removal operations were completed on December 6 and 7, 2004. Approximately 3000 gallons of oily waste water/fuel/debris were removed from the vessel. Environment Canada expressed its satisfaction with the risks to the environment having been removed. TCMS stated that "at this time, the vessel is a minimum risk for pollution".

On December 8, 2004, the vessel was upright and properly secured. DFO Digby had confirmed to CCG ER that they would monitor the *Ronald M* and report on the vessel's condition.

On January 13, 2005, a letter was sent to the wharf's owners to prevent further accumulation of oily waste on board the *Ronald M*. It had appeared that others had used the *Ronald M* as a depository for their oily waste/debris.

The CCG recommended reasonable steps to make and maintain the vessel watertight.

On February 9, 2005, the CCG filed a claim with the Administrator for its costs and expenses totaling $13,957.80.

CCG ER, Dartmouth, Nova Scotia, had kept the Administrator informed of the operations as they had developed. This greatly facilitated the Administrator's assessment of the claim.

On February 16, 2005, the Administrator directed payment to DFO/CCG of $13,957.80 plus $122.20 interest.

The Administrator has closed his file.

## 3.18 Anna M (2004)

On March 26, 2004 the CCG was advised that this fishing vessel had struck a rock and sunk at the inner side of Venn Pass, Prince Rupert, British Columbia.

The CCG responded and boomed off the vessel. Divers plugged off the vents in the vessel.

The hole in the vessel's bow was too big to patch where she lay and the vessel could not be "pumped" afloat. Another obstacle to refloating was the 17 tons of herring in the vessel's hold. As the herring was thought to be contaminated no mobile packers were willing to assist in pumping off the cargo.

The CCG arranged to have the vessel lifted between two barges on slings and towed to the contractor's yard. There the herring cargo and pollutants were removed to prevent the threat of further pollution. The vessel was refloated with the aid of several pumps running full time. It was then temporarily patched to stop it from sinking and returned to the contractor's yard. The vessel was a constructive total loss.

On November 23, 2004, the CCG filed a claim on the SOPF for their costs and expenses totalling $67,496.15.

On January 31, 2005, the Administrator directed

payment to DFO/CCG for $58,243.47 plus $2,070.62 in full and final settlement of this claim.

At year end the Administrator was considering his recoovery options pursant to MLA subsection 87(3).

## 3.19 Algonorth (2004)

On April 5, 2004, the *MV Algonorth*, while backing out of drydock in Thunder Bay, Ontario, hit the wall and punched a hole one and a half metres above the waterline on the port side, resulting in the release of intermediate fuel oil.

A TCMS official was the first federal representative on scene. He took control of the response until CCG ER personnel arrived, As such, local contractors conducted containment and cleanup operations using CCG pollution response equipment.

Most of the oil was contained in the drydock, although an unknown amount escaped into the harbour where the leading edge of the ice and wind prevented widespread movement of the oil.

On April 6, 2004, the polluter took control of the response, with CCG ER on site in a monitoring role. Later the Thunder Bay Port Authority assumed the role as lead Agency. Most of the free floating oil within the boom and the drydock was recovered. The ice was broken up and removed to a reception facility where the oil-water mixture was separated and disposed of. Approximately 3,800 litres of product was recovered. An estimated 3,000-5,000 litres of oil was released.

The CCG reports that on November 16, 2004, its claim was settled in full by the shipowner.

The Administrator has closed his file.

## 3.20 Sea Shepherd II (2004)

Having received a number of reports in April 2004 that the MV Sea Shepherd II, located in Robbers Pass, Tzartus Island, British Columbia, was in a derelict state and in danger of sinking, the CCG, TCMS, and Provincial authorities, attended on scene to investigate. It having been concluded that the vessel's condition made it a threat to the marine environment, a Response Order under CSA section 678 was issued on April 26, 2004.

The Administrator engaged legal counsel and a marine surveyor. The latter attended on the vessel.

On May 10, 2004, CCG contractors began pumping operations on site. By May 11, 2004, some 188 tons of a mixture of waste oil and diesel was pumped off the *Sea Shepherd II*. But, some 16 gallons per hour of seawater was leaking back into the vessel. On May 26, 2004, the vessel was taken in tow, arriving at the Esquimalt graving dock the next day for break up. By June 17, 2004, seven large waste bins of oiled debris had been removed from the vessel. By July 30, 2004, the break up of the vessel had been completed.

On November 22, 2004, the Administrator received the CCG's claim on the SOPF for its costs and expenses totalling $515,333.70.

On December 13 & 14, 2004, the Administrator sought further information and materials from the CCG. On February 23, 2005, the CCG provided the Administrator with some of that requested.

On March 3, 2005, the Administrator advised the CCG that whilst at that point he found only $331,892.31 of the claim established - and offered compensation in that amount - he would consider further evidence in support of other parts of the CCG claim when provided to him.

He noted that he had been unable to assess some parts of the CCG claim, pursuant to MLA section 86, due to lack of supporting evidence.

On March 3, 2005, the CCG on behalf of the Minister of Fisheries and Oceans (DFO/CCG) accepted the Administrator's offer of $331,892.31 plus interest. The CCG advised that they would try to provide information to substantiate the remainder of their claim.

On March 3, 2005, the Administrator directed payment to DFO/CCG of $331,892.31 plus $9,810.24 interest.

Note: The lack of supporting evidence for parts of this claim raises similar concerns to those expressed respecting the *Beaufort Spirit* claim reported herein at 3.11. A claimant to be successful must be able to prove its claim.

## 3.21 Irving Eskimo (2004)

On February 19, 2004, the MT *Irving Eskimo* had just finished unloading cargo at the dock in Charlottetown Harbour, Prince Edward Island (from which the oil is then transferred to shore storage facilities through an underground pipe) when the ship was blown away from the dock. It is reported that the vessel broke free of its mooring lines and the discharge hose ruptured releasing the residual oil in the hose.

CCG advises that it did not respond to the incident nor was it aware of what response the shipowner took regarding the oil spill.

On January 25, 2005, it was reported that the shipowner was ordered that day by the PEI Provincial Court to pay $5,000.00 in fines and make a $10,000.00 donation to the University of Prince Edward Island for estuary research, after conviction for violation of the Pollution Prevention Regulations made pursuant to the CSA.

A report on the Court hearing notes: "The captain originally thought about 450 litres had been spilled… it turns out it was only 15."

The Administrator has closed his file.

## 3.22 GMS 620 (2004)

On July 3, 2004, it was reported that the barge *GMS 620* in tow had ran aground in Knight Inlet, north of Midsummer Island (central British Columbia Coast) and sustained hull damage. The barge was loaded with fish pellets and 40,000 litres of diesel. No pollution was reported.

The owner advised that he would manage the response to the incident – which he did. The CCG assumed the role of Federal Monitoring officer (FMO). The CCG had pollution response equipment transferred to the *CCGS Tsekoa II*, which remained on scene to assist as needed.

After some deck cargo was removed, the vessel was freed from the rock. After completion of the removal of deck cargo, a surveyor advised that the barge would be safe to move to Vancouver with the fuel on board. The CCG FMO recommended the fuel be removed before moving the barge. The CCG FMO then sought the advice of TCMS regarding a towage plan. The owner complied with CCG and TCMS requirements, and by July 7, 2004, the fuel from the two onboard tanks had been removed in preparation for the barge being towed to Vancouver. On July 9, 2004, the barge was secured at Vancouver Shipyards in Vancouver.

The Administrator has closed his file.

## 3.23 Horizon (2004)

The container ship CV *Horizon* grounded on July 24, 2004, in the area of Buoy 5-129, in the River St. Lawrence, near Sorel, Québec.

The Regional Environmental Emergency Team (REET) convened, and reported to CCG ER on July 28, 2004, CCG ER engaged TCMS, Environment Canada, the Quebec Ministry of Environment, and the Quebec Ministry of Public Security. The shipowner was presented with the issues identified by REET. On July 30, 2004, a CCG surveillance flight revealed no sign of oil pollution.

On July 31, CCG and REET expressed their satisfaction with the owners' salvage plan. CCG ER monitored the salvage operations.

On August 1-2, 2004, containers were removed from the vessel. Attempts to remove the vessel with tugs were unsuccessful. More containers had to be removed.

On August 4, 2004, the vessel was refloated and later inspected at dock 10 in the Port of Sorel. Another surveillance flight over the area revealed no pollution from the incident.

It is understood that CCG Québec shall seek recovery of its costs and expenses in this incident from the shipowner.

## 3.24 Alicia Dawn (2004)

On the morning of September 8, 2004, the fishing vessel *Alicia Dawn 94* with a severe list, was towed into Caribou Harbour, Nova Scotia. The vessel had some 1200 litres of diesel and other engine and lube oils onboard. CCG ER Charlottetown, Prince Edward Island, responded, arriving in Caribou that forenoon at 0930.

A diver had been hired to plug the vents. The fish tubs were released and measures taken designed to bring the vessel to an upright position. Oil escaping from the vessel was recovered by CCG ER.

The vessel departed Caribou bound for Murray Harbour at 1315 September 8, 2004.

On February 4, 2005, the CCG filed a claim on the SOPF for its costs and expenses totaling $2,625.42.

The Administrator's offer of compensation in the amount of $2,543.01 plus interest was accepted by the DFO/CCG on February 9, 2005. On February 11, 2005, the Administrator directed payment to the DFO/CCG in the amount of $2,595.99 including interest.

At year end the Administrator was considering his recovery options pursuant to MLA subsection 87(3).

## 3.25 Peter's Dream (2004)

On October 22, 2004, the fishing vessel *Peter's Dream* was reported on fire and aground near Harbour Grace, Newfoundland. A local boat responded to remove the two crew members. The CCG Marine Rescue Centre tasked the CCGS Shamook to assist.

CCG ER responded to the incident. Some 1600 gallons of diesel and 400 gallons of hydraulic oil were discovered onboard. Attempts to lighten and remove the vessel using the Shamook were unsuccessful.

On October 26, 2004, oil was found leaking from a hole in the port side. Containment measures were taken by the vessel's insurers. CCG ER conducted shoreline assessments using an all-terrain vehicle (ATV) the next day, but no oil

was found in the water or around the vessel. On November 2, 2004, high winds combined with high tides demolished the vessel.

The CCG's claim for its costs and expenses was presented to the shipowner on November 23, 2004.

## 3.26 P.H. Phippen (2004)

On November 3, 2004, it was reported that the *P.H. Phippen* had sunk at the dock at Fisherman's wharf in Port Hardy, British Columbia. The Harbour Master boomed the vessel to contain leaking fuel.

The vessel, for sale at the time and also known as Underwater Sunshine, was an ex tug converted to a live aboard type vessel. It had not been moved in several years, but was regularly pumped.

CCG ER was informed that the vessel was laying on its side with fuel leaking from one tank containing some 30-40 gallons of diesel. The second tank containing some 100 gallons of diesel was said to be not leaking.

On November 5, 2004, CCG ER was advised that divers had been successful in plugging the vents. With CCG ER on scene, on November 12-13, 2004, contractors, with a barge and excavators, commenced lift operations. An airbag was inflated on the stern of the vessel and a forward sling was put in place for the lift. On November 14, 2004, the vessel was lifted to the surface and pumped out. Some unrecoverable diesel was spilled during the recovery operation. The vessel was stabilized and was considered to be no longer a pollution threat.

On January 31, 2005, the CCG filed a claim on the SOPF for its costs and expenses in this incident totaling $2,113.91. On February 7, 2005, the Administrator directed payment of compensation to DFO/CCG of $2,141.95 including interest, in full and final settlement.

At year end the Administrator was considering recovery options pursuant to MLA subsection 87(3).

## 3.27 Innchanter (2004)

On November 8, 2004, the vessel *Innchanter* was reported taking on water and spilling diesel at Hot Springs Cove, Vancouver Island, British Columbia. It was reported that there was minimal pollution and that pumps were being taken to the vessel. Apparently, there was a power failure on board and the bilge pumps were not able to function causing the bilge levels to rise.

The *Innchanter* is an old freighter converted to a bed and breakfast and is tied to Hot Springs cove wharf.

CCG ER received a call from the Hesquit Band Office requesting more boom to be flown to them. CCG advised the Band that the owner was responding with contractors.

On November 9, 2004, the CCG Tofino Lifeboat Station advised CCG ER that the contractors were on site and that the situation was stable.

A small amount of pollution had occurred, and recovery operations were undertaken.

The Administrator has closed his file.

## 3.28 Thrasyvoulos V (2004)

On November 11, 2004, CCG ER Victoria, British Columbia, received a report that the Panamanian flag vessel *Thrasyvoulos V* had discovered a hole in one of its fuel tanks, 170 miles offshore from Cape Flattery.

The *Thrasyvoulos V* is a 37,094 GRT bulk carrier, 224 metres long. Tugs were dispatched to assist the vessel. It was reported that the vessel had 30 metric tonnes of oil and seawater on board.

On November 12, 2004, the vessel was 50 nautical miles west of Tofino, Vancouver Island. Surveyors boarded and assessed the damage to the vessel. Tugs were also on scene to assist and escort. It was reported that the vessel had a hole in the fuel tank 3 inches x 1.5 inches, approximately 2 feet above the waterline. The level of the oil/water mixture was 12 metres below the hole. There was an 8 inch x 9 inch indentation on the hull, indicating that an impact most likely caused the hole. The hole was patched with a 12 inch steel plate. The vessel was given clearance to proceed to the Port of Vancouver.

The vessel arrived at Vancouver. Transport Canada inspected the vessel on November 13, 2004. The vessel sailed from Vancouver on November 25, 2004.

The Administrator has closed his file.

## 3.29 Terra Nova FPSO (2004)

On November 21, 2004, a report was received from the *Terra Nova* oil platform that a release of approximately 25 m3 of crude oil was released as a result of a malfunction in an oily-water separator. The slick size was estimated at 2km long by 500m wide. The incident was under the jurisdiction of the Canada-Newfoundland Offshore Petroleum Board (CNOPB). CNOPB ordered the *Terra Nova* platform to stop production at 0415 hrs. *Terra Nova* FPSO reported that at 0700 production had been suspended.

Eastern Canada Response Corporation (ECRC) were contracted to run spill trajectory and assist with response operations. CCG ER assisted with the surveillance of the spill and provided equipment and personnel to assist with the response. TC and Environment Canada were involved in surveillance.

On November 23-24, Petro-Canada estimated that approximately 165 m3 was released. Officials for Petro-Canada et al's Terra Nova offshore project completed their investigation and the company has reportedly put changes into place to prevent further incidents. The company reported that first, there was a failure in the injection system delivering chemicals that separate oil and water brought up from the ocean floor. The oil, which was not properly separated from the water discharged back into the ocean. Second, a sensor that should have detected the imbalance failed. Petro-Canada was to submit the preliminary report to the CNOPB, the federal-provincial body that regulates the industry. The CNOPB was conducting its own investigation.

Claims for costs and expenses submitted by the CCG to the owners on December 3, 2004, have been paid in full.

*Note:* Whilst Part 6 of the MLA providing for the statutory liability of the SOPF is for oil pollution damage from the ship and for costs and expenses incurred in respect of measures taken to prevent, repair, remedy or minimize oil pollution damage from the ship, etc., to the extent that the measures taken and the costs and expenses are reasonable, Part 6 of the MLA also provides for certain exceptions including, drilling activities, and floating storage units. MLA section 49 states:

"49. (1) This Part does not apply to a drilling ship that is on location and engaged in the exploration or exploitation of the sea-bed or its subsoil in so far as a discharge of a pollutant emanates from those activities.

(2) This Part does not apply to a floating storage unit or floating production, storage and offloading unit unless it is carrying oil as a cargo on a voyage to or from a port or terminal outside an offshore oil field."

The Administrator has closed his file.

## 3.30 Henry Goodrich (2004)

On November 24, 2004, the drill rig *Henry Goodrich* reported a loss of some 1000 litres of emulsified oil while conducting a flow test from a wellhead on the Newfoundland offshore.

The Canada-Newfoundland Offshore Petroleum Board (CNOPB) ordered the immediate suspension of all activities at the drill rig. The spill was to be included as part of the investigation then underway of offshore operations resulting from the *Terra Nova* FPSO spill referred immediately above.

It is understood that CCG claimed no costs and expenses in this incident.

The Administrator has closed his file.

## 3.31 Mystery oil spill, Cape Shore, Newfoundland (2004)

On November 27, 2004, CCG ER St John's, Newfoundland, received a call from St. John's MCTS regarding oiled birds in Placentia Bay, Cape Shore area, resulting from a possible mystery spill. An initial CCG investigation of the report is said to confirm the suspected source was a ship source mystery spill and a number of oiled birds were found in the area. Oil samples taken from the birds and tested by Environment Canada confirmed that the oil was not from the *Terra Nova* spill reported herein above.

TC investigated the source of the spill. Approximately 16 suspect vessels had transited the area. CCG investigated the size of the spill and identified impacted areas. CWS investigated the impact of the mystery spill on the migratory bird population in the affected area.

CCG responded to remove the oiled birds and debris. CCG Also supported the enforcement activities of TC and Environment Canada through the collection of samples, etc., as per the Atlantic MOU Enforcement Annex with TC and Environment Canada.

Approximately 272 oiled birds had been impacted by December 3, 2004.

There being no claim on the SOPF, the Administrator has closed his file.

## 3.32 Mystery Spill, Placentia and St. Mary's Bays, Newfoundland (2004)

On January 6, 2005, the Administrator received a telephone call from a person in Newfoundland respecting alleged losses and/or costs and expenses incurred respecting oiled birds said to be from an oil spill off the coast. The person was seeking information with respect the possibility of making a claim on the SOPF. Attempts to reach the person by electronic mail on January 6, 2005, were unsuccessful.

Subsequently, with the person's correct address then available, the Administrator confirmed in writing to the person details on the working of the SOPF along with information explain-

ing the claims process including, presentation of claims, information required under various heads of claims, mystery spills and special loss of income claims under MLA section 88.

On January 11, 2005, the Newfoundland and Labrador Environmental Association (NLEA) filed a claim on the SOPF for $8,320.00 for expenses related to "monitoring and clean-up of recent ship-source oil pollution mystery spill in Placentia and St. Mary's Bays, Newfoundland." Particularly, the claim refers to seabirds impacted by the mystery spill in the said areas between November 26 and December 28, 2004. The expenses claimed appeared to relate to the capture, cleaning, rehabilitation and release of oiled seabirds. The claimant said that the NLEA is the only entity capable of responding to and dealing with seabirds contaminated by ship-source oil in Newfoundland and Labrador.

By correspondence dated January 21, 2005, the Administrator acknowledged receipt of the claim and requested further particulars in its support.

On March 11, 2005, the Administrator received some of the additional information requested.

The Administrator's investigation continues.

## 3.33 Amanda (2004)

On December 24, 2004 the vessel Amanda was reported high and dry south of Turnbull Reef off Portland Island, British Columbia. An estimated 100 gallons of diesel was thought to be onboard. No pollution of the marine environment had yet occurred. The Amanda was a 42 foot wooden troller probably built in the 1940s or 1950s which had been converted for pleasure use. CCG ER, Victoria, requested the CCGC Skua, which was already on scene, to plug the vents. By 2210 hours the same day,Vancouver Island Marine Assist had been engaged to help with the salvage.

On December 27, 2004 Vancouver Island Marine Assist reported that their attempts to salvage had failed. The vessel had moved to deeper water and was beginning to break up.

On December 28, 2004, CCG ER discussed options with a contractor for a CCG led response.

On December 29, 2004 the CCG contractor advised that they had found the Amanda. The vessel appeared to be impaled on the rocks. The condition of the vents were not known however little sign of oil leakage was found. The vessel was sitting nose down.

On December 31, 2004 the CCG contractor reported that the severely damage vessel had been brought to the surface. One tank was found to have been ripped out and was recovered from the ocean floor. The contractor was then directed to deconstruct the vessel ashore and dispose of all the contaminants. The deconstruction of the vessel was completed on January 17, 2005.

On February 18, 2005, the CCG filed a claim with on the SOPF for its costs and expenses in the amount of $11,382.06.

On March 3, 2005, the Administrator directed payment of compensation to DFO/CCG in the amount of $10,980.16 plus $66.55 interest.

At year end the Administrator was considering recovery options pursuant to MLA subsection 87(3).

## 3.34 Mary Makin (2005)

On January 23, 2005, a report was received of a diesel and lube oil spill from the Mary Makin in Patricia Bay, Vancouver Island, British Columbia. The Mary Makin was an old wooden tug that was beached near the Institute of Ocean Sciences for several years and had been the subject of a fire several months previous. It had been believed that the vessel was not a pollution threat.

A contractor had been engaged by the Receiver of Wrecks for the demolition and disposal of the vessel. During demolition, they discovered oil onboard and a spill resulted. A CCG ER Officer was tasked to the scene to assess the situation. The area was boomed by the contractor. There was an oil sheen along the shoreline towards the Institute of Ocean Sciences. It was estimated that 500 – 1000 gallons of oil was onboard the vessel.

On January 24, 2005, the contractor for the Receiver of Wrecks advised CCG ER that they had removed most of the internal components that could contain oil. The one tank left to be removed was sealed to prevent further loss of oil. On site demolition and disposal of the vessel was completed on February 10, 2005, without incident.

There being no claim on the SOPF, the Administrator has closed his file.

## 3.35 Tor (2005)

On January 16, 2005, a report was received that the converted fishing vessel Tor sank alongside the dock at the small craft harbour in Mission, British Columbia. Some diesel was seen seeping under the ice in the harbour. Sorbent boom and pads were deployed by the master harbour. On January 22, 2005 CCG ER was informed that fuel was still onboard the vessel. CCG ER took over the management of the response and requested quotes from contractors for the raising of the vessel and removal of pollutants.

On January 28, 2005 the contract to raise the vessel was awarded. The contractor raised the vessel and the harbour master kept it afloat over the weekend with pumps. On January 31, 2005 – due to the continuing ingress of water, the vessel was towed to Shelter Island Marina and placed on land. The CCG surveyor had advised that the cost to repair the vessel would well exceed the vessel's market value. It was then decided that the vessel be destroyed. CCG ER requested bids from contractors for the destruction of the vessel and the removal of pollutants.

On February 9, 2005 the contract to remove and dispose all pollutants and destroy the vessel was awarded. On March 2, 2005, the contractor reported that the removal and disposal of pollutants and destruction of the vessel has been completed.

The Administrator awaits developments.

## 3.36 Sonny Boy (2004)

On September 26, 2004, CCG ER, Victoria, received a report from MCTS that the fishing vessel Sonny Boy had sunk at the Fishermans' Wharf in Port Hardy, British Columbia, with an unconfirmed amount of pollutants on board. The vessel was boomed off with absorbent boom and pads applied by the Harbour Manager. Further inquiries revealed that the Sonny Boy was tied to another vessel and it was suggested that if immediate action was not taken there would be two sunken vessels. CCG ER then decided to hire a local salvage/dive company to deal with the situation.

Using air bags and pumps, contractors refloated the vessel at 2230 on September 26, 2004, and

secured it to the wharf. All suspected pollutants on board had apparently dissipated and the contractor could not find any reason for why the vessel had sunk.

On January 31, 2005, CCG filed a claim on the SOPF for it costs and expenses totaling $7,902.37. After investigation of the incident and assessment of the claim, the Administrator, on February 10, 2005, directed payment to DFO/CCG of $7,902.37 plus $122.80 interest.

At year end the Administrator was considering his recovery options under MLA subsection 87(3).

## 3.37 Mystery oil spill, Wheatley Harbour, Ontario (2004)

The first the Administrator learned of this October 12, 2004 incident was on January 31, 2005 when he received the CCG claim for its costs and expenses of $7,944.19. Wheatley Harbour, Ontario, is situated some 30 miles southwest of Pointe aux Pins and some nine miles north-northeast of Point Pelee, on Lake Erie, one of the Great Lakes. The Village of Wheatley is located about one mile north of the harbour.

The CCG claim referred to the incident as a mystery spill, but also noted that a fishing vessel was the suspected source. CCG ER and its contractor ECRC responded. Equipment deployed by ECRC included a vacuum truck. By 2200, October 12, 2004, 7200 litres of water/oil and oiled debris had been recovered, and CCG ER and ECRC departed the site. The CCG claim made no mention of any oil samples having been taken.

On February 7, 2005, the Administrator wrote to CCG requesting missing information, including the field notes and logs of officials attending the site from CCG ER and ECRC.

In the meantime, the Administrator investigated the incident. He was advised that on the morning of October 12, 2004, a man walking his dog near the harbour had noticed a strong smell of diesel oil, and telephoned the Harbour Master of the Wheatley Harbour Authority Corporation (WHAC). On attending at the scene the Harbour Master noted sludge in the harbour. Ontario Provincial authorities were then notified. Officials from the Ontario Ministry of Natural Resources (MNR), the WHAC, and other local persons tried to contain the spill. Concerned that the spill would drift out of the harbour into Lake Erie, the MNR officer called the CCG at Amherstburg, at 1230, October 12, 2004.

The MNR officer informed the Administrator that he had taken a number of oil samples from and around a suspected fishing vessel and had recorded details of his observations in writing. He said that he had informed CCG that he had oil samples and was advised that if they (CCG) needed the samples they would contact him. Having had heard nothing from CCG he advised the Administrator that the samples had since been "thrown out". They had not been sent out for analysis. The spill was located in an area where commercial fishing vessels secure.

Both the WHAC and MNR officials who attended the site provided their written notes on the incident to the Administrator. Subsequently, on February 14, 2005, CCG provided additional information in response to the Administrator's request of February 7, 2005.

On February 16, 2005, the Administrator directed payment of compensation to DFO/CCG of $7,502.88 plus $89.71 interest.

*Note:* In his letter of offer to DFO/CCG for this incident, the Administrator, noted the transcending importance of the Administrator having timely access to oil samples where available, as part of the evidence package he needs in order to make the polluter pay. The Administrator recalled the statutory scheme in Part 6 of the MLA – under which both federal agencies operate in this respect – and particularly the Administrator's statutory obligation, under section 87(3)(d), to take measures to recover the amount of the payment (to CCG) from the owner of the ship.

At year end the Administrator was reviewing this file.

## 3.38 Cape Roger (2005)

MTCS reported that the CCGS Cape Roger spilled 20 litres of diesel fuel in St John's Harbour, Newfoundland, while refueling on February 4, 2005. The crew from the vessel deployed a containment boom and, with assistance from CCG ER, worked to cleanup the spill. There were 53 bags of recovered oiled absorbents. CCG were said to be reviewing what went wrong to prevent this type of accident happening again.

The Administrator has closed his file.

## 3.39 Vinland (2005)

On February 7, 2005, the Newfoundland Transshipment Limited terminal at Whiffen Head, Placentia Bay, Newfoundland, reported that the 76,200 gross ton Canadian flag oil tanker *Vinland* spilled some ten barrels of crude oil on deck, while stripping crude from the cargo tanks. Most of the oil was contained on deck. The vessel launched a boat with crew to cleanup the oil in the water along side. The terminal engaged a contractor and deployed two boats to assist in the on water cleanup.

The *Vinland* is one of the three purposes – built 127,000 deadweight tonne crude oil shuttle tankers, serving the Hibernia and Terra Nova oil fields off Newfoundland. The *Vinland* is one of the largest vessels registered in Canada and crewed entirely by Canadians. The vessels are designed to load crude oil through a specialized bow-loading system and transport it to markets world-wide.

The Administrator has closed his file.

## 3.40 Abandoned vessel, Vancouver Harbour, British Columbia (2004)

During the evening of October 8, 2004, the CCG crew at Kitsalano SAR station received a report that a semi-submerged vessel was drifting past a deep sea vessel at anchorage #4, in English Bay, Vancouver Harbour, British Columbia.

The SAR crew responded and found an abandoned vessel adrift and the smell of fuel oil. As it posed a navigational hazard adrift in the dark, the crew made the decision to tow the vessel and beach it beside the SAR station and then boom it off to prevent further pollution. This was successfully completed that night.

At daylight on October 9, the crew observed pockets of oil and oily debris both inside and outside the boom. At this point CCG ER was notified of the incident.

On site that morning, CCG ER with the assistance of the SAR crew, plugged the vent, recovered the free oil from the water with pads and boom and removed the oiled debris. No indication of ownership or identification of vessel was found at the scene. The vessel had been stripped and it appeared that someone had attempted to sink it out in the bay, as slabs of concrete were found inside and holes had been cut in the hull.

Because of the amount of debris inside the vessel the fuel tanks could not be accessed to determine the amount of fuel remaining onboard. It was decided that it would be necessary to remove the vessel from the water, deconstruct it to access the tanks and dispose of the contaminated waste. The incident site was maintained by CCG ER and the SAR crew over the remainder of the Thanksgiving long weekend.

On October 12, 2004, a contractor working in the area was engaged to do the removal, thus minimizing the mobilization/demobilization charges. On October 13, 2004, the contractor brought in a barge and crane, removed the vessel and took it to its yard for deconstruction and disposal.

On February 4, 2005, the CCG filed a claim on the SOPF for its costs and expenses totaling $7,493.10. After requesting and receiving further information from CCG, the Administra-

tor on February 11, 2005, directed payment of compensation to DFO/CCG of $7,236.73 plus $62.28 interest.

At year end the Administrator was reviewing this file.

## 3.41 Zuiho Maru No. 88 (2005)

On February 8, 2005 the Long Pond Harbour Master, Conception Bay, Newfoundland, reported that the Japanese flag fishing vessel *Zuiho Maru No. 88* spilled a quantity of diesel oil while loading fuel at the main wharf. An estimated 2500 litres had spilled into the marine environment. The polluter assumed management of the response and hired Eastern Canada Response Corporation (ECRC) to contain the spill.

On February 9, 2005, CCG ER assumed the role of Federal Monitoring Officer (IMO) to monitor cleanup activities. A second release of fuel oil occurred. While transferring fuel between tanks onboard the vessel fuel came through a vent at the stern on the port side, spilling onto the deck and over the side. The fuel oil was contained within the boom already surrounding the vessel. Cleanup operations continued.

CCG ER obtained a Letter of Undertaking for its monitoring activities for this incident from Japan Ship Owners' Mutual Protection & Indemnity Association (P&I Club) in favour of DFO/CCG and the Administrator of the SOPF.

On February 11, 2005, an on water assessment was conducted by Environment Canada and CCG. No significant sheens were observed.

The vessel was instructed to transfer fuel from the fore peak tank to the aft tanks. Permission was also given to the vessel to do a gravity transfer. No mechanical transfer was allowed until the new Chief Engineer arrived.

On February 12, 2005, on water recovery operations concluded. The vessel departed Long Pond for St. John's to take on fuel.

On April 22, 2005, the shipowner paid the CCG's claim for its costs and expenses. The CCG and the Administrator therefore released the Letter of Undertaking to the vessel's agent.

TCMS was investigating the incidents for any infraction of the Pollution Prevention Regulations under the CSA.

The Administrator has closed his file.

## 3.42 Mystery Spill, Southern Shore, Newfoundland (2005)

MCTS reported on February 26, 2005, the presence of two live oiled ducks at Admiral Cove near Cape Broyle. Environment Canada received another anonymous report of 60 oil birds from Renews to Portugal Cove South on the South East Avalon.

It is reported that CCG ER, TC, and Environment Canada (CWS) conducted extensive ground shoreline and air surveillance along the Cape Shore and Southern Shore from Branch, St. Mary's Bay to Grates Cove, Trinity Bay, on the Avalon Peninsula. It was reported that there was no oil observed on the water but some oil debris that required removal was observed on two beaches. The impact on seabirds (primarily eider ducks) was being assessed. It is said that hunters have killed over 50 oiled eiders and observations from the public and CWS employees estimate that over 500 birds were oiled. A CCG helicopter with an ER observer and Environment Canada biologist was also to conduct an air survey of the coast line from Cape St. Francis to Cape Race. The CCG ER dispatched ground and on water crews to cleanup oiled beaches and assess other shoreline areas. CCG ER stood down its operations around March 7, 2005.

No claim is expected on the SOPF. The Administrator has closed his file.

## 3.43 Hime Maru No. 38 (2004)

It was reported on February 14, 2005 that the Nova Scotia Provincial Court in Halifax had ordered the fishing vessel *Hime Maru No. 38* to pay a $60,000 penalty for violation of the *Canada Shipping Act* regulations associated with the unlawful discharge of an oily substance into Canadian waters. It is said to be the first time in Canada that a member of a ship's crew has been convicted of oil record book violations.

On January 6, 2004, the vessel's agent had reported an oil slick around the *FV Hime Maru No. 38*, which was berthed at Pier 24 in the Port of Halifax. A subsequent investigation by TC determined that the slick, containing an undetermined amount of oil, originated from the *FV Hime Maru No. 38*.

On March 2, 2004, the Regional Operations Centre of the CCG had received a report from Imperial Oil that the *FV Hime Maru No. 38* had discharged oil overboard while refueling at the Imperial Oil dock in Dartmouth. TC investigators confirmed that the spill, containing 567.5 litres of oil, originated from the *FV Hime Maru No. 38*.

As a result of these two incidents, the vessel, master and company had faced a number of charges. The vessel and master subsequently pleaded guilty to several offences under the Canada Shipping Act. The vessel was found guilty of two counts of illegal discharge of a pollutant and fined $40,000. The master of the vessel was found guilty of one count of misreporting information in the vessel's oil record book and one count of not reporting a incident, and was fined a total of $20,000.

The court ordered that $25,000 of the $60,000 monetary penalty be paid to the Environmental Damages Fund (EDF) administered by Environment Canada. See Section 4.3 herein on the EDF.

The Administrator has closed his file.

## 3.44 Detroit River – Land based spill, Ecourse, Michigan, USA (2005)

On February 14, 2005, CCG ER was first informed by MCTS that a U.S. corporation at Ecourse, Michigan had spilled some eight gallons of an undisclosed substance into the Detroit River. The Ontario Ministry of the Environment (MOE) was investigating. At first it was thought to be hydraulic fluid. It was learned that the spill had actually occurred on February 13, 2005, thus leaving little to no chance of recovery by February 14. It was ultimately determined that the substance was a water/glycol mixture and the amount was 800 gallons. The towns of La Salle and Amherstburg, both in Ontario downstream of Ecourse, had been notified by MOE. No unusual substances were reported in their water intake systems.

For information on the potential impact on Canada and the SOPF of these chronic spills in the Detroit and Rouge Rivers, see the Administrator's Annual Report, 2003-2004, section 3.46.

# 4. Challenges and Opportunities

## 4.1 Quasi-Criminal Liability for Environmental Offences in Canada

On May 6, 2004, the Honourable David Anderson, Minister of the Environment, tabled new legislation (Bill C-34) to amend the *Migratory Birds Convention Act (1994)* and the *Canadian Environmental Protection Act (1999)*.

As a result of the Dissolution of Parliament on May 23, 2004, the proposed legislation "died on the order paper". See the Administrator's Annual Report 2003-2004 at section 4.1.

On October 26, 2004, during the next session of Parliament the legislation was re-introduced as Bill C-15 by the Honourable Stéphane Dion, Minister of the Environment. On May 19, 2005, Parliament passed the legislation. The Act was proclaimed in force as of June 28, 2005.

This Act amending the *Migratory Birds Convention Act, 1994*, and the *Canadian Environmental Protection Act, 1999*, is commented on, from another prospective, in the Stewart McKelvey Stirling Scales, Barristers and Solicitors, Halifax, Nova Scotia, Client Update: "Changes to Canadian Marine Pollution Laws". The following excerpts are reprinted with permission of the law firm:

> After more than a year of Parliamentary effort, including an intervening general election, Canada has adopted legislation which in some respects duplicates, but in some important respects fundamentally alters, Canadian law relating to marine pollution in the exclusive economic zone.
>
> Under former, and still-existing, Canadian law (principally the *Canada Shipping Act*) discharge of prescribed pollutants is prohibited in the territorial sea and in the EEZ, and is punishable by fines not exceeding C$250,000 (on summary conviction) or C$1 million (on indictment). Although there is provision for detention of a ship in the case of a suspected discharge, there was some uncertainty whether Canadian authorities formerly had power to detain an offending ship, or to redirect it into a Canadian port, when the ship was in transit outside Canada's territorial waters.
>
> On May 19, 2005, Parliament passed legislation, designated Bill C-15, to amend the *Migratory Birds Convention Act, 1994* and the *Canadian Environmental Protection Act, 1999*. The amendments expand the application of both these Acts to ship-source pollution and facilitate their availability to support prosecutions in addition to, and perhaps in lieu of, the more traditional *Canada Shipping Act* régime…
>
> Under the amendments to the *Migratory Birds Convention Act, 1994*, which formerly applied only to the outer limit of Canada's territorial sea, this statute is declared to apply in the EEZ. It contains a prohibition against any ship or person discharging any substance harmful to migratory birds in waters frequented by migratory birds or in a place from which the substance may enter such waters. It enacts statutory positive personal duties on the master and chief engineer of the ship, and on directors and officers of the corporate owner and operator of the ship, to take all reasonable care to ensure compliance by the ship and by all persons on board the ship. In addition, corporate directors, officers, and agents who "direct, authorize, assent to or acquiesce in" the discharge will be declared to be parties to the offence and liable to conviction. Maximum fines on conviction are increased to C$300,000 on summary conviction or C$1 million on indictment; in the case of conviction of a ship over 5,000 DWT, the statute imposes minimum fines of C$100,000 on summary conviction or C$500,000

on indictment. There is in addition provision for imprisonment of individuals who are convicted.

Enforcement officers, who will likely be officials of the Canadian environment department, are empowered to "stop" or "move", and to detain "for a reasonable time" for the purpose of inspection, any ship. They are empowered also to board and inspect, without warrant, any ship in Canada's territorial sea or EEZ if the ship is believed to have on board "any thing to which this Act or the Regulations apply or any document, record or data relating to the administration of this Act …". Although not stated in the legislation, it is believed that the "thing" will be oil (including bunkers, lubricants and bilge waste) and that the "record" will include the oil record book. The boarding and inspection powers will be exercisable in respect of foreign-flag vessels in the EEZ only with the consent of the Minister of the Environment. Officers will have, in addition, the power to direct a ship into port and to issue detention orders against the ship if they believe that the ship has committed, or has been used in, an offence. The power to deviate and/or detain may only be exercised in respect of a ship in the EEZ if the officer believes that the offence "will cause major damage to the environment, or an actual threat of major damage to the environment". Although apparently an attempt to be consistent with Canada's international obligations under the Law of the Sea Convention and MARPOL, the concept "major damage" is not defined and can be expected to be a significant source of controversy in practice. In particular, there is provision for consideration of the "cumulative or aggregate" effect of discharges, causing concern that relatively small individual spills will be alleged to contribute to "major" cumulative damage, and so support exercise of the detention power. Finally, the deviation/detention power will be exercisable in respect of foreign-flag ships in the EEZ only with the consent of the Attorney-General of Canada.

Under the *Migratory Birds Convention Act, 1994*, as amended, security may be provided to release a ship from detention, but unless the Attorney-General of Canada accepts a lower amount in a specific case, the security must be in the amount of "the maximum fine that might be imposed as a result of conviction of every accused", causing concern that security demands will be in multiples of the million-dollar maximum fine.

The *Canadian Environmental Protection Act, 1999* is a multi-faceted statute which formerly was seldom applied to ship-source marine pollution. Among other things, its Part 7, Division 3 prohibited "deliberate" disposal of prescribed waste in waters including Canada's territorial sea and EEZ, but excludes from that prohibition, among other things, disposals which are "incidental to the normal operations of a ship". The amendments to this Division delete the word "deliberate" from the definition of "disposal", but would still except from the prohibition releases incidental to or derived from the normal operations of a ship. However, the amendments empower the Minister of the Environment to make regulations specifying "acts or omissions that constitute a disposal" for purposes of the prohibition, and also specifying "the operations that are deemed to be, or deemed not to be, the normal operations of a ship". It is believed that this prohibition, and these regulation-making powers, will be employed to expressly prohibit, and to support prosecution for, discharges of bilge waste in those portions of Canada's EEZ which cannot be proved to be frequented by migratory birds.

Maximum fines under the present *Canadian Environmental Protection Act, 1999* are C$1 million on indictment and C$300,000 on summary conviction, and there is present provision for imprisonment of individuals. These penalty provisions have not been amended, and unlike the case of the *Migratory Birds Convention Act, 1994*, there is no provision for minimum fines under the *Canadian Environmental Protection Act, 1999*.

> Despite many subtitles, and some striking, differences in wording, the effects in practice of which differences are imponderable at the moment, the amendments to the *Canadian Environmental Protection Act, 1999*, like those to the *Migratory Birds Convention Act, 1994*, provide for enforcement officers' exercise of powers of boarding and inspection in respect of foreign-flag ships in the EEZ with the consent of the Environment Minister and the exercise of powers of "arrest, entry, search and seizure" in respect of such ships with the consent of the Attorney-General. There is also power, when an offence is suspected, to direct ships in the EEZ into Canadian ports. Under the amended *Canadian Environmental Protection Act, 1999*, security for release from detention will be required to be in the amount of "the maximum fine that might be imposed as a result of conviction of the person or ship charged with that offence". Finally, the amendments to the *Canadian Environmental Protection Act, 1999* similarly provide for criminal responsibility of the master and chief engineer of the ship, and of directors and officers of any corporation who are 'in a position to direct or influence the corporation's policies or activities in respect of conduct that is the subject-matter of the offence'.

Note: The Administrator understands that Environment Canada is in the process of negotiating a Memorandum of Understanding with DFO/CCG and TCMS with respect to enforcing the provisions of the Act.

## 4.2 Civil Liability for Environmental Damage in Canada

Compensation for environmental damage is handled differently under the *Canadian Marine Liability Act* (*MLA*), the 1992 CLC, the 1992 IOPC Fund Convention, and the *US OPA*.

The 1992 CLC and the 1992 IOPC Fund Convention, in their definitions provide that "pollution damage" means [in part]

> *"(a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken…"*

In Canada the *MLA* (the SOPF Fund's governing statute) defines "oil pollution damage" as:

> *"…in relation to any ship, means loss or damage outside the ship caused by contamination resulting from the discharge of oil from the ship."*

The *MLA* provides:

> *"the owner of a ship is liable for oil pollution damage from the ship."*

The *MLA* further provides:

> *"If oil pollution damage from a ship results in impairment to the environment, the owner of the ship is liable for the costs of reasonable measures of reinstatement actually undertaken or to be undertaken."*

In the United States, *OPA 90* provides for payment of natural resource damage claims from the Oil Spill Liability Trust Fund. Only designated Trustees may submit natural resource damages. Under the US regulations the trustee may consider a plan to restore and rehabilitate or acquire the equivalent of the damaged natural resource.

The technically justified reasonable cost for reinstatement/restoration measures, for which compensation is available under the 1992 CLC and the 1992 IOPC Fund Convention, might equate to

primary restoration under the US NRDA regulations. However, the further measure of *OPA NRDA* is:

- The diminution in value of those natural resources pending restoration, plus
- The reasonable cost of assessing those damages.

The 1992 CLC and the 1992 IOPC Fund Convention do not, by their definition of pollution damage, cover this latter sort of compensation provided by the NRDA regulations or other theoretically based assessments of environmental damage.

Note: A list of federal legislation and regulations dealing with various aspects of marine pollution in Canada is contained in section 5.2 of the Administrator Annual Report 2003-2004.

## 4.3 Canada's Environmental Damages Fund (EDF)[1]

Prior to 1995, any judgments obtained from a court or monies obtained from settlements reached between parties involving the Canadian government had to be paid into the Consolidated Revenue Fund by virtue of the *Financial Administration Act*[2]. Consequently, those monies could not be used to assist in environmental restoration projects. A new policy was developed to avoid this problem. The Treasury Board of Canada in 1995 authorized the creation of a special holding account (Environmental Damages Fund) for the purpose of allocating court awards and settlements, as well as voluntary payments and international funds compensation, towards environmental restoration projects.

The object of the Environmental Damages Fund (EDF) is to assist in the rehabilitation of injured or damaged environmental or natural resources and to ensure that proposed projects to help rehabilitate the environment are cost effective and technically feasible.

For instance, after the Crown successfully prosecutes a polluter under certain federal environmental legislation and a fine is imposed, or in a case where the federal government commences civil litigation against the polluter and either negotiates or obtains a judgment from a court in relation to restoration of environmental damages both with respect to past and future damage, the court, the Crown and the defence can recommend that the monies obtained be placed into the EDF. However, cleanup costs, actual response costs and legal costs are specifically excluded from the EDF.

This approach is seen to be effective. At the March 2001 sessions of the Third Intersessional Working Group of the 1992 IOPC Fund, ITOPF presented its views on compensation for environmental damages under the international 1992 Civility Liability and Fund Conventions. In its paper (92FUND/WGR.3/5/2) ITOPF refers to other approaches by the USA and developments in the European Commission. ITOPF comments on the EDF managed by Environment Canada:

> "The Environmental Damages Fund serves as a special trust account to manage monies that are received as a result of court orders, awards, out-of-court settlements, voluntary payments and, so it is stated, compensation provided through international liability regimes. The Canadian Courts are apparently able to use various Federal laws to direct money to the Fund, including the *Canadian Environmental Protection Act*, *Migratory Birds Convention Act*, the *Canada Wildlife Act*, the *Fisheries Act* and the *Canada Shipping*

[1] Harry Wruck, QC, *Overview of Canadian Environmental Legislation and Compensation for Environmental Damage*, presented at the EDF national workshop, *Towards a national Environmental Damages Fund Action Plan*, hosted by Environment Canada, Gatineau, Qc, December 11-13, 2002. See also Harry Wruck QC, *The Federal Environmental Damages Fund*, 5 C.E.L.R. (3d) 120.

[2] R.S.C. 1985, c. F-11.

> *Act*. The Environmental Damages Fund is used to remediate damages to the environment, including assessment or research and development work required to support such restoration efforts. Whilst monies received may not always be used to restore the damaged area in respect of which they were received, it is a requirement that any projects have to be in the region/community where the incident occurred. This initiative is seen as both an effective economic disincentive for illegal activities and as a means of providing compensation for environmental damage."

One of the problems that arose after 1995 and to some extent is still the case today, is that courts and even government counsel are not familiar with the EDF. As a consequence, not a great deal of money has been paid into the EDF.

In the Atlantic Region of Environment Canada alone, as at November 2004 in excess of $650,000 has been contributed to the EDF and $450,000 dispersed for worthwhile restoration projects. A major part of that contribution is composed of proceeds obtained through quasi-criminal charges filed under the *Canadian Environmental Protection Act* and sections 32, 35 and 36(3) of the *Fisheries Act*.

As government officials, prosecutors, judges and defence counsel become more aware of the EDF it may become more utilized.

For instance, on February 25, 2002, a Nova Scotia Provincial Court judge imposed the country's highest ever fine - $125,000 – for pollution of coastal waters that are a haven to thousands of seabirds. In this case, the Philippine – registered ship *Baltic Confidence* was charged for dumping at least 850 litres of oil-mixed bilge water in December 1999, about 158 kilometres southwest of Halifax. In pleading guilty to the quasi-criminal offense, lawyers for Prime Orient Maritime of Manila said the company agreed to a penalty of $80,000 and a contribution of $45,000 to Canada's Environmental Damages Fund. The *Baltic Confidence* incident was the first time that a shipping firm paid into the EDF.

Another successful aerial surveillance mission occurred in March 2002, when a fishery patrol aircraft spotted an oil slick about 120 kilometres southeast of Halifax. The slick was reported to be 40 kilometres long and 15 metres wide. The oil trailed directly astern of the foreign-registered bulk carrier *CSL Atlas*. Subsequently quasi-criminal charges were laid and, after an agreement was reached between defence lawyers and federal Justice Department officials, a Nova Scotia Provincial Court judge imposed a fine of $125,000 on November 25, 2002. The fine includes a $50,000 assessment that will go to the EDF toward dealing with environmental damages caused by marine pollution.

The important point to recognize with respect to the administration of the EDF is that it establishes clear criteria and standards that apply both to applicants and decision-makers in relation to the use of the Fund monies in respect to the restoration and projects. There really are three important principles running through the process. First, the restoration projects must be cost effective. Second, they must be technically feasible. Third, they must be scientifically sound before Fund monies may be used in that manner. To a large degree these important principles have been borrowed from American jurisprudence such as in the *Puerto Rico v. SS Zoe Collocotroni*[3] case, where the court refused to grant damages for the restoration of the environment, unless the government had a realistic plan in place to restore the environment to its pre-spill state.

[3] *Puerto Rico* v. *SS Zoe Collocotroni*, 456 F.Supp 1327 (D.P.R. 1978)

## 4.4 Environment Damage Assessments and Restoration in Canada (EDA)

Following on the EDF there are now persons in Canada who are developing natural resource valuation methodologies to quantify damages to the environment for the purpose of obtaining funding for restoration.

The enforcement of environmental laws and regulations is done primarily through a system of fines relating to the different pieces of legislation applicable in Canada. It is stated that the traditional problem associated with this technique is the lack of accepted methods to match costs with the damage that had occurred. Judges have used the deterrence criterion in sentencing for environmental offences. Environment Canada is developing a new approach – Environmental Damage Assessment or EDA – towards quantifying such costs.

The Atlantic Region of Environment Canada is currently developing a framework to guide the various activities associated with the three primary components of the EDA: assessing damage to the natural environment; valuing this damage; and initiating projects aimed at restoring the damage which has been caused.

The initial trigger for implementing assessment activities occurs when an incident is reported or observed. Once damage has been measured, there is a need to place a value on the losses or environmental impacts. The Atlantic Region is developing models and protocols for conducting this type of economic valuation. Restoring the damage caused by a spill or release is an integral component of the EDA process. The intent is to replace the damaged ecosystem components, or enhance natural recovery.

The EDF is intended to fund environmental restoration projects after completion of an EDA. At this point in the development of a framework for general fund criteria and project requirements, all project proposals submitted to Environment Canada for funding from the EDF should satisfy the following general requirements:

- Satisfy all conditions specified by the courts;
- Build on partnerships with stakeholders in achieving common goals/objectives regarding remediation and restoration of damages to the natural environment;
- Satisfy evaluation/technical review criteria;
- Be cost effective in achieving goals, objectives and deliverables;
- Recipients must process the necessary knowledge and skills required to undertake the project;
- Have broad community support;
- Be approved by the Regional Director General.

In the meantime, it is acknowledged that the framework for establishing a national plan for implementing an environmental damage assessment and restoration process remains as a work in progress.

Due to the infancy of the EDA process in Canada, it is clearly at a stage in its history where conflict emerges between the theoretical aspects developed by its creators and its use by judges. The development of the EDF by Environment Canada may be a strong influence on judges to call upon EDA for environmental offences. The impact, if any, of such developments on the statutory civil liability of the SOPF for oil pollution damage from a ship which results in impediment to the environment remains to be seen.

Note: Additional information about Canada's Environmental Damages Fund, and the current framework for the general fund and project requirements are described in SOPF Administrator's Annual Reports 2001-2002 and 2002-2003, respectively, at section 4.1.1, and the 2003-2004 Annual Report at Sections 4.3 and 4.4.

## 4.5 Prevention and Response Measures in Canada

### 4.5.1 Port Reception Facilities for Oily Waste

Many migratory seabirds die each year as a result of ships deliberately dumping a mix of water and oil waste from engine room bilges. The ability of ships to comply with regulatory discharge requirements when in port depends largely upon the availability of adequate port reception facilities. The lack of reception facilities in many ports worldwide may contribute to pollution of the marine environment.

**MARPOL Convention**

At the international level, IMO Member States that are party to MARPOL 73/78 are required to ensure the provision of adequate reception facilities in its ports for the reception of oily waste from oil tankers and other ships using its ports without causing undue delay. Furthermore, all parties to the MARPOL Convention are required to communicate to IMO a list of reception facilities in their ports in accordance with the Convention. With the aim of promoting the effective implementation of the Convention, since 1983 the IMO has been collecting and disseminating information on the availability of reception facilities through the Marine Environment Protection Committee (MEPC) circulars. A recent report of MEPC states: "Port States failing to provide adequate reception facilities will make it harder to deal with the enforcement of ships' illegal discharge at sea." Canada is a signatory to MARPOL 73/78.

Note: The list of oily waste reception facilities can be accessed at: http://www.imo.org.

The IMO has prepared guidelines for ensuring the adequacy of port waste reception facilities. In summary, these guidelines provide information relating to the ongoing management of existing facilities, as well as for the planning and establishment of new facilities. The guidelines are also intended to encourage the better and more active use of port waste facilities. The ultimate aim is to help achieve the complete elimination of intentional pollution of the marine environment by oil and other harmful substances, One of the main objectives of the guidelines is to assist States Parties to MARPOL 73/78 in planning and providing adequate port waste reception facilities. Most States have delegated this duty to their ports' industry, port authorities, or to other public or private bodies, but States retain the ultimate responsibility for ensuring that their undertaking is fulfilled.

**Transport Canada**

In response to the Administrator's enquiry, TCMS advised in 1999:

"The authority exists in paragraph 657(1)(n) of the *Canada Shipping Act* to make regulations requiring ports to provide reception facilities, to the satisfaction of the Minister of Transport, but no regulation has ever been made". The decision not to produce regulations was based on surveys before and after Canada's accession to MARPOL indicating that adequate facilities were being provided by the Canadian ports. The most recent survey then was completed in 1995.

TCMS also advised the Administrator in 1999 that as a result of concerns by some that Canadian ports may not be providing adequate facilities, the issue was added to the agenda of the Environment Standing Committee of the Canadian Marine Advisory Council (CMAC) in 1999. TCMS led the Committee's focus group, which consulted with representatives of the Canadian shipping, and petroleum industries, port authorities and other stakeholders. TCMS reported to CMAC that the focus group studying the question of adequate reception facilities found that waste facilities for residual oils and other ships' waste at Canadian oil refineries and oil terminals were adequate. Recently, to assist with the annual submission to IMO of information on new reception facilities and to update information on the list of facilities in Canadian ports, TCMS developed a website database. All Canadian port authorities and other representatives of marine waste reception facilities are requested by TCMS to provide information to the database as it applies to their facilities.

As reported in section 5.3 of this report, TCMS advised in November 2004 that during its first year of operation the database achieved limited response. Consequently, TCMS intends to take a further pro-active role in this matter.

It is generally acknowledged that from an economic and practical standpoint, all Canadian port reception facilities have to be adequate and conveniently located to meet the needs of the ship without causing undue delay. The facilities must also be affordable for all classes of ships. There must be more incentive for the ship to retain oily bilge water and residue on board for disposal in port, rather than dumping it at sea.

**Baltic Strategy**

TCMS reported at the CMAC meeting in November 2004 that in 2005 Transport Canada plans to examine the feasibility of adopting an approach like the "Baltic Strategy" for reception facilities for ship-generated waste. As part of this strategy, to facilitate offloading of ships' waste at ports of Baltic countries the costs are integrated into port fees – a "no-special-fee" system.

The Swedish Maritime Administration reports that, actions to deal with the environmental problems caused by discharges of wastes from ship have been part of international Baltic co-operation ever since the first Convention on the Protection of the Marine Environment of the Baltic Sea Area (the Helsinki Convention) was signed in 1974.

In addition, the Baltic Sea Area has also been designated a Special Area under the International Convention for the Prevention of Pollution from Ships, 1973 as amended by a protocol in 1978 (MARPOL 73/78). Such status is given to sea areas which, because of their special oceanographic or ecological characteristics, are regarded as particularly sensitive to environmental disturbances.

As a consequence, regulations concerning discharges of oil and other types of ship-generated wastes are particularly strict in the Baltic Sea Area. In principle, all wastes should be delivered to reception facilities ashore.

However, despite 20 years of international co-operation within the Helsinki Commission (HELCOM) framework as well as in IMO to control discharges of wastes from ship's, such illegal discharges remained a serious environmental problem in the Baltic Sea Area.

To address this problem, the countries around the Baltic Sea Area agreed on a comprehensive set of measures to tackle problems with ship-generated waste. The Baltic Strategy for Reception Facilities for Ship-generated Waste and Associated Issues was adopted by HELCOM in March 1996.

The main objective of the Strategy is to substantially decrease operational and to eliminate illegal disposal of ship's wastes and thus, prevent pollution of the Baltic Sea Area.

The Strategy includes all types of wastes generated onboard ships, being it a large ship, fishing vessel, working vessel or pleasure craft.

In practice, this means that:

- Over 210 port reception facilities for ship-generated wastes are available in ports around the Baltic. These facilities are easily accessible and adequately equipped;

- It is mandatory for ships to deliver all their wastes to a reception facility before leaving port, with some exceptions;

- According to the "no-special-fee" system, a fee covering the cost of reception, handling and final disposal of ship-generated wastes is levied on the ship irrespective of whether or not ship-generated wastes are actually delivered. The fee is included in the harbour fee or otherwise charged to the ship.

Currently the "no-special-fee" system should be applied in all Baltic Sea ports to oily wastes from machinery spaces. The "no-special-fee" system is expected to be extended by 2005 to cover other categories of ship-generated wastes, i.e., sewage and garbage.

Pollution from shipping, by its very nature, has transboundary implication. Actions to reduce the environmental impact of shipping are needed in a wide international context.

Thus, the application of the concepts embedded in the Baltic Strategy (e.g. the no-special fee system and mandatory delivery of all wastes ashore) to wider geographical regions would be important steps towards further reducing the effects of shipping on the marine and coastal environments.

**European Union**

With respect to the European Union's position on this issue, it is reported that the deadline for implementation of the European waste reception directive come into effect on May 1, 2004. This directive aims to reduce discharges at sea by insisting that each European Union port have disposal facilities. It has been reported, however, that Member States have different interpretations of how waste should be dealt with at the quayside. The lack of standardization and the fact that fees are not harmonized are causing problems with implementation of the directive. As a result, several governments and industry agencies continue to work on improving the port waste reception facilities and finding a "best practice" solution.

**Canadian Industry**

In Canada, the Canadian Petroleum Products Institute (CPPI) makes the point that lack of support (industry input) for the new TCMS database is a matter for all ports, all terminals and all waste disposal service providers. CCPI says its members' facilities constitute a very small part of the picture.

CPPI says it is more than willing to play its part in supporting the initiative and even to encourage others to do the same. CPPI is encouraging TCMS to more actively market the database to industry and to pursue Canada's international obligations in this matter.

Note: The Administrator is following progress on this matter, particularly in light of reports of chronic mystery marine oil spills in eastern Canada. The issues associated with port reception facilities in Canada for ship's waste can be sorted.

### 4.5.2 National Aerial Surveillance Program (NASP)

Federal governments departments and agencies are using available resources to combat oil pollution caused by passing ships. Transport Canada is responsible for the overall direction and coordination of the NASP. The objectives of the NASP include enforcement of the pollution prevention regulations, deterrence, emergency response and program support for other government departments and federal agencies, such as, the CCG, Environment Canada, and the Royal Canadian Mounted Police.

Currently, aerial surveillance is conducted through the use of three different aircraft. Two of these are owned and operated by Transport Canada's Aircraft Services Directorate. The third is a contracted aircraft owned and operated by Provincial Airlines Limited. The number of patrol hours are increased during the winter by multi-tasking the ice reconnaissance aircraft flights south of 60 degrees north latitude. Specialized video and still cameras, computerized reporting software, remote sensing and communication instruments are fitted and utilized in various methods of detection on each of the aircraft. The computerized imaging equipment records vessel discharges and pollution sightings.

Transport Canada reported in May, 2005 that surveillance equipment valued at $2.3M has recently been acquired that significantly increases TC's ability to detect illegal discharges from passing vessels, even in conditions of reduced visibility and darkness. The primary new sensor is a side-looking airborne radar that extends the range for detecting spills to 25 nautical miles on both sides of the aircraft. Ships can be detected up to 50 nautical miles away. Previously, visual detection by crews on planes was effective for a range limited to just 2 nautical miles. Other new equipment includes an ultraviolet/infrared line scanner; Airborne Automated Identification System transponder; a high-resolution digital photography camera and video system; and a console that integrates all the systems.

The three aircraft utilized by the TCMS are:

- A de Havilland Twin Otter aircraft is located in Vancouver. This aircraft patrols Vancouver Island's Inner Passage, the Strait of Juan de Fuca and the West Coast tanker exclusion zone, as well as the Queen Charlotte Islands;
- A de Havilland Dash – 8 aircraft now located in Moncton, New Brunswick. This aircraft patrols the Great Lakes, the St. Lawrence River, and the Gulf of St. Lawrence, Cabot Strait and the coast of Nova Scotia, including the Bay of Fundy;
- A Beechcraft King Air 200 is located in St. John's. This aircraft is contracted for fisheries patrol off the coast of Newfoundland. It is also multi-tasked or conducts dedicated oil pollution surveillance flights.

Transport Canada continues to seek funding for additional aerial surveillance. Transport Canada will also continue the NASP's involvement in the Integrated Satellite Tracking of Polluters Project I-STOP. The objective of this project is to help determine if RADARSAT technology can be harnessed to the task of reducing chronic oil pollution in Canada.

Note: Other Canadian initiatives on oiled wildlife issues are reported in the Administrator's Annual Report 2003-2004, sections 4.8.1, 4.8.2 and 4.8.3.

### 4.5.3 Using Satellites to Protect the Marine Environment in Canada: Integrated Satellite Tracking of Polluters (I-STOP)

Canada's 243,000 km coastline and vast off-shore waters present a challenge to effective ship-source oil detection by conventional methods such as aircraft. The use of satellite technology

presents a cost effective tool to monitor vast areas of ocean and to direct aircraft to areas where oil releases are suspected. To increase the effectiveness of existing aircraft monitoring programs, several government departments have become involved in a project to utilize satellite detection systems.

In 2002 a three-month pilot project known as STOP (Satellite Tracking of Oil Polluters), implemented by Environment Canada, Transport Canada, Canadian Coast Guard and the Canadian Space Agency illustrated that RADARSAT-1 was a reliable monitoring tool. A protocol for downloading, processing and analyzing the image of potential oil releases and potential target sources in near-real time was also developed by the industrial partner, RADARSAT International Inc. The STOP project was further refined through the partnership with C-CORE (Memorial University, St. John's, Newfoundland) and their ability to link this Canadian project to those European agencies involved in oil discharge monitoring.

Operational projects in 2003 and 2004 resulted in: 12- month monitoring of Canada's Atlantic and Pacific coasts, the St. Lawrence Seaway and the Great Lake region; near-real time processing of images of approximately 1 hour and 20 minutes; and the participation of seven project partners representing government, industry and academia. Although satellite technology is stable, the need for visual confirmation of oil releases remains the accepted practice with respect to investigating possible releases. All Federal Departments that routinely travel over an "Area of Interest" by plane or ship can be contacted, and monitoring activities are coordinated to provide ground validation for the I-STOP project.

One of the newest participants is the Offshore Petroleum Boards of Newfoundland and Nova Scotia who regulate oil platforms that are routinely monitored. This provides vital information for ground validation of satellite imagery. In 2005 the I-STOP project team is expanding image acquisition to include Canadian waters in the north, thereby creating a three-ocean program and examining operational linkages between the I-STOP program and Environment Canada's Canadian Ice Service. Satellite technology will play an important role in monitoring and detecting ship-sourced oil discharges.

## 4.6 Changes to the 1992 International Regime – Impact on SOPF

### 4.6.1 Increases in Compensation Limits

From 1989 to May 29, 1999, Canada was a Contracting State to the 1969 Civil Liability Convention and the 1971 IOPC Fund Convention. The compensation limit for each incident was approximately $120 million. These Conventions applied to pollution damage suffered in the territory – including the territorial sea – of a State Party to the respective convention by spills of persistent oil from oil tankers.

On May 29, 1999, Canada became a Contracting State to the 1992 Civil Liability Convention and the 1992 IOPC Fund Convention. The compensation limit per incident increased to approximately $270 million. Under the 1992 Civil Liability and the 1992 IOPC Fund Convention, the geographical scope is wider with the cover extended to pollution damage caused in the exclusive economic zone, or equivalent area of a Contracting State.

On November 1, 2003, the limits of liability and compensation under the 1992 CLC and 1992 IOPC Fund Convention increased by 50.37 per cent. These increases were adopted by the IMO legal committee pursuant to Articles 15 and 33 of the 1992 CLC and the 1992 Fund Convention respectively. The increase which resulted in a total of approximately $372 million (as at April 1, 2005) of coverage per incident for oil tanker spills is noted under Figure 1, Appendix D.

To illustrate (using a nominal value of $2.00 to one SDR), as a result of the amendment to the 1992 CLC the increased limits of the shipowner's liability for incidents caused by oil tankers on or after November 1, 2003, are as follows:

(a) For a ship not exceeding 5,000 units of gross tonnage, 4,510,000 SDR (approximately $9 million);
(b) For a ship with a tonnage between 5,000 and 140,000 units of gross tonnage, 4,510,000 SDR (approximately $9 million) plus 631 SDR ($1,262) for each additional unit of tonnage, and
(c) For a ship of 140,000 units of tonnage or over, 89,770,000 SDR (approximately $179.5 million).

As of April 1, 2005, the limit of liability of the SOPF is approximately $145 million for each incident. This amount is available to cover oil spills in Canada from ships of all classes – not just tankers – and not only persistent mineral oil. As a result of the increase in the limits of compensation for oil pollution damage under the 1992 CLC, the 1992 IOPC Fund and the domestic SOPF, the aggregate compensation available for an oil tanker – spill in Canada – was approximately $517 million on April 1, 2005.

The above-noted increases are unrelated to any amount of compensation that might be available under the Supplementary Fund – "optional" third tier, referred to following.

### 4.6.2 Supplementary Fund – "Optional" Third Tier

The IOPC Supplementary Fund entered into force on March 3, 2005. The first session of the Supplementary Fund Assembly was held from March 14 to 23, 2005. The following Contracting States were present: Denmark, Finland, France, Germany, Ireland, Japan, Norway and Spain. Note: Information about the first session is contained in Appendix F.

By way of background, the Diplomatic Conference convened by IMO in London during the week of May 12, 2003, adopted a Protocol creating the International Oil Pollution Compensation Supplementary Fund (IOPC Supplementary Fund). The most important elements of the Protocol include:

- The aggregate maximum amount of compensation available will be 750 million SDR per incident, consisting of the 1992 CLC; the 1992 Fund Convention and the Supplementary Fund. This amount represents about C$1.5 billion as compared to the current amount of C$372 million.

- The minimum receipt of one million tons of contributing oil is deemed to be received in each Contracting State to the Supplementary Fund. This is a new feature designed to deal with those States that normally submit nil reports and, therefore, make no contributions.

- The amount of annual contributions payable by a single Contracting State will be capped at 20% of the aggregate amount of annual contributions. As a result, the annual contributions payable by all other Contracting States will be increased pro rata to ensure that the total amount of contributions payable by all persons liable to contribute to the Supplementary Fund, in respect of the calendar year, will reach the total amount of contributions decided by the Assembly.

These capping provisions shall remain in effect until the total quantity of contributing oil received in all Contracting States has reached one billion tons annually, or until a period of 10 years after the date on entry into force of the Supplementary Fund has elapsed, whichever occurs earlier.

According to its terms, the Protocol entered into force three months following the date that at least eight states had signed the Protocol without reservation or deposited instruments of ratification, etc., and the total quantity of at least 450 million tons of contributing oil had been received by those states in the preceding calendar year.

The Protocol shall cease to be in force when the number of Contracting States fall below seven or the total quantity of contributing oil received falls below 350 million tons, whichever occurs earlier.

Presumably, European Union countries will continue to adopt the third tier by becoming Contracting States to the Protocol. It appears, however, that most other Contracting States to the 1992 regime, save Japan, will not adopt the third tier. Most of these other Contracting States will continue with the 1992 CLC and the 1992 IOPC Fund Convention, which has had compensation limits increased as described immediately above.

We are pleased with the positive developments that took place on the international front with respect to establishing the Supplementary Fund. The Canadian delegation position, which includes that of the Administrator of the SOPF, is supportive of the initiative to establish an "optional" Supplementary Fund under the International Regime. However, we understand that support for the initiative does not imply a Canadian decision to join the Supplementary Fund now that it has come into force.

From the Administrator's view this Supplementary Fund ("optional" third tier) may prove to be both a practical alternative – and an effective IMO response – to the proposed European COPE Fund[4].

Will Canada become a Contracting State to the "optional" International Supplementary Fund? Of course this is a question for Cabinet to decide in Canada's interests.

Generally, should a State opt into the new Supplementary Fund very significant additional contributions may be required, as and when levied, over and above any contributions that would be payable for current International Fund coverage. It is noteworthy that for both Funds contributions are not in the form of premiums.

Both the International Fund and the (optional) International Supplementary Fund mutualize the risk of oil pollution from tankers. Thus, normally, the sources of monies for both Funds would be contributions in response to levies on actual oil receivers in Contracting States, collected retrospectively. Such is the open-ended "call" nature of these International Funds. Consequently, the number and levels of levies and contributions would be driven by the number and nature of international oil tanker spills, as well as the number and levels of related claims and how the claims are assessed.

For Canada the question of becoming involved in the Supplementary Fund - "optional" third tier - may raise particular issues and challenges[5].

In many cases the amounts claimed against the International Funds have been very high. Historically, in Canada the amounts claimed in oil tanker incidents have been significantly lower than claims in foreign incidents.

North America developments differ from European experience. While Canadian and US oil tanker incidents appear to have fallen off dramatically, there has been an increase in tanker incidents in Europe recently.

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[4] See SOPF Administrator's Annual Report 2000-2001 at pages i-iv, section 4.5.3 and Appendix G.

[5] See SOPF Administrator's Annual Reports: 2000-2001, pages ii-iv, sections 4.5.3, 4.6 and 4.11; 2001-2002, page v, sections 4.3.4 and 4.6.2; 2004-2005, section 4.6.1.

Sustainable shipping requires the prevention of costly accidents. The maritime industry's goal should be to develop a safety mentality in all those engaged in shipping oil. Significant steps have been taken in this direction.

On government's part, normally there is the question of efficacy in allocating public resources to the protection, prevention, preparedness, and response continuum for marine environmental protection. Compensation is part of the package. Enforcement may be the key to the continuum. We all know an ounce of prevention is worth a pound of cure for environmental impacts if oil spills happen.

In Canada fiscal implications also arise with the question of who pays. It is sometimes assumed, incorrectly, that there are no public funds required for the SOPF Administrator to make payments to the International Funds. Uniquely, all Canadian contribution payments to the International Funds for foreign incidents involving oil tankers are made from the SOPF[6]. The SOPF is a special purpose account in the accounts of Canada established for the purposes set out in Part 6 of the *Marine Liability Act*. As the Government of Canada has borrowed the entire capital of the SOPF, it is required to provide the necessary funds to meet the liabilities of the SOPF as they arise. Such fiscal implications of joining the Supplementary Fund would not arise in other Contracting States to the International Fund. In other Contracting States invoices for levies of contributions are paid by the actual receivers of oil in the respective countries – not from the public treasury, as in Canada.

We ought not forget the importance of the SOPF's fundamental obligations in Canada. In Canada the SOPF covers oil spills from ships of all classes – it is not restricted to sea-going tankers as is the International Fund.

As we reported in 2001, it is apparent that non-tank vessels constitute significant risks of oil spills. There are more non-tank vessels making more frequent passages. The growth in non-tank vessels is projected to increase.

In North America, oil spills from tankers make up a small percentage of the total. For 1999, in the United States 94 per cent of oil spill incidents and 70 per cent of volume were from vessels other than tankers, according to the USCG. In Canada, between 1993 and 2000 some 88 per cent of incidents reported by the SOPF related to non-tank vessels and mystery spills.

It was reported in 2001 that it had been estimated that, on a global basis, as much as 14 million tonnes of bunkers (fuel) are being carried in non-tankers at any one time. This compared to approximately 30 million tonnes of oil cargo on the world's seas.

Some bulk carriers and containerships are known to carry more oil as bunkers than coastal tankers do as cargo. The International Fund does not pay claims for non-tanker spills. Fortunately, in Canada, the SOPF does.

In the meantime the preponderance of oil tanker spills outside of Canada and the very high levels of claims in the International Regime continues.

Thus, even the current exposure of the SOPF is significant: The SOPF covers all Canadian oil spills from ships of all classes plus payments of all Canadian contributions to the International Fund for foreign incidents involving oil tankers.

If total SOPF payments to the International Funds for the period 2000/01 – 2004/05 (section 6 herein) based on the then maximum compensation level of some $270 million per incident is any indication, membership in the "optional" Supplementary Fund, with a maximum compensation

[6] Canada itself (as opposed to oil receivers in Canada) assumed this obligation. See section 76 of the Marine Liability Act and Article 14 of the 1992 Fund Convention.

level of $1.5 billion per incident, would result in a very significant increase in the SOPF's exposure for contributions for oil tanker spills outside of Canada. The fiscal functioning of the SOPF as we know it may be challenged.

As mentioned, the question of whether or not Canada should also become a Contracting State to the International Supplementary Fund – "optional" third tier, is for Cabinet to decide. Whatever is proposed to Cabinet should undoubtedly have been preceded by meaningful consultations with government agencies and Canadian industries. Currently, a discussion paper prepared by Transport Canada officials on the subject, dated May 2005, is being circulated inviting comment by October 31, 2005.

For further information, please refer to the Administrator's Annual Reports: 1999-2000, pages 37-40; 2000-2001, pages i-iv, sections 4.2.1, 4.2.2, 4.2.3, 4.3, 4.5.3, 4.6, 4.11, and Appendix G; 2001-2002, page v, sections 4.3.1, 4.3.2, 4.3.3, 4.3.4, 4.6.2 and Appendix I; 2002-2003, sections 4.2.1, 4.2.2, 4.2.3, 4.2.4, 4.2.5, 4.2.6, 4.2.7, 4.3.1, 4.3.2, 4.3.4, 4.3.5, 4.3.6, 4.6.2, 4.6.3 and 4.11; 2003-2004, sections 4.8.1, 4.8.2, 4.8.3, 4.8.4, 4.8.5, 4.8.6, 4.9.1, 4.9.2 and 4.10; 2004-2005, sections4.1, 4.2, 4.3, 4.4, 4.5.1, 4.5.2, 4.5.3, 4.6.1, 4.6.3 (TOPIA) and 6.

### 4.6.3 Revision of the Civil Liability and Fund Conventions "to be or not to be"

The fundamental issue before the Third Intersessional Working Group is whether or not to recommend the re-opening of the two Conventions in order to adjust the shipowners' limit of liability. This is a significant issue in light of the increases that entered into force in November 2003 and the entering into force of the Supplementary Fund Protocol on March 3, 2005.

To assist the Working Group with its deliberations the IOPC Funds Secretariat had undertaken an independent study of the costs of post oil spills in relations to the past, current and future limitation amounts of the compensation conventions. The study showed that on the basis of the financial limits of the applicable compensation regime the shipping industry had contributed 45%, and oil cargo interests 55% of the total costs of 5,802 incidents that occurred world-wide (except in the United States of America) in the 25-year period 1978-2002. The study had also shown that the sharing of the financial burden varied considerably with different size ranges of ships, with cargo interests contributing considerably more to the costs of incidents involving ships up to 20 000 gross tonnes, an equal sharing of the costs between oil cargo interests and the shipping industry in respect of incidents involving ships between 20 000 and 80 000 gross tonnes, and the shipping industry contributing considerably more to the costs of incidents involving ships greater than 80 000 gross tonnes. When the costs of past incidents were inflated to 2002 and predicted 2012 monetary values the relative contribution of oil interests to the costs of oil spills increased considerably.

The debate about revision of the Conventions has concentrated on two principal issues:

Sharing the cost of compensation between shipowners and oil receivers; and Substandard shipping.

#### (a) Sharing the Financial Burden

#### The Oil Companies International Marine Forum (OCIMF)

OCIMF's position is that it is essential to maintain the principle of balancing risk between shipowners and cargo interests, which is the foundation of the current regimes.

OCIMF argues in favour of revision of the 1992 Conventions – and against voluntary arrangements.

OCIMF's arguments include:

It is one of the basic tenets of the international liability and compensation regime that the shipowner is strictly liable for the costs of pollution damage up to a limited amount based on the vessel's tonnage.

It is also a fundamental principle of the regime that "breakability" of limitation should begin where insurability ends. In other words the limitation of liability should end at the limit of capacity of the insurance market. Limitation limits currently lie well below the capacity of insurance and it is therefore feasible to increase limits closer to market capacity. As originally intended, when the insurance capacity is reached, the Fund would then take responsibility to ensure that full compensation is available to claimants. This issue can only be addressed through revision of the Conventions.

OCIMF has long argued that increasing the financial responsibility of the shipowner by increasing Civil Liability Convention (CLC) limits as well as participation in the Supplementary Fund is necessary to ensure that the person with control over the vessel has an appropriate financial stake in the regime. Without this "financial responsibility" the regime will not create, maintain and instill the correct incentives for safe and, above all, pollution free shipping.

In turn, if the financial responsibility of the shipowner is addressed in the 1992 regime and the Supplementary Fund this will give the International Group of P&I Clubs (through their pooling agreement) the appropriate financial responsibility and incentives to give greater consideration to the quality of its shipowner assureds.

Ensuring that the financial responsibility of the shipowners is commensurate with their operational controls of and responsibilities for their ships will provide a real incentive for marine liability insurers to better select and screen vessels for insurance cover.

Finally, OCIMF maintains that a strong argument for revising the Conventions has got to be that States that provide around three quarters (73%) of the financing for the Fund openly favour revision of the regime. It would be disingenuous, and strike at the heart of mutuality, for States opposing revision to say that the system is working fine and should not change, when three quarters of those financing the Fund take the opposite view, OCIMF says.

**The International Group of P&I Clubs**

During the course of the deliberations, the International Group of P&I Clubs has submitted various papers for consideration by the Third Intersessional Working Group. Two recent voluntary proposals by the International Group – as alternatives to revising the Conventions – are noted: (1) The Small Tankers Oil Pollution Indemnification Agreement (STOPIA) and, (2) The Tanker Oil Pollution Indemnification Agreement (TOPIA).

STOPIA

STOPIA, an offer by the International Group of P& I Clubs to the 1992 Fund to increase, on a voluntary basis, the limitation amount for small tankers, to be known as the Small Tankers Oil Pollution Indemnification Agreement (STOPIA), came into force on March 3, 2005, the date of the entry into force of the Supplementary Fund Protocol.

STOPIA, which applies to pollution damage in a State for which the Supplementary Fund Protocol is in force, is a contract between owners of small tankers to increase, on a voluntary basis, the limitation amount applicable to tankers under the 1992 Civil Liability Convention. The con-

tract applies to all ships entered in one of the P&I Clubs that were members of the International Group and reinsured through the pooling arrangements of the International Group. The effect of STOPIA is that the maximum amount of compensation payable by owners of all ships of 29 548 gross tonnage or less would be 20 million SDR (some $40 million). The 1992 Fund is not a party to STOPIA, but STOPIA confers legally enforceable rights on the 1992 Fund of indemnification from the shipowner involved.

97% by tonnage of the world's tanker fleet, corresponding to some 5 000 vessels, are covered by STOPIA, including nearly 200 Japanese coastal tankers not covered by the International Group's pooling agreement. Further, ships insured with underwriters not members of the International Group but which had reinsurance with the Group are covered by STOPIA.

The 1992 Fund shall, in respect of ships covered by STOPIA, continue to be liable to compensate claimants if and to the extent that the total amount of admissible claims exceeded the limitation amount applicable to the ship in question under the 1992 Civil Liability Convention. If an incident involved a ship to which STOPIA applied, the 1992 Fund would be entitled to indemnification by the shipowner of the difference between the shipowner's liability under the 1992 civil Liability Convention and 20 million SDR. The 1992 Fund would be entitled to indemnification even if the Supplementary Fund would not be called upon to pay compensation in respect of the incident.

The Director of the IOPC Funds considers that the Agreement is, from a legal point of view, acceptable to the 1992 Fund.

It is noted that STOPIA is not a contract between the 1992 Fund and shipowners, but a unilateral offer by shipowners, which confers on the Fund the right of enforcement. It is also important to realize that although STOPIA only applies to pollution damage occurring in States that are members of the Supplementary Fund, the 1992 Fund would be indemnified and so contributors to the 1992 Fund would be the beneficiaries, whether or not they were located in a Supplementary fund Member State.

Many agree that this scheme is a significant step towards alleviating the inequality in the sharing of the financial burden between the shipping industry and oil cargo interests highlighted by the Secretariat's cost study undertaken in 2004.

Others say that STOPIA does not address the distortion of the financial burden created by the Supplementary Fund Protocol, but merely goes some way towards correcting the imbalance that already exists under the 1992 Conventions in respect of small ships. They therefore consider that STOPIA should apply to pollution damage in all States that are members of the 1992 Fund, whether or not they are members of the Supplementary Fund.

TOPIA

The International Group of P&I Clubs' paper 92 FUND/WGR.3/25/2 dated February 4, 2005, states:

> "Oil receivers have suggested that the commercial exposure of the oil industry following a major incident involving the Supplementary Fund is disproportionately high. Various ways have been proposed in which the Conventions may be amended so that this result may be avoided. To meet this concern in a time-effective manner [the International Group of P&I Clubs makes an] alternative proposal… – that shipowners and their Clubs should offer to maintain the existing broad sharing of the cost of claims, as established by the [IOPC Funds] Secretariat's claims study, by means of a binding agreement to indemnify the Supplementary Fund... TOPIA provides that shipowners and their Clubs will indemnify

the Supplementary Fund in respect of 50% of the claim falling on the Supplementary Fund. The principal objective of oil receivers can therefore be met by a binding agreement which does not involve the necessity to amend the Conventions. The oil companies represented in OCIMF have not associated themselves with this proposal, but this does not affect its viability, since it adopts the same mechanism as the STOPIA agreement and would also operate without the explicit agreement of oil receivers. However, it should be noted that the TOPIA proposal is put forward as an alternative to STOPIA and is not intended as an interim measure while the revision process continues but rather as a means of addressing the issue of sharing promptly without having to revise the Conventions. It should also be noted that TOPIA will only be available where the spilling vessel is liable under CLC and to the extent that the incident is not caused by a terrorist or bio-chemical incident."

"If the TOPIA proposal is accepted, it will be necessary to reach agreement with both the 1992 and Supplementary Fund Assemblies in order to ensure the simultaneous implementation of TOPIA and withdrawal of STOPIA."

"It should be noted that whilst the present draft of TOPIA is closely modeled on STOPIA, no detailed discussion in the text of TOPIA has yet taken place with the Director of the IOPC Funds."

"The TOPIA scheme would be established by a legally binding Agreement between the owners of tankers, which are insured against oil pollution risks by P&I Clubs in the International Group."

**(b) Substandard Shipping**

The problem of finding ways and means to reduce the incidents caused by substandard shipping, has motivated a number of proposals designed to accomplish this end through particular revisions to the liability and compensation regime. The International Group of P&I Clubs says that these proposals are misplaced in the context of the Liability and Fund Conventions, because they will be ineffective, but the issue of substandard shipping is of crucial importance and has to be addressed seriously.

The OECD report (Report commissioned by the Maritime Transport Committee of OECD, dated June 2004, published at http://www.oecd.org/dataoecd/58/15/32144381.pdf, on "The Removal of Insurance from Substandard Shipping") was anticipated with interest since it focused specifically on the possible role of insurance in relation to sub-standard shipping.

The International Group, in its paper 92FUND/WGR.3/25/3 which can be found at www.iopcfund.org, suggests that the primary aim should be to create the conditions that would deter or prevent the substandard operator from trading altogether, rather than imposing greater liability for any damage he does and supporting him with insurance that spreads the liability burden.

The contribution of the P&I Clubs is set out in its paper in two parts, with the first part providing an overview of the existing measures taken by the clubs in relation to sub-standard shipping and the second part containing tentative conclusions on further measures that may be taken in response to the OECD report referred to above. Two further sections of the paper deal with the possible measures to be taken by other industries and proposals for action by States.

Note: For additional information about perspectives on substandard ships and revision of the Civil Liability and IOPC Fund Conventions, see the Administrator's Annual Reports 2002-2003 and 2003-2004, at section 4.6.3 and Appendix C (Third Intersessional Working Group-fifth meeting) and Appendix C (Third Intersessional Working Group – seventh meeting) respectively.

## 4.7 The Polluter Pays

Section 51 *MLA* makes the shipowner strictly liable for oil pollution damage caused by his ship and for costs and expenses incurred for clean-up and preventive measures.

As provided in the *MLA*, in the first instance, a claimant can take action against a shipowner. The Administrator of the SOPF is a party by statute to any litigation in the Canadian courts commenced by a claimant against the shipowner, its guarantor, or the 1992 IOPC Fund. In such event, the extent of the SOPF's liability as a last resort is stipulated in section 84 *MLA*.

The SOPF can also be a fund of first resort for claimants under section 85 *MLA*.

On settling and paying such a section 85 claim, the Administrator is, to the extent of the payment to the claimant, subrogated to the claimant's rights, and subsection 87(3) (d) requires that the *"…Administrator shall take all reasonable measures to recover the amount of payment to the claimant from the owner of the ship, the International Fund or any person liable…."*

In this process, the Administrator has to handle the claim twice, firstly with the claimant, then with the shipowner/person liable in a recovery action.

The Administrator notes that, as normal, in the cases of several incidents the claimant, primarily the CCG has, during the fiscal year, elected to first claim directly against the responsible shipowner. Sometimes this leads to claimants negotiating and settling their claims with the polluter's directly, with or without SOPF intervention as may be necessary. Other times the shipowner is not forthcoming and the claimant must resort to the SOPF.

In the interest of expediting satisfactory claim and recovery settlements the Administrator encourages such direct claim action by claimants where appropriate.

N.B.: In reality, the notion that the polluter pays is subject to the important caveat that the shipowner is entitled to limit his liability. The shipowner is deprived of the right to limit his liability only if it is proved that the pollution damage resulted from the shipowner's personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result. This new test makes it practically impossible to break the shipowner's right to limit liability.

# 5. Outreach Initiatives

## 5.1 General

The Administrator continues with outreach initiatives to further his understanding of the perspectives of parties interested in Canada's ship-source oil pollution, prevention response, liability and compensation regime. In Canada, these include citizens, shipowners, insurers, ROs, oil receivers, REET, CPPI, CCG, TC, EC, CMAC, CMLA, other federal and provincial government agencies, and non-governmental organizations.

On the international front organizations of interest include: ITOPF, OCIMF, CEDRE, P&I Clubs, INTERTANKO, ICS, IOPC Fund, EC, USCG, US Dept. of Commerce (NOAA), US Dept. of Interior and the US EPA.

## 5.2 Regional Environmental Emergency Team (REET)

The Administrator participated in the Atlantic Regional Environmental Emergency Team (REET) meetings held in St. John's, Newfoundland, on November 3 and 4, 2004.

REET is comprised of representatives from federal, provincial, first nations, municipal and other agencies, as necessary. Environment Canada, the federal authority responsible for environmental advice during a pollution incident, normally chairs REET. This body is responsible for providing consolidated environmental and scientific information during the course of response operations. The contingency plans of REET contain a basic framework to ensure that all partners work together efficiently. These plans are also integrated with the emergency plans of other government departments. REET provides the CCG and/or the polluter's On-Scene Commander (OSC) with advice on weather forecasts. In addition, information is made available on the physical operating environment, spill movement and trajectory forecasts. This assistance by REET to the OSC during an incident can make a major difference in the response to the incident. REET may approve the use of chemical dispersion and recommend shoreline treatment/cleanup techniques.

Roger Percy (Environment Canada) chaired this excellent meeting in St. John's. Ken Dominie, Deputy Minister, NL Department of Environment and Conservation, welcomed the attendees and gave an overview of environmental issues. Approximately 85 people attended. They represented federal, provincial and municipal governments, the oil industry, the Canadian Offshore Petroleum Boards, the Eastern Canada Response Corporation, the Canadian Association of Petroleum Producers, the International Tankers Owners Pollution Federation, environmental associations, and other non-government organizations interested in the marine environment.

The presentations ranged from intergovernmental relationships to places of refuge and marine oil spill issues. The speakers came from England, St.Pierre and Miquelon, Quebec, Ontario and the Atlantic provinces.

The Administrator's presentation covered the creation and principal elements of Canada's Ship-source Oil Pollution Fund. The presentation addressed the role of the SOPF in oil spills incidents from ships of all classes operating in Canadian waters, including the St. Lawrence River system and other inland lakes and waterways. He explained that the responsibilities and duties of the Administrator include the authority to offer compensation to claimants for whatever portion of a claim the Administrator finds to be established and, where a claimant accepts an offer, the Administrator directs payment to the claimant out of the SOPF. Prior to any offer every claim for compensation is investigated and then assessed. In appropriate cases the Administrator may take

measures to recover the amount of the payment from the shipowner, the International Fund or any other person liable.

In addition, the Administrator provided an overview of the activities of the SOPF in the fiscal year ended March 31, 2004, during which the SOPF had handled 57 active incident files. In particular, 15 Canadian claims totaling $3.4 million were settled for some $2.7 million plus interest. Recoveries from third parties liable, amount to some $87,000. The SOPF continues to pay considerable contributions to the International Fund: $4.8 million during that fiscal year and $38.2 million since 1989. It was noted that with the 50 percent rise in compensation levels for the international regime effective November 2003, Canada's (SOPF) potential liabilities to the International Fund have increased significantly (see Figure 1, Appendix D).

Some of the other presentations are summarized following:

**Places of Refuge**

Richard Southcott, a barrister (Stewart McKelvey Stirling Scales) discussed this issue from on international perspective. He spoke about the work being conducted by both the IMO and the CMI. Mr. Southcott explained that the CMLA had responded to the questionnaires circulated by the CMI. The CMI reported its recommendation to the IMO Legal Committee.

Mike Balaban (TC) presented the TCMS perspective on places of refuge in Atlantic Canada. He discussed the circumstances surrounding the *MT Dodsland* and *MT Eastern Power* incidents to illustrate when and how TCMS intervenes to provide technical and other support when tankers require assistance.

Note: For further information on places of refuge see SOPF Administrator's Annual Report 2002-2003 at section 4.3.1.

**Oily waste Disposal in Newfoundland and Labrador**

Charlie Riggs of the Newfoundland Labrador Environmental Industries Association (NEIA) reviewed the proceedings of the oil spill conference that was hosted by NEIA in St. John's in November 2003. That conference focused on issue related to the handling and disposal of oily waste from marine spills.

Mr. Riggs reminded participants that the European experience in response to the *Prestige* incident highlighted, once again, that oil spill waste management is a critical component of an effective response strategy. NEIA representatives and others visited Spain for first-hand observations of the cleanup operations, and for discussions in Europe with various interested parties. The handling and disposal of accumulated waste oil materials presents significant challenges for governments and industries to address environmental concerns, cleanup/disposal costs and liabilities.

Leslie Grattan's (Environmental Planner, St. John's) presentation title said it all: "Toward an oil spill waste management strategy for Newfoundland and Labrador." She noted that following the 2003 NEIA oil spill conference, it was clear that a significant gap exists in the Province's preparedness for an effective response to a major oil spill off its coasts.

Consequently, Environment Canada commissioned Cormorant Ltd. of St. John's to evaluate the current level of preparedness for oil spill waste management in the province. The resulting report recommends actions required, primarily by the Government of Newfoundland and Labrador, to develop a comprehensive oil spill waste strategy for the province. Ms. Grattan explained that

the central theme of the report's recommendation is directed towards proactive measures to help ensure that appropriate waste management capability is in place to support effective response to a major spill off the coasts of Newfoundland and Labrador. Recommendations are provided for other stakeholders – federal government departments and regulatory agencies, the community level, and also the oil industry.

NEIA members fully support this inter-governmental initiative, because it will greatly assist in the development of a clear strategy for the proper management of the wastes that result from a large spill response. The successful management of oil spill wastes is a shared responsibility.

Note: For information on the 2003 NEIA conference see SOPF Administrator's Annual Report 2003-2004 at section 5.3.

**Prevention of Oiled Wildlife**

Ray Browne (CCG) presented a status report on the recommendations resulting from the Prevention of Oiled Wildlife project (POW) under taken by the Newfoundland Region of DFO/CCG to address the chronic problem of oiled seabirds.

Note: For information on POW see SOPF Administrator's Annual Report 2003-2004 at sections 4.8.3 and 5.4.

**Canada – United States Updates**

Garnet Spicer (CCG) presented overviews of topics for the USCG/CCG CANUSLANT workshop and exercise scheduled to be held at the College of the Atlantic in Bar Harbour, Maine, from June 13 to 16, 2005, where, *inter alia*, the respective US and Canadian strategies on places of refuge shall be tested.

Note: For information on CANUSLANT generally see SOPF Administrator's Annual Report 2002-2003 at section 5.7.

**Environmental Damages Fund**

Roger Percy (Environment Canada) provided an update on the Environmental Damages Fund (EDF). He noted for the Atlantic Region to date in excess of $650,000 has been contributed to the EDF and $450,000 dispersed for worthwhile restoration projects.

**Prevention**

Graham Thomas and Glenn Worthman of Environment Canada reported on the Operation Clean Feather project, which is focusing on prevention through education, including that of senior officers in ships calling at Atlantic Canada ports, on the oiling of wildlife. Local industry is supportive of the program.

**Spill Treatments Options**

Urban Williams (Petro Canada) reported on the Environmental Studies Research Fund workshop held in St. John's in February 2004 on "Dispersant use in Eastern Canada". Sinclair Dewis

responded with Environment Canada's perspective. Oil spill dispersants have received considerable attention in eastern Canada in recent years. It is understood that additional research and development is required on the dispersibility of Grand Banks crude oils.

**International Marine Spills**

Stéphane Grenon (ITOPF) introduced the role and work of ITOPF and gave a comprehensive and interesting presentation on the *MT Tasman Spirit* incident (Karachi, Pakistan, July 2003) and the *MV Rocknes* incident (Bergen, Norway, January, 2004). ITOPF has noted the average number of large oil spills (> 700 tonnes) during the 1990s was less than a third of that during the 1970s.

Note: For more on the decreasing number of oil tankers incidents see SOPF Administrator's Annual Report 2002-2003, section 4.11.

**Response Training/Tools**

Urban William (Petro Canada) presented Petro-Canada's seabird program for its east coast operations. The topics included the seabird monitoring program, which is designed to identify seabirds in the vicinity of the *Terra Nova* FPSO. Mr. William also described activities at Petro-Canada's oiled seabird cleaning facility in St. John's.

Joan O'Brien (DFO) reported on coastal community resource inventory.

Martin Blouin (CCG) introduced SPILLVIEW: Software to support decision-making in emergency response to marine oil spills. In the event of a marine oil spill, it is necessary to quickly and clearly assess the situation and estimate the extent of the area potentially impacted by oil. This software combines the following features integrated in a Geographical Information System: Geo-referenced digital aerial survey; Access to trajectory forecast model results; charts with marine and terrestrial data. These features allow a better planning of the emergency response in terms of deployment of personnel and equipment, because it helps to document clearly the observed spill and to project rapidly the length of coastline at risk and the forecasted time at which the oil spill will start reaching the coast.

Aerial surveys are one of the main tools used towards these ends. Aerial observations support the planning of oil cleanup and recovery work, and can provide data for oil spill trajectory models.

Aerial surveyors traditionally use paper maps to record their observations. This way of doing things presents some limits. These include: 1) the difficulty to evaluate the exact location of observed features on the map; 2) the difficulty to record all the necessary information on a fixed-scale map and; 3) the issue of transferring the recorded observations to spill managers, which takes time, requires explanations from the observer and can be subject to interpretation mistakes.

For these reasons the CCG, in partnership with Cogeni Technologie Inc., developed the SPILLVIEW software system. SPILLVIEW, which runs under the Windows XP operating system, is designed to operate on a pressure sensitive tablet PC equipped with a GPS and electronic maps. The system displays the real time location and trajectory of the aircraft. The observer can record different types of observations (such as oil location, environmental resources, and shorelines contamination) on georeferenced layers that can be individually exported to formats compatible with other Geographical Information Systems. The observer can also use the system to electronically transfer the observed oil location to a spill modeling center, and display the modeling results within minutes.

SPILLVIEW proved to be a good tool to support training and exercises, as it can be used to portray different spill scenarios on electronic maps. The software could also be used for other aerial survey needs, such as national security or forest fires. SPILLVIEW is presently being enhanced in order to provide operational support by enabling real time access to equipment inventory databases and fieldwork description forms.

**Surveillance**

Joe Pomeroy (Environment Canada) made a presentation on the "Integrated Satellite Tracking of Polluters" system. Louis Armstrong (TC) reported on related TC/DFO overflights.

**Communications and Media Relations**

Jan Woodford (DFO) gave an overview of the Department's Crisis and Emergency Communications Strategy. Paula Walsh, Royal Newfoundland Constabulary, addressed issues in working effectively under operational pressures. Wayne Halley (CCG) offered advice drawn from his practical experience in marine oil pollution response incidents.

## 5.3 Canadian Marine Advisory Council (National)

The Canadian Marine Advisory Council (CMAC) held meetings in Ottawa from May 3 to 8 and November 22 to 25, 2004. The Administrator attended some of the meetings. Of particular interest is the work in the Standing Committee on the Environment.

During the November meeting a representative of TCMS addressed the issue of marine waste disposal facilities for the reception of residual oils and other ships' waste at Canadian ports and oil refineries. It was noted that Transport Canada's website database has been online for one year. The website is designed to provide up-to-date information on Canadian port facilities that handle all waste as listed under MARPOL – that is, garbage, oil, chemicals, engine room oily waste and all other ship generated marine waste. The database allows port authorities to enter and update their own information. However, in the first year of the program only 11 out of 850 known terminals and waste disposal service providers have responded to the TCMS request for data input. As a result, TCMS is now pro-active in calling and writing to reception facility managers and shipowners asking them to participate in populating its website database.

It was discussed whether or not TCMS is contacting the right people. It is not the shipowners themselves who have waste disposal terminals. The representative of the CPPI advised that he will inform the CPPI membership about the database initiative, and its overall benefit to the marine industry. He emphasized that the CPPI member's waste disposal facilities constitute a very small part of the total number.

Of particular interest to the Administrator is the important information provided by the Standing Committee on the Environment about the chronic problem of oiled wildlife caused by illegal discharge of oily machinery waste at sea. The provision of adequate and cost effective waste disposal facilities may improve the current situation. TCMS is now looking at the Baltic Strategy of including with port fees the costs of port facilities for disposal of oily waste from ships. TCMS plans to undertake a feasibility study during 2005, with the aim of identifying specific problem areas and developing a future action plan. The study will help determine whether the costs for waste disposal in Canada may be integrated into port fees.

Note: For information on the Baltic Strategy see section 4.5.1 of this Report.

The ability of ships to comply with MARPOL discharge requirements depends largely upon the availability of adequate port reception facilities. The situation is not unique to Canada. The lack of reception facilities in many ports worldwide poses a serious threat of pollution to the marine environment.

Also, Environment Canada presented information to the Committee's Working Group on Marine Oil Pollution about recent Government initiatives to address ship-source oil pollution.

The video, "Silent Disaster", was shown followed by a presentation providing background and an update on the peer reviewed science that demonstrates the impact of oil pollution on seabirds. The presentation stressed that early indications are that seabird mortality on the West Coast of Canada is as great or greater than that on the East Coast. Determining seabird mortality on the West Coast is more difficult given that seabird populations are located at much greater distances from shore. The Working Group noted that the Canadian Wildlife Services will be examining the types of oil causing chronic problems to seabirds at sites around the world.

An overview of Bill C-15 (ex Bill C-34) was presented. This Bill would amend the *Migratory Birds Convention Act, 1994*, and the *Canadian Environmental Protection Act, 1999*, to improve their effectiveness to address ship source pollution and better coordinate them with the *Canada Shipping Act*. The Working Group discussed concerns of the maritime shipping community. In response to the concerns of stakeholders regarding consultation, the co-chairs recommend that the Working Group on Marine Oil Pollution be reconvened at the next national CMAC meeting to continue discussions on legislative matters and other developments.

A representative of TCMS provided an overview of TC's National Aerial Surveillance Program (NASP). On December 12, 2003, the federal government transferred responsibility for the NASP from CCG to TC. TC is now responsible for the overall direction and coordination of the NASP.

The objectives of the NASP include enforcement of the pollution prevention regulations, deterrence, emergency response and program support for other government departments and federal agencies, such as, the CCG, Environment Canada, and the Royal Canadian Mounted Police.

The Dash-8 aircraft previously located in Ottawa for patrols of the Great Lakes and the St. Lawrence River has been relocated to Moncton, New Brunswick. Also, plans are in hand for the modernization of airborne marine pollution surveillance equipment. Acquisitions within the next 12 months will include: Side looking Airborne Radar; Infrared/Ultraviolet Line Scanner; Photographic and Video Camera system with GPS annotation; Airborne Automated Identification System (AIS) transponder receiver; Data Processor Interface.

TC will continue the NASP's involvement in the Integrated Satellite Tracking of Polluters Project. TC continues to seek funding for additional surveillance. The objective of this project is to help determine if RADARSAT technology can be harnessed to the task of reducing chronic oil pollution in Canada.

The Administrator was invited to speak to the agenda item on Civil Liability. He provided an overview of the Canadian compensation regime, and explained that Canada is a Contracting State to the 1992 Civil Liability Convention and the 1992 IOPC Fund Convention. He noted the amount of compensation that will be available per incident under the "optional" Supplementary Fund, that is expected to come into force in the spring of 2005.

The Administrator said that he could not speak for the Government on whether or not Canada will join the Supplementary Fund, but that he understands that TC will consult with other government agencies, and Canadian industries before any decision is taken.

## 5.4 Canadian Marine Advisory Council (Arctic)

The Administrator was invited to attend the Regional Canadian Marine Advisory Council – Northern (CMAC) meetings held in Iqaluit from April 14 to 16, 2004. He participated in the Northern CMAC meeting held in Montréal on November 16 and 17, 2004. Participants at these CMAC meetings represent federal and territorial governments, and a range of operators from the northern marine shipping industry. Discussions are co-chaired by representatives of DFO/CCG - Central and Arctic Region, and TCMS - Prairie and Northern Region.

The Administrator has a direct interest in transportation of oil products issues for the high Arctic.

At the Montréal meeting, it was noted that CCG has updated the CCG Marine Spills Contingency Plan and the Arctic Response Strategy. These are key documents for the Region's Environmental response in the event of an oil spill in Arctic waters.

During 2004, Emergency Response personnel from Central & Arctic Region visited several communities in the Northwest Territories and Nunavut. They held meetings with wildlife officers, emergency personnel (fire and police) hamlet officials and council members, hunters and trappers committees, oil handling facilities personnel, fuel distributors, parks staff, and others. They also visited tank farms and shore fuel receiving installations for assessment of operational tactics and oil spill clean-up strategies.

Currently, no Arctic REET meetings are held in the North to develop a joint planning approach with Environment Canada. Consequently CCG seeks direct input from Arctic communities to develop oil pollution response efforts based on local needs and sensitivities.

A representative of Petro-NAV reported on the delivery of fuel oil to communities in Northern Quebec and in Foxe Basin. Petro-NAV is a subsidiary of Group Desgagnes and operates tankers in the Canadian domestic trade. The ships operated by Petro-NAV are constructed with double hulls. They are Canadian registered and crewed by Canadians.

Petro-NAV has been deploying tankers to Hudson Strait, Ungava Bay and Hudson Bay since 1997. During the 2004 Sealift the *Maria Desgagnés* made two voyages and the *Petrolia Desgagnés* three voyages. All fuel oil was loaded at the Shell Canada refinery in Montreal and delivered to 14 communities in Northern Quebec. During the 2004 season Petro-NAV delivered 58,000 metric tonnes of oil (Jet fuel, diesel and gasoline). The total operational time of over 165 ship days marked another incident free season of Arctic fuel resupply for the Desgagnés group.

It was explained that the Arctic Sealift has two different operational profiles:

1. At Kuujjuag (Ungava Bay) the fuel oil is discharged into barges operated by Shell Canada, which in turn shuttles the cargo to the tank farm.
2. At all other ports, the ship anchors off and discharges ashore through a floating hose that could be as long as 7 000 feet. This fuel transfer operation requires constant monitoring by the ship's crew in workboats.

Petro-NAV officials attribute its operational success and safety record in protecting the marine environment to the experience and training of their shipboard officers and crew. The lightering and fuel transfer equipment fitted in the Petro-NAV ships is designed specifically for the Arctic Sealift.

The co-chairman of the Montréal meeting, Peter Timonin, Regional Director, TCMS, Prairie and Northern region, provided TC updates which included the first voyage of the tanker *Tuvaq* to

Kugaaruk (formerly Pelly Bay). The *Tuvaq* currently operated by Coastal Shipping of Goose Bay, Labrador is an ex-Baltic Class ice strengthened ship equivalent to a Canadian Arctic Class 3. The experimental voyage to Kugaaruk with Quebec based icebreaker escort was completed successfully. It is not known whether the *Tuvaq* will proceed to the area next season.

Mr. Timonin stated that in light of the proposed pipeline development in the western Arctic, tug and barge traffic on the Mackenzie River system is expected to increase substantially.

Steve Newton, DFO Winnipeg, spoke about the issue of transportation in the Tarium Niryutait Marine Protected Area (Beaufort Sea – Mackenzie Delta region). He explained that DFO is currently preparing for the regulatory process. Management guidelines are being developed to help ensure that transportation supply routes through the "Marine Protected Area" are made available for mariners. During 2005 a major consultation process will be undertaken. An international conference will be held in Tuktoyaktuk next summer at which approximately 300 participants are expected. He indicated that volunteers are doing a considerable amount of planning and preparation for this Arctic Conference.

Waguih Rayes, General Manager, Nunavut Sealink & Supply Inc. and Desgagnés Transarctik Inc. gave a presentation about the Arctic 2004 re-supply. He noted that for the regular Sealift operations the company deployed motors vessels *Anna Desgagnes*, *Camilla Desgagnes*, *Cecilia Desgagnes* and *Mathilda Desgagnes*. Also, a 65 foot tug and a 160 x 40 foot barge were utilized for the lightering and discharge operations to Baker Lake. The company vessels covered most of the eastern Arctic communities. It used about 450 ship-days for regular sealift operations and carried over 130,000 cubic metres of northbound general cargo.

There was discussion about CCG's proposed reduction of the existing number of navigation aids in Arctic waters. The marine operators were asked to forward comments to the CCG at Sarnia. Industry representatives at the CMAC meeting indicated that they would consult with their shipmasters before responding in writing. It was mentioned that the ship operators may, in fact, be looking for upgrades to the aids to navigation rather than agreeing to the proposed reductions. Also, industry will discuss the proposed reductions with the Arctic Marine Advisory Committee and the Nunavut government. The findings from these discussions will be forwarded to CCG.

The CCG co-chairman, Julian Goodyear, explained that any infrastructure that is critical for Arctic marine operations would not be discontinued.

## 5.5 Garde côtière canadienne et Ministère de la Sécurité publique Québec

The Administrator was invited by the Canadian Coast Guard to attend a meeting held in Québec with the Ministère de la Sécurité publique du Québec and the CCG's Environmental Response Unit in Québec.

The purpose of the meeting was to better inform Québec government officials about the availability of compensation from the SOPF, and contingency planning, in the event of a significant oil spill in the marine environment. Provincial officials were seeking identification of specific operational activities which may be eligible for compensation. Generally they wanted to know what is required in the event that the Province makes application for reimbursement of costs and expenses incurred during an emergency response to an incident. They had concerns about the availability of funds for evacuation and relocation of people, and other emergency provisions to maintain essential community services. It was noted that there are risks related to a spill of petroleum and other hazardous products, such as the toxicity of oil products that could have bad effects on human health from

toxic vapors. Consequently, people may have to be evacuated from shoreline communities during a large oil spill.

It is noted that in the event of a disaster in Canada, the federal government may provide financial assistance to provincial and territorial governments through disaster financial assistance arrangements. This financial assistance is available to help when expenditures exceed what an individual province or territory could reasonably be expected to bear in its own.

Paul-Yvon Deschênes, é.a, Directeur Direction de l'assistance financière de la Sécurité civile et des services à la gestion, expressed particular interest in being informed on the availability of financial assistance from the Ship-source Oil Pollution Fund.

The Administrator explained the creation and principal elements of Canada's ship-source Oil Pollution fund. The SOPF is governed by Part 6 of the *Marine Liability Act*. He emphasized that the Canadian regime deals with liability and compensation in oil pollution incidents arising from ships of all classes, as well as mystery spills. As supporting documentation, Mr. Deschênes was given copies of some of the Administrator's recent Annual Reports to Parliament, which address how the SOPF liability and compensation regime is administered.

The responsibilities and duties of the Administrator include the authority to offer compensation to claimants for whatever portion of a claim the Administrator finds to be established. Where a claimant accepts an offer the Administrator directs payment to the claimant out of the SOPF. Every claim for compensation is investigated and assessed thoroughly on the basis of the submitted documentation and other evidence. The SOPF Annual Reports contain concrete examples of the types of claims that may arise. Some of these claims cover incidents in the St. Lawrence River system and along Québec's rive nord.

In addition, the Administrator explained how the International liability and compensation system works. Canada is a Contracting State in the current International regime. The officials were provided with documents published by the International Fund.

Since 1989, the SOPF has paid the IOPC Funds approximately $42 million as Canada's contribution to the General Fund and for major incidents. The IOPC Funds paid out to Canada a total amount of approximately $12 million for costs and expenses incurred respecting the vessel *Rio Orinoco*, which grounded on Île d'Anticosti in the Gulf of St. Lawrence in October 16, 1990.

## 5.6 Federal Judges Conference

The Administrator attended the Federal Court and Federal Court of Appeal Education Seminar – Marine Law – held in Ottawa on November 5, 2004. The conference was organized jointly by the Canadian Maritime Law Association and the National Judicial Institute. The seminar focused on several challenging contemporary aspects of maritime law, including evidentiary issues, and marine security issues.

## 5.7 Canadian Maritime Law Association

The Administrator attended the annual Executive Committee meeting of the Canadian Maritime Law Association (CMLA) held in conjunction with a CMLA meeting with representatives of the federal government in Ottawa on April 2, 2004. He was invited to the Annual General meeting of the CMLA held in Vancouver in May 30, 2004. The Administrator values his contacts with the Canadian Maritime Law Association and continues to dialogue with members.

## 5.8 Comité Maritime International Conference

The Administrator attended the 38th Comité Maritime International Conference (CMI) held in Vancouver from May 31 to June 4, 2004. The Canadian Maritime Law Association and its local host committee coordinated efforts with international and domestic sponsors to organize this successful 38th Conference of the CMI. Of particular interest at the Conference were sessions on proposed changes to the international oil pollution liability and compensation regime, places of refuge for ships in distress and, marine insurance.

## 5.9 Transport Canada Marine Safety Investigators' Course

The Administrator participated in the Transport Canada Marine Safety Investigators' Course (Phase II) held in Ottawa from November 15 to 19, 2004. The course for marine inspectors appointed under the *Canada Shipping Act*, is an intense one-week program. In his presentation, the Administrator spoke about the civil liability evidence requirements and the Ship-source Oil Pollution Fund under the *Marine Liability Act*, as compared to the burden of proof in prosecutions under quasi-criminal Pollution Prevention Regulations made pursuant to the *Canada shipping Act*.

Note: For additional information on the TCMS Investigators' Course see the SOPF Administrator's Annual Report 2003-2004, at section 5.12.

## 5.10 On-Scene Commander Course

The Administrator participated in the On-Scene Commander Course held at the Canadian Coast Guard College in Sydney, Nova Scotia, from February 28 to March 4, 2005.

The On-Scene Commander Course is designed for CCG officers and operational managers of industry. It addreses the on-site coordination and the development of clean-up strategies that are necessary to respond effectively to an oil spill up to the international tier 3 response capability (i.e. maximum quantity of oil spilled at 2,500 tonnes). Under the tier 3 criteria, the equipment and resources must be deployed to the affected operating environment within 18 hours after notification of an oil spill.

The Administrator spoke about the role and responsibilities of the Administrator of the SOPF. As a panel member he explored the interface between the Administrator and the Canadian marine oil spill response regime. This sort of interaction contributes to an increased awareness among stakeholders about Canada's overall statutory scheme for marine oil pollution prevention response, liability and compensation. As requested, the CCG College was provided with the SOPF Administrator's Annual Report for distribution to the candidates for their personal use as a reference document.

The presenters made comprehensive and insightful presentations. There were informative speakers representing the CCG, the Nova Scotia Department of Environment, ECRC, a media consultant, Rigel Shipping, First Nations, marine salvors, Environment Canada, shore line clean-up consultant, and others. The presentations and case histories covering domestic and international oil tanker incidents were valuable learning experiences. Participants from the USCG, ITOPF, and member of the Department of Justice Canada advising DFO/CCG gave the training course a meaningful international perspective.

The On-Scene Commander Course, held each year at the CCG College, offers an opportunity for representatives from government agencies and the marine industry to meet and work together. The Administrator very much appreciates CCG's invitation for him to participate in this valuable exercise.

## 5.11 Canadian Bar Association – New Brunswick Branch

The Administrator participated in the winter meeting of the New Brunswick Branch of the Canadian Bar Association held in Saint John from February 3 to 5, 2005. The Conference addressed topics relevant to the Bar Association's Continuing Legal Education program.

As requested, the Administrator submitted a comprehensive paper on the Ship-source Oil Pollution Fund and Environment Damage Assessment in Canada. The written papers submitted by various speakers were provided to the attending delegates as resource material.

In the session on Maritime Law the Administrator gave a PowerPoint presentation on the background to Canadian legislation on ship-source oil pollution liability, compensation and, the responsibilities of the Administrator of the SOPF. He also explained the current limits of liability and compensation available under the 1992 CLC, the 1992 IOPC Fund Convention, and the Canadian SOPF, for oil spills from oil tankers in Canada.

## 5.12 Simon Fraser University – Centre for Dialogue

The Administrator participated in an international conference held at the Morris J. Wosk Centre for Dialogue, Simon Fraser University, Vancouver, from February 23 to 26, 2005.

The goal of the conference, Changing Currents: Charting a Course of Action for the Future of Oceans, was to develop a blueprint for action that can be measured over time and elaborated for evidence of progress in reversing the negative trends and finding workable solutions for the future sustainability of marine ecosystems.

The conference brought together a team of international leaders, experts and ocean champions at all levels of career – academics, government managers and policy makers, industry, non-government organizations and community representatives – who will take the leadership in pointing the way forward and commit to following through with the agenda.

Considerable scientific information is available about marine ecosystems and many solutions have been put forth for offsetting the negative trends – for example, establishing marine protected areas, offering incentives to prevent over-fishing, global monitoring and mapping systems, legal frameworks, and others.

The catalysts for dialogue included several key presentations focused on current issues related to the sustainable use of ocean resources and analyses of case studies that identify challenges and demonstrate how positive charge can occur.

The Administrator participated in a Discussion Circle on industry perspectives. This dialogue addressed the question: What would it take to make industry's bottom line consistent with a healthy marine/ocean ecosystem?

The outcome of the conference will be a practical document containing a guideline for action for ocean and coastal resource managers and policy makers.

## 5.13 Eastern Admiralty Law Association (EALA)

The Administrator attended a special meeting of the EALA in Halifax, Nova Scotia, on March 30, 2005.

The purpose of the meeting was to discuss plans for an EALA organized New Directions in Maritime Law Conference in Halifax in June 2006.

## 5.14 Dalhousie Law School – Shipping Law

On March 31, 2005, the Administrator spoke to the Shipping Law class at the Law School, Dalhousie University, Halifax, Nova Scotia. He explained the Canadian and international ship-source oil pollution liability and compensation regimes. He provided copies of the IOPC Fund 1992 Claims Manual and the joint IPIECA/ITOPF Guide to the International Conventions on the subject. The Administrator wishes to thank Dalhousie University and Professor Moira McConnell for this opportunity.

# 6. SOPF Liabilities to the International Funds

1969 CLC and 1971 IOPC

Canada first became a Contracting State to the International Conventions on May 24, 1989. These two Conventions were the 1969 International Convention on Civil Liability for Oil Pollution Damage (1969 CLC) and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1971 IOPC Fund Convention).

Some of the major incidents involving the 1971 IOPC Fund since 1989 include *Haven* (Italy 1991) *Aegean Sea* (Spain, 1992), *Braer* (UK, 1992), *Sea Prince* (Republic of Korea, 1995), *Sea Empress* (UK, 1996), *Nakhodka* (Japan, 1997), and the *Nissos Amorgos* (Venezuela, 1997).

The SOPF now has contingent liabilities in the 1971 IOPC Fund for oil spill incidents prior to May 29, 1999. The SOPF will pay these as they mature. It has no responsibility for any administrative costs after that date.

1992 CLC and the 1992 IOPC

On May 29, 1999, Canada acceded to the 1992 CLC and the 1992 IOPC Fund Convention. These two Conventions apply only to spills of persistent oil from sea-going tankers.

The 1992 IOPC Fund Assembly decides the total amount that should be levied each year to meet general operating expenses and anticipated compensation payments in major incidents. The required levy is calculated by the IOPC Secretariat. The SOPF receives an invoice from the 1992 IOPC Fund based on the calculated levy multiplied by the total amount of Canada's "contributing oil".

Under the *MLA* (SOPF) regulations the reporting of imported and coastal movements of "contributing oil" is mandatory by persons receiving more than 150,000 tonnes during the previous calendar year.

Reports must be received by the SOPF no later than February 28 of the year following such receipt. In early January of each year the Administrator writes to each potential respondent explaining the process and providing the necessary reporting form. All the completed forms are then processed to arrive at the consolidated national figure that is, in turn, reported to the 1992 IOPC Fund. Currently there are 10 respondents who report. They represent organizations in the oil (refining and trans-shipment operations) and power generation industries.

The *Erika* incident (France, 1999) provided the SOPF with its first test of the 1992 IOPC regime, where compensation payable reached the 1992 IOPC limits. The SOPF payments to date to the 1992 IOPC Fund for the *Erika* incident amount to approximately $11.2 million.

The SOPF payments to the 1992 IOPC Fund for the *Prestige* incident may amount to approximately $13 million.

The SOPF is also liable to pay ongoing contributions to the 1992 IOPC Fund's General Fund and for other 1992 IOPC Fund major incidents happening after May 29, 1999. However, Canada will have no responsibility to the 1992 Fund for any incidents or administrative costs prior to May 29, 1999.

Since 1989, the SOPF has paid the IOPC Funds approximately $41.6 million, as listed in the table below.

Canadian Contributions to the International Funds

This shows the "call" nature of the IOPC Funds. Contributions and levies are driven by claims, and how they are assessed.

| **Fiscal Year** | **Paid from the SOPF ($)** |
|---|---|
| 1989/90 | 207,207.99 |
| 1990/91 | 49,161.28 |
| 1991/92 | 1,785,478.65 |
| 1992/93 | 714,180.48 |
| 1993/94 | 4,927,555.76 |
| 1994/95 | 2,903,695.55 |
| 1995/96 | 2,527,058.41 |
| 1996/97 | 1,111,828.20 |
| 1997/98 | 5,141,693.01 |
| 1998/99 | 902,488.15 |
| 1999/00 | 273,807.10 |
| 2000/01 | 6,687,696.71 |
| 2001/02 | 2,897,244.45 |
| 2002/03 | 3,219,969.17 |
| 2003/04 | 4,836,108.49 |
| 2004/05 | 3,448,152.80 |
| **Total** | **$41,633,326.20** |

# 7. Financial Summary

## Ship-source Oil Pollution Fund of Canada (SOPF)

### Income

| | |
|---|---|
| Balance forward from March 31, 2004 | $330,734,143.74 |
| Interest credited (April 1, 2004 – March 31, 2005) | 12,851,563.77 |
| Recoveries of settlements – *MLA* section 87 | 60,000.00 |
| Total Income | **$343,645,707.51** |

### Expenditure

Pursuant to *MLA* sections 81 and 82, the following was paid out of the SOPF:

| | | |
|---|---|---|
| Administrator fees | 99,000.00 | |
| Legal services | 95,659.20 | |
| Professional services | 74,196.48 | |
| Administrative services | 42,927.33 | |
| Travel | 46,647.84 | |
| Printing | 15,000.00 | |
| Occupancy | 73,416.00 | |
| Computers | 14,188.19 | |
| Office expenses | 17,013.44 | |
| Total expenses | $478,048.48 | $478,048.48 |
| Pursuant to *MLA* sections 85-87, the Administrator paid for Canadian claims: | | 610,572.01 |
| Pursuant to *MLA* section 76, the Administrator paid to the 1992 International Fund: | | 3,448,152.80 |
| Total expenditure from the SOPF | | **$4,536,773.29** |

### Balance in SOPF as at March 31, 2005 $339,108,934.22

# Appendix A: The International Compensation Regime

The International Oil Pollution Compensation Fund 1992 - IOPC - is an intergovernmental organisation established by States.

## The International Conventions

The present international regime of compensation for damage caused by oil pollution from oil tankers is based on two international Conventions adopted in 1992 under the auspices of the International Maritime Organisation (IMO), a specialized agency of the United Nations. These Conventions are the 1992 Civil Liability Convention and the 1992 Fund Convention. The IOPC Fund 1992 established under the 1992 Fund Convention follows an earlier Fund created under the 1971 Fund Convention, which still exists but is in the process of being wound up.

The conventions have been implemented into the national law of the States, which have become parties to them.

Canada is a Contracting State in the current international regime.

## The CLC

The 1969 and the 1992 CLC govern liability of oil tanker owners for oil pollution damage. The shipowner is normally entitled to limit his liability to an amount that is linked to the tonnage of his ship. The source of compensation money comes from insurance (P&I Club).

Figure 1, Appendix D, shows the limits of liability.

Under the 1969 CLC, the shipowner is deprived of the right to limit his liability if the incident occurred as a results of the owner's actual fault or privity. Jurisprudence provides reasonable prospects for breaking the shipowner's right to limit liability under this test.

Under the 1992 CLC, claims for pollution damage can be made only against the registered owner of the tanker or his insurer. The shipowner is deprived of his right to limit his liability only if it is proved that the pollution damage resulted from the shipowner's personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result. This new test makes it practically impossible to break the shipowner' right to limit liability. The shipowner's limit of liability is higher in the 1992 CLC than in the 1969 CLC.

## The IOPC Fund Conventions

Under the IOPC Fund Conventions, which mutualize the risk of oil pollution from tankers, the IOPC Funds pay a supplementary layer of compensation to victims of oil pollution damage in the IOPC Fund – Contracting States that cannot obtain full compensation for the damage under the applicable CLC. The 1971 and the 1992 Fund Conventions are supplementary to the 1969 CLC and the 1992 CLC respectively. The source of the money is the levies on oil receivers in Contacting States, collected retrospectively. Canada is the exception, where the SOPF pays all Canadian contributions to the IOPC Fund.

The compensations payable by the 1971 IOPC Fund for any one incident is limited to 60 million Special Drawing Rights (SDR) (about $120 million), including the sum actually paid by the shipowner or his insurer under the 1969 CLC. Effective November 1, 2003, the maximum amount payable by the 1992 IOPC Fund for any one incident is 203 million (SDR) (about $372 million), including the sum actually paid by the shipowner or his insurer and any sum paid by the 1971 Fund.

Figure 1, Appendix D, shows compensation available from the 1992 IOPC Fund.

## Contracting States

Contracting States, as of June 30, 2005, to the 1992 protocols are listed in Appendix E.

## Principal Changes

In the 1992 CLC and the 1992 IOPC Fund Convention, the underlying principles remain. The principal changes introduced by the 1992 Protocols are shown in Appendix D.

## Damage covered by the Conventions

Any person or company which has suffered pollution damage in a Contracting State of the IOPC Fund 1992 caused by oil transported by ship can claim compensation from the shipowner, his insurer and the Fund. This applies to individuals, businesses, local communities or States.

To be entitled to compensation, the damage must result from pollution and have caused a quantifiable economic loss. The claimant must substantiate the amount of his loss or damage by producing accounting records or other appropriate evidence.

An oil pollution incident can give rise to claims for damage of mainly four types:

- Property damage;
- Costs of clean-up at sea or on shore;
- Economic losses by fishermen or those engaged in mariculture;
- Economic losses in the tourism sector.

Claims assessment is carried out according to the criteria laid down by the representatives of the Governments of Contracting States. These criteria are set out in the IOPC Fund 1992's claims manual, which is a practical guide to the presentation of claims for compensation.

In a number of major cases, the IOPC Funds and the shipowner's insurer have jointly established local claims offices in the country where the oil spill occurred to facilitate the handling of the large number of claims. Depending on the nature of the claims, the IOPC Fund 1992 uses experts in the different fields to assist in the assessment of claims.

## Structure of the IOPC Fund 1992

The Assembly and Executive Committee are composed of Contracting States.

The IOPC Fund 1992, whose headquarters is in London, is governed by an Assembly composed of representatives of all the Contracting States. The Assembly holds an ordinary session every year. It elects an Executive Committee made up of 15 Contracting States. The main function of the Executive Committee is to approve the settlement of claims for compensation.

Organizations connected with the maritime transport of oil, such as those representing the shipowners, marine insurers and the oil industry, as well as environmental organizations, are represented as observers at the IOPC Fund 1992's meetings.

The Assembly appoints a Director, who is responsible for the operations of the IOPC Fund 1992. The Executive Committee has given the Director extensive authority to take decisions regarding settlement of claims.

# Appendix B: IOPC Fund 1971– Administrative Council and Assembly sessions

## The 14th Administrative Council – May 24 to 28, 2004

In the absence of the Administrative Council's Chairman, Captain Raja Malik (Malaysia), the Administrative Council elected Mr. John Wren (United Kingdom) as Chairman for the session. The agenda included:

## Incidents involving the 1971 IOPC Fund

### Nissos Amorgos (1997)

The Greek tanker *Nissos Amorgos* (50,563 gross tons) laden with 75,000 tonnes of Venezuelan crude grounded in the Maracaibo Channel in the Gulf of Venezuela. An estimated 3,600 tonnes of crude oil was spilled.

The Director informed the Administrative Council of an exchange of letters with the Venezuelan Government respecting a possible global settlement of all outstanding claims. The latest letter from the Republic of Venezuela indicated its willingness to "stand last in the queue" to be paid. The Council authorized the Director to increase the level of payments to 100% when he was satisfied with the undertaking given by Venezuela.

The Director presented his findings and conclusions regarding possible recourse action. The Canadian delegation noted, while normally it favours recourse action, in this instance it supported the Director's view that reasonably no action should be taken. There was no clear consensus and the Administrative Council decided to postpone a decision.

### Alambra (2000)

The Maltese registered tanker *Alambra* (75,366 gross tons) was loading a cargo of heavy fuel oil in the Port of Muuga, Tallinn (Estonia), when an alleged 250 tonnes of cargo escaped from a crack in the ship's bottom shell plating.

The Council discussed issues arising from claims presented to the London P & I Club by the Port of Muuga and the contractor for loading operations and also, whether the Fund Convention has been correctly implemented into Estonian national law. These matters remain unresolved.

Note: For more information about the Alambra incident see Administrator's Annual Report 2002-2003 and 2003-2004 respectively at Appendix B.

### Keumdong No. 5 (1993)

The Korean barge *Keumdong No. 5* (481 gross tons) collided with another ship off the coast of the Republic of Korea. An estimated 1,280 tonnes of heavy fuel oil was spilled. It resulted in substantial claims from fishery and aquaculture industries.

The Council was informed the Korean Supreme Court had rejected the Fishery Associations' appeal against a judgment in favour of the IOPC Fund 1971 respecting compensation to unlicensed fishermen for pain and suffering rather than economic loss. The Court decided that under Korean law oil pollution damage includes pain and suffering, but in this case the claims were not accepted, because the claimants were not natural persons but fishery associations that could not suffer pain and suffering.

## The 15th Administrative Council – October 18 to 22, 2004

Captain R. Malik (Malaysia) chaired the fifteenth session of the Administrative Council, which dealt with the agenda items, including:

### Financial Statements and Auditor's Report

The Administrative Council noted with appreciation that the external auditor had provided an unqualified audit opinion on the 2003 financial statements. The Council approved the accounts of the IOPC Fund 1971 for the financial period January 1 to December 31, 2003.

### Winding up of the 1971 Fund

The Administrative Council took note of the information in documents 71FUND/AC.15/15 and 71FUND/AC15/15/Add.1 regarding the winding up of the 1971 Fund.

### Budget for 2005

The Administrative Council adopted the budget for 2005 for the administrative expenses for the joint Secretariat. The Administrative Council noted the Director's view that the surplus in the General Fund as at December 31, 2005, should be sufficient to cover any payments of compensation, indemnification or other incident related expenses to be made after December 31, 2005, as well as the 1971 Fund's share of the administrative expenditure of the joint Secretariat and the costs of the winding up of the 1971 Fund.

### Assessment of contributions to Major Claims Funds

The Director introduced document 71FUND/AC.15/21 which dealt with the levy of 2004 contributions to Major Claims Funds and reimbursements to contributors of Major Claims Funds.

It was decided that due to the significant surplus on the Keumdong No. 5 Major Claims Fund an amount of £8.1 million should be reimbursed to contributors to that Major Claims Fund and that the remaining balance should be transferred to the General Fund.

The Council also decided to reimburse the following amounts to contributors to the Major Claims Funds mentioned below:

| | |
|---|---|
| *Aegean Sea* Major Claims Fund | £800 000 |
| *Sea Empress* Major Claims Fund | £350 000 |
| *Nakhodka* Major Claims Fund | £400 000 |

The Administrative Council decided that reimbursement from surpluses on the Major Claims Funds (after offset had been made against any arrears) to contributors in those States which had any oil reports outstanding should be postponed until all such reports had been submitted.

### Winding up of the 1971 Fund

Although the 1971 Fund Convention ceased to be in force on May 24, 2002, the 1971 Fund cannot be wound up until it has settled all claims arising from outstanding incidents.

The Administrative Council noted it is anticipated that by the end of 2005, there would only be outstanding compensation and indemnification claims in respect of the *Nissos Amorgos* incident (Venezuela, 1997) and, possibly, in respect of the *Iliad* (Greece, 1993), *Pontoon 300* (United Arab Emirates, 1998) and *Alambra* (Estonia, 2000) incidents. The 1971 Fund might however still be involved in recourse proceedings concerning the *Vistabella* (Caribbean, 1991), *Pontoon 300*, *Al Jaziah 1* (United Arab Emirates, 2000) and *Nissos Amorgos* incidents.

### Incidents involving the 1971 Fund

The Administrative Council noted the information contained in document 71FUND/AC.15/14, which containes a summary of the situation in respect of all 13 incidents dealt with by the 1971 Fund during the past 12 months.

### Nissos Amorgos (1997)

The total amount of the claims assessed for this incident exceeded the amount of compensation available under the 1971 Fund Convention, 60 millions SDR (£49 million). In view of the uncertainty as to the total amount of claims, the 1971 Fund Administrative Council had decided to limit payments to 65% of the loss or damage actually suffered by each claimant.

Following the decision by the Republic of Venezuela not to seek payment for its claims for compensation under the 1969 Civil Liability Convention and the 1971 Fund Convention until all other admissible claims had been paid in full, the 1971 Fund Administrative Council at its May 2004 session authorized the Director to increase the level of payments to 100% of the established claims. The Council noted that as a consequence, since then a payment of US$5.6 million had been made by the 1971 Fund to the shrimp fishermen and processors of Lake Maracaibo and that, with this payment, these claimants had received the full amount of their compensation.

## The 16th Administrative Council – March 15 to 23, 2005

Captain R. Malik (Malaysia) chaired the sixteenth session of the 1971 Fund Administrative Council, which dealt primarily with matters relating to the establishment of the supplementary fund, and other items of a general administrative nature.

# Appendix C: IOPC Fund 1992 – Executive Committee and Assembly Sessions

The Executive Committee of the 1992 IOPC Fund held three sessions during the year. The 25th and 26th session were held under the chairmanship of Mr. J. Rysanek (Canada). The 27th session was held under the chairmanship of Mrs. Lolan Margaretha Eriksson (Finland). The 28th session was held under the chairmanship of Vice-chairman, Mr. Volker Schöfisch (Germany). The 8th Extraordinary session of the Assembly and the 9th session of the Assembly were held under the chairmanship of Mr. Oosterveen (Netherlands). The 9th Extraordinary session of the Assembly was held under the chairmanship of Mr. J. Rysanek (Canada).

## The 25th Executive Committee – May 24 to 28, 2004

### Incidents Involving the IOPC Fund 1992

### Erika (1999)

The Maltese tanker *Erika* (19,666 gross tons) broke in two in the Bay of Biscay, France, on December 12, 1999. The tanker was carrying a cargo of 31,000 tonnes of heavy fuel oil. Approximately 19,800 tonnes of oil spilled as the ship sank.

The Committee took note of the judgments rendered in December 2003 by the Commercial Court in Lorient in respect of four claims in the tourism and fisheries sectors, which had been rejected by the shipowner, Steamship Mutual and the 1992 Fund.

The Committee recalled that one of the claims related to loss of income allegedly suffered by a claimant whose property in the affected area was to be let to other businesses (and not directly to tourists) but which, according to the claimant, could not be let due to the negative effects of the *Erika* incident. It was recalled that the Commercial Court had held that it was not bound by the criteria for admissibility of claims laid down by IOPC Fund 1992, and found in favour of the claimant. The IOPC Fund 1992 pursued an appeal against this judgment. It was noted that the Court of Appeal of Rennes had rendered its decision on May 25, 2004, in which the claim was rejected. It was noted that, although the Court of Appeal did not apply the 1992 Fund's criteria which it considered not binding on national courts, the Court of Appeal held that the claimant had not shown that there was a sufficient link of causation between the event in question and the damage, nor had the claimant proven that any damage existed.

The Committee also recalled that in a judgment dated January 29, 2004, rendered by the Civil Court (Tribunal de Grande Instance) in Nantes, in respect of claims by the owners of the two hotels in Nantes for pure economic loss, that Court had rejected the claims in the light of the Fund's criteria, on the grounds that the claimants had not shown a link of causation between the alleged losses and the oil pollution caused by the *Erika* incident. It was noted that the claimants had not appealed against the judgment.

Note: For additional information about the *Erika* incident and its significant impact on the international regime see SOPF Administrator's Annual Reports 1999-2000, 2000-2001, 2001-2002, 2002-2003 and 2003-2004 at section 4 and Appendix C, respectively.

## Prestige (2002)

On November 19, 2002, the Bahamas registered tanker *Prestige* (42,820 gross tons) broke in two and sank 170 nautical miles west of Cape Finistere on the northwest coast of Spain. The tanker was loaded with approximately 77,000 tonnes of heavy fuel oil. An unknown quantity of oil was released when the ship broke in half.

The Committee noted that claims submitted to date total £501.4 million – in Spain £445 million, France £54.2 million and Portugal £2.2 million.

The Committee noted that estimates for the total amount of claims give a global figure of approximately £680 million – Spain £554 million, France £124 million and Portugal £2.2 million. This total estimated amount greatly exceeds the compensation available (£121 million). In view of these figures provided by the Governments of the three States concerned and the remaining uncertainties as to the level of admissible claims, the Executive Committee decided to maintain the current level of payments at 15% of the loss or damage suffered by the respective claimants.

Note: For additional information on the *Prestige* incident see SOPF Administrator's Annual Reports 2002-2003 at section 4.4 and, 2003-2004 at Appendix C, respectively.

## Incident in the Kingdom of Bahrain (2003)

On March 15, 2003, an oil slick was reported 20 miles off the north coast of Bahrain. A few days later, 18 kilometres of shoreline had been polluted by an estimated 100 tonnes of oil.

The Committee recalled that at its October 2002 session it had decided that the 1992 Fund Convention applied to spills of persistent oil even if the ship from which the oil came could not be identified, provided that it was shown to the satisfaction of the 1992 Fund, or in the case of dispute to the satisfaction of a competent court, that the oil originated from a ship as defined in the 1992 Fund Convention (document 92FUND/EXC.18/14, paragraph 3.12.13).

The Committee noted that on the basis of the chemical analyses of the pollution samples collected, the Director was of the view that it was highly likely that the pollution oil was Iraq (Basrah) crude oil. The Committee also noted that on the basis of the satellite imagery, the trajectory analyses, and the chemical analyses it was considered unlikely that the source of the pollution was an offshore oil field, subsea pipeline or oil terminal.

The Committee noted: (1) In light of the evidence supporting the above the Director was satisfied that the source of pollution was a ship carrying oil in bulk as cargo engaged either in the transport of Iraq crude oil under the United Nations 'Oil for Food' program or illegal oil smuggling operations. (2) The Director therefore considered that claims for pollution damage arising from this incident were covered by the 1992 Conventions, and that even in the absence of the identity of a specific vessel as the source, the 1992 Fund was liable to pay compensation.

The Executive Committee decided that the claims arising from the incident were covered by the 1992 Fund Convention and that the claims by the Bahrain authorities were admissible in principle.

## The Third Intersessional Working Group (Eight Meeting)

The eight meeting of the IOPC Fund 1992 Third Intersessional Working Group was held from May 25 to 28, 2004, under the chairmanship of Mr. Alfred Popp, QC (Canada). The Working Group continued an exchange of views concerning the need to revise the international compensation

regime. The discussions focused on the shipowner's limit of liability, and whether the international compensation regime should include provisions to discourage substandard oil transportation.

The Working Group considered proposals for dealing with the substandard transportation of oil in documents submitted by the delegations of Japan, Italy, Portugal, United Kingdom, France and Spain.

Some delegations expressed a willingness to explore further the possibility of linking the issue within the legal framework of the Convention. Other delegations remained skeptical about linking compensation payments with safety issues. They were of the view that this could create complications that would undermine what is now a simple and effective regime.

With regard to the level of shipowners' limitation of liability and its relationship with the compensation funded by oil receivers, the Working Group considered two options for revising the level of the shipowners' limitation amount put forward by the delegations of Australia, Canada, Finland, New Zealand, Portugal and the United Kingdom. The first option envisaged an increase in the level of shipowner liability for smaller ships as well as shipowner liability to contribute to the Supplementary Fund. The second option envisaged shipowners paying compensation up to a fixed amount irrespective of the size of the ship, beyond which there would be a shared liability between shipowners and oil receivers up to the maximum amount available under the 1992 Fund Convention, but with no financial involvement of the shipowner in the Supplementary Fund.

Generally discussions ensued on whether or not the 1992 Conventions should be revised. In his summing up, the Chairman noted that some delegations had expressed the view that the current weakness in the system could be addressed through voluntary industry arrangements, while others had maintained that there were some issues that could only be resolved through changes to the Conventions.

The Working Group also considered a study of the costs of oil spills in relation to limitation amounts of the 1992 Convention. The Working Group had requested the Director to undertake an independent study of the costs of past oil spills in relation to past, current and future limitation amounts of the relevant Conventions (1969 Civil Liability Convention and 1971 Fund Convention and 1992 Civil Liability and Fund Conventions) and the voluntary industry schemes (TOVALOP and CRISTAL). The study had shown that on the basis of the financial limits of the applicable compensation regime the shipping industry had contributed 45% and oil cargo interest 55% of the total costs of 5 802 incidents that had occurred world-wide (except in the United States of America) in the 25-year period 1978 – 2002. The study had also shown that the sharing of the financial burden varied considerably with different size ranges of ships, with oil receivers contributing considerably more to the costs of incidents involving ships up to 20 000 gross tonnes, an equal sharing of the costs between oil cargo interests and the shipping industry in respect of incidents involving ships between 20 000 and 80 000 gross tonnes, and the shipping industry contributing considerably more to the costs of incidents involving ships greater than 80 000 gross tonnes. When the costs of past incidents were inflated to 2003 and predicted 2012 monetary values the relative contribution of oil receivers to the costs of oil spills increased considerably.

Notes: (1) The meeting of the Working Group scheduled for February 2005 was re-scheduled to the period March 14 to 23, 2005. (2) For additional information on the eight meeting of the Third Intersessional Working Group see document 92FUND/WGR.3/23 on the IOPC Funds website: www.iopcfund.org

## The 8th Extraordinary Session of the Assembly – May 25 to 28, 2004

The Assembly focused on preparations for entry into force of the Supplementary Fund Protocol.

With regard to the current status of the Supplementary Fund Protocol the Assembly noted that as at May 28, 2004, Denmark, Finland and Norway had ratified the Protocol.

The delegations of Japan, France, United Kingdom, Spain, Ireland and Germany stated that to varying degrees their governments were working towards ratification during the summer of 2004. The delegations of Greece, Poland, Sweden, Italy and the Netherlands informed the Assembly that progress towards ratification was being made by their States.

The Assembly agreed that the criteria for the admissibility of claims against the Supplementary Fund must be identical to those applied by the 1992 Fund. The Assembly recommended that for this reason the Supplementary Fund should not develop its own criteria.

The Assembly agreed that the first levy of contributions for the administration of the Supplementary Fund should be postponed until the ordinary session of the Supplementary Fund Assembly in the autumn of 2005 and that such contributions should be levied every year. Many delegations, including Canada, supported this view.

The Assembly noted that contributions to cover payments of compensation and incident related expenses would, under Article 11.2(b) of the Supplementary Fund Protocol, be levied separately for each incident involving the Supplementary Fund. It agreed with the Director that the level and timing of such contributions would have to be decided by the Supplementary Fund Assembly on a case-by-case basis.

Note: For a summary of important elements of the Supplementary Fund Protocol see SOPF Administrator's Annual Report 2003-2004 at section 4.9.2.

## The 26th Executive Committee – October 18 to 22, 2004

### Incidents involving the 1992 Fund

The Executive Committee took note of document 92FUND/EXC.26/2, which contained summaries of the situation in respect of all 16 incidents dealt with by the 1992 Fund since the Committee's 23rd session, held in October 2003.

### Other incidents

### Erika (1999)

The Committee recalled that on December 29, 2003, the 1992 Fund had paid £6 973 146 to the French State, corresponding to the French Government's subrogated claim in respect of the supplementary payments made by the Government to claimants in the tourism sector.

The Committee noted that in light of the developments during 2004, the Director decided that there was sufficient margin to enable the 1992 Fund to make a further payment to the French State. As a result, on October 14, 2004, an amount of £4 145 215 was paid to the French State relating to the Government's supplementary payments to claimants in the fishery, mariculture, oyster farming and salt producing sectors.

### Prestige (2002)

The Spanish delegation made a presentation to the Executive Committee on the operation to remove the remaining oil from the wreck of the *Prestige*. The work commenced in May 2004 and was finalized in September 2004 at an estimated cost of some £68 million.

The 1992 Fund has taken a policy decision that the Fund should, in respect of any oil pollution incident, endeavour to recover from third parties the amounts it has paid in compensation for pollution damage.

After having considered the implications and costs associated with legal action in the United States and Spain, the Executive Committee decided that the Fund should not take recourse action against ABS in the United States. It further decided to defer any decision on recourse action against ABS in Spain until further details surrounding the cause of the *Prestige* incident are available.

## The 27th Executive Committee – October 22, 2004

The Executive Committee elected Mrs. Lolan Margaretha Eriksson (Finland) as Chairman, and Mr. Volker Schöfisch (Germany) as Vice-Chairman to hold office until the end of the next regular session of the Assembly/

## The 9th Session of the Assembly – October 19 to 22, 2004

### Report of the Director

The Director reported on the activities of the 1992 Fund since the Assembly's 8th session in October 2003. He noted that the number of 1992 Fund Member States has continued to increase; the Intersessional Working Group, which was established to consider the need to improve the compensation regime under the 1992 Conventions, has continued its work, and six States have ratified the Supplementary Fund Protocol, which is expected to enter into force in early 2005.

### Status of Conventions

The 1992 Fund now has 86 Contracting States and an additional five States have deposited instruments of accession, which will bring the total to 91 by October 2005. The 1971 Fund Convention ceased to be in force on May 24, 2002 and does not apply to incidents occurring after that date.

### Re-appointment of the IOPC Fund's Director

The 1992 Fund Assembly decided to extend the contract of the present Director, Mr. Måns Jacobsson, for a further term of office of two years, as from January 1, 2005, to include a transition period for the handover to his successor.

### Procedures for Recruitment of future Directors

The Assembly decided that the Audit Body should be requested to prepare a detailed job description and competency requirements for the post of Director and to propose a timetable for the various stages of the selection process. The Audit Body was authorized to seek expert advice if considered useful to do so.

## Report of the Third Intersessional Working Group

The Chairman of the Working Group, Mr. Alfred Popp, QC (Canada) introduced the report of the Working Group on its seventh and eighth meetings held in February and May 2004, respectively.

This Working Group was set up in April 2000 to consider the need to improve the international compensation regime established by the 1992 Civil Liability Convention and the 1992 Fund Convention.

The 1992 Fund Assembly considered the reports of the Working Group's meetings. The reports reflected the divergence of opinion between Contracting States who oppose any revision of the 1992 Conventions and those who believe revision is indispensable. Discussions that followed reiterated these different viewpoints with a number of Contracting States questioning the continuation of the Working Group and others deeming it necessary for the Working Group to complete its mandate with regard to outstanding issues not yet addressed. The 1992 Fund Assembly decided that the Working Group should meet in February 2005 as planned and make final recommendations to the October 2005 session of the Assembly on whether or not the conventions should be revised and, if so, which items required revision.

Note: The IOPC meetings planned for late February and early March were later re-scheduled to the period March 14 to 23, 2005.

## Revision of Claims Manual

A revised text of the 1992 Fund Claims Manual, which is a guide to presenting compensation claims against the Fund, was approved by the 1992 Fund Assembly. The revised Claims Manual is easier to read and gives further assistance to claimants.

Note: For information on the Claims Manual see the SOPF Administrator's Annual Report 2002-2003 at Appendix F.

## Supplementary Fund Protocol

It was recalled that in May 2003 a Diplomatic Conference adopted a Protocol establishing an "optional" Supplementary Fund to provide additional compensation over and above that available under the 1992 Fund Convention for pollution damage in the States that become Parties to the Protocol. As a result, the total amount available for compensation for each incident for pollution damage in countries which become Contracting States to the Supplementary Fund will be 750 million SDR ($1.5 billion).

The Supplementary Fund Protocol would enter into force three months after it has been ratified by at least eight States and the aggregate quantity of contributing oil received in these States after sea transport in the preceding year is at least 450 million tonnes. It was noted that six States (Denmark, Finland, France, Ireland, Japan and Norway) had ratified the Protocol and a number of other States have indicated that they expect to ratify the Supplementary Fund Protocol by the end of 2004. It was noted that the Protocol is likely to enter into force early in 2005 and the first Assembly of the Supplementary Fund might therefore have to be held during February or March 2005.

Note: For information on the Supplementary Fund see SOPF Administrator's Annual Report 2003-2004 at section 4.9.2 and section 4.6.2 of this Report.

## Non-submission of Oil Reports

The Council noted that a total of 29 States still had outstanding oil reports for the year 2003 and/or previous years: 12 States in respect of the 1971 Fund and 23 States in respect of the 1992 Fund. It was further noted that a number of States had reports outstanding for several years. It was emphasized that non-submission of oil reports was a violation of States' treaty obligations under the 1971 and 1992 Fund Conventions. It was suggested that States that did not fulfil their duties had no rights.

## Developments within the European Union on matters of interest to the 1992 Fund

The Assembly noted that the European Commission had proposed a Directive on ship-source pollution and on the introduction of sanctions, including criminal sanctions, for pollutions offences the text of which would have to be agreed between the European Parliament and the Council of the European Union.

## Budget for 2005 and Assessment of Contributions to the General Fund

The assembly adopted the budget for 2005 for the administrative expenses for the joint Secretariat with a total of £3 372 600.

The Assembly decided to levy contributions to the General Fund for a total of £5.4 million, with the entire levy due for payment by March 1, 2005.

Note: Normally all Canadian contributions to the General Fund are paid from the SOPF.

## Financial Statements and Auditor's Report and Opinion and Audit Body's Report

The External Auditor provided an unqualified audit opinion of the 2003 financial statements while noting the good work of the Audit Body. The Assembly approved the accounts of the 1992 Fund for the financial period January 1 to December 31, 2003.

Note: For information about the composition and mandate of the IOPC Fund's Audit Body see SOPF Administrator's Annual Report 2002-2003 at Appendix C and Appendix G, respectively.

## Election of members of the Executive Committee

In accordance with 1992 Fund resolution No 5, the Assembly elected the following States as members of the Executive Committee to hold office until the end of the next regular session of the Assembly:

| **Eligible under paragraph (a)** | **Eligible under paragraph (b)** |
|---|---|
| Germany | Algeria |
| India | Australia |
| Italy | China (Hong Kong Special Administrative Region) |
| Japan | Finland |
| Netherlands | Portugal |
| Republic of Korea | Russian Federation |
| United Kingdom | United Arab Emirates |
| | Uruguay |

### Assessment of Contributions to Major Claims Funds

In order to enable the 1992 Fund to make payments of claims for compensation arising out of the *Prestige* incident, the Assembly decided to raise 2004 contributions to the *Prestige* Major Claims Fund of £33 million, the entire levy payable by March 1, 2005.

The Assembly noted that following the reimbursement (authorized by the Assembly at its 8th session in October 2003) to contributors to the *Nakhodka* Major Claims Fund of £37.7 million, a subsequent reconciliation of that Major Claims Fund's account had shown that there would be a remaining balance on that Fund of some £680 000.

The Assembly approved a further reimbursement to contributors to the *Nakhodka* Major Claims Fund of £600 000 and decided that the remaining balance on that Major Claims Fund, estimated at £100 000, should be transferred to the General Fund.

Note: The Canadian contributions to the extent invoiced shall be paid from the SOPF.

## The 9th Extraordinary Session of the Assembly – March 15 to 23, 2005

### Election of the chairman

The present chairman of the 1992 Fund Assembly, Mr. Willem Oosterveen (Neitherlands) stepped down. Pursuant to Article 18.1 of the 1992 fund Convention the Assembly elected Mr. Jerry Rysanek (Canada) as chairman to hold office until its next regular session.

### Supplementary Fund

The Assembly noted that the requirements for the entry into force of the Supplementary Fund Protocol were fulfilled on 3 December 2004 and that the Protocol had therefore entered into force on 3 March 2005. The Assembly also noted that there were at present eight Contracting States to the Supplementary Fund and that one more State, Portugal, had deposited an instrument of ratification of the Protocol on 15 February 2005 and would become a Member of the Supplementary Fund on 15 May 2005.

The Assembly considered and approved various 1992 Fund matters relating to the establishment of the Supplementary Fund, including (a) Joint Secretariat with the Supplementary Fund; (b) Sharing of joint administrative costs with the 1971 Fund and the Supplementary Fund; and (c) Sharing of joint costs in respect of incidents involving both the 1992 Fund and the Supplementary Fund.

The Assembly agreed that the 1992 Fund, the 1971 Fund, and the Supplementary Fund should have a joint secretariat and share the workload and administrative costs. For administrative expenses of the Secretariat the Assembly agreed that the 1971 Fund and the Supplementary Fund should each pay a flat management fee to the 1992 Fund initially set at £150 000 per annum (5 percent of the administrative expenses of the Secretariat). For the Supplementary Fund the fee for 2005 would be prorated for a ten month period from the date when the Supplementary Fund Protocol came into force, ie March 3, 2005.

The Canadian delegation suggested that in future a more detailed breakdown should be made of the actual expenses in respect of the Supplementary Fund. The Director undertook to provide more details of expenses which could be attributed specifically to the Supplementary Fund.

The Assembly agreed that the apportionment of joint costs in respect of incidents involving both the 1992 Fund and the Supplementary Fund should be agreed by the governing bodies of the two Funds on a case-by-case basis.

Under financial matters, the Assembly authorized the Director of the 1992 Fund to make the necessary funds available to the Supplementary Fund in the form of loans to be repaid, with interest, when the Supplementary Fund had received the first levy of contributions decided (probably in October 2005) by its Assembly to the extent that this could be done without prejudice to the operations of the 1992 Fund.

Note: For a summary of important elements of the Supplementary Fund Protocol see section 4.6.2 herein.

### The Small Tanker Oil Pollution Indemnification Agreement

The Assembly noted the offer by the International Group of P&I Clubs concerning the Small Tanker Oil Pollution Indemnification Agreement (STOPIA). It is an offer to increase, on a voluntary basis, the limitation amount for small tankers. STOPIA came into force in March 3, 2005, the date of the entry into force of the Supplementary Fund Protocol.

Note: For additional information on STOPIA see section 4.6.3 herein.

### Appointment of new Director

The contract of the present Director, Mr. Måns Jacobsson, expires December 31, 2006, and includes a period for a smooth transition to his successor.

The Assembly agreed on the job specification, competence requirements, personal attributes, and nomination of candidates by 1992 Fund Contracting States, for the position of Director of the International Oil Pollution Compensation Funds. The Assembly decided also on the selection process for the appointment of the Director. It should be noted that the Director of the 1992 Fund is *ex officio* Director of the 1971 Fund, and the Supplementary Fund.

The Assembly decided that the following timetable for the appointment and transitional arrangements should apply:

(1) Contracting States are invited to submit candidatures by June 30, 2005.
(2) Election of a new Director shall be made at the October 2005 session of the fund's governing bodies.
(3) The new Director shall not join the Secretariat on a permanent basis before September 1, 2006.
(4) The present Director shall have full responsibility for the October 2006 session of the Assembly.
(5) The new Director shall take up his/her functions and take over responsibility for the Organizations on November 1, 2006.
(6) The present Director shall continue to be available up to December 31, 2006.

# The 28th Executive Committee – March 14 to 23, 2005

## Incidents Involving the 1992 Fund

### Kuzbass (1996)

In June 1996, the Russian tanker *Kuzbass* (88,692 gross tons) was suspected of discharging crude oil that polluted the German coastline close to the border with Denmark in the North Sea.

In July 1998, the Federal Republic of Germany brought legal actions in the Court of first instance (Landgericht) against the owner and his insurer, the West of England P&I Club, claiming compensation for the cost of clean-up operations.

In December 2002, The Court rendered a part-judgment in which it held that the owner of the *Kuzbass* and the West of England Club were jointly and severally liable for the pollution damages.

The shipowner and the West of England Club appealed against the judgement. At a hearing in December 2004, the Schleswig – Holstein Appeal Court (Oberlandesgericht) indicated that on the basis of the evidence submitted, it was far from convinced that the *Kuzbass* was the source of the pollution. The Court strongly recommended that the parties reach an out-of-court settlement.

The Committee authorized the Director to seek an out-of-court settlement between the German Government, the shipowner, the West of England Club and the IOPC Fund 1992.

### Erika (1999)

The Committee noted that 6,959 claims for compensation have been submitted and 94.5 per cent of the claims have been assessed. Compensation payments totaling £68 million have been made in respect of 5,579 claims. It was recalled that legal actions against the shipowner, his insurers and the 1992 Fund were taken by 795 claimants. It was noted that out-of-court settlements have been reached with 409 of these claimants, and that actions by 386 claimants were pending.

### Prestige (2002)

Claims totaling £481 million have been received by the Claims office in Spain, and claims totaling £65 million by the Claims Office in France. The Portuguese Government has submitted a claim for £2.3 million in respect of clean-up and preventative measures in Portugal.

The total amount of the accepted claims arising from the *Prestige* incident will significantly exceed the total amount of compensation available, 135 million Special Drawing Rights corresponding to £121 million. In May 2003 the Executive Committee decided that the 1992 Fund's payments should, for the time being, be limited to 15 per cent of the loss or damage actually suffered by the respective claimants, as assessed by the experts engaged by the Fund and the ship's insurers.

The shipowner's limit of liability for the *Prestige* incident under the 1992 Civil Liability Convention is approximately £16 million.

With reference to the investigations into the cause of the incident the Bahamas Maritime Authority (of the flag State) carried out an investigation into the cause of the incident. The report of investigation was published in November 2004. As regards the cause of the incident, the report

concludes, *inter alia*, that it was likely that the initial failure had been in the side structure of No. 3 starboard wing tank, followed by a failure in No. 2 starboard after wing tank, probably in the bulkhead between the two tanks.

The report is available at www.bahamasmaritime.com

## Nefterudovoz – 57M (2003)

The Russian oil-ore carrier *Nefterudovoz – 57M* (2,605 gross tons), laden with a cargo of heavy fuel oil, struck the Cyprus tanker *Zoja I* (18,627 gross tons) in the outer roads of Onega, White Sea (Russian Federation). At the time of the incident, the *Nefterudovoz – 57M* was manoeuvering alongside the *Zoja I* in order to undertake a ship-to-ship transfer of cargo.

The ship was insured by the North of England P&I Club. Although the scale of the incident was such that the 1992 Fund would not be required to pay compensation, the International Group nevertheless brought the Executive Committee's attention to the circumstances of the incident and the position taken by the Russian Courts as regard the applicability of the 1992 CLC and the scope of compensation for impairment of the environment.

A Claim for Roubles 14 847 521 (£242 000) for pollution damage was submitted by the Arkhangelsk Specialised Maritime Inspectorate of the Ministry of Natural Resources of the Russian Federation. The claimed amount was calculated on the basis of the 'Methodika', a method developed in 1967 for quantifying environmental damages. The method uses a theoretical formula to determine the scale of damages based on the volume of oil spilled, the sensitivity of the area in which a spill occurs and the rate at which the oil is cleaned up.

The claimants referred the claim to the Arkhangelsk Arbitration Court. The shipowner's argument that the claims should be governed by the 1992 Civil Liability Convention was dismissed by the Arbitration Court.

In April 2004, the Arbitration Court found against the shipowner in the amount of Roubles 12,397,500 (£202 000) calculated in accordance with the "Methodika". The shipowner appealed to the Appeal Court of Arkhangelsk and then to the Court of Cassation in St. Petersburg. Both these Courts upheld the ruling of the first instance Arbitration Court.

The Executive Committee noted the statement of the International Group of P&I Clubs that the latter had brought this incident to the attention of the Executive Committee for the following reasons:

(1) *The Arbitration Court had stated that the provisions of the 1992 Civil Liability Convention applied to vessels carrying oil and oil products which called at a foreign port and which were on the high seas or on inland waters of a foreign State. However, Article II(a)(i) of the 1992 Civil Liability Convention stated that the Convention applied to pollution damage in the territory, including the territorial sea of a Contracting State.*

(2) *In the case of a similar incident, namely the Victoriya (Russian Federation, 30 August 2003) – a Russian tanker that suffered a fire and explosion at a terminal on the Volga river, 1 300 kilometres inland from the Caspian Sea and the Sea of Azov – the 1992 Fund Executive Committee had decided at its October 2003 session that the 1992 Conventions applied, since the Victoriya was a sea-going vessel and the pollution damage had been caused in the territory of a Contracting State.*

(3) *As the International Group is firmly convinced that claims for pollution damage arising from the Nefterudovoz-57M incident should be governed by the 1992 Civil Liability Con-*

> *vention, the claims calculated on the basis of the 'Methodika' should be inadmissible in accordance with the policy of the 1992 Fund, where claims would not be entertained for environmental damage based on an abstract quantification in accordance with theoretical models (cf 1992 Claims Manual, November 2002 edition, page 30.)*

The delegation of the Russian Federation agreed that the 1992 Civil Liability Convention should have applied to the incident, and that while the Russian courts could be criticized for their decisions, there was nothing that could be done to change the situation. That delegation further stated that it appeared that the courts might have decided, since the 'Methodika' was not applicable under the 1992 Civil Liability Convention, and in order to protect victims to the maximum possible extent, to apply national legislation that did permit its use.

The Committee recalled that the 'Methodika' had been applied to the first incident involving the 1971 Fund and that this had led to the 1971 Fund Assembly passing a Resolution in 1980 to the effect that the assessment of compensation should not be made on the basis of an abstract quantification of damage calculated in accordance with theoretical models.

The Canadian delegation drew attention to the positive aspect that, the Russian courts had recognized that the application of the 'Methodika' was not compatible with the 1992 Conventions.

The Executive Committee considered that the 1992 Civil Liability Convention should have applied to the *Nefterudovoz - 57M* incident and that had the Convention been applied, claims based on the 'Methodika' would not have been admissible.

## The Third Intersessional Working Group (Ninth Meeting)

The ninth meeting of the IOPC Fund 1992 Third Intersessional Working Group was held from March 17 to March 23, 2005, under the Chairmanship of Mr. Alfred Popp, QC (Canada).

The purpose of the Working Group meeting was to make final recommendations to the October 2005 session of the Assembly on whether or not the Conventions should be revised and, if so, which items required revision

The Working Group also considered the issues described in papers submitted by the International Group of P&I Clubs on "Sharing the Burden" and "Proposals made in relation to substandard shipping" (92FUND/WGR.3/25/2 and 92FUND/WGR.3/25/3) available at: www.iopcfund.org

The key question is whether to reopen the two Conventions to adjust the shipowner's limit of liability. This must be considered in the light of increases effective November 2003, and the additional burden on oil receivers under the Protocol of 2003 establishing a Supplementary Fund. In the Chairman's view this issue requires a clear resolution, since other proposed amendments would not justify the reopening of the two Conventions. After debate the delegations were virtually divided 50/50 on the need to reopen the Convention to adjust the shipowners' limit of liability under the current CLC. Some delegations, including Canada, are of the view there is an imbalance between the CLC and the Fund Convention and that revision embodied in a legal framework is preferable. Other delegations saw no such imbalance, and no reason for revision. Another group of delegations saw an imbalance, but accepted that voluntary industry solutions would be a better way to go, at least for the next ten years.

Should the Assembly decide to open up the Conventions for revision, the following issues would be recommended to the Assembly by the Working Group for amendments to the 1992 CLC and 1992 Fund Conventions: (1) Level of shipowner's limitation of liability and its relationship with the compensation funded by oil receivers. (2) Tacit amendment procedures. (3) Compulsory insurance. (4) Non-submission of oil reports. (5) Quorum for meetings of the 1992 Fund Assembly. (6) Definition of "ship".

Issues identified by the Working Group as requiring further guidance from the Assembly include: (1) Substandard transportation of oil. (2) Uniform application of the Conventions.

Issues the Working Group shall recommend to the Assembly in October 2005 for deletion from the Working Group agenda include: (1) The test for breaking the shipowner's limit of liability. (2) The paying of levies by storage companies relating to the receiving of contributing oil temporarily stored with them. (3) An additional tier of liability for cargo owners. (4) A required minimum annual contribution to the 1992 Fund from all Contracting States. (5) Merging of the Conventions into one instrument.

# Appendix D: Changes continuing under the 1992 Protocols

- A special limit of liability for owners of small vessels and a substantial increase in the limitation amount. The limit is approximately $8.28 million for a ship not exceeding 5,000 units of gross tonnage, increasing on a linear scale to approximately $164.72 million for ships of 140,000 units of tonnage or over, using the value the SDR at April 1, 2005.

- An increase in the maximum compensation payable by the 1992 IOPC Fund to $372.49 million, including the compensation payable by the shipowner under the 1992 CLC up to its limit of liability. This includes the compensation levels increase of approximately 50% on November 1, 2003 – see section 4.6.2 herein.

- A simplified procedure for increasing the limitation amounts in the two Conventions by majority decision taken by the Contracting States to the Conventions.

- An extended geographical scope of application of the Conventions to include the exclusive economic zone or equivalent area of a Contracting State.

- Pollution damage caused by spills of bunker oil and by cargo residues from unladen tankers on any voyage after carrying a cargo are covered.

- Expenses incurred for preventative measures are recoverable even when no spill of oil occurs, provided that there was a grave and imminent danger of pollution damage.

- A new definition of pollution damage retaining the basic wording of the 1969 CLC and 1971 IOPC Fund Convention with the addition of a phrase to clarify that, for environmental damage, only cost incurred for reasonable measures actually undertaken to restore the contaminated environment are included in the concept of pollution damage.

- Under the 1969 CLC the shipowner cannot limit liability if the incident occurred as a result of the owner's actual fault or privity. Under the 1992 CLC, however, the shipowner is deprived of this right only if it is proved that the pollution damage resulted from the shipowner's personal act or omission, committed with the intent to cause such damage or recklessly and with knowledge that such damage would probably result.

- Claims for pollution damage under the CLC can be made only against the registered owner of the ship concerned. This does not preclude victims from claiming compensation outside the CLC from persons other than the owner. However, the 1969 CLC prohibits claims against the servants or agents of the owner. The 1992 CLC does the same, but also prohibits claims against the pilot, the charterer (including a bareboat charterer) manager or operator of the ship, or any person carrying out salvage operations or taking preventive measures.

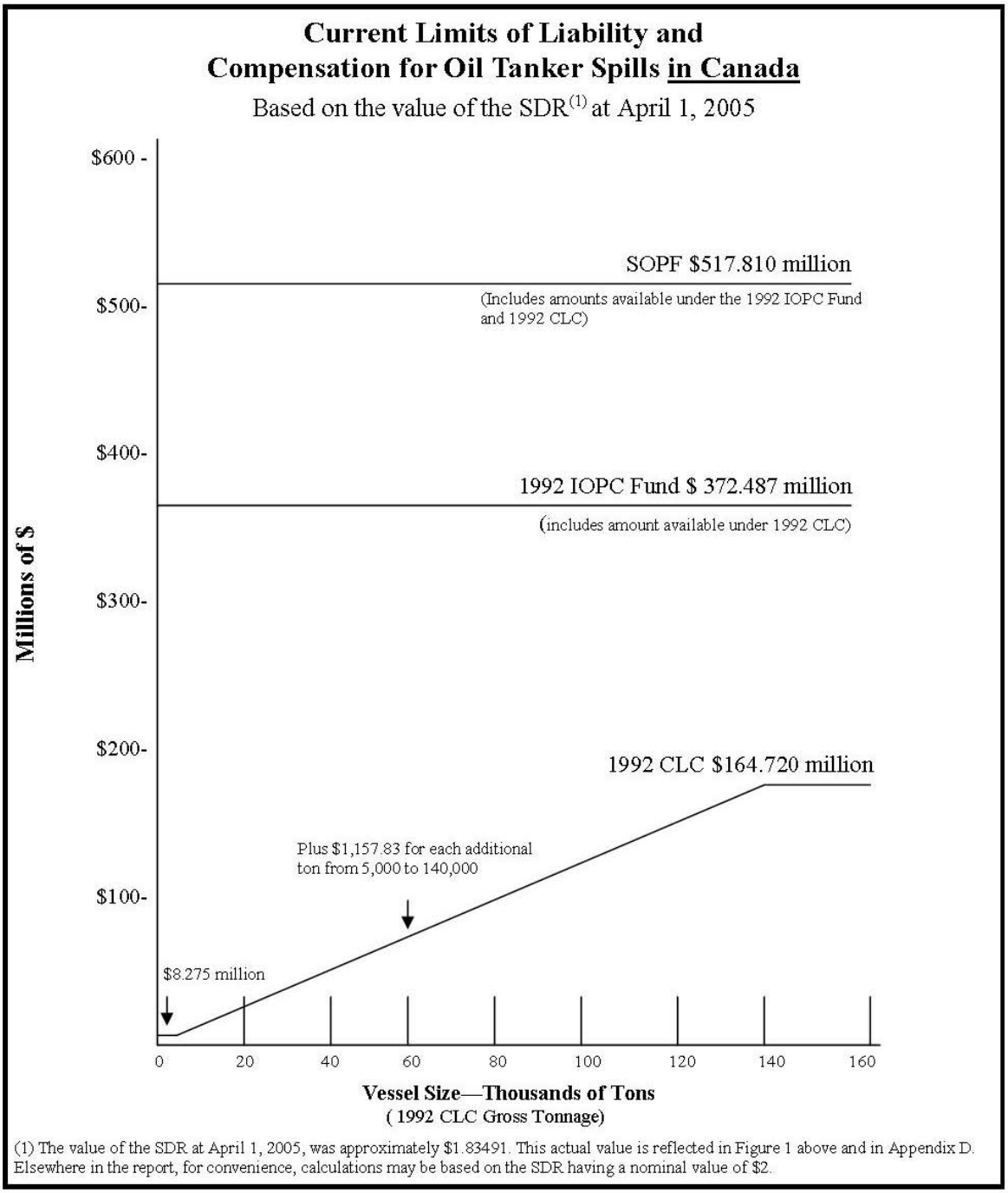


**Figure 1**

Figure 1 shows the current limits of liability and compensation available under the 1992 CLC, the 1992 IOPC Fund Convention, and the SOPF for oil spills from oil tankers in Canada, including the territorial sea and the exclusive economic zone. Because of the SOPF, Canada has an extra cover over and above that available under the international Conventions.

N.B. The above aggregate amount available under the 1992 CLC and the 1992 IOPC Fund is 372.486 million effective November 1, 2003. The SOPF amount of some 145.32 million on top of that, results in 517.810 million being available now for a tanker spill in Canada - without reference to the new International "optional" Supplementary Fund.

# Appendix E: Contracting States to both the 1992 Protocol to the Civil Liability Convention and the 1992 Protocol to the IOPC Fund Convention as at 30 June 2005

| **89 States for which Fund Protocol is in Force (and therefore Contracting States of the 1992 IOPC Fund)** | | |
|---|---|---|
| Algeria | Jamaica | Papua New Guinea |
| Angola | Japan | Philippines |
| Antigua and Barbuda | Kenya | Poland |
| Argentina | Latvia | Portugal |
| Australia | Liberia | Qatar |
| Bahamas | Lithuania | Republic of Korea |
| Bahrain | Madagascar | Russian Federation |
| Barbados | Malaysia | Saint Lucia |
| Belgium | Malta | Saint Vincent and the Grenadines |
| Belize | Marshall Islands | Samoa |
| Brunei Darussalam | Mauritius | Seychelles |
| Cambodia | Mexico | Sierra Leone |
| Cameroon | Monaco | Singapore |
| Canada | Morocco | Slovenia |
| Cape Verde | Mozambique | Spain |
| China (Hong Kong Special Administrative Region) | Namibia | Sri Lanka |
| Columbia | Netherlands | Sweden |
| Comoros | New Zealand | Tonga |
| Congo | Nigeria | Trinidad and Tobago |
| Croatia | Norway | Tunisia |
| Cyprus | Oman | Turkey |
| Denmark | Panama | Tuvalu |
| Djibouti | | United Arab Emirates |
| Dominica | | United Kingdom |
| Dominican Republic | | United Republic of Tanzania |
| Fiji | | Uruguay |
| Finland | | Vanuatu |
| | | Venezuela |

| **5 States which have deposited instruments of accession, but for which the Fund Protocol does not enter into force until date indicated** | |
|---|---|
| Estonia | 5 August 2005 |
| South Africa | 1 October 2005 |
| Israel | 21 October 2005 |
| Saint Kitts and Nevis | 2 March 2006 |
| Maldives | 20 May 2006 |

# Appendix F: IOPC Supplementary Fund – Assembly

## First Session of the Supplementary Fund Assembly – March 14 to 23, 2005

### Opening of the session

The 1st session of the Assembly of the Organisation established under the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation Supplementary Fund (Supplementary Fund), was opened by the Secretary-General of the International Maritime Organization (IMO), Mr. Efthimios E. Mitropoulos.

The Secretary-General noted that the proposal to establish the Supplementary Fund had received impetus through oil pollution incidents such as those involving the tankers *Erika* and *Prestige* along the coastline of Western Europe. He referred to the fact that public feelings had run high and political pressure had been brought to bear.

The Secretary-General pointed out that in the face of calls for regional regulatory alternatives which, if adopted, might well have undermined the international regulatory regime, IMO had acted quickly and decisively to put in place new measures.

The Secretary-General pointed out that on the technical side, the IMO had adopted amendments to the MARPOL Convention that had resulted in considerably accelerating the phasing out period for single hull tankers - a measure principally designed to reduce the risk of oil spills from tankers involved in low energy collisions or groundings.

The Secretary-General reminded the Assembly that the Supplementary Fund would have available an amount of some £436 million, in addition to the amount of some £161 million which was available under the 1992 Conventions, following the increase which had taken effect on 1 November 2003. He reminded the Assembly that States which chose not to join the Supplementary Fund would continue to be covered by the 1992 Fund, with no reduction in that coverage.

### Election of Chairman and two Vice-Chairmen

The Assembly elected as Chairman Captain Esteban Pacha (Spain), and two-Vice Chairmen Mr. Nobuhiro Tsuyuki (Japan) and Mrs. Birgit Sølling Olsen (Denmark) to hold office until the second regular session of the Assembly.

The Director of the 1992 Fund pointed out that the Supplementary Fund was a separate intergovernmental organisation but that, as had already been emphasised in the discussions in the 1992 Fund Assembly, the Supplementary Fund would apply the same criteria for the admissibility of claims as had been adopted for the 1992 Fund.

### Examination of credentials

The following Supplementary Fund Contracting States were present: Denmark, Finland, France, Germany, Ireland, Japan, Norway, and Spain.

Other IOPC Fund 1992 Contracting States, including Canada, were represented as observers.

## Status of the Supplementary Fund Protocol

The Assembly noted that the requirements for the entry into force of the Supplementary Fund Protocol had been fulfilled on 3 December 2004 and that the Protocol had therefore entered into force on 3 March 2005. The Assembly also noted that there were at present eight Contracting States of the Supplementary Fund and that one more State, Portugal, had deposited an instrument of ratification of the Protocol on 15 February 2005 and would become a Member of the Supplementary Fund on 15 May 2005. A number of other delegations indicated that their respective States would soon ratify the Supplementary Fund Protocol.

At its first session, the Supplementary Fund Assembly decided various matters, under the headings of: procedural, treaty, secretariat and headquarters, contributors, compensation, operational, financial and general administrative respecting the Supplementary Fund, as set out in a Record of Decisions contained in document SUPPFUND/A.1/39 available at: www.iopcfund.org

Note: For a summary of important elements of the Supplementary Fund see section 4.6.2 herein.