

**TRANSPORTATION APPEAL TRIBUNAL OF CANADA**

BETWEEN:

**Thundercat**, Applicant

- and -

**Minister of Transport**, Respondent

**LEGISLATION:**

*Canada Shipping Act*, 2001, S.C. 2001, c. 26; section 187

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**Review Determination**  
**David G. Henley**

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**Decision: May 8, 2012**

Citation: *Thundercat v. Canada (Minister of Transport)*, 2012 TATCE 15 (Review)

Heard in Yarmouth, Nova Scotia, on November 9, 2011

**Held:** The Minister of Transport has proven, on a balance of probabilities, that the Applicant, F/V *Thundercat*, violated section 187 of the *Canada Shipping Act, 2001*. Due to mitigating factors, I reduce the penalty from \$6 000 to \$3 000.

The total amount of \$3 000 is payable to the Receiver General for Canada and must be received by the Transportation Appeal Tribunal of Canada within thirty-five (35) days of service of this Determination.

**I. BACKGROUND**

[1] On April 20, 2011, the Minister of Transport ("Minister") issued a Notice of Violation ("Notice") to the Applicant, the fishing vessel F/V *Thundercat* ("Vessel"), through the Vessel's authorized representative, Nivenie Fisheries Ltd. ("Nivenie Fisheries"), for a violation of section 187 of the *Canada Shipping Act, 2001* ("Act") by the Vessel. The Notice indicates that an administrative penalty was assessed for a violation pursuant to the *Administrative Monetary Penalties Regulations*, SOR/2008-97 ("AMPRs"). Schedule A to the Notice states the following:

On or about April 4, 2011, at or near Sanford Harbour, Chegoggin Point, between Yarmouth and Digby in the province of Nova Scotia, the fishing vessel THUNDERCAT, Official number 821402, discharged a prescribed pollutant, thereby contravening section 187 of the *Canada Shipping Act, 2001*.

- [2] In Schedule A to the Notice, a penalty of \$6 000 was assessed by the Minister.
- [3] On June 2, 2011, Nivenie Fisheries requested a review of the administrative monetary penalty by the Transportation Appeal Tribunal of Canada ("Tribunal").

## II. STATUTES AND REGULATIONS

- [4] Section 187 and subsection 190(1) of the *Act* are relevant and provide as follows:

187. No person or vessel shall discharge a prescribed pollutant, except in accordance with the regulations made under this Part or a permit granted under Division 3 of Part 7 of the *Canadian Environmental Protection Act, 1999*.

...

190. (1) The Governor in Council may, on the recommendation of the Minister, make regulations respecting the protection of the marine environment, including regulations

(a) prescribing pollutants for the purpose of sections 187 and 189 and respecting the circumstances in which such pollutants may be discharged...

- [5] Subsection 1(1) of the *Regulations for the Prevention of Pollution from Ships and for Dangerous Chemicals*, SOR/2007-86, ("*Pollution Regulations*"), states the following:

1. (1) The following definitions apply in these Regulations.

"*fishing zone*" has the same meaning as a fishing zone of Canada described in the *Fishing Zones of Canada (Zones 1, 2 and 3) Order*, *Fishing Zones of Canada (Zones 4 and 5) Order* and *Fishing Zones of Canada (Zone 6) Order* made under the *Oceans Act*.

"*internal waters of Canada*" means the waters referred to in section 6 of the *Oceans Act*.

"*oily mixture*" means a mixture with any oil content.

"*Section I waters*" means fishing zone 1, 2 or 3 or any portion of the internal waters of Canada that is not within a shipping safety control zone.

"*Section II waters*" means any portion of the territorial sea or of fishing zone 4, 5 or 6 that is not within a shipping safety control zone.

- [6] Subsection 3(1), paragraph 4(a) and sections 40, 41 and 42 of the *Pollution Regulations* state as follows:

3. (1) Unless otherwise specified, these Regulations apply to

(a) a Canadian ship anywhere; and

(b) a ship that is not a Canadian ship in waters under Canadian jurisdiction.

4. For the purposes of Part XV of the Act, the following substances are prescribed to be pollutants:

(a) oil and any oily mixture;

40. Subject to sections 8, 41 and 42, no ship shall discharge and no person shall discharge or permit the discharge of an oil or oily mixture.

41. The discharge of an oily mixture from machinery spaces is authorized from any ship in Section I waters if

- (a) the ship is en route;
- (b) none of the oily mixture
  - (i) originates in cargo pump room bilges, or
  - (ii) is mixed with oil cargo residues;
- (c) the discharge is processed through oil filtering equipment that
  - (i) produces an undiluted effluent that has an oil content of no more than 15 ppm, and
  - (ii) triggers an alarm and a discharge-stopping device as soon as the oil content in the effluent exceeds
    - (A) 5 ppm, where discharged in inland waters of Canada, or
    - (B) 15 ppm, where discharged in fishing zone 1, 2 or 3 or in those internal waters of Canada that do not include inland waters of Canada; and
- (d) the discharge does not contain chemicals or any other substance introduced for the purpose of circumventing the detection of concentrations of oil that exceed the oil content limits specified in this section.

42. (1) The discharge of an oily mixture from the machinery space bilges of a ship in Section II waters and a Canadian ship referred to in paragraph 39(b) is authorized if

- (a) the ship is en route;
- (b) in the case of an oil tanker, none of the oily mixture
  - (i) originates in cargo pump room bilges, or
  - (ii) is mixed with oil cargo residues;
- (c) the discharge is processed through oil filtering equipment that produces an undiluted effluent that has an oil content of no more than 15 ppm; and
- (d) the discharge does not contain chemicals or any other substance introduced for the purpose of circumventing the detection of concentrations of oil that exceed the oil content limit specified in paragraph (c).

(2) The discharge of an oily mixture from cargo spaces of an oil tanker in Section II waters and a Canadian ship referred to in paragraph 39(b) that is an oil tanker is authorized if

- (a) the oil tanker is en route;
- (b) the oil tanker is more than 50 nautical miles from the nearest land;
- (c) the instantaneous rate of discharge of the oil that is in the effluent does not exceed 30 L per nautical mile;
- (d) the total quantity of oil discharged into the sea does not consist of
  - (i) in the case of an oil tanker that was put into service on or before December 31, 1979, more than 1/15,000 of the cargo of which the oily mixture forms part,
  - (ii) in the case of an oil tanker that is put into service after December 31, 1979, more than 1/30,000 of the cargo of which the oily mixture forms part, or
  - (iii) despite subparagraph (i), in the case of an oil tanker that is transferred to Canadian registry on or after February 16, 1993, more than 1/30,000 of the cargo of which the oily mixture forms part; and
- (e) the oil discharge monitoring and control system is in operation and can stop the discharge of

- (i) any effluent having an oil discharge rate greater than that allowed under paragraph (c), or
- (ii) any oil in a quantity greater than that allowed under paragraph (d).

[7] As well, paragraph 229(1)(b), subsection 232.1(4) and paragraph 244(h) of the *Act* are relevant and read as follows:

229. (1) If the Minister has reasonable grounds to believe that a person or vessel has committed a violation, the Minister may

(b) issue, and cause to be served on the person or vessel, a notice of violation that names the person or vessel, identifies the violation and sets out

(i) the penalty, fixed by or within the range fixed by the regulations made under this Part, for the violation that the person or vessel is liable to pay,

(ii) the period, being thirty days after the notice is served, within which the penalty must be paid or a review of the notice requested, and

(iii) particulars of the manner in which, and the address at which, the penalty must be paid or a review requested.

**232.1** (4) The member may confirm the Minister's decision or, subject to any regulations made under paragraph 244(h), substitute his or her own determination.

244. The Governor in Council may, on the recommendation of the Minister, make regulations for carrying out the purposes and provisions of this Part, including regulations

(h) designating violations that may be proceeded with by issuing notices of violation and fixing a penalty or a range of penalties in respect of each such violation, up to a maximum of \$25,000 but in any event not greater than the maximum fine if the violation were proceeded with by way of summary conviction;

[8] Subsection 15(1) of the *Transportation Appeal Tribunal of Canada Act*, S.C. 2001, c.29 ("*TATC Act*"), provides as follows:

15. (1) Subject to subsection (2), the Tribunal is not bound by any legal or technical rules of evidence in conducting any matter that comes before it, and all such matters shall be dealt with by it as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit.

### **III. PRELIMINARY ISSUES**

[9] At the commencement of the Hearing, Philip Star appeared on behalf of the Applicant, but immediately notified the Tribunal that he would be withdrawing on instruction of the Applicant, who would thereafter be represented by Brian Giroux and Robert Durkee.

[10] Mr. Star indicated that he had a document which had not been disclosed to the Applicant prior to the date of the Hearing, but noted that the document had been provided to the Applicant on the morning of the Hearing. Mr. Star identified the document as a statement of certain witnesses that the Minister intended to call. He confirmed that the Applicant was willing to proceed with the Hearing after having reviewed the document.

[11] Mr. Star also confirmed, on behalf of the Applicant, that there were no technical or procedural issues in dispute, confirming specifically that the owner of the Vessel is Nivenie Fisheries and that Jeffrey Durkee is the owner of Nivenie Fisheries. Mr. Star indicated that the

Applicant was requesting an order to exclude witnesses, which the Tribunal confirmed it would issue. Mr. Star then submitted to the Tribunal a Notice of Withdrawal and a document appointing Brian Giroux and Robert Durkee as representatives of the Applicant. The Minister expressed no objection to the withdrawal or the appointments. The Tribunal accepted Mr. Star's withdrawal and he then withdrew from the proceedings. Messrs. Giroux and Durkee confirmed to the Tribunal that they would be representing the Applicant and that the Applicant was ready to proceed with the Hearing.

#### **IV. EVIDENCE**

##### **A. Minister**

###### **(1) *Rahul Gulati***

[12] Mr. Gulati testified that he is a Senior Marine Safety Inspector with Transport Canada Marine Safety and that he works in the compliance and enforcement section in the Dartmouth regional office. The Minister sought to have Mr. Gulati qualified as an expert witness.

[13] Mr. Gulati testified that he is a certified Chief Engineer under both United Kingdom and Canadian legislation, and has a certificate in marine investigation from the United Kingdom. He stated that he is appointed in Canada as an arctic Pollution Prevention Officer and as a local Pollution Prevention Officer. He reported that his role includes looking after pollution prosecutions under the *AMPRs* system. Mr. Gulati testified that the present case is his 13<sup>th</sup> pollution investigation.

[14] Mr. Gulati testified that he was appointed as the lead investigator for the present case. He indicated that he first determined the owner of the Vessel and confirmed that it was a Canadian-registered vessel. Mr. Gulati indicated that he also sought information from Nova Scotia's Registry of Joint Stock Companies as the authorized representative for the Vessel is not an individual. The Transcript of Registry for the Vessel obtained by Mr. Gulati was entered as an exhibit (Exhibit M-1). He indicated on the Transcript that the authorized representative was identified as "Nivenie Fisheries Ltd."

[15] Mr. Gulati testified that once he had determined that the pollution incident was in Yarmouth, Nova Scotia, distant from his office in Dartmouth, Nova Scotia, he engaged the services of local Transport Canada officers to investigate. He confirmed that he engaged the Yarmouth Manager of Transport Canada, Martyn Richard Bowler, and instructed him to be accompanied by another Transport Canada Marine Safety Inspector to visit the site of the alleged pollution incident and report back to him. Mr. Gulati testified that Mr. Bowler indicated that he would be taking Daniel Arseneault, a junior staff member, to the scene. He noted that the time to travel from their offices to the scene of the incident was roughly five and one-half hours. Mr. Gulati then went on to describe what Messrs. Bowler and Arseneault found at the scene. The Tribunal notes that while this information forms the basis of Mr. Gulati's report, it is clearly hearsay evidence from Mr. Gulati. As Messrs. Bowler and Arseneault testified at the Hearing, their personal reports of their investigation are preferable.

[16] Mr. Gulati also testified that the pollution incident was initially observed by a Marine Aerial Reconnaissance Team ("MART") which conducted several fly-overs of the Vessel location collecting photographic and video evidence.

[17] Subsequent to the alleged pollution incident, Mr. Gulati reported receiving a call from a Transport Canada Inspector in Yarmouth – who was identified later in the Hearing as Peter Coggins and who gave testimony – asking whether there was any concern with him carrying out an inspection on board the Vessel. Mr. Gulati reported instructing the investigator that there was no objection arising from the fact that the Inspector had been invited to do the inspection by the owner of the Vessel. Mr. Gulati indicated that it was his understanding that on September 16, 2011 an underwater hull inspection was carried out, on September 23, 2011 a topside inspection was conducted and on September 26, 2011, the Inspector returned to the Vessel to review deficiencies that had been rectified by the owner. Mr. Gulati testified that data relating to the inspection was entered into a Transport Canada database called the Ship Inspection Reporting System ("SIRS") (Exhibit M-2).

[18] Mr. Gulati testified that he began the investigation after being advised by the Regional Operations Centre - Maritimes, a facility staffed by the Canadian Coast Guard, in a Casualty Pollution Report that there had been an aerial sighting of pollution (Exhibit M-3). Mr. Gulati testified that the report which he received indicated the location of the incident as Sandford Harbour, Nova Scotia. He indicated that the Report stated that the "only target in the area is fishing vessel Thundercat". Mr. Gulati testified that the Report indicated that no call was placed to the Vessel, as there was no sign of any activity on board.

[19] A copy of Mr. Gulati's investigation report ("Gulati Report") was then entered into evidence (Exhibit M-4). Referring to Schedule 1 of the Gulati Report, the bilge system plan for the Vessel, Mr. Gulati then explained his understanding of the bilge system for the Vessel. Mr. Gulati indicated that when inspectors inspect a vessel, they inspect various parts of the bilge system including bilge suction strainers, bilge pipelines, bilge pumps and anything that would prove detrimental to the safety of the vessel. He emphasized that the bilge system is a very important safety system onboard the vessel. He testified that the Inspector who inspected the Vessel in September 2011, inspected the entire bilge system with the exception of one bilge pump. Mr. Gulati referred to a quotation from Peter Coggins, a Marine Safety Inspector and witness at this Hearing, made on September 23, 2011 and included in the Gulati Report. Mr. Gulati read the quotation at the Hearing as follows:

All compartments tested by all means available except for E/R (which in my understanding is 'engine room') which appeared to have a degreaser in the bilge system. The Jabsco pump [suction from] F/H (which is 'fish hold') had a blocked strainer and this had become dislodged from suction pipe. Suction pipe [renewed] with new bilge strainer and operation verified on 26/09/2011.

[20] It is to be noted again that Mr. Coggins testified during the Hearing and, as Mr. Gulati's report of Mr. Coggins' statement is clearly hearsay, Mr. Coggins' testimony is preferred.

[21] Mr. Gulati indicated that the bilge pump identified by Mr. Coggins is identified as item #5 in Schedule 1 to the Gulati Report. He noted that item #5 in the legend for Schedule 1 reads "Rule 3700 pump in Engine room FSO [float switch operated]". He described the float switch as equivalent to a sump pump employed in a flooded basement. Mr. Gulati indicated that such

pumps start automatically when the basement is flooded and pump all the water out of the basement. He said that this engine room pump would be a similar system that would automatically start and discharge any collection of a liquid in the specific area where the pump is located. Mr. Gulati testified that it was his understanding that the Vessel went beyond the requirements of the *Small Fishing Vessel Inspection Regulations*, C.R.C., c. 1486 ("*Small Fishing Vessel Regulations*"), with respect to bilge pumps. He indicated that the *Small Fishing Vessel Regulations* require two pumps, one pump being solely able to provide fire-fighting capabilities and one for the bilge system. Mr. Gulati testified that his review of the bilge plan in Schedule 1 indicated that the Vessel had several independent pumps.

[22] At this point during his testimony, the Tribunal noted that Mr. Gulati was expressing opinion evidence and asked whether the Minister intended to qualify Mr. Gulati as an expert. The Minister confirmed that she wanted to introduce Mr. Gulati as an expert with respect to how a bilge system operates. The Applicant expressed no objections and I reserved my assessment until after the Hearing.

[23] Mr. Gulati indicated that the drawing of the bilge system in Schedule 1 was not to scale. He confirmed that Pump Number 5 is located in the engine room of the Vessel and that it is an independent pump not driven by any engine mechanism; rather, it is powered by a battery or an electrical system, which means that the Vessel's engine does not have to be running in order to make the pump operative. He testified that the pump and the associated pipelines are connected directly to what is identified in the bilge system plan as "OB-1" [Overboard 1].

[24] Mr. Gulati then referred to photographs and witness statements from the Transport Canada Inspectors' on-site investigation wherein it was identified that an oily track overflowed from OB-1 with the track ending at the waterline in an accumulation with a rainbow hue in the water. He testified that this hue indicates the presence of a hydrocarbon, stating that as a hydrocarbon is lighter than water, it acts as a surfactant and rises to the surface.

[25] Mr. Gulati testified that OB-1 is identified as a straight pipe connection and that there is no other associated pipework or connection to Pump Number 5. He stated that Pump Number 5 draws from only one place onboard and discharges directly over the side.

[26] During cross-examination, Mr. Gulati confirmed that, while he was the lead investigator, he did not do any personal inspections. Rather, he stated that his role was to put together the investigation package. He confirmed that he did not inspect the wiring on Pump Number 5. When asked whether it was unusual that no sample had been taken of the substance in the water, Mr. Gulati indicated that it was his understanding that during the aerial surveillance, the substance was categorized as a fast dissipation fraction of oil. He indicated that, in his view, weather conditions affect the rate of evaporation from the surface of the water of any hydrocarbon. He testified that the lighter the fraction of the oil, the quicker the evaporation. Mr. Gulati reported that when the investigators arrived five and one-half hours later, they found only a trace of hydrocarbon.

[27] When asked about the fast-evaporating nature of the substance, Mr. Gulati indicated that, in his view, it is very hard for a person operating an aircraft to land and collect a sample. He did confirm that under normal procedures a person would collect a sample if possible. When

questioned on whether the substance could have been something such as fish oil, Mr. Gulati testified that it was his understanding that fish oil is organic in composition and does not have the inherent characteristics of oil. He indicated that he has been involved in past investigations involving fish oil, which produced video and still imagery different than those in the present case.

**(2) *Serge Léger***

[28] The Minister sought to introduce Mr. Léger as an expert witness on oil pollution observation. Mr. Léger's résumé was entered as an exhibit (Exhibit M-5).

[29] Mr. Léger confirmed that his present occupation is Field Manager at MART - Atlantic in Moncton, New Brunswick. He testified that MART does scheduled surveillance flights for the National Aerial Surveillance Program, a part of Transport Canada Marine Safety. MART's mandate is to do pollution flights over Canadian waters to enforce pollution regulations.

[30] Mr. Léger testified that he is trained as an MSS6000 operator, which refers to a surveillance system onboard the aircraft. He is also a trained oil observer. He testified that he received oil observation training and aerial observation training in separate courses. Mr. Léger also indicated that he has received pollution prevention officer training.

[31] Mr. Léger confirmed that he has been in charge of MART Atlantic since 2008 and has been a part of the MART program since 2005. He testified that he has flown 557 missions as a crew member and observer and documented 120 pollution incidents. Since 1987, Mr. Léger has been on 1 775 missions in which he was asked to observe, record and report on surface-based phenomena from an aerial platform over a maritime environment. He testified that he participated in the 2010 Deep Water Horizon pollution incident in the Gulf of Mexico (British Petroleum incident) for two and one-half months with the main task of his team being to conduct a daily surveillance of the pollution slick and to report back to the command centre so that resources could be sent out.

[32] During cross-examination with respect to his qualifications, Mr. Léger admitted that he spent 20 years as an ice observer and has only been qualified since 2005 with respect to the observation of oil pollution. He confirmed that his oil pollution experience is limited to the past six years and that the 120 pollution incidents in which he has participated occurred during that time.

[33] Mr. Léger confirmed that his pollution prevention officer training was a five-day course, the aerial observation training in 2011 was a one-day course, the aerial remote sensing and surveillance training in 2007 was a three-week course and the oil pollution observer training program in 2005 was a one-day course. The Applicant drew attention to the limited duration of these courses while the Minister argued that the duration of the courses was not relevant and that Mr. Léger had developed a reputation at an international level with respect to oil pollution observation.

[34] At the beginning of Mr. Léger's testimony, a universal serial bus ("USB") memory stick was entered as an exhibit (Exhibit M-6) and included photographs and a video taken of the

incident by Mr. Léger. These photographs and images were entered into evidence, reviewed during the course of the Hearing and assigned individual exhibit numbers for ease of reference:

- Exhibit M-6a – Screen Capture with file name MSS MAP Image 149
- Exhibit M-6b – Screen Capture with file name MSS IRUV Image 141
- Exhibit M-6c – Screen Capture with file name MSS MAP Image 136
- Exhibit M-6d – Screen Capture with file name MSS MAP Image 143
- Exhibit M-6e – Photograph with file name SCAM Image 007\_A
- Exhibit M-6f – Photograph with file name SCAM Image 009\_A
- Exhibit M-6g – Photograph with file name SCAM Image 010\_A
- Exhibit M-6h – Photograph with file name SCAM Image 014\_A
- Exhibit M-6i – Photograph with file name SCAM Image 018\_A
- Exhibit M-6j – Photograph with file name SCAM Image 020\_A
- Exhibit M-6k – Photograph with file name SCAM Image 023\_A
- Exhibit M-6l – Photograph with file name SCAM Image 025\_A
- Exhibit M-6m – Photograph with file name SCAM Image 027\_A
- Exhibit M-6n – Photograph with file name SCAM Image 029\_A\_147
- Exhibit M-6o – Photograph with file name SCAM Image 031\_A
- Exhibit M-6p – Photograph with file name Thundercat MART video FB0-1190

[35] Exhibit M-6a is a screen capture of the available surveillance system mission map. Mr. Léger confirmed that the map has two tracks with the thinner line in yellow showing the intended track from Moncton, New Brunswick, to Nova Scotia. He testified that the solid red lines depict the actual track flown by the aircraft to Sandford Harbour and then back to Moncton. He confirmed that they took off from Moncton, then visited Saint John Harbour, New Brunswick, and Digby, Nova Scotia, offshore Brier Island, Nova Scotia. While they were en route to Yarmouth, they flew over Sandford Harbour where the pollution had been observed. Mr. Léger testified that while approaching Sandford Harbour he was the visual observer at the window in the aircraft. From a distance, he observed a sheen on the water within the Harbour next to a fishing vessel (which he identified as the Vessel) and, as the aircraft got closer, he identified a hydrocarbon on the water around the Vessel.

[36] Exhibits M-6b through M-6d are various screen captures which were identified by Mr. Léger. He testified that Exhibit M-6b is a survey of the area of the pollution and is ultraviolet ("UV") sensor output which detects reflection on the surface of the water. Mr. Léger testified that Exhibit M-6b is a marine map representation of Sandford Harbour with a polygon outlined in blue overlain on top of the marine map. He testified that the blue outline is from the UV sensor. Referring to the screen capture in Exhibit M-6c, Mr. Léger indicated that the pollution extended all the way up to the shoreline and that the reflection is of the hydrocarbon as interpreted by the sensor. Mr. Léger explained that Exhibit M-6d is a closer view of the Sandford Harbour area

with UV sensor output imagery overlain including the polygon and the red lines of the flight path from the aircraft.

[37] Mr. Léger described a photograph entered as Exhibit M-6e as having been taken at 1419 hours Coordinated Universal Time ("UTC"), shortly after arriving at Sandford Harbour. He testified that it depicts the Sandford Harbour with a hydrocarbon in the water, which is shown by the sheen around a fishing vessel in the photograph. He confirmed that at the time he could not see the name of the vessel because of the height of the aircraft. He noted that a co-worker using a camera was able to zoom in on the vessel and get the name and the fishing number. Exhibits M-6f and M-6g were described by Mr. Léger as similar pictures taken from different views as the aircraft circled the Harbour.

[38] He stated that, referring to Exhibit M-6f, he identified the sheen as a hydrocarbon because of the iridescence on the surface of the water which matches oil category codes.

[39] Referring to Exhibit M-6g, Mr. Léger stated that in this scene there is a strip of darkness around the breakwater which indicates that the tide is either going down and has been going down for a "little while" or is coming up and it is not "totally flooded". Mr. Léger confirmed that in the photograph there is another vessel near the bottom of the image around which no hydrocarbon appears to be present. He testified that he could not see anything that indicated pollution around the wharf and that the pollutant was identified as being primarily on the surface of the water and around the blue-hulled vessel with the white superstructure, which he later identified as the Vessel.

[40] Referring to another photograph entered as Exhibit M-6h, Mr. Léger indicated that he could see that the hydrocarbon was spreading and that it was starting to cross from the Vessel towards the breakwater side in the harbour. Mr. Léger testified that this would show that the tide was definitely not going down because, if the tide had been going down, it would have been pulling the pollution towards the exit of the harbour. He stated that the pollution was crossing towards the opposite corner, the bottom left corner of the image.

[41] Exhibit M-6i is another photograph and depicts another scene of the hydrocarbon on the water. While noting that the "look angle" is not great, he indicated that it still shows the hydrocarbon on the water spreading towards the corner of the Harbour indicated in the previous photographs. He noted that it is evident that there is a large hole with very little hydrocarbon on the surface of the water right in the central part of the slick that was forming, testifying that this indicated that the slick had been moving and spreading. When asked about the time difference between the first photograph (Exhibit M-6e) and Exhibit M-6i, he indicated that the first photograph was taken at 1419 hours UTC and that Exhibit M-6i was taken at 1423 hours UTC, confirming that the four-minute period indicated that the slick was spreading quickly.

[42] Additional photographs were entered as Exhibits M-6j and M-6k and represent similar shots from different angles.

[43] Referring to the photograph entered as Exhibit M-6l, Mr. Léger confirmed that in this photograph, the concentration of the substance was where the iridescence, or the rainbow-like

colours are evident, specifically closer to the Vessel and closer to the wharf and the bow section of the Vessel.

[44] Referring to Exhibit M-6m, Mr. Léger confirmed that in this picture iridescence could be seen around the Vessel; it is evident that it is a hydrocarbon because of its colour. Exhibit M-6n is a photograph similar to Exhibit M-6m. Mr. Léger indicated that it is a good representation of the hydrocarbon on the water from a different angle.

[45] Mr. Léger indicated that in a photograph entered as Exhibit M-6o, the slick is more apparent as it is crossing to the other side. He noted that this photograph was also taken at 1423 hours UTC, stating that the slick was moving relatively quickly.

[46] Exhibit M-6p is video footage taken by Mr. Léger from the aircraft. Mr. Léger confirmed that it is a general overview in which you could see iridescence on the surface of the water and the fishing number on the vessel. Mr. Léger testified that the optimal viewing angle for a hydrocarbon is with the sun at your back and as close to vertical as possible. He testified that the angle that the aircraft was flying while the video was being taken was not an optimal angle for viewing the hydrocarbon on the water. He indicated that this is why the hydrocarbon is not as visible in this footage compared to the photographs. However, Mr. Léger testified that if you are at an angle and still seeing a rainbow colour, there is definitely a hydrocarbon because, as you move at an angle, you lose the optimal viewing position and if that iridescence is still present, it is even more certain. Mr. Léger confirmed that the local time of the video footage would have been 1022 hours local time. Referring to the video footage (Exhibit M-6p), Mr. Léger was able to identify the vessel's name as "Thundercat".

[47] Mr. Léger confirmed that he prepared a report documenting the pollution incident (Exhibit M-7). Mr. Léger confirmed that the pollution incident referred to in the report occurred on April 4, 2011 at Sandford Harbour. He testified that he calculated the estimated quantity of pollutant as 0.3 litres. When asked what amount was allowed by the Regulations, he testified that five parts per million is specified in clause 41(c)(ii)(A) of the *Pollution Regulations*. Mr. Léger testified that the amount of hydrocarbon identified in Sandford Harbour would have been greater than five parts per million ("ppm") because five ppm is not visible on the water. He testified that, as soon as a hydrocarbon is visible on the water, it has exceeded the limits in the *Pollution Regulations*.

[48] Mr. Léger then described the oil categories used to qualify and quantify hydrocarbons. He testified that each category code relates to the thickness of the oil film in nanometres. Mr. Léger testified that when they came upon the Vessel, the oil was around the Vessel and, as it was spreading and not becoming thicker closer to the vessel, in his opinion, the source had stopped and the slick was drifting away and crossing to the other side of Sandford Harbour.

[49] He testified that when a pollutant exhibits a rainbow colour on the surface of the water, it definitely falls under Codes C and D in the Oil Category Table, which is referred to in his report (Exhibit M-7). He testified that a hydrocarbon is the only substance on water which will emit these rainbow bands. He testified that it does not matter if it is salt or fresh water, the characteristics are the same. Mr. Léger testified that, in his opinion, based upon his training and observations, the substance on the water was definitely a hydrocarbon, which is a pollutant. He

further testified that, based upon what was seen in the video at Exhibit M-6p, it is his belief that the pollutant came from the Vessel.

[50] During cross-examination, Mr. Léger confirmed that he did not actually see the Vessel discharging the pollutant; rather, it is his opinion that the pollution came from the Vessel. Mr. Léger confirmed that he did not see any other vessels close to the wharf other than the two vessels depicted in the photographs but admitted that a vessel could have left the wharf a short time prior to the pollution incident.

[51] During cross-examination, Mr. Léger was unable to identify the time that high tide had been scheduled to occur. When questioned whether the oil in the image could have come from the left of the photograph at Exhibit M-6l and moved towards the right where the Vessel was located during a rising tide, Mr. Léger clarified that he would not characterize the slick as moving to the left but more to the north, or top, of the image, to the corner that is in the middle or central portion of Exhibit M-6l towards the top.

[52] Mr. Léger confirmed that in the photograph at Exhibit M-6e many vehicles were evident on the wharf. He also confirmed that there were a number of barrels on the wharf. Mr. Léger testified that he was not familiar with the drainage patterns on the wharf because he was viewing it from the air.

[53] Referring to Exhibit M-6b, Mr. Léger confirmed that the sensor returns UV radiation from the surface. Any white or grey return is reflected UV radiation with darker images being less reflective. He testified that the whiter the image, the more UV present which is being reflected. Mr. Léger was cross-examined on the point marked in the polygon shown in Exhibit M-6b and questioned whether that indicated a source of pollutant away from the Vessel. Mr. Léger confirmed that the polygon point was simply a reference point for where the drawing had begun and had no relevance to the location of the pollution.

[54] Mr. Léger admitted that there are many natural sources of hydrocarbons. When questioned whether fish oil has the same sheen appearance as that depicted in the photographs, Mr. Léger testified that it has the appearance of a Category A substance (referring to 'Code A' in his Report at Exhibit M-7), which is transparent. He testified that he has never seen iridescence from a fish oil and stated that the only time iridescence will be observed from a fish oil is immediately after it is discharged. He testified that fish oil spreads so fast that it becomes a thin film and becomes transparent or colourless. When questioned whether this is relevant for the wide spectrum of fish oils such as seal oil, mackerel oil or cod liver oil, Mr. Léger confirmed that it is all fish oil.

**(3) *Martyn Bowler***

[55] Mr. Bowler testified that, at the time of the incident, he was the Manager at the Transport Canada Marine Safety office in Yarmouth. He testified that on April 4, 2011, he was advised by fax and a telephone call from the Dartmouth office of Transport Canada Marine Safety that there was a reported pollution incident in Sandford Harbour. He is designated as a Pollution Prevention Officer.

[56] He testified that he had been advised that a vessel called *Thundercat* was tied up in Sandford Harbour and had been apparently shown to be a source of a pollution incident. He was requested to contact the Vessel's owner and arrange to board the vessel and conduct an inspection. Mr. Bowler testified that he attempted to call Jeffrey Durkee, the Vessel's owner, but was unable to reach him and left a message on his answering machine identifying who he was and that there had been an alleged pollution incident reported in Sandford Harbour, and requested that he be called. Mr. Bowler confirmed that he did not hear back from the owner of the Vessel.

[57] Photographs taken by Mr. Bowler on April 4, 2011 were entered as exhibits (Exhibits M-8 to M-11).

[58] Mr. Bowler confirmed that on the afternoon of April 4, 2011 at approximately 1600 hours local time, he and Mr. Arseneault went to Sandford Harbour and found the Vessel tied up on the outer seaward side of the Harbour. He testified that at the time it was almost low tide and there was no pollution visible in the Harbour. He testified that they looked around the Vessel from the wharf and then went down a ladder at the face of the wharf on the starboard side of the Vessel. He testified that they went aboard the Vessel and found that it was secured and locked. They made no attempt to go into the Vessel and stood on the deck. He testified that he could not see or identify any aroma of oil at that time.

[59] Mr. Bowler testified that he looked over the side of the Vessel on the starboard side, closest to the wharf, and pushed the Vessel off the wharf. Looking down the side of the Vessel, Mr. Bowler indicated that he noticed two discharge points on the hull towards the forward end of the Vessel below the wheelhouse area. Mr. Bowler testified that of the two discharge points, the forward one appeared to be much dirtier and black and the aft one seemed to be cleaner and brighter. Mr. Bowler testified that there was a small amount of oil, or what appeared to be oil residue, in the water, noting that it was "very spotty, nothing of any great significance". Mr. Bowler testified that Exhibits M-9 and M-10 depict the darker area around and below the forward discharge point. He testified that the aft discharge point showed signs of surface corrosion and interior corrosion. He confirmed that the forward discharge point is the one on the right-hand side of the pictures of Exhibits M-9 and M-10. Mr. Bowler testified that the forward discharge point was darker and that there is an indication below the discharge point of a shiny track which was not evident on the aft discharge point.

[60] Referring to Exhibit M-11, Mr. Bowler confirmed that the finger in the picture is that of Mr. Arseneault. He testified that Mr. Arseneault was climbing down or hanging off the ladder and reaching over while Mr. Bowler was trying to hold the boat out and take the picture. He testified that Mr. Arseneault wiped his finger around the forward discharge point and, when he removed his finger from the discharge point, there was a dark substance on his finger which gave the appearance of an oily mixture. Mr. Bowler testified that there was no real aroma to the oily mixture and that it was just a dirty residue.

[61] A copy of the statement of Mr. Bowler regarding the alleged pollution incident was entered as an exhibit (Exhibit M-12).

[62] Referring to the photograph identified as Exhibit M-6e, Mr. Bowler indicated that the tide would have been almost or at high water at the time the picture was taken. Mr. Bowler confirmed that he checked the tide table and that high tide on that day would have been around 1100 hours or shortly after, in the morning. He testified that low tide would have been around 1600 hours or 1700 hours in the afternoon. Mr. Bowler testified that if the discharge had occurred before high tide, the tidal current would have been coming into Sandford Harbour towards the bottom right of the photograph.

[63] Mr. Bowler was asked to identify, on the vessel bilge plan at Schedule 1 to the Gulati Report (Exhibit M-4), the discharge point which Mr. Arseneault was pointing to in Exhibit M-11. Mr. Bowler testified that the point marked "OB-1" was the discharge point.

[64] During cross-examination, Mr. Bowler said that he was unable to remember whether he had ever inspected the Vessel previously. He confirmed that he and Mr. Arseneault did not inspect the opposite shore in the Harbour and that they did not go onto the breakwater. He confirmed that their inspection was limited to the Vessel and the area around the Vessel. Mr. Bowler testified that he is not familiar with the drainage on the wharf. He confirmed that they arrived at approximately 1615 hours local time and that at the time they arrived there were a "fair number" of vehicles on the wharf. He testified that they walked up and down the wharf in both directions about 50 or 60 feet both ways. He confirmed that there were bait barrels towards the back of the wharf. Mr. Bowler confirmed that they did not take a sample of the substance on Mr. Arseneault's finger from discharge point "OB-1". He confirmed that he had no means of telling how long the streak had been on the side of the boat below the forward discharge point.

[65] Mr. Bowler testified that it is difficult to tell from the photographs, but that it appears to have been either at or just before high tide. He agreed that, if there had been a rising tide, the flow would generally have moved from left to right in the direction of the vessel. Mr. Bowler was referred to the wharf on the left side of the photographs and agreed that it was traditionally the busiest area of the wharf. He also agreed that the wharf would be "uptide" from the Vessel.

[66] During re-examination, Mr. Bowler confirmed that on the day of the incident it was dry and there was no indication of any liquids that had been running across the wharf.

**(4) *Daniel Arseneault***

[67] Daniel Arseneault testified that he is a Marine Safety Inspector for Transport Canada based out of Yarmouth, Nova Scotia. He testified that he has 22 years of experience at sea with the last five years as a Captain. He has been with Transport Canada as an Inspector for two years. A copy of a statement concerning the incident by Mr. Arseneault was entered as an exhibit (Exhibit M-13). Mr. Arseneault confirmed that on April 4, 2011, he assisted Mr. Bowler with an oil spill response call. He testified that they arrived at Sandford Harbour at about 1555 hours local time on April 4, 2011. At the time, the weather was cloudy with light wind and the tide was rising. He testified that there was no visible aroma of pollutant in the Harbour when they arrived, but that when inspecting the Vessel, they saw a small trace of pollutant between the Vessel and the wharf on its starboard side. He testified that they went aboard the Vessel and found no trace of pollutant on top of the Vessel, noting that all accesses were locked and no-one was on board.

He testified that on the forward starboard side of the hull there were two overboard discharge points.

[68] Mr. Arseneault testified that he went down the ladder of the pier and put his finger into one of the overboard discharge points and found a smelly and greasy oil substance, indicating that below that discharge point there was a leak of a trace of oil that could be seen. He testified that they took pictures of the discharge points and at about 1615 hours local time left the wharf. Mr. Arseneault confirmed that the finger depicted in Exhibit M-11 is his.

[69] Mr. Arseneault identified two pictures taken by himself on the day of the incident of the Vessel's bow and stern (Exhibits M-14 and M-15, respectively). Mr. Arseneault confirmed that the name appearing on the vessel in Exhibit M-14 is *Thundercat* and that this was the vessel photographed and inspected on April 4, 2011. He confirmed that the discharge point which he was pointing to in Exhibit M-11 is on the starboard side of the Vessel, just below the bridge window.

[70] During cross-examination, Mr. Arseneault confirmed that he and Mr. Bowler were present at the wharf for approximately 20 minutes but not longer than half an hour. He testified that when they arrived at the wharf they looked around and there was nothing visible on the other side of the harbour. He stated that there were no other boats on the pier on the other side because the tide was rising. He confirmed that there were vehicles on the wharf. He testified that they did not go to the other side of the wharf. He confirmed that when they arrived in Sandford Harbour they did a cursory inspection to see if there could have been another source of pollution. He further confirmed that he did not take a sample of the substance on his finger or from forward discharge point "OB-1". He confirmed that he had no way of knowing how long the substance on forward discharge point "OB-1" had been present.

**(5) Peter Coggins**

[71] Peter Coggins testified that he is a Marine Safety Inspector with Transport Canada Marine Safety. He testified that he is a Marine Engineer by background but has been working with Transport Canada for 11 years. He indicated that 90 to 95 percent of his work is with fishing vessels. Mr. Coggins testified that he had previously inspected the Vessel and examined its bilge system.

[72] Mr. Coggins referred to a sketch of the Vessel's plan drawn by him (Exhibit M-18). Mr. Coggins testified that the Vessel is divided into six compartments. Four of the compartments have pumps and two of the compartments do not. He testified that the aft storage compartment has two Electric Rule 2000 pumps that go overboard on the aft starboard side. The next most forward compartment is for the steering gear and does not have a bilge pump in it, but does have a drain valve to drain any water in that compartment into the fish hold. The fish hold has one Electric Rule pump and one direct suction from the Jabsco pump which is driven by the main engine.

[73] Mr. Coggins testified that the Electric Rule pump in the fish hold discharges through the aft engine room bulkhead and out through an overboard on the starboard side in the engine room. The suction for the Jabsco pump comes through the aft engine room bulkhead, through the pump

and then it can be either diverted overboard or pumped into the live well. He testified that the engine room also has two bilge suction in it: an Electric Rule pump that pumps overboard on the starboard side and a direct suction for the Jabsco pump which is engine driven. As well, sitting on top of the fish hold, just aft of the engine room bulkhead, is the live well filled from the Jabsco pump driven by the engine.

[74] Mr. Coggins also testified that the live well has its own pump which pumps out over the starboard side. As well, there are two overboard discharges for the continuous circulation of water in the live well. Any water that accumulates in the cuddy or the forward cabin space drains into the engine room through a valve that can be opened or closed at leisure.

[75] Mr. Coggins confirmed that Pump Number 5 was in the engine room and testified that it is an Electric Rule 3700 pump with direct suction to the Jabsco pump. He testified that Pump Number 5 is a float switch operated pump, indicating that as the water level comes up, there is a float switch which allows the pump to cut in and out automatically depending upon the level of water in the bilge. When the pump engages, it discharges at OB-1, the forward overboard in the engine room, starboard side. A photograph taken by Mr. Coggins depicting the forward discharge points was entered as an exhibit (Exhibit M-16) and Mr. Coggins confirmed that the forward discharge point in the photograph is OB-1.

[76] Mr. Coggins testified that when he inspects a vessel, he has to verify that all the bilge pumps work, which he does by putting water in the spaces. He testified that during his inspection of the Vessel on September 23, 2011, he did not do this in the engine room for the Vessel because the engine room had an emulsion in it, similar to what is used to wash an engine room. In order to avoid putting the emulsion into the harbour in Digby they did not pump this bilge. Mr. Coggins confirmed that the emulsion was white and he was not able to identify what it was.

[77] Mr. Coggins testified that he was called to Digby to do a topside inspection on another vessel on October 4, 2011. He testified that when he was leaving this vessel, he walked past the Vessel (F/V *Thundercat*) and noticed something coming out of its forward engine room bilge discharge and, at that time, he took the picture entered as Exhibit M-16.

[78] Mr. Coggins' statement regarding the incident was entered as an exhibit (Exhibit M-17).

[79] During cross-examination, Mr. Coggins confirmed that he looked at the bilge system on the Vessel while the Vessel was in refit on September 16, 2011 and tested the system on September 23, 2011 when it was in the water. He testified that he tested all the bilge pumps to make sure they worked except for the two in the engine room. He confirmed that he did not inspect the wiring of the pumps. When questioned whether he knew how the pumps were switched, he confirmed that they can be wired a number of different ways. He agreed that the pumps could be wired such that when the power is off on the Vessel the pumps are off and noted that some people wire them directly to the batteries. However, Mr. Coggins confirmed that he did not inspect the wiring to see how this particular Vessel's pumps were wired. He agreed that the Vessel could have been configured such that when the main switch is off, the pumps are off. Mr. Coggins agreed that, in such a case, the pumps would not run automatically.

**B. Applicant**

[80] The Applicant chose not to call any witnesses or adduce any evidence.

**V. ARGUMENTS**

**A. Minister**

[81] The Minister submitted that the Vessel is responsible, under section 187 of the *Act*, for having discharged a prescribed pollutant in Sandford Harbour on April 4, 2011. The Minister referred to the following portion of section 187 of the *Act*:

"No person or vessel shall discharge a prescribed pollutant, except in accordance with the regulations made under this Part or a permit granted under Division 3..."

[82] The Minister indicated that the Regulations referred to in section 187 of the *Act* are the Pollution Regulations. She noted that section 4 of the Pollution Regulations describes what qualifies as a prescribed pollutant, specifically paragraph 4(a) which states "oil and any oily mixture".

[83] The Minister's position was that, based upon all of the evidence gathered and the testimony of the witnesses, on the balance of probabilities, there was a discharge of oil or an oily mixture, a prescribed pollutant, from the Vessel on April 4, 2011.

[84] The Minister referred to the Canadian Coast Guard report (Exhibit M-3), in which it is indicated that on April 4, 2011, Transport Canada was informed that there was an aerial sighting of pollution at Sandford Harbour, specifying that the only target in the area was the Vessel.

[85] The Minister also referred to the evidence from Mr. Léger that MART had planned for the aircraft a certain route for that day and upon identifying the discharge, they went on to investigate further. The Minister stated that the photographs and the video footage from the surveillance mission indicated a concentration of oil around the Vessel. The Minister noted that Mr. Léger gave expert evidence and that after having participated in over 500 pollution missions and having successfully identified about 100 to 120 pollution incidents, Mr. Léger considered this substance to be a pollutant in a quantity greater than that allowed by the *Pollution Regulations*.

[86] The Minister then referred to section 41 of the *Pollution Regulations* which specifically authorize certain types of discharges in Section 1 waters. The Minister submitted that the Sandford Harbour waters are Section 1 waters. However, she went on to note that section 41 does not apply to the Applicant or to the Vessel because the Vessel would have to have been en route, whereas the evidence indicates that she was tied to the wharf.

[87] However, the Minister added, that even if the section applied to the Vessel, that the amount of five ppm was exceeded. She referred to the testimony of Mr. Léger in which he explained that five ppm would not be visible to the naked eye. The Minister stated that from the evidence and the testimony, there were visible traces of oil in the water and that Mr. Léger quantified the amount of the oil as 0.3 litres. The Minister submitted that Mr. Léger is a well-

trained individual with vast and significant experience, emphasizing that Mr. Léger testified that the substance in the water could not have been anything other than a pollutant.

[88] It was the Minister's position that Mr. Léger confirmed the substance in the water was a pollutant that had been discharged by the Vessel. She stated that the evidence indicates that there was only one other vessel in the vicinity but that it was not even close to the Vessel and that there was no discoloration around that other vessel.

[89] The Minister referred to the testimony of Mr. Bowler that he witnessed traces of oil between the Vessel and the wharf, which were visible five hours after the aerial sighting. The Minister reiterated that if the oil content had only been five ppm, which in any case does not apply because the Vessel was not en route, it would not have been visible between the Vessel and the wharf.

[90] The Minister noted that Messrs. Bowler and Arseneault both indicated that they saw a discharge surrounding the overboard, noted as "OB-1" in Exhibit M-4, indicating that there was a residue, an oily substance, on the finger of Mr. Arseneault after he had touched the overboard outlet. The Minister also referred to their testimony that the discharge was shiny in appearance and that they saw a sheen on the Vessel from where the pollutant had been discharged.

[91] The Minister also referred to the evidence about how the bilge system on the Vessel is configured. In particular, she noted that Pump Number 5, which is in the engine room, is connected to forward discharge point "OB-1" on the Vessel. The Minister submitted that Mr. Arseneault identified it as being on the side between the Vessel and the wharf.

[92] The Minister stated that Mr. Coggins, who had previously inspected the Vessel, testified that he saw evidence of another similar discharge on October 4, 2011. She stated that Mr. Coggins had not been inspecting the Vessel on that day, but had simply been walking by when he saw the discharge and took a picture.

[93] The Minister submitted that the evidence proves, on a balance of probabilities, that there was a discharge of a prescribed pollutant according to the *Pollution Regulations* on April 4, 2011 at Sandford Harbour. She further submitted that the quantity of the pollutant is more than the quantity allowed for in the *Pollution Regulations*.

[94] The Minister argued that because the Vessel was tied up and not en route, the one exception in the *Pollution Regulations* to a small discharge does not apply in this case. She submitted that this violation, under section 187 of the *Act*, is a serious one and there is reason to believe that this offence was committed again on October 4, 2011.

[95] The Minister noted that the owner of the Vessel never reported the pollution incident. Transport Canada tried to contact the owner of the Vessel but never received a response. It was the Minister's submission that, this being a severe violation, a \$6 000 penalty is justified.

## **B. Applicant**

[96] The Applicant asserted that while Mr. Arseneault indicated he saw a stain on the side of the Vessel, he did not say that he saw any oil in Sandford Harbour. He also indicated that neither

Mr. Bowler nor Mr. Coggins saw a discharge in the Harbour, only something on the side of the boat.

[97] The Applicant submitted that a discharge would mean that the Vessel's pump had been working and actively pumping. He submitted that while Mr. Coggins saw a streak on the Vessel, it could have been there for a long period of time.

[98] The Applicant referred to the Transport Canada "Penalty ranges" for the Regulatory Impact Analysis Statement ("RIAS") to the *AMPRs, Canada Gazette, Part II, Volume 142, Number 8* on page 625. He submitted that fishing licences are issued by Fisheries and Oceans Canada and held by individuals, noting that such a licence is held by Jeffrey Durkee. While the Minister noted that this was not adduced into evidence, I am willing to take judicial notice of the fact that lobster licences are issued to individuals, not corporations, in Nova Scotia.

[99] The Applicant submitted that many fishermen use a limited corporation as a tax vehicle, arguing that the Applicant is a single-shareholder corporation based upon the individual who owns the license (Jeffrey Durkee). On that basis, the Applicant submitted that penalizing it as a corporation instead of an individual is punitive, noting that there is a wide difference between what the Applicant would have received as an individual for a first offence, versus what it would have received as a corporation. He further emphasized the size of the corporation, asserting that it is essentially an individual with a lobster boat, not a multi-national corporation.

[100] He noted the distinction in the RIAS between median penalties for individuals and corporations. He suggested that for an individual, the median first offence is a \$600 penalty and the median for a corporation is \$3 000. In this situation, the Minister chose the high amount of \$6 000 for a corporation on the basis that it is a high-gravity violation.

[101] The Applicant also argued that a spill involving 0.3 litres of a substance should not be considered a high gravity offence. He also submitted that the spill dissipated very quickly, was gone before the inspectors arrived and that there was no evidence of any harm to the environment.

[102] The Applicant argued that there could have been other sources for the pollutant which caused the slick. Referring to the testimony of both Messrs. Léger and Bowler, he asserted that the oil would have risen with the tide up into Sandford Harbour, toward the narrow entrance of the inner Harbour. He submitted that there could have been an oil source up-current from the Vessel. He also referred to the testimony that there were vehicles, bait barrels and other things on the wharf. He submitted that there is a great deal of traffic on the wharf which could have been the source of a pollutant.

[103] The Applicant noted that no samples were taken by the Transport Canada inspectors. The Applicant submitted that the Minister has not demonstrated, on a balance of probabilities, that the Vessel was the source of a pollutant.

### **C. Reply by the Minister**

[104] The Minister noted that it has zero tolerance when it comes to pollution incidents. She submitted that pollution is not to be taken lightly. The Minister also noted that the range of

penalties is from \$1 250 to \$25 000 according to the Schedule to the *AMPRs* for section 187 of the *Act*, emphasizing that at the highest level, a penalty could have been assessed at more than \$6 000.

[105] The Minister submitted that the Applicant was given the same option that is afforded to all persons who receive a notice of violation, which is to have an informal meeting with Transport Canada and express mitigating factors. The Minister submitted that the Applicant ignored this opportunity and chose not to speak with Transport Canada representatives, even after they had contacted the Applicant. The Minister submitted that the penalty was not assessed solely on the basis that the Applicant is a corporation; deterrence was also a factor in assessing the penalty.

[106] The Minister acknowledged that it would have been useful to have had evidence of the Vessel's corporate revenues to justify the penalty or to address the difference between an individual and a corporation. However, the Minister submitted that the status of the Applicant is only one factor that was considered. The Minister also noted that there is reason to believe that this is not the first time such a discharge had occurred from the Vessel. The Minister did confirm that the Applicant has no prior convictions.

## **VI. EVIDENCE, LEGISLATION AND POLICY ANALYSIS**

### **A. Expert testimony**

[107] The Minister sought to qualify two witnesses for expert opinion testimony:

1. Mr. Gulati as an expert with respect to the operation of vessel bilge systems; and
2. Mr. Léger as an expert in oil pollution observation.

[108] There are generally four criteria for the opinion of an expert to be admissible:

1. the evidence must be relevant;
2. it must be necessary;
3. it must not be excluded under some other exclusionary rule; and
4. the expert must be properly qualified.

[109] While section 15 of the *TATC Act* provides that I am not bound by the strict rules of evidence, the above factors remain relevant in determining whether to accept expert opinion and what weight to assign it.

[110] The testimony of Mr. Gulati covered his initiation of the on-scene investigation which was conducted by Messrs. Bowler and Arseneault. It also addressed aspects of the inspections of the Vessel conducted by Mr. Coggins. To the extent that Mr. Gulati's testimony and his Report (Exhibit M-4) reported on events witnessed by others, I prefer to rely upon the first-hand testimony of the witnesses. Mr. Gulati's testimony is largely hearsay, with the exception of his initial involvement in the commencement of the investigation. While his report (Exhibit M-4) is

a useful summary of the process, I place little weight on it from an evidentiary perspective because of its hearsay nature.

[111] I accept Mr. Gulati's testimony that he is a certified Chief Engineer in both the United Kingdom and Canada, though no other information was provided with respect to his qualifications that would have informed as to his ability to opine on the operation of the bilge systems for the Vessel. Mr. Gulati had no first-hand knowledge of the bilge system of the Vessel but I accept his ability as a Chief Engineer to describe the system from the schematic print. However, I prefer to rely upon the evidence of Mr. Coggins with respect to the description of the Vessel's bilge system since he inspected it. Mr. Gulati also offered the following as opinion evidence:

1. an explanation of how a float switch operates; and
2. whether a float switch system is required by the *Small Fishing Vessel Regulations*.

[112] Both Messrs. Coggins and Gulati described the operation of a float switch in the same way. I do not consider expert opinion necessary to explain this concept. However, I accept that Mr. Gulati, as a certified Chief Engineer, has sufficient qualifications to explain how such a switch operates.

[113] Mr. Gulati also testified that the bilge pump system on the Vessel went beyond that required by the *Small Fishing Vessel Regulations*. No detail was provided in this respect. As well, the Tribunal was provided no information on Mr. Gulati's background with respect to these Regulations other than the fact that this was his 13<sup>th</sup> pollution investigation. I find it unnecessary to qualify Mr. Gulati as an expert on this point as the particular opinion is, in my view, irrelevant to the proceedings and unnecessary for my findings. The Vessel is not charged with failing to meet the requirements of the *Small Fishing Vessel Regulations*. The evidence in respect of the bilge system is relevant to the question of how the discharge was caused, but Mr. Gulati's opinion on this point is not determinative.

[114] Mr. Gulati also briefly offered comment that the sheen below forward discharge point "OB-1" on the Vessel was indicative of a hydrocarbon. I do not accept Mr. Gulati's opinion on this point. He relied solely on his review after the fact of photographs taken by other witnesses and the Tribunal was provided with no information as to what training or qualifications Mr. Gulati has which would inform his ability to make this assessment.

[115] Mr. Léger testified with respect to his observation of the sheen surrounding the Vessel and provided opinion evidence that this sheen represented a hydrocarbon on the surface of the water. The assessment of whether the sheen is a hydrocarbon is clearly relevant and necessary to the proceedings, particularly given that no samples were available. I accept that Mr. Léger is qualified to assess whether sheen on water represents a hydrocarbon. Mr. Léger received training in 2005 and 2011 in the aerial observation of oil. His curriculum vitae (Exhibit M-5) indicates a reasonable amount of relevant training. While his practical experience with respect to oil pollution did not commence until 2007, his experience since that time seems more than adequate to demonstrate confirmation of his training. He testified that he has flown 557 missions as a crewmember and observer on pollution surveillance aircraft and documented 120 pollution incidents during that time.

[116] I note that both Messrs. Gulati and Léger were proffered to provide both first-hand testimony and expert evidence. The use of a witness in the dual role of both a fact and expert witness is somewhat unusual. However, this Tribunal is not bound by the strict rules of evidence. As noted above, I did not rely upon the expert testimony of Mr. Gulati as I found his opinions unnecessary for the purpose of my determination. I did accept Mr. Léger's qualification as an expert able to give opinion evidence regarding whether sheen on water represents a hydrocarbon. Mr. Léger's factual testimony related primarily to his having viewed and photographed the scene of the alleged pollution incident. The fact that Mr. Léger viewed the actual sheen on the water, albeit from an aircraft, rather than making his assessment purely from photographs, enhances the effectiveness of his opinion as to whether the sheen represented a hydrocarbon.

## **B. Elements of the Offence**

[117] For ease of reference, the offence as described in the Notice is repeated:

On or about April 4, 2011, at or near Sanford Harbour, Chegoggin Point, between Yarmouth and Digby in the province of Nova Scotia, the fishing vessel THUNDERCAT, Official number 821402, discharged a prescribed pollutant, thereby contravening section 187 of the *Canada Shipping Act, 2001*.

[118] The elements to be proven for an offence under section 187 of the *Act* are that:

1. there was a discharge of a prescribed pollutant, as defined in the *Act*;
2. the discharge came from the Vessel; and
3. the discharge was not authorized or excepted under applicable regulations.

[119] The third element can be dealt with quickly. The relevant Regulations are the *Pollution Regulations*. Section 41 deals with vessels in Section 1 waters and subsection 42(1) deals with vessels in Section 2 waters. Both sections authorize the discharge of an oily mixture from machinery spaces of a vessel if certain conditions are met. The Minister submitted that the Vessel was in Section 1 waters without adducing any evidence or argument on the point, but it is unnecessary to make this determination as I agree with the Minister that both of these sections would have only been applicable if the Vessel had been en route. Section 41 and subsection 42(1) of the *Pollution Regulations* are expressed such that all of the conditions of these provisions must be met for a discharge to be authorized. As the Vessel was clearly stationary, neither of these paragraphs are applicable and the discharge would not be authorized under the *Pollution Regulations*. Given this conclusion, the question of whether the amount of the substance exceeded five ppm, as expressed in clause 41(c)(ii)(A), is irrelevant.

[120] As no sample was taken of the substance in the water, the determination of the first element of the offence turns primarily on the testimony of Mr. Léger. Mr. Léger is the first person who actually saw the substance in and around the Vessel, albeit from an aircraft. I have no difficulty in accepting Mr. Léger's testimony as evidence that that substance in the water was a hydrocarbon. His training and experience are, in my view, sufficient to allow him to make the determination that the slick, which is apparent in the photographs (specifically Exhibits M-6c through M-6o) and the video (Exhibit M-6p), is a hydrocarbon which is a prescribed pollutant, specifically oil or an oily mixture.

[121] Mr. Léger testified that he is trained to conduct visual analyses based upon oil category codes and that he analyzed the slick visually in accordance with these codes, which are described in more detail in his Report (Exhibit M-7). He testified that the iridescence on the water was indicative of a hydrocarbon and during cross-examination was clear in his opinion that other substances would not create the same sustained iridescence. No evidence was adduced to contradict Mr. Léger's conclusions in this respect.

[122] While Mr. Léger alternatively referred to the substance as a hydrocarbon or oil, I accept that it was oil or an oily mixture, as referred to in paragraph 4(a) of the *Pollution Regulations* and would therefore be a prescribed pollutant.

[123] In addition, there is the testimony of Messrs. Bowler and Arseneault. While the slick observed by Mr. Léger was no longer present when these individuals arrived at the Vessel, they both testified that some small amount of oil was present in the water between the Vessel and the wharf. Regardless of whether this can be attributed to the Vessel, it is further confirmation that there was a discharge of a prescribed pollutant.

[124] I accept that, on the balance of probabilities, the evidence indicates that there was a discharge of a prescribed pollutant. The Minister has therefore met the first element of the offence.

[125] The primary question in this case is whether the discharge came from the Vessel. Since there is no evidence that anyone witnessed the source of the discharge, the Tribunal must determine whether the other evidence sufficiently connects the Vessel to the discharge on the balance of probabilities.

[126] A significant amount of evidence was adduced with respect to the forward discharge points and the starboard side of the Vessel's hull. Specifically, the Minister sought to demonstrate that the discharge came from forward discharge point "OB-1" as indicated on Schedule 1 to the Gulati Report (Exhibit M-4).

[127] While both Messrs. Bowler and Arseneault described the substance on the OB-1 discharge point as having the appearance of an oily residue, their testimonies varied as to whether it smelled of oil, with Mr. Bowler stating that it had no real aroma and Mr. Arseneault describing the substance as smelling of oil. It is unfortunate that no sample of the substance was taken. While I accept that obtaining a sample of the oil slick was impractical for an aerial sighting, the Inspectors could have easily taken a sample of this substance.

[128] I note that Mr. Bowler's written statement (Exhibit M-12) varies from his testimony and states that "the residue removed looked and had an aroma of oily substance". He testified, however, that he could not see or identify any aroma of oil. Because of the variance between his testimony and his statement, and because Mr. Arseneault was the one who physically examined forward discharge point "OB-1" and the substance on it, I prefer to rely upon the evidence of Mr. Arseneault. On the basis of Mr. Arseneault's testimony, I accept that there was oil or an oily mixture on forward discharge point "OB-1". In my view, most people can distinguish the odour of oil and I accept that given his background, Mr. Arseneault would be sufficiently familiar with the odour of oil to make such a distinction.

[129] Significant evidence was adduced in respect of the operation of the bilge system of the Vessel. In particular, Mr. Coggins confirmed that Pump Number 5, which led to the forward discharge point OB-1, was float switch operated. I understand from his evidence that the pump would automatically engage when fluid in the engine compartment reaches a certain level, pumping it out of forward discharge point "OB-1". However, Mr. Coggins confirmed under cross-examination that he never examined the wiring of the pumps on the Vessel and admitted that they could have been wired in a variety of ways. His evidence suggests that the pump could have been wired to pump regardless of whether the Vessel was under power or it could have been wired in a way that when the Vessel was not under power it would not operate. There was no evidence adduced by either the Applicant or the Minister as to how this pump would have actually operated when the Vessel was tied alongside with the power off.

[130] However, once it is accepted that oil or an oily mixture has emanated at some point from the forward discharge point of the Vessel's starboard side, the next obvious conclusion is that the shiny track below forward discharge point "OB-1" and down the starboard side of the Vessel is evidence that oil or an oily mixture had been discharged into water. The Applicant aptly points out that there is no way of knowing when the stains were deposited on the Vessel's hull below the forward discharge point. It is possible that the residue and stains were deposited at some point when the Vessel was out of the water, perhaps while she was in refit. It is also possible that the discharge occurred at some other time prior to April 4, 2011.

[131] The Tribunal is left with the presence of the slick around the Vessel. It is quite apparent in the photographs at Exhibits M-6c through M-6o that the slick is surrounding the Vessel. During the evidence there was some discussion about the impact of the tide. In particular, the Applicant suggested that with the tide coming in, the slick could have been discharged by another vessel closer to the outward part of Sandford Harbour and then moved inward to surround the Vessel. The Applicant adduced no evidence in respect of vessel traffic on that day. The progression of the slick in photographs (specifically Exhibits M-6c through M-6o) and the video (Exhibit M-6p) seem to indicate that the slick is moving from the Vessel, rather than passing by it. I see nothing to suggest migration of the slick from a different area of the Harbour.

[132] The Applicant also suggested in cross-examination and in his arguments that the slick could have emanated from another source on the wharf, perhaps a vehicle or one of the bait barrels. However, the Applicant adduced no evidence in this respect. Mr. Bowler testified that it was a dry day and that when they visited the wharf there was no indication of any liquids having run across the wharf. Of course, it must be noted that Mr. Bowler attended the scene approximately five and a half hours after the alleged incident. In the photographs at Exhibits M-6c through M-6o, which were taken much closer to the time of the incident, there is no obvious source of run-off on the wharf. It is possible that the discharge emanated from a source other than the Vessel. However, there is no evidence to support this theory. While the Minister has the burden of proof to demonstrate that the discharge came from the Vessel, the mere possibility of another source does not in itself overcome the other evidence.

[133] In my view, the following findings articulated above lead to the inevitable conclusion that, on the balance of probabilities, the Vessel discharged a prescribed pollutant:

1. there was oil or an oily mixture on the starboard forward discharge point on April 4, 2011;

2. at some point, that oil or oily mixture moved from the forward discharge point down the starboard side of the Vessel;
3. there was oil, albeit a small amount, in the water below the starboard forward discharge point between the Vessel and the wharf on April 4, 2011;
4. a slick of oil surrounded the Vessel on April 4, 2011;
5. this slick was observed to emanate from the location of the Vessel; and
6. there was no reliable evidence of any other source of the discharge.

[134] While no single one of these findings is conclusive, the totality of the evidence suggests that, on the balance of probabilities, the Vessel did in fact discharge a prescribed pollutant on April 4, 2011. The Minister has therefore proven all the elements of the offence.

### **C. Sanction**

[135] My authority to review the penalty is provided under subsection 232.1(4) of the *Act*, which reads as follows:

**232.1** (4) The member may confirm the Minister's decision or, subject to any regulations made under paragraph 244(*h*), substitute his or her own determination.

[136] Where the Minister has issued a Notice pursuant to subsection 229(1) of the *Act*, the penalty is to be fixed by, or fall within the range established by the Regulations made under Part II of the *Act*. Pursuant to paragraph 244(*h*) of the *Act*, the range of penalties that has been set out in item 69 of the Schedule to the *AMPRs*, for a violation regarding section 187 of the *Act*, is from \$1 250 to \$25 000.

[137] Under the *AMPRs*, the minimum penalty is \$1 250. The Minister has established guidelines and policies for sanction levels, reflected in the *RIAS* included in the Minister's Book of Authorities. These are just that, policies and guidelines to guide the Minister's representatives in determining an appropriate level of sanction. I am not bound by these policies and guidelines as they do not have the force of law. However, to the extent that they provide useful information on the appropriate level of sanction, I may consider them.

[138] The *AMPRs* do not clearly state which offences are considered low, medium or high-gravity. However, I am satisfied that this offence would likely attract a high level of gravity. The \$1 250 to \$25 000 range of penalties regarding section 187 of the *Act* makes this offence one which could attract the highest level of fine under the *AMPRs*. This further suggests that the violation is regarded as one of high gravity.

[139] The *RIAS* states on page 625 of the *Canada Gazette*, Part II, Volume 142, Number 8, without further elaboration that "[a]s a matter of general policy, vessels and corporations will be subject to higher penalties than individuals".

[140] I am not satisfied that sufficient rationale is provided in the *RIAS* for vessels and corporations to automatically be assigned a higher level of fine. The assessment of the need for deterrence may lead to this conclusion but, in my view, a level of consideration is required before reaching the conclusion that a corporation merits a higher level of fine in any given case.

In this respect, I agree with Tribunal Member C. Michael Keefe's comments at paragraph [42] of *D & C Management Ltd. v. Canada (Minister of Transport)*, 2010 TATCE 6 (Review), TATC File No. MP-0023-37, that "justice is not served when one bases the amount of a penalty on departmental policy with the class or status of an offender being the determining factor".

[141] There are both mitigating and aggravating circumstances to consider in the present case.

[142] The Minister indicated that this is a first offence for the Applicant. Applying the guidelines in the *RIAS*, this suggests that the range of possible penalties should be from \$1 250 to \$6 000. There was some suggestion in the evidence of Mr. Coggins that there could have been another discharge from forward discharge point "OB-1" on the Vessel based upon his observation of similar staining on the hull of the Vessel which he observed and photographed on October 4, 2011 (Exhibit M-16). As before, no samples were taken so the Tribunal has no way of knowing whether this is a new stain or the same one observed by Messrs. Bowler and Arseneault on April 4, 2011. There is simply insufficient evidence for the Tribunal to draw any conclusions that the Vessel might have discharged a prescribed pollutant on dates other than April 4, 2011.

[143] I acknowledge the policy stated in the *RIAS* that, as a matter of general policy, vessels and corporations will be subject to higher penalties than individuals. In my view, this does not obviate the obligation placed upon the Minister to bring evidence to demonstrate why an accused vessel or an accused corporation merits a higher penalty, particularly in the case of fishing enterprises which have a broad spectrum of size. The Tribunal has no evidence before it to determine why the Vessel merits a higher range of penalty than an individual. Accordingly, I do not consider the minimum penalty to be \$6 000. I consider the range of penalties for a first offence to be from \$1 250 to \$6 000.

[144] The Minister points out that the discharge was never reported by the Applicant and that the Applicant did not avail itself of opportunities to present mitigating factors after the Notice had been issued. There is no evidence as to when the Applicant became aware of the discharge, other than the testimony of Mr. Bowler that he left a message on Jeffrey Durkee's answering machine. It seems to me that little would be gained by reporting a discharge once Transport Canada had already identified it and arrived on scene. Clearly, the Vessel was unoccupied at the time that Messrs. Bowler and Arseneault arrived so it seems unlikely that the Applicant had the opportunity to report the discharge prior to that time. I accord the failure to report little weight as an aggravating factor and place no weight on the Applicant's failure to engage in subsequent discussions with Transport Canada, as it was not obliged to do so.

[145] The amount of pollutant discharged was 0.3 litres according to the testimony of Mr. Léger. While even a small amount of oil can spread over a large area, this discharge was not what could be considered a large spill. In addition, the evidence is that it dissipated relatively quickly, certainly before Messrs. Bowler and Arseneault arrived on the scene. There was no evidence adduced with respect to any environmental harm caused by the discharge. Nevertheless, any discharge of oil or an oily mixture into water remains a serious matter which in my view merits more than the minimum level of penalty. The fact that even small amounts are considered serious by Parliament is reflected in the low threshold amounts found in sections 41 and 42 of the *Pollution Regulations*.

[146] The mitigating factors discussed above suggest that the highest level in the first-offence range is more than would be necessary to achieve the appropriate deterrent effect. In view of all of the factors, I consider a fine of \$3 000 to be an appropriate level of penalty.

## **VII. DETERMINATION**

[147] The Minister of Transport has proven, on a balance of probabilities, that the Applicant, F/V *Thundercat*, violated section 187 of the *Canada Shipping Act, 2001*. Due to mitigating factors, I reduce the penalty from \$6 000 to \$3 000.

May 8, 2012

(Original signed)

David G. Henley

Member