

TRANSPORTATION APPEAL TRIBUNAL OF CANADA

BETWEEN:

S.S. Oceanic, Applicant

- and -

Minister of Transport, Respondent

LEGISLATION:

Canada Shipping Act, 2001, S.C. 2001, c. 26, para. 23(b), (c) and section 187

**Review Determination
Barrie LePitre**

Decision: January 23, 2012

Citation: *S.S. Oceanic (The) v. Canada (Minister of Transport)*, 2012 TATCE 5 (Review)

Heard in Vancouver, British Columbia, on August 9, 2011

Held: The Minister of Transport has not proven, on a balance of probabilities, that the Applicant, the *S.S. Oceanic*, is liable for the violation alleged in Violation No. 1, Violation No. 2, or Violation No. 4 of the Notice of Violation or has violated the relevant provision of the *Canada Shipping Act, 2001* as alleged in Violation No. 3 of the Notice of Violation. As a result, the penalty of \$7 800 for each of Violation No. 1, Violation No. 2, Violation No. 3 and Violation No. 4 is dismissed. Violation No. 5 of the Notice of Violation was withdrawn by the Minister of Transport.

I. BACKGROUND AND INTRODUCTION

[1] The Minister of Transport ("Minister") issued a Notice of Violation ("Notice") pursuant to the *Canada Shipping Act, 2001* ("Act"), dated November 26, 2009, to the vessel *S.S. Oceanic*. In the Notice under "Vessel particulars" the following is indicated: the name of the vessel as the "*S.S. OCEANIC*"; the type of vessel as "Passenger – Cargo"; the port of registry as "Valletta, Malta"; and the year built as "1961". Under "Authorized representative particulars" the following is indicated: the name of the Authorized Representative as "Capt. Georgios Antonellos Master of

S.S. *OCEANIC*"; and the address of the Authorized Representative as "Seahawk North America LLC", located in Miami Lakes, Florida, USA.

[2] In Schedule 'A' to the Notice, the details of and penalties for the alleged violations are specified as follows:

No.	Violation	Penalty
1	<p>On or about July 27, 2009, at or near the city of Vancouver in the province of British Columbia, Mr. GEORGIOS BALTAS knowingly omitted to make an entry regarding the taking on board of fuel in a log book required to be kept under the <i>Canada Shipping Act, 2001</i> with intent to mislead, thereby contravening paragraph 23(b) of that <i>Act</i>.</p> <p>Pursuant to sub-section 238(2) of the <i>Act</i>, the vessel S.S. OCEANIC is being proceeded against as the employer or principal of Mr. GEORGIOS BALTAS in respect of this violation and is liable for a penalty provided as punishment for it.</p>	\$7,800.00
2	<p>On or about July 27, 2009, at or near the city of Vancouver in the province of British Columbia, Mr. GEORGIOS BALTAS knowingly omitted to make an entry regarding an internal oil spill on board in a log book required to be kept under the <i>Canada Shipping Act, 2001</i> with intent to mislead, thereby contravening paragraph 23(b) of that <i>Act</i>.</p> <p>Pursuant to sub-section 238(2) of the <i>Act</i>, the vessel S.S. OCEANIC is being proceeded against as the employer or principal of Mr. GEORGIOS BALTAS in respect of this violation and is liable for a penalty provided as punishment for it.</p>	\$7,800.00
3	<p>On or about July 30, 2009, at or near the city of Vancouver in the province of British Columbia, S.S. OCEANIC discharged a prescribed pollutant, namely oil or oily waters, thereby contravening section 187 of the <i>Canada Shipping Act, 2001</i>.</p>	\$7,800.00
4	<p>On or about July 31, 2009 at or near the city of Vancouver in the province of British Columbia, Capt. GEORGIOS ANTONELLOS, the master of S.S. OCEANIC, wilfully obstructed Marine Safety Inspector KHUSHRU IRANI or ISRAR WAHEED who were exercising powers or performing duties under the <i>Canada Shipping Act, 2001</i> thereby contravening paragraph 23(c) of that <i>Act</i>.</p> <p>Pursuant to sub-section 238(2) of the <i>Act</i>, the vessel S.S. OCEANIC is being proceeded against as the employer or principal of Capt. GEORGIOS ANTONELLOS in respect of this violation and is liable for a penalty provided as punishment for it.</p>	\$7,800.00
5	<p>On or about August 1, 2009, at or near Vancouver Island, in approximate position Lat.49 deg 34.5' North and Long.128 deg. 38.2' West, in the province</p>	\$15,600.00

	of British Columbia, S.S. OCEANIC discharged a prescribed pollutant, namely oil or oily waters, thereby contravening section 187 of the <i>Canada Shipping Act, 2001</i> .	
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II. STATUTES, REGULATIONS AND POLICIES

[3] At the time of the alleged violations, section 2 of the *Act* provided the following applicable definitions:

"*authorized representative*" means, in respect of a Canadian vessel, the person referred to in subsection 14(1) and, in respect of a foreign vessel, the master.

"*Canadian vessel*" means a vessel registered or listed under Part 2 (Registration, Listing and Recording).

"foreign vessel" means a vessel that is not a Canadian vessel or a pleasure craft.

"prescribed" means prescribed by regulations made by the Governor in Council.

"vessel" means a boat, ship or craft designed, used or capable of being used solely or partly for navigation in, on, through or immediately above water, without regard to method or lack of propulsion, and includes such a vessel that is under construction. It does not include a floating object of a prescribed class.

[4] Section 8, paragraphs 23(b) and (c), subsection 186(1) and section 187 of the *Act* provide as follows:

8. This Part applies in respect of Canadian vessels everywhere and in respect of foreign vessels in Canadian waters, but regulations made under paragraph 35(1)(d) in respect of pollution apply, if they so state, in respect of foreign vessels in waters in the exclusive economic zone of Canada.

23. No person shall

...

(b) make or cause to be made a false entry in a log book required under this Act to be kept with intent to mislead or wilfully omit to make an entry;

(c) wilfully obstruct any inspector or other person or classification society or other organization that is exercising powers or performing duties under this Act;

186.(1) Subject to subsection (2), this Part applies in respect of vessels in Canadian waters or waters in the exclusive economic zone of Canada.

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](#).

[5] Section 210 of the *Act* provides the applicable definition for "relevant provision":

"*relevant provision*" means a provision of this Act or the regulations that the Minister is responsible for administering...

[6] Subparagraph 229(1)(b)(i), section 232.1, subsections 232(1) and 238(2) and paragraphs 244(f) and (h) of the *Act* provide 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

232.(1) A person or vessel served with a notice of violation under paragraph 229(1)(b) must

(a) pay the amount of the penalty; or

(b) within thirty days after being served or any further time that the Tribunal on application allows, file with the Tribunal a written request for a review of the facts of the violation or the amount of the penalty.

232.1(1) On receipt of a request filed under paragraph 232(1)(b), the Tribunal must appoint a time and place for the review and must notify the Minister and the person who, or vessel that, filed the request of the time and place in writing.

(2) The member of the Tribunal assigned to conduct the review must provide the Minister and the person or vessel with an opportunity consistent with procedural fairness and natural justice to present evidence and make representations.

(3) The burden is on the Minister to establish that the person or vessel committed the violation referred to in the notice. The person is not required, and must not be compelled, to give any evidence or testimony in the matter.

(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.

238.(2) A person or vessel is liable for a violation that is committed by an employee or agent of the person or vessel acting in the course of the employee's employment or within the scope of the agent's authority, whether or not the employee or agent who actually committed the violation is identified or proceeded against in accordance with this Act.

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

...

(f) designating as a violation that may be proceeded with in accordance with sections 229 to 242 the contravention of a relevant provision that is an offence under this Act;

...

(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;

[7] Paragraph 44(g) of the *Interpretation Act*, R.S.C. 1985, c. I-21 provides as follows:

44. Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,

...

(g) all regulations made under the repealed enactment remain in force and are deemed to have been made under the new enactment, in so far as they are not inconsistent with the new enactment, until they are repealed or others made in their stead...

[8] Subsection 8(1) of the *Vessel Certificates Regulations*, SOR-2007-31, ("VCRs"), made under the *Act*, provides as follows:

- 8.**(1) The authorized representative of a foreign vessel in Canadian waters shall ensure that
- (a) the documents required to be carried on board by an international convention, protocol or resolution listed in Schedule 1 to the *Act* are on board; and
 - (b) the requirements that were to be met for the issuance of those documents are met.

[9] Paragraphs 3(1)(b), 4(a) and 8(a), (b) and (d) and subsections 51(1) and (3) of the *Regulations for the Prevention of Pollution from Ships and for Dangerous Chemicals*, SOR/2007-86 ("RPP"), made under the *Act*, provide as follows:

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

...

(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;

8. Sections 9, 10, 40, 82, 83, 108, 128 and 139 respecting the discharge of a pollutant and Division 6 respecting the pollution of the air do not apply if

(a) a discharge is necessary for the purpose of saving lives, securing the safety of a ship or preventing the immediate loss of a ship;

(b) a discharge occurs as a result of an accident of navigation in which a ship or its equipment is damaged, unless the accident occurs as a result of an action that is outside the ordinary practice of seamen;

...

(d) a discharge is made for the purpose of scientific research into pollution abatement or control in accordance with permission granted by the Minister;

51.(1) A ship of 400 tons gross tonnage or more that carries oil as fuel or as cargo and an oil tanker of 150 tons gross tonnage or more shall keep on board an Oil Record Book, Part I (Machinery Space Operations) in the form set out in Appendix III to Annex I to the Pollution Convention.

...

(3) The master of a ship of 400 tons gross tonnage or more that carries oil as fuel or as cargo or of an oil tanker of 150 tons gross tonnage or more shall

(a) ensure that

(i) the machinery space operations referred to in regulation 17.2 of Annex I to the Pollution Convention and the discharges referred to in paragraphs 8(a), (b) and (d) are recorded in English or French in the Oil Record Book, Part I (Machinery Space Operations) without delay each time the operations and discharges take place, and

(ii) any failure of the oil filtering equipment is recorded in the Oil Record Book, Part I (Machinery Space Operations) without delay;

(b) ensure that each recorded entry in the Oil Record Book, Part I (Machinery Space Operations) is signed by the officer in charge of the operation; and

(c) sign each page of the Oil Record Book, Part I (Machinery Space Operations).

[10] Regulations 7.1 and 17 of Annex I to the International Convention for the Prevention of Pollution from Ships ("MARPOL") (referred to as the "Pollution Convention" under the previous *Canada Shipping Act*, R.S.C. 1985, c. S-9 and, therefore, under the *RPP* as well, but now often referred to as "MARPOL") provide as follows.

Regulation 7

Issue or endorsement of certificate

...

1 An International Oil Pollution Prevention Certificate shall be issued, after an initial or renewal survey in accordance with the provisions of regulation 6 of this Annex, to any oil tanker of 150 gross tonnage and above and any other ships of 400 gross tonnage and above which are engaged in voyages to ports or offshore terminals under the jurisdiction of other Parties to the present Convention.

Regulation 17

Oil Record Book, Part I – Machinery space operations

1 Every oil tanker of 150 gross tonnage and above and every ship of 400 gross tonnage and above other than an oil tanker shall be provided with an Oil Record Book Part I (Machinery space operations). The Oil Record Book, whether as a part of the ship's official log-book or otherwise, shall be in the form specified in appendix III to this Annex.

2 The Oil Record Book Part I shall be completed on each occasion, on a tank-to-tank basis if appropriate, whenever any of the following machinery space operations takes place in the ship:

- .1 ballasting or cleaning of oil fuel tanks;
- .2 discharge of dirty ballast or cleaning water from oil fuel tanks;
- .3 collection and disposal of oil residues (sludge and other oil residues);
- .4 discharge overboard or disposal otherwise of bilge water which has accumulated in machinery spaces; and
- .5 bunkering of fuel or bulk lubricating oil.

3 In the event of such discharge of oil or oily mixture as is referred to in regulation 4 of this Annex or in the event of accidental or other exceptional discharge of oil not excepted by that regulation, a statement shall be made in the Oil Record Book Part I of the circumstances of, and the reasons for, the discharge.

4 Each operation described in paragraph 2 of this regulation shall be fully recorded without delay in the Oil Record Book Part I, so that all entries in the book appropriate to that operation are completed. Each completed operation shall be signed by the officer or officers in charge of the operations concerned and each completed page shall be signed by the master of ship. The entries in the Oil Record Book Part I, for ships holding an International Oil Pollution Prevention Certificate, shall be at least in English, French or Spanish. Where entries in an official national language of the State whose flag the ship is entitled to fly are also used, this shall prevail in case of a dispute or discrepancy.

5 Any failure of the oil filtering equipment shall be recorded in the Oil Record Book Part I.

6 The Oil Record Book Part I shall be kept in such a place as to be readily available for inspection at all reasonable times and, except in the case of unmanned ships under tow, shall be kept on board the ship. It shall be preserved for a period of three years after the last entry has been made.

7 The competent authority of the Government of a Party to the present Convention may inspect the Oil Record Book Part I on board any ship to which this Annex applies while the ship is in its port or offshore terminals and may make a copy of any entry in that book and may require the master of the ship to certify that the copy is a true copy of such entry. Any copy so made which

has been certified by the master of the ship as a true copy of an entry in the ship's Oil Record Book Part I shall be made admissible in any judicial proceedings as evidence of the facts stated in the entry. The inspection of an Oil Record Book Part I and the taking of a certified copy by the competent authority under this paragraph shall be performed as expeditiously as possible without causing the ship to be unduly delayed.

[11] Subsections 2(1) and (2) of the *Administrative Monetary Penalties Regulations*, SOR/2008-97 ("*AMPRs*"), which are made under the *Act*, provide as follows:

2.(1) The contravention of a provision of the Act set out in column 1 of the schedule is designated as a violation that may be proceeded with in accordance with sections 229 to 242 of the Act and by the issuance of a notice of violation.

(2) The range of penalties set out in column 2 of the schedule is the range of penalties in respect of a violation set out in column 1.

[12] The Schedule to the *AMPRs* sets out the penalty ranges for the applicable provisions of the *Act*. For paragraphs 23(b) and (c) and section 187 of the *Act*, the range of penalties is from \$1 250 to \$25 000.

[13] According to the policy framework described under 'Penalty ranges' in the Regulatory Impact Analysis Statement ("*RIAS*") that accompanies the *AMPRs*, a violation of paragraph 23(b) or (c), or section 187 of the *Act* is regarded as a high-gravity violation; as such, the minimum penalty payable by an individual for a first violation is \$1 250 and the minimum penalty payable by a vessel for a first violation is \$6 000.

III. EVIDENCE

A. Minister

(1) *Ronald Ferris*

[14] Ronald Ferris was working as a Longshoreman at Canada Place on July 30, 2009, for Ceres Corp, a company that manages ships. He was there to watch the gangway of the *S.S. Oceanic*, which was tied up to the Canada Place Pier ("*Pier*"). He began his shift at 1:00 a.m. and ended it at about 7:50 a.m.

[15] When Mr. Ferris first arrived that night he could smell fumes of oil of some kind. He indicated that this happens on the waterfront once in a while, but the difference that night was that the smell was continuous. While it was still dark, he looked down and saw some bubbles coming up. When there was enough light he could see that it was dark oil, thick and black.

[16] Selected from 19 photographs entered together later as an exhibit (Exhibit M-1), several photographs were shown to Mr. Ferris. He described Photograph 4 as showing the *S.S. Oceanic* adjacent to the Pier and as showing something dark, not really water, which looks like it is coming from a hole in the vessel. He indicated that it was oil flowing out of the vessel; he said it was black so it had to be oil and that it was thick and not just a film. Mr. Ferris indicated that Photograph 19 showed air coming from the same hole pictured in Photograph 4. Just after daylight, he could see a shine on the water underneath the Pier to the other side of the Pier, which looked like tar on the water. The Applicant's Representative objected to Mr. Ferris'

evidence on the grounds that he had not been qualified as an expert and was expressing his opinion about what the substance in the water was.

[17] Mr. Ferris indicated that Photograph 9 shows a white containment buoy, with something cotton-like in the netting, that would normally be used for controlling and absorbing oil spills or any spill that floats on top of the water. He was not sure who deployed the white containment buoy.

[18] Mr. Ferris indicated that Photograph 1 shows an orange containment buoy which was unloaded from the deck of the *S.S. Oceanic*. Using a lifeboat lowered from the vessel, the vessel's crew placed the orange containment buoy around the substance in the water. The speed with which the crew deployed the orange containment buoy gave him the impression that the crew had done this before. He concluded that the orange containment boom had been used before because parts of it were already black before it first went into the water.

[19] During cross-examination, Mr. Ferris indicated that he was first registered as a longshoreman in 1981. His training as a longshoreman has not included shipboard operations, such as mechanical operations in the engine room.

[20] Mr. Ferris indicated that the Pier is a cruise ship terminal on the waterfront of Burrard Inlet, which is part of a waterway that extends for several miles. On the east side of the terminal is Berth 4, where two cruise ships can moor in line, one facing north and one south. On the west side of the terminal are Berth 1, which is closest to the shoreline, and Berth 2 which is further out; both are parallel to the east side. At the outer end of the west side is Berth 3, which is angled to a point where it meets the east side. He indicated that, on July 30, 2009: the *S.S. Oceanic* was at Berth 2; another cruise ship was at Berth 1; and there were no ships on the east side of the terminal. The other cruise ship which had been docked there, the name of which he could not recall, had left between 1:00 a.m. and 2:00 a.m. that day.

[21] Mr. Ferris indicated that the substance he saw in the water could not have come from the other cruise ship because: there were no waves; the tide was slack or the current was slow; and the substance was between the Pier and the side of the vessel (the *S.S. Oceanic*). The tide range can vary from 1 or 2 feet to 16 feet, but he could not recall the tide range for the morning of July 30, 2009. Standing on the Pier, he was 10 to 12 feet away from the water's surface. The substance in the water beside the vessel was thick, black and like tar on the water. On the other side of the Pier, it was a thin, discoloured film and he thought it was oil because it was like a rainbow. However, later during his evidence he acknowledged that he did not see how the substance might have moved around the Pier or its piles while it was dark, and he did not know what was bubbling out of the vessel. He indicated that daylight came between 4:00 a.m. and 4:30 a.m. that day. He never touched the substance in the water nor took a sample of it and could not categorically state that the substance was oil. He believes that something was being pumped out of the vessel, but he does not know what it was.

(2) Mark Bulgin

[22] Mark Bulgin is in his sixth season as a Longshore Supervisor at Ceres Corp. At about 5:00 a.m. on July 30, 2009, he was in his office when he received a telephone call from one of

the "upstairs coordinators" asking if he had smelled diesel fuel. He then drove to the north end of the Pier where it looked like somebody had spilled gasoline or fuel into the water due to a rainbow discolouration on top of the water on the east side of the Pier. He then drove to the west side of the Pier where the *S.S. Oceanic* was tied up and noticed that there was an oil slick or sludge on top of the water.

[23] Mr. Bulgin was shown a photograph which he had taken (Exhibit M-2). Referring to the photograph, he indicated that he noticed that there was a bubbling or burping sound coming from the side of the vessel and that a black liquid was coming out of its side, from a hole shown in the middle of the photograph. He was not sure if the hole was the bilge hole or an exhaust. He stated that the rainbow effect on the east side of the Pier continued on to the edge of the vessel where it looked like sludge about an inch thick, and which looked like pudding or Jell-O where it was burping or percolating as well as like a gel on top of the water.

[24] Mr. Bulgin indicated that the hole shown in Photograph 4 of Exhibit M-1 is the same as the one shown in his photograph (Exhibit M-2) and that it showed the same substance coming from the hole. He indicated that he has had quite a bit of experience with outboard motors and that he is familiar with the rainbow effect from fuel on the water.

[25] Mr. Bulgin attempted to contact the Captain of the vessel, but was abruptly met by security personnel who would not let him onto the vessel. Standing on the gangway along the side of the vessel, he noticed that the vessel's crew had already started putting out its oil booms without anybody alerting them that there had been an oil spill. He indicated that Photograph 1 of Exhibit M-1 shows a white oil boom that looks like a sock with cotton stuffed in it, along the front of the vessel. He indicated that Photograph 1 also shows an orange oil boom.

[26] During cross-examination, Mr. Bulgin indicated that he had been a Longshore Supervisor for eighteen months with another company before beginning his work with Ceres Corp. and that he had worked in the rail industry before that. He has had no training in shipboard operations.

[27] Mr. Bulgin first became involved in this matter when he was informed that a security officer had noticed a heavy diesel smell and so Mr. Bulgin went to investigate. He testified that Mr. Ferris was also working during the night in question and that Mr. Ferris was located at the base of the gangway to the *S.S. Oceanic* during his shift.

[28] Mr. Bulgin indicated that although he saw the oil boom in the water, he did not see it being taken off the vessel. He indicated that he did not alert the vessel about an oil spill and that he did not know how the vessel's crew came to know about the oil in the water. He stated that he saw something black in the water coming out of a hole in the vessel. He did not touch or sample the substance, but he could see it and he could smell diesel. From what he saw and smelled, he believes that it was oil. When questioned by the Applicant's Representative, he acknowledged that he does not know whether "black sludge" had entered the hole from the water and was then being pushed back out of it by a different substance. He indicated that the hole is partially below and above the water.

[29] Mr. Bulgin indicated that when he arrived for his shift at 1:00 a.m. on July 30, 2009, another cruise ship, the *Seven Seas Mariner*, was at the east side of the Pier, directly across from

the *S.S. Oceanic*. He could not indicate how the tide was moving at the time in question, but agreed that generally, when it is dropping, the water moves from east to west in Burrard Inlet. He believes that the *Seven Seas Mariner* left the Pier around 2:00 a.m. and he could not say whether the black substance in the water came from the *Seven Seas Mariner*.

[30] During re-examination, Mr. Bulgin indicated that, when he arrived at the Pier, he saw a rainbow effect in the water on the east side, heading towards but not yet reaching the *SeaBus*. By 6:00 a.m. on July 30, 2009, it had migrated and booms were being placed all the way over to the *SeaBus*.

(3) Cathy McDonald

[31] Cathy McDonald has been a Harbour Patrol Officer with the Port of Vancouver for about four years. She has a "Master, Limited for a Vessel of 60 Gross Tonnage or More" certificate and she has some marine experience.

[32] Shortly after 5:00 a.m., on July 30, 2009, Ms. McDonald and the master of a harbour boat, Yves Gauthier, were at a boathouse about 1 000 metres east of Canada Place when they received a call from Vessel Traffic Services ("VTS") asking them to investigate a report of oil and a strong smell of oil, on the water between Canada Place and Centerm (east of Canada Place). They went over to Canada Place on the harbour boat, where she saw oil and a sheen radiating around the *S.S. Oceanic* and then she boarded the Pier from the harbour boat. In between the *S.S. Oceanic* and the Pier, she saw that the water was thick with oil. She also saw the crew of the *S.S. Oceanic* deploying some white boom around the vessel.

[33] Ms. McDonald stated that she had taken the nineteen photographs (Exhibit M-1). She indicated that Photograph 1 of Exhibit M-1 shows the crew deploying a containment boom at the forward end of the *S.S. Oceanic*, at the "point of Canada Place" on the west side. When asked about items in the photograph, she identified the "white thing coming out" as a sorbent boom which absorbs oil from the surface of the water and the "orange thing" as a containment boom to hold in the oil.

[34] Ms. McDonald indicated that Photograph 2 of Exhibit M-1 shows, on the port side of the *S.S. Oceanic*, a heavy layer of oil dissipating into a rainbow sheen and a thick layer of oil stuck onto the side of the vessel; the port side of the vessel being the side that was not against the wharf. Ms. McDonald indicated that Photograph 3 shows a sheen on the port side at the stern of the *S.S. Oceanic*. She indicated that Photograph 4 shows an overboard valve with oil rippling out and that it was the thickest there. She indicated that Photograph 5 shows an oil sheen at the forward end of the *S.S. Oceanic*. She stated that although there was oil all around the vessel, it was lighter on the side where it was not coming out.

[35] Ms. McDonald indicated that Photograph 6 of Exhibit M-1 shows, on the port side of the *S.S. Oceanic*, sorbent pads that the crew deployed to try to absorb the oil which had escaped from the ship, but that the pads were not very effective because there was a lot of oil. She indicated that Photograph 7 shows thick oil sticking to the side of the ship, probably the thickest that she has experienced when attending to spills at the Port of Vancouver.

[36] Ms. McDonald indicated that Photographs 8 and 9 of Exhibit M-1 show a sorbent boom deployed at the bow of the *S.S. Oceanic*. She indicated that she took Photograph 10 to show how thick the oil was on the starboard side of the vessel where it was coming out. With regard to Photograph 11, again showing the starboard side of the vessel but viewed more from the stern, she recalled that the discharge point was between the two bumpers (camels) shown in the picture. She indicated that Photograph 12 again shows how thick the oil was, and that Photograph 13 also shows oil rippling out. She indicated that Photograph 19 shows something being discharged from the side of the *S.S. Oceanic*, but that it might be discharging from a different position than from where she had earlier indicated she saw a substance being discharged.

[37] Ms. McDonald indicated that her work involves responding to oil spills and other marine incidents and that she has seen oil many times. Referring to the alleged oil spill, she indicated that it smelled like oil, it looked like oil, and it was oil. She stated that her work has involved oil deliveries and oil changes on boats.

[38] Ms. McDonald indicated that she saw the crew deploying sorbent pads, a sorbent boom and a containment boom. At the end of her shift, she and Mr. Gauthier headed back to the boathouse to put some boom on board so that the next harbour boat crew could deploy it since the *S.S. Oceanic* did not seem to have enough supplies to contain the oil around the vessel.

[39] During cross-examination, Ms. McDonald was asked about her marine experience. She indicated that she has done a lot of recreational boating; that she worked for a short time as a deckhand for B.C. Ferries; and that she has taken a four-month bridge watchman course on seamanship and collision regulations. She has minimal training or experience with the mechanical operations of ships and was unaware that the *S.S. Oceanic* is a steamship.

[40] On July 30, 2009, when Ms. McDonald returned to the boathouse, Mr. Gauthier asked her to prepare an incident report, which she sent to him by email at 7:50 a.m. that day. A copy of the email report, which Ms. McDonald signed on August 6, 2009, has as its first entry: "05:05 – VTS reports spill" (Exhibit A-1). The telephone call from VTS was Ms. McDonald's first indication that something had occurred at Canada Place. Although she had been on patrol at Canada Place earlier, it was dark and she did not notice anything. She could not recall whether a cruise ship other than the *S.S. Oceanic* was docked at Canada Place.

[41] Ms. McDonald indicated that Mr. Gauthier took a sample from the water sheen, but she was not on the harbour boat when he took it and did not see him taking it. She saw something being pumped from a hole in the *S.S. Oceanic* and she smelled oil from the Pier, but she did not go down to the hole and smell what was being pumped out, nor did she take a sample of it. She acknowledged the possibility that the black substance in the water could have flowed into the hole and was being pushed out by something else being discharged from the vessel. She also acknowledged the possibility that the black substance could have come from another vessel, but there were no other vessels around when she was on the Pier.

[42] Ms. McDonald indicated that she does not know how the tide might have moved the substance in the water. She agreed that the Pier is constructed on pilings and that water circulates through the pilings under the Pier. She stated that the Pier is 10 or 12 feet above the water and that the *S.S. Oceanic* was about 10 or 12 feet away from the Pier. With regard to Photograph 7 of

Exhibit M-1, Ms. McDonald acknowledged that the black substance could have been on "ripples" in the hull of the *S.S. Oceanic*.

[43] With regard to the 19 photographs (Exhibit M-1), there was a cover page that was not entered into evidence with the agreement of the Applicant's and Minister's Representatives.

(4) Captain Khushru Irani

[44] Captain Khrushru Irani is a Senior Marine Inspector with Marine Safety, Transport Canada, in Vancouver, and he is also a qualified Master Mariner. He has sailed on various ships at sea and has worked as a Marine Surveyor.

[45] Captain Irani explained that, under two international memoranda of understanding to which Canada is a signatory, a ship of another flag state that comes into a member's waters can be subjected to a Port State Control (PSC) inspection. Once each season, Transport Canada inspects cruise ships which come into Canadian ports. On July 27, 2009, Captain Irani and another Senior Marine Inspector, Param Mangat, boarded the *S.S. Oceanic* because the vessel was scheduled for a PSC inspection. The inspection revealed eighteen deficiencies, some of which led to a detention of the vessel, but none were related to the allegations in the Notice. As the inspection was beginning, a fuel barge was tied up alongside the *S.S. Oceanic*. As to whether any fuel was taken on board at that time, the inspectors understood that the *S.S. Oceanic* was scheduled to take on fuel and they saw hoses connected to the barge. After the inspection had been completed, they returned to their office to do follow-up work which had arisen from detaining the vessel.

[46] Captain Irani indicated that, on July 30, 2009, his manager asked him to assist another colleague, Israr Waheed, a Senior Marine Inspector, in investigating an oil spill observed around a vessel tied up at the Pier. That vessel was the *S.S. Oceanic*, which he boarded around 8:14 a.m. When he and Mr. Waheed boarded the vessel, it had a legal representative on board. They advised him of the purpose of their visit, and asked to see some of the vessel's documents, especially the Oil Record Book, which was given to them. Furthermore, the Chief Engineer, Georgios Baltas, had prepared a written statement of facts, a copy of which was also given to them. Captain Irani stated that, in the Oil Record Book, the "Chief Engineer or Master" is required to record oil transfers and any oil spill incident, yet the vessel's Oil Record Book did not contain an entry for fuel bunkering on July 27, 2009. During a conversation between Mr. Baltas and the inspectors, Mr. Baltas indicated that some transfers had taken place that day, but that the figures in the Oil Record Book for oil in the tanks that day did not match with the figures for the day before. Mr. Baltas explained the discrepancies as an error in the figures.

[47] Captain Irani was then shown four pages which he stated were copied from the Oil Record Book of the *S.S. Oceanic* (Exhibit M-3). As the first date at the top of the left column on the first page was partially cut off, Captain Irani agreed with the Minister's Representative that the first identifiable date, halfway down the left column on that page, is July 26, 2009. The second column indicates, by code letter, the sort of operation being done. The next column indicates, by code letter and number, a subset of the type of operation. Captain Irani indicated that the meaning of the code letters and numbers is given at the front of the Oil Record Book.

[48] Captain Irani was asked to explain where there is a discrepancy in the Oil Record Book with regard to taking on fuel. He started with the second page of Exhibit M-3, indicating that the second entry on that page, dated July 27, 2009, describes the "18 starboard dirty tank" as having a total capacity of 93 cubic metres (m³); and the second entry also indicates that a transfer of 20 m³ of oily bilge water from a tank to Vancouver shore facilities left 10 m³ in that tank. He indicated that the first entry on the third page of Exhibit M-3, dated July 28, 2009, describes a transfer of 20 m³ of bilge water from the "engine room, generator room", to the "18 starboard dirty tank", as leaving 50 m³ in the tank. The entry did not describe 30 m³ remaining in the tank, which, in his opinion, would have been the result of adding 20 m³ on July 28, 2009, to the 10 m³ remaining on July 27, 2009. He supposed this meant there were additional cubic metres of unaccounted "oil" transfer.

[49] Captain Irani was asked whether he made inquiries regarding the bunkering operation of July 27, 2009 and he replied that he contacted Seaspan, which he had been told was involved in towing the bunker barge, and asked for copies of the bunkering receipts along with the log book for the bunker vessel, which were provided the next day. The first of these documents is a copy of a Purchase Confirmation from Ocean Energy Inc., dated July 21, 2009 (Exhibit M-4). Captain Irani stated that the Purchase Confirmation indicates an order of 150 metric tonnes of diesel oil and 2000 metric tonnes of heavy oil. The second document is a copy of an Oil Transfer Check List on the stationery of the Vancouver Fraser Port Authority, dated July 27, 2009 (Exhibit M-5). Captain Irani described it as a document filled out by the bunker barge operator and the "ship's responsible person" (the Chief Engineer or the Master of the receiving ship, which was the *S.S. Oceanic* in this case), showing the quantity to be bunkered by the *S.S. Oceanic*. The third document is a copy of a 'Marine Fuel Oils – Bunker Receipt' from Marine Petrobulk Ltd., dated July 27, 2009 (Exhibit M-6). Captain Irani indicated that, according to the document, 1862 metric tonnes of fuel and 150 metric tonnes of marine gas oil were delivered, an interpretation to which the Applicant's Representative objected. Captain Irani indicated that the delivery of 1862 metric tonnes of fuel does not appear in the Oil Record Book of the *S.S. Oceanic* and that he was told by Mr. Baltas that he had been busy and had not had time to make the entries.

[50] Captain Irani was asked about a letter from Mr. Baltas addressed "To whom it may concern" (Exhibit M-7). He indicated that it was provided by Mr. Baltas and the Master of the *S.S. Oceanic*, Captain Georgios Antonellos, in the presence of legal counsel and refers to an oil spill on the morning of July 30, 2009. The letter indicates that: the deck officer on duty called Mr. Baltas to inform him that the deck officer smelled oil from the starboard side of the vessel; that Mr. Baltas went to the engine room to see if the oil spill was coming from the side of the vessel; that the Engineer on duty indicated there were no bilge or other liquids being transferred at that time; that Mr. Baltas examined the engine room for abnormal activity and stopped normal activity there; and that Mr. Baltas went to the bridge and informed Captain Antonellos that nothing was coming out of the side of the vessel.

[51] Captain Irani indicated that when he had arrived at the *S.S. Oceanic* (on July 30, 2009), he saw oil in the water between the vessel and the Pier and the oil had started to spread across the harbour to the east and west. The oil was quite thick and it smelled like heavy oil. He did not take samples, but Mr. Waheed did take samples. Mr. Baltas told Captain Irani that he had been transferring fuel oil from the "number 5 port and starboard tanks forward" into the "number 37

port and starboard tanks aft" between 4:00 a.m. and 8:00 a.m. on July 30, 2009. There was no notation of that transfer in the Oil Record Book.

[52] Captain Irani and Mr. Waheed asked Mr. Baltas for a copy of the depth soundings in the oil tanks for the morning of July 30, 2009 and the previous morning. Mr. Baltas gave them documents wherein the figures did not seem to match up, so they asked for an explanation. Mr. Baltas indicated that it was due to high boiler consumption and errors in the figures.

[53] The next morning (July 31, 2009), Captain Irani received a telephone call from Captain Antonellos asking that PSC deficiency items be re-inspected to allow for the detention of the vessel to be lifted so he and Mr. Waheed went to the vessel. They were accompanied by Fred Campbell and Tarsem Buttard, employees of Ceres Corp. Captain Irani had been informed by Ceres Corp. that two of its employees had witnessed an oil spill on board the ship on July 27, 2009. The purpose of going on board the vessel on July 31, 2009 was to re-inspect the deficiencies as well as to inspect the area of the reported oil spill to see that there were no safety concerns in that regard.

[54] The Inspectors were proceeding to the area of the reported oil spill when the Staff Captain of the *S.S. Oceanic* received a telephone call from Captain Antonellos to say that they should not be taken there but to his cabin instead. Captain Irani told Captain Antonellos that he was obstructing their work and he replied that he had been told by legal counsel to keep them there until the counsel arrived. After legal counsel arrived, Captain Irani proceeded with the PSC re-inspection and Mr. Waheed proceeded with the oil spill investigation. The deficiency items had been addressed, so the detention was lifted; however, as there was also concern that the vessel might have been responsible for pollution on July 30, 2009, it was agreed that, instead of further detaining the vessel, a Letter of Undertaking from the Protection and Indemnity (P & I) Club of the vessel owner's insurance company would be provided and it was later obtained.

[55] While Captain Irani was performing his re-inspection, he received a telephone call from Mr. Mangat, who was assisting Mr. Waheed with the internal oil spill investigation. Mr. Mangat indicated that he had located the deck where the internal oil spill had happened. Captain Irani went down there and saw that the deck still had a "little oil sheen" on it and that there were "clear signs of fuel oil being stuck underneath the gratings and underneath some of the storage cleaning materials which were lying in that compartment".

[56] During cross-examination, Captain Irani indicated that, as an accident and unusual circumstance, an internal oil spill is a type of event that is required to be recorded in the Oil Record Book according to Regulation 17.3 of Annex I to MARPOL. He also indicated that Regulation 17.2.5 of Annex I to MARPOL requires that bunkering be recorded in the Oil Record Book. In addition, he agreed that there is a provision with respect to oil record books found in the *RPP*. Captain Irani acknowledged that he did not witness how or when the oil came to be on the deck and had received information about that from others.

[57] With regard to the alleged obstruction, Captain Irani indicated that an Enforcement Officer from Environment Canada, Lance Penny, was also with him as an observer. He acknowledged that the two Longshoremen he took on board the *S.S. Oceanic* had no official duties on the vessel at that time. He told the Staff Captain the purposes for which the party was

boarding the vessel, which were to complete the PSC inspection and to continue the oil spill investigation.

[58] Captain Irani also indicated that he has been designated a Pollution Prevention Officer by the Minister under the *Act*. He acknowledged that it is only with the "consent of the vessel" that he can bring witnesses on board for the purpose of showing a potential area of safety concern. He indicated that he had received consent and was proceeding to the area with the Staff Captain when Captain Antonellos telephoned to stop them. He indicated that, instead of showing his party the problem, they were just trying to "hide things" from his party. The Longshoremen left the vessel at the request of Captain Antonellos.

[59] Captain Irani indicated that he told Captain Antonellos he was obstructing and he replied that they would wait for his legal counsel to arrive. After a short discussion, the Applicant's and Minister's Representatives agreed that the "sea master" of the *S.S. Oceanic* was Captain Antonellos. Captain Irani acquiesced to the request of Captain Antonellos to wait for his legal counsel. The legal counsel suggested that Captain Irani continue the PSC re-inspection and that Mr. Waheed and Mr. Penny perform the pollution investigation. At about 4:00 p.m. they resumed their work with the functions split that way.

[60] With regard to the bunkering, Captain Irani indicated that it is normal in an inspection or investigation to check a vessel's documents, such as the Oil Record Book, a fuel oil tank bunkering status report, or a fuel oil soundings table. Captain Irani was shown a copy of a single-page document titled "Bunkering", dated July 27, 2009 (Exhibit A-2); however, two pencilled notes in the right-hand margin of the document were excluded from the evidence by agreement between the Applicant's and Minister's Representatives. Captain Irani described the document as a record of the bunkering into the *S.S. Oceanic's* fuel oil tanks on July 27, 2009. He was shown a copy of another single-page document also titled "Bunkering" and dated July 27, 2009 (Exhibit A-3). He described it as a record of the bunkering into the *S.S. Oceanic's* diesel oil tanks on July 27, 2009. These documents (Exhibits A-2 and A-3) show the amount of fuel or diesel oil in the various tanks before the bunkering and after the bunkering. Captain Irani reviewed these documents when he came aboard the vessel on July 30, 2009; no-one attempted to keep these documents from him that day.

[61] Referring to Exhibit M-3, Captain Irani agreed that the first identifiable date, halfway down the left column on the first page of the Exhibit, could be July 24, 2009, rather than July 26, 2009. He acknowledged that only the second of the four pages has a printed page number at the bottom. To his recollection, however, there were no pages missing from the Exhibit.

[62] Captain Irani was shown a one-page document which he described as identifying the quantity of fuel in the tanks for the dates of July 28, 29, and 30, 2009 (Exhibit A-4). He viewed this document on the *S.S. Oceanic* on the morning of July 30, 2009. He also acknowledged the possibility that there might have been a similar document for July 27, 2009. When he was on board the *S.S. Oceanic* on July 27, 2009, he was told that the bunkering barge would be docked alongside the cruise ship until late that afternoon. When he was on board the *S.S. Oceanic* on July 30, 2009, he asked for confirmation that bunkering had been done on July 27, 2009, and it was confirmed that bunkering had been done but that an entry had not been made. According to Captain Irani, Mr. Baltas agreed that the figures in the vessel's records were inaccurate. Captain

Irani acknowledged that the vessel is old and does not have a high efficiency engine, so its fuel consumption may be high.

[63] With regard to Exhibit A-4, Captain Irani indicated that the total fuel in the tanks is shown as 2514 metric tonnes on July 28, 2009, and 2484 metric tonnes on July 29, 2009, but is not shown for July 30, 2009. He indicated that his calculation of the total for the individual tanks on July 30, 2009, is 2428 metric tonnes. He acknowledged that this was his own calculation of the total, based on his reading of the amounts shown for each individual tank (one entry was unclear), and not a calculation made by the crew.

[64] Captain Irani was asked to look at the Oil Transfer Check List (Exhibit M-5). He indicated that the notation, "fill to 90%", regarding the amount of fuel oil to be loaded, is an appropriate and common practice.

[65] Captain Irani indicated that another cruise ship, the *Seven Seas Mariner*, was docked at the east side of the Pier, directly opposite the *S.S. Oceanic*, on the night of July 29, 2009. On July 30, 2009, he became aware that there had been a spill during a transfer from the *Seven Seas Mariner* to a truck on the Pier. To his knowledge, that spill was not reported to Transport Canada. He believes that the *Seven Seas Mariner* departed from the east side of the Pier at 2:45 a.m. on July 30, 2009.

[66] Captain Irani was shown a copy of an International Oil Pollution Prevention Certificate ("IOPP Certificate") issued to the *S.S. Oceanic* on June 27, 2009 (Exhibit A-5). Captain Irani indicated that the IOPP Certificate signifies that the vessel is complying with all international convention regulations as inspected by Bureau Veritas, a classification society, on behalf of the relevant flag state.

[67] Captain Irani was shown a copy of a one-page Document of Compliance issued on April 7, 2009, to Seahawk North America, LLC, under the International Convention for the Safety of Life at Sea ("SOLAS"), together with a copy of a one-page Endorsement for Annual Verification, both bearing the same certificate number (Exhibit A-6). Captain Irani indicated that the Document of Compliance is issued to a company for the type of ships it operates once it has been determined that the company has met the international safety management requirements under SOLAS.

[68] Captain Irani indicated that when he arrived at the *S.S. Oceanic* on July 30, 2009, he noticed that the vessel had taken out its booms and lowered one of its port side lifeboats to place a boom around the vessel. He noted that every vessel over 400 gross tonnage is required to have an arrangement with a local response organization in the event of an oil spill; Burrard Clean is the local response organization for the *S.S. Oceanic*, which is a vessel over 400 gross tonnage. Captain Irani was given to understand that the *S.S. Oceanic* had activated Burrard Clean to contain the situation and start the clean-up and he believes that Burrard Clean had boats in the water and booms out. He believes that the *S.S. Oceanic* was doing this as part of its oil pollution emergency plan. He was also aware that the vessel had put absorbent pads in the water to try to soak up some of the substance from it. He regarded this as responsible action by a vessel when there is oil around it. While he was viewing closed-circuit television ("CCTV") cameras, he noticed an "oil-like substance" coming from a hole in the vessel but he did not determine what

that hole was connected to. When he was called down to the deck where there had been an internal oil spill, he observed catering staff scooping what they described as "grey water which has leaked out" into drums.

[69] Captain Irani was shown a copy of a tide table for the Point Atkinson Lighthouse for July, 2009 (Exhibit A-7), which he agreed is in English Bay, just outside the First Narrows. He also agreed that, according to the table, a high tide of 14.2 feet, at 23:41 p.m. (Pacific Daylight Savings Time) on July 29, 2009, fell to a low tide of 4.5 feet at 7:35 a.m. on July 30, 2009. He described this as an "average" high tide to low tide differential.

[70] When asked if he had investigated when the substance that "some" described as oil in the water first entered the water, Captain Irani replied that his viewing of the CCTV cameras confirmed to him that there was a substance in the water after 4:00 a.m. on July 30, 2009. He has received no training in the appraisal of such pictures. He saw "black marks" on the pilings of the Pier, but he could not tell when the markings occurred just by looking at them.

[71] During re-examination, Captain Irani confirmed that the Document of Compliance (Exhibit A-6) certifies that the named company is following safety management procedures. He also confirmed that an IOPP Certificate is issued when the named vessel is compliant with the pollution prevention requirements under MARPOL, including the keeping of an Oil Record Book; the *S.S. Oceanic's* IOPP Certificate (Exhibit A-5) indicates that, when it was issued, the *S.S. Oceanic* was in compliance with MARPOL; and if an Oil Record Book is not completed as required, then there is non-compliance with MARPOL. With regard to the one-page document identifying tank fuel quantities for July 28, 29, and 30, 2009 (Exhibit A-4), Captain Irani indicated that the difference between the totals shown for July 28 and 29, 2009 is 30 metric tonnes; that the total he calculated for July 30, 2009 is 2428 metric tonnes; that the difference between the total shown for July 29, and 30, 2009 is 56 metric tonnes; and that the vessel was in port during that whole time.

(5) Fred Campbell

[72] Fred Campbell is a Foreman for Western Stevedoring and was working for Ceres Corp. in July, 2009. On July 27, 2009, he was the head Foreman overseeing the loading of provisions onto the *S.S. Oceanic*, when one of his foremen asked him to look at a problem in the storage area on one of the lower decks of the vessel. He saw eight to ten inches of sawdust being used to clean up a spill in more than one room. To him, it looked like the substance that was being cleaned up was oil.

[73] During cross-examination, Mr. Campbell indicated that he saw the sawdust at about 8:00 a.m. or 8:30 a.m. on July 27, 2009. He confirmed that he saw, in the sawdust, a substance that he believed to be oil.

(6) Israr Waheed

[74] Israr Waheed is a Senior Marine Inspector with Compliance and Enforcement, Transport Canada, in Vancouver. Before becoming an Inspector, he worked on ships in different capacities, studied marine engineering and served as Chief Engineer on different types of vessels.

[75] Mr. Waheed first became involved with the *S.S. Oceanic* on July 30, 2009, when his Acting Manager assigned him to go to Canada Place as there was pollution there, so he went to Canada Place with Captain Irani around 8:45 a.m. When they arrived at the Pier, they observed a sheen of oil and when they approached the vessel, there was "heavy oil" where the vessel was situated alongside the Pier. After boarding the vessel, they presented themselves to security personnel and indicated that they were there to look into the pollution incident. They then met Duty Officers and went to the bridge to introduce themselves to the Master (Captain Antonellos) and other staff. While on the bridge they asked what had happened and could see that a clean-up operation was taking place. They could see that the vessel's lifeboat was being lowered and that the vessel's crew was doing the clean-up.

[76] Mr. Waheed and Mr. Irani then went to the engine room of the vessel where they asked Mr. Baltas to show them the oily water separator and its discharge line. Mr. Waheed explained that the oily water separator is a piece of equipment which separates the oil content from bilge water (dirty water which ships produce); the oil content goes to a separate tank and the clean water goes overboard. They wanted to check the discharge pipe to make sure that no oil had been discharged through it.

[77] The Inspectors also asked to see the Oil Record Book. Mr. Waheed was referred to the copied pages from the Oil Record Book (Exhibit M-3). He indicated that they do not show fuel oil being taken on board on July 27, 2009. Mr. Waheed was also referred to the document indicating tank fuel quantity for July 28, 29, and 30, 2009 (Exhibit A-4), which he indicated as the vessel's daily log of fuel in different tanks. He calculated that the difference in the tanks between July 28 and 29, 2009 was 30 metric tonnes and the difference between July 29 and 30, 2009 was 56 metric tonnes.

[78] He boarded the harbour boat and observed Burrard Clean doing clean-up work on the port side at the stern of the *S.S. Oceanic*. He took a sample of "black, heavy stuff" from the seawater and determined that the substance was heavy bunker fuel. As he had been informed that there had been a spill from the *Seven Seas Mariner* while transferring sludge to a Tymac truck on July 29, 2009, he went to the Tymac dock and took a sample of "dirty oil, sludge" from the top of the truck.

[79] On July 31, 2009, Mr. Waheed left the samples at an Environment Canada laboratory. Afterwards, he and Captain Irani boarded the *S.S. Oceanic* to continue the pollution investigation. They brought an Inspector from Environment Canada and two witnesses, Mr. Campbell and Mr. Buttard, from Ceres Corp. to show where there had apparently been an internal spill. They introduced themselves to security staff and the Staff Captain was there to meet them. They then informed him of the purpose of the visit and told him that they had the two witnesses to identify the spill area. They were heading towards that area when they were informed that the Master (Captain Antonellos) wanted to see them and that they would not be allowed in the area with the two witnesses; the Staff Captain told them to go to Captain Antonellos' office. Captain Antonellos told the Inspectors that he had to consult with his lawyer and that they would have to wait. After the lawyer arrived, they were told that there were two different processes going on – a PSC inspection and a pollution investigation – and that they had to separate the two. They were also told that the witnesses had no business on the vessel and the witnesses were escorted off of it.

[80] Mr. Waheed and the Environment Canada Inspector then went to the Staff Captain's office with the lawyer where Mr. Waheed asked Mr. Baltas for further documents. They then went to the forward storage area. At the Hearing, Mr. Waheed referred to six photographs that he had taken (Exhibit M-8). He identified Photograph 1 as a picture of a pail, on which there was some oil, in the oil handling area; Photograph 2 as showing a locker, some pails and pallets and, at the bottom, a heavy sludge mixture of oil and water; Photograph 3 as showing mostly rust on the floor; Photograph 4 as showing a pallet with heavy fuel content on the legs; Photograph 5 as showing oil content on a storage container; and Photograph 6 as showing a hose which does not look clean. Mr. Waheed indicated that it is not normal to have fuel oil in a storage handling area.

[81] During cross-examination, Mr. Waheed recalled that he asked Mr. Antonellos and Mr. Baltas whether the oil that Mr. Waheed had seen in the water came from the *S.S. Oceanic*. Their answer, according to the letter from Mr. Baltas (Exhibit M-7), was negative. As to his efforts to determine whether the oil in the water might have come from somewhere other than the *S.S. Oceanic*, he investigated the spill that resulted from the transfer between the vessel *Seven Seas Mariner* and the Tymac truck on the Pier.

[82] With regard to the *S.S. Oceanic's* daily log of fuel in different tanks (Exhibit A-4), he indicated that the difference of 56 metric tonnes between July 29 and 30, 2009 was based on his own calculations and not the crew's. He was told by Mr. Baltas that the fuel consumption of the vessel is 60 to 65 metric tonnes (daily). To calculate the total for July 30, 2009 and the difference between July 29 and 30, 2009, he read the figure for the No. 5 port tank as 129 metric tonnes, but he agreed that it is hard to say whether the figure there is "129" or "159".

[83] Mr. Waheed confirmed that he saw Burrard Clean cleaning up the port side at the stern and that Burrard Clean was the response organization for the *S.S. Oceanic*. Mr. Waheed's understanding was that the *S.S. Oceanic* had received an order to have its hull cleaned along the waterline before departing from Vancouver. He acknowledged that, if there is oil in the water near a ship, it is prudent and responsible for that ship's crew to try to contain the oil so it does not spread. He acknowledged that he was not present at the time of the spill involving the *Seven Seas Mariner* and the Tymac truck.

[84] Mr. Waheed was asked about five of the six photographs he took (Exhibit M-8). He indicated that he touched the black substance on the pail pictured in Photograph 1 and confirmed that it was a heavy substance. With regard to Photograph 2, he acknowledged that the *S.S. Oceanic* is an old ship and could not say how long the substance shown in the photograph had been there. With regard to Photograph 3, he confirmed the pictured substance as mostly rust. With regard to Photograph 4, he indicated that he does not know how long the black substance on the bottom of the pallet had been there. With regard to Photograph 5, he did not remember whether he had touched the black substance on the blue container and he acknowledged that he did not check to see whether it was oil or black paint.

[85] Mr. Waheed was referred to a chart, titled "Burrard Inlet" and "Vancouver Harbour" with the notation at the bottom corrected to "1997" (Exhibit A-8). Additionally, a photocopy of a portion of the chart showing the First Narrows, Stanley Park, Canada Place and the Centerm facility was introduced through Mr. Waheed (Exhibit A-9). Mr. Waheed identified a number of features on the chart (Exhibit A-8) such as the location of the First Narrows, which is the eastern

entrance to the harbour, as well as the location of Canada Place. He agreed that Canada Place had been extended since the chart was made, but he could not comment on the current configuration of the extension. He agreed that the Centerm container facility is located to the east of Canada Place on the South Shore of the harbour; that the area of the chart labelled "Vancouver" is the City of Vancouver; and that the other side of the harbour is the North Shore. He agreed that there are terminals on the North Shore between the First Narrows and the Second Narrows, and that there are terminals on the South Shore to the east of Canada Place towards the Second Narrows. He agreed that there is deep-sea ship traffic between the First Narrows and the terminals on the North Shore and South Shore. He agreed that there are anchorages in the harbour where deep-sea ships anchor.

[86] Mr. Waheed identified five photographs as ones that he took or believes he took (Exhibits A-10 to A-14). He described the first photograph (Exhibit A-10) as showing the Pier, including some of the Pier's pilings; a floating concrete bumper between the Pier and a ship; and a ladder. He took that photograph because Mr. Baltas had pointed out the level of a heavy substance on the Pier's pilings. Mr. Waheed's recollection was that Mr. Baltas was pointing out that the black substance in the water had made a mark on the pilings at a high level, indicating that the substance must have marked the pilings at an earlier time in the morning. Mr. Waheed could not recall checking the level of the markings against the tide tables to see if he could time the markings. He did not take a sample of the black substance from the pilings but he believes that the Environment Canada Inspector did take a sample. Mr. Waheed took that sample to an Environment Canada laboratory.

[87] Mr. Waheed described the next photograph (Exhibit A-11) as showing the engine room and, more particularly, the overboard discharge line, or pipe, which connects to the oily water separator on the inboard side, and which exits the hull of the vessel. Water that has been cleaned by the oily water separator is discharged through that line. While in the engine room, he asked Mr. Baltas to disconnect the line so that he could see its condition from the inside, particularly whether there was oil in the pipe. Mr. Waheed described the next photograph (Exhibit A-12) as showing the same line but from a different angle and as showing a sign on the inside of the hull warning about discharges. He agreed that the following photograph (Exhibit A-13), showing the overboard discharge line after it was disconnected, indicates that the inside of the pipe is clean and that there had not been any recent discharge of oil or oily water from that line. He agreed that the fifth photograph (Exhibit A-14) shows the disconnected discharge line and a nearby sign reading: "Discharge of oil prohibited with heavy fines".

[88] Mr. Waheed did not recall whether he checked the bilge pump discharge valves and the associated line. He recalled seeing padlocks on some of the valves in the engine room but noted that it is not uncommon for ships to have valves padlocked to ensure that they are not opened without the person who has the key, normally the chief engineer. He checked the oily water separator overboard discharge valve on the *S.S. Oceanic* and he believes that it was locked.

[89] Mr. Waheed stated that he took a sample from the Tymac truck on July 30, 2009 and a sample of a black substance from the storage area of the *S.S. Oceanic* on July 31, 2009. He took samples from different locations in the vessel's engine room on July 30, 2009. He agreed that samples are important in pollution incidents to scientifically determine what a substance is and to compare samples taken from different locations to examine if they are the same. He took samples

from the water, the pilings of the Pier, the *S.S. Oceanic* and the Tymac truck, to an Environment Canada laboratory for analysis to confirm whether the samples were oil and to see if there was a match – Environment Canada subsequently prepared a report.

[90] Mr. Waheed did not interview anyone from the *Seven Seas Mariner* as that vessel had left. He does not know the time at which it left nor did he make an effort to determine whether the *Seven Seas Mariner* was returning to Vancouver. He did not investigate whether any other ships had been in the area of Canada Place on the night of July 29 and early morning of July 30, 2009.

B. Applicant

[91] The Applicant did not call a witness.

IV. ARGUMENTS

A. Minister

[92] The Minister's Representative submitted a Book of Authorities containing provisions from legislation, regulations, and an international convention. The Minister's Representative submitted that section 51 of the *RPP* concerning the Oil Record Book, applies to foreign vessels in Canadian waters. He also submitted that the *VCRs* provide that a vessel must first comply with all of the requirements of the certificates on board, one of them being the IOPP Certificate, and secondly, that it has to meet the requirements that were there for the issuance of that Certificate, which include having an accurate Oil Record Book on board.

[93] Of concern here was the amount of material in the water next to the *S.S. Oceanic* when the pollution event was reported and the extent to which it spread out to "the better part of the whole harbour", notwithstanding the clean-up efforts. Then, in the course of investigating a report of an internal spill, it became apparent that the Oil Record Book did not accurately reflect what had occurred. The discharge of oil on board a vessel is something that must be recorded in an Oil Record Book and the delivery of oil which occurred after the internal spill was not recorded in the vessel's Oil Record Book. An Oil Record Book is something that may be reviewed as part of a PSC inspection, but it is rare to review delivery records. The Minister's Representative submitted that the motivation for not making the entry in the Oil Record Book was that there had been an unreported spill on board the vessel which they did not want Transport Canada to investigate and not recording the delivery was a way to "fudge up" the amount of oil that was transferred from tank to tank, the amount of oil that was on board and the amount of oil that was discharged into the harbour.

[94] While the Minister's Representative did not present evidence of a scientific analysis of the material that was in the water, the witnesses had knowledge of "what constitutes" the heavy fuel oil that is used aboard ships to run boilers, and knew that the material in the water was oil or an oily mixture – a pollutant prescribed in paragraph 4(a) of the *RPP*. He suggested that it should be acceptable for the Member to take judicial notice that people know what oil is compared to other materials. He submitted that: the witnesses testified what was in the water was oil; and what Mr. Campbell saw being picked up in the storage area was oil.

[95] The Minister's Representative submitted that since the material was thick beside the *S.S. Oceanic* and thinner further away from that vessel some three or four hours after the previous vessel had left, the material came from the *S.S. Oceanic*. If the material had come from another source two or three hours prior, it would have dissipated more. He suggested that the Member can take judicial notice that oil spreads on water. Between 5:00 a.m. and 8:00 a.m., the sheen spreading from Canada Place to the SeaBus terminal, or one kilometre away, indicates the material went into the water well after the previous vessel had left.

[96] The argument that the material in the water early in the morning of July 30, 2009 might have come from the discharge on the Pier involving the Tymac truck on the afternoon of July 29, 2009, seemed to the Minister's Representative to be very "fantastical". Such a spill would have been noticed earlier and it would have dissipated.

[97] With respect to the alleged obstruction, the position of the Minister's Representative is that the Inspectors went to the vessel for the purpose of completing the PSC inspection and were prevented from doing so by a "direction" from Captain Antonellos. When they are denied access to an area, it is not up to them to seek or use force to gain access. The obstruction of an inspector exercising his duties is prohibited under the *Act*. The Minister's Representative submitted that the Inspectors were impeded not only in their inspection for safety purposes, but also in their *inspection*, not *investigation*, of the possibility of an internal spill on July 27, 2009.

[98] The Minister's Representative submitted that the alleged violations are serious, with a penalty range of \$1 250 to \$25 000, under the *AMPRs*, for a violation of each of the applicable provisions of the *Act*.

[99] In response to a question from the Member, the Minister's Representative submitted that, under subsection 238(2) of the *Act*, a vessel is treated as a person. He submitted that the only way that the subsection makes sense is to say that a vessel employs people, but it does so through its owner, who has the contract of employment, and that a vessel is a principal because it is responsible for the actions of other people. He also submitted that if the subsection has any meaning, the only people who can be employed by it or by its agents are its master, members of its crew and perhaps, in some situations, the owner of the vessel. He acknowledged that he has some trouble with that concept.

B. Applicant

[100] In response to the submissions of the Minister's Representative, the Applicant's Representative submitted that there is very little evidence of the volume of the substance in the harbour and that the Minister's Representative's reference to the "whole harbour" (in describing the spread of the substance) was a gross exaggeration. The evidence of Ms. McDonald, that from the harbour boat, shortly after 5:00 in the morning, she or the boat crew could see a light sheen by Centerm, is consistent with the suggestion that the substance could have come from the *Seven Seas Mariner* when it departed (before 3:00 in the morning of July 30, 2009). The Applicant's Representative submitted that the evidence of Mr. Campbell was that he believed he saw oil in the sawdust in the storeroom, not that it was "impregnated" as the Minister's Representative suggested. There was no evidence presented that it was unusual for Captain Irani and Mr.

Waheed to check fuel soundings or delivery records when they boarded the *S.S. Oceanic* on July 30, 2009.

[101] With regard to the issue of motivation for not recording the alleged internal oil spill, the Applicant's Representative submitted that there is no evidence as to whether such a spill occurred before or after the PSC inspection. With regard to the knowledge of the substance in the water, the Applicant's Representative submitted that Mr. Bulgin, Mr. Ferris and Ms. McDonald admitted that they could not categorically state that there was oil coming out of the ship, and that Mr. Waheed first described the substance of which he took a sample as "black material"; only after he was pressed did he describe it as "heavy fuel oil". Since samples were taken and analyzed, and a report prepared but not put into evidence, a real concern is raised over the identification of oil by these witnesses. Furthermore, there was limited evidence of the significance of the *S.S. Oceanic* being an old steamship (that uses heavy fuel oil to run boilers) rather than a diesel-powered ship. The Applicant's Representative argued that it would be inappropriate to take judicial notice that the substance in question was oil. There is some evidence from the witnesses that the substance was oil, but it does not go beyond a balance of probabilities, given that the analyzed samples, while available, were not entered into evidence. He argued that the focus should be on the evidence and not on common knowledge about whether the material in the water came from the *S.S. Oceanic* or from other sources. There was no evidence entered that oil spreads on water or that a sheen had spread from Canada Place to the SeaBus terminal between 5:00 a.m. and 8:00 a.m. There was no evidence that material from the Tymac spill could not have remained under the Pier during the evening of July 29, 2009. There was no evidence about the movement of oil in the water, except some evidence regarding currents and counter-currents.

[102] The Applicant's Representative submitted that there was a lack of clarity as to whether the Minister's Representative's position is that the obstruction was by Captain Antonellos or by the Staff Captain. The evidence is contrary to the submission that the attendance on board the *S.S. Oceanic* on July 31, 2009 was for a PSC inspection and not for the investigation of a spill. Under direct examination, Captain Irani indicated that he was there on July 31, 2009 for inspection purposes – a PSC inspection and an inspection of the safety of the storeroom – but under cross-examination, he agreed that the distinction between his attendance for *inspection* purposes and Mr. Waheed's attendance for *investigation* purposes was not that apparent when he came on board. The distinction between the two roles of PSC inspection and pollution investigation only occurred after the vessel's legal counsel arrived and objected to the inspection and investigation taking place at the same time or with the same people.

[103] The Applicant's Representative submitted a binder of written submissions titled "Applicant's Submissions"; and a binder of authorities titled "Applicant's Book of Authorities" containing excerpts from legislation, regulations, an international convention and legal texts as well as containing a Transportation Appeal Tribunal of Canada ("Tribunal") determination. The Applicant's Representative submitted that the way the violations have been framed is inaccurate.

[104] With regard to Violation No. 1, the vessel cannot be held vicariously liable for the alleged failure of Mr. Baltas to record bunkering in the Oil Record Book, because it is the obligation of the Master, Captain Antonellos, not the Chief Engineer, Mr. Baltas, to ensure that bunkering entries are recorded according to section 51 of the *RPP*. The determination in *Way v.*

Canada (Minister of Transport) 2009 TATCE 16, TATC File No. MA-004-37 (Review) was cited as authority. Violation No. 1 alleges an omission of an entry in a log book with the "intent to mislead", but there is no such violation in the legislation. The actual violation in the legislation is "wilful omission". There was no evidence that either Captain Antonellos or Mr. Baltas intended to mislead anyone.

[105] With regard to Violation No. 2, the evidence has not established that there was an internal oil spill as alleged. There is evidence that Mr. Campbell saw a lot of sawdust with some oil, so something might have occurred but it is unclear when it occurred and there is no evidence of exactly what happened. The vessel cannot be held vicariously liable for the alleged failure of Mr. Baltas to record an internal oil spill when it is the obligation of the Master, Captain Antonellos, to ensure that such an event is recorded. The Violation alleges intent to mislead, but the violation in the legislation is for wilful omission. The Canadian legislation incorporating provisions of MARPOL does not incorporate the MARPOL provision requiring the recording of an accidental or other exceptional discharge of oil.

[106] With regard to Violation No. 3, the eyewitness evidence is unclear. The eyewitnesses can not confirm that what they saw coming out of the vessel was oil and there is no scientific evidence that the black substance in the water was oil. The Minister's Representative did not introduce any evidence of the results of the analysis of the samples taken from the vessel, nor the water, the pilings, or the Tymac truck. Furthermore, it is just as likely that any oil in the water at Canada Place came from the *Seven Seas Mariner* as it is that any such oil came from the *S.S. Oceanic* and consequently, the Minister's Representative has failed to prove the violation on a balance of probabilities.

[107] With regard to Violation No. 4, there was no obstruction as Captain Antonellos was within his rights to question the Transport Canada officials about their intentions and their bringing of unauthorized persons on board the vessel. The two Longshoremen had no role to play as longshoremen that day so Captain Antonellos questioned the two Longshoremen being there; the vessel's legal counsel arrived and the two Longshoremen left. It was also unclear whether it was a PSC inspection, a pollution investigation, or both. Furthermore, if there was an obstruction of the Inspectors, it was *de minimis* – there was only a few minutes' delay. There was no evidence that the inspection or investigation was prejudiced and there was no suggestion or warning that Captain Antonellos' actions were subject to enforcement action. Additionally, there was no evidence that the witnesses were entitled to be taken on board. Finally, if there was any obstruction by the Staff Captain, the *S.S. Oceanic* cannot be held vicariously liable for it, because the alleged violation is obstruction by Captain Antonellos.

[108] The Applicant's Representative argued that the "wilful omission" prohibited under paragraph 23(b) of the *Act* and the "wilful obstruction" prohibited under paragraph 23(c) of the *Act* involve a *mens rea* requirement, as discussed in **Ruth Sullivan**, *Driedger on the Construction of Statutes*, 3ded. (Markham: Butterworths Canada Ltd., 1994) at 365 ("*Driedger*"). There is no evidence that Mr. Baltas or Captain Antonellos wilfully omitted to make an entry. The evidence was that Mr. Baltas was busy and forgot to make an entry in the Oil Record Book, but it is not his obligation to ensure that an entry is recorded – it is an obligation for the Master, Captain Antonellos. As such, it is the *mens rea* of Captain Antonellos that is properly at issue with respect to Violation No. 1 and Violation No. 2.

[109] The Applicant's Representative questioned the evidence of Mr. Ferris about what he could see in the dark of the night while looking down at a dark area between the vessel and the Pier. Additionally, if a flash was used for the photographs taken by Ms. McDonald, then the photographs present an inaccurate record of what she saw. From the evidence of the witnesses, it is not known whether the black substance had flowed into the vessel and was being pushed out. The witnesses were focussed on the *S.S. Oceanic*, rather than looking at other possible sources of the oil. In her email report for the incident (Exhibit A-1), Ms. McDonald recorded that she observed "pumping out amidships starboard side" but her recorded observation did not specify what was being pumped out. Captain Irani had no expertise or training in the interpretation of video evidence; nevertheless the video evidence established, in his mind, that the incident occurred at 4:00 a.m.

[110] The Applicant's Representative argued that it is not correct that the obligation regarding the making of an entry in the Oil Record Book with respect to both the bunkers and the internal oil spill comes from the *VCRs*. If section 8 of the *VCRs* is the provision on which the Minister is relying, that section places its obligation on the Authorized Representative, not the Chief Engineer. Also, the obligation that flows from paragraph 8(a) of the *VCRs* is to carry an Oil Record Book on board, which was on board the *S.S. Oceanic*. The obligation that flows from paragraph 8(b) of the *VCRs* is that the requirements for the issuance of the vessel certificates are met. As indicated in *Driedger*, it is presumed that the ordinary meaning of a legislative text is the intended or most appropriate meaning. Again according to *Driedger*, where there is conflict between two provisions, a *specific* provision applies to the exclusion of a *general* provision. As such, in this case, if there is conflict, the specific provision in the *RPP* applies rather than the provision in the *VCRs*. An IOPP Certificate under Regulation 7.1 of Annex 1 to MARPOL is the sort of provision to which paragraph 8(b) of the *VCRs* refers. That paragraph relates to issuing certificates, not the content of a record or the requirement to make a record. The *RPP* mirror MARPOL regarding record keeping obligations, so the specific requirement with respect to record keeping in the Oil Record Book is found in the *RPP*. According to *Driedger*, international conventions do not automatically become a part of domestic law in Canada. Implementing legislation is required to alter Canadian law, so MARPOL is only applicable through the provisions of the *RPP*.

[111] The Applicant's Representative noted that the vessel's crew has denied all along that the black substance or oil came from the vessel. With this in mind, if efforts to contain an oil spill are treated as evidence of having caused that spill, then this will deter efforts to contain oil spills by those not responsible for them.

C. Minister (in reply)

[112] With regard to the Authorized Representative being responsible under section 8 of the *VCRs*, the definition of "authorized representative" in section 2 of the *Act* indicates that the Authorized Representative of a foreign vessel is its Master.

V. ANALYSIS

A. Violation No. 1 and Violation No. 2

[113] For Violation No. 1 and Violation No. 2, the relevant portions of paragraph 23(b) of the *Act* provide that no person shall wilfully omit to make an entry in a log book required to be kept under the *Act*. Under subsection 238(2) of the *Act*, a vessel is liable for a violation that is committed by an employee or an agent of the vessel acting in the course of the employee's employment or within the scope of the agent's authority, whether or not the employee or agent who actually committed the violation is identified or proceeded against in accordance with the *Act*.

[114] As a result, the elements of Violation No. 1 that the Minister's Representative must prove, on a balance of probabilities, are that, on or about July 27, 2009, at or near the City of Vancouver in the province of British Columbia:

1. with respect to taking fuel on board, Mr. Baltas wilfully omitted to make an entry in a log book required to be kept under the *Act*; and
2. while committing that violation of paragraph 23(b) of the *Act*, Mr. Baltas was an employee or agent of the *S.S. Oceanic* acting in the course of his employment or within the scope of his authority (as an agent), thereby rendering the *S.S. Oceanic* liable for the violation.

[115] With regard to the first element, section 51 of the *RPP* and subsection 8(1) of the *VCRs* applied to the *S.S. Oceanic* on July 27, 2009, as the vessel was in Canadian waters on that date. Pursuant to subsection 51(1) of the *RPP* (along with the deemed continuation provisions of paragraph 44(g) of the *Interpretation Act*) and pursuant to paragraph 8(1)(a) of the *VCRs*, an Oil Record Book was required to be kept on board the *S.S. Oceanic* under the *Act*.

[116] Pursuant to subsection 51(3) of the *RPP*, including its reference to regulation 17.2 of Annex I to MARPOL, the Master of the *S.S. Oceanic*, Captain Antonellos, had to ensure that an entry for each bunkering of fuel was recorded in the Oil Record Book and that each recorded entry was signed by the officer in charge of the bunkering. There is documentary evidence of bunkering from Marine Petrobulk Limited to the *S.S. Oceanic*, in Vancouver, on July 27, 2009 (Exhibit M-6). While an entry for that bunkering does not appear in the photocopies of the four pages from the Oil Record Book of the *S.S. Oceanic* (Exhibit M-3), as only one of those photocopies shows a page number, there is some uncertainty as to whether a page showing an entry for July 27, 2009, might be missing. The photocopies were not certified by Captain Antonellos as true copies of pages of the Oil Record Book as provided for under Regulation 17.7 of Annex 1 to MARPOL. There is evidence that bunkering on July 27, 2009 was recorded in two single-page documents (Exhibits A-2 and A-3) that were on board the *S.S. Oceanic*. There is also the evidence about discrepancies in the figures regarding internal transfers of oil or oily bilge water on the *S.S. Oceanic*, but I do not regard it as sufficient to establish a discrepancy in the Oil Record Book concerning the taking of fuel on board.

[117] The obligation, under subsection 51(3) of the *RPP*, to ensure that there was an entry in the Oil Record Book for each bunkering and that the entry was signed by the officer in charge of

the bunkering, was an obligation of the Master. On July 27, 2009, Captain Antonellos was the Master of the *S.S. Oceanic*, while Mr. Baltas was the Chief Engineer. Mr. Irani gave evidence of being told by Mr. Baltas that he had been busy and had not had time to make the entries. Even if reliance is placed on that evidence to determine that Mr. Baltas would have been the officer tasked with actually making a bunkering entry that day, that evidence would also indicate that Mr. Baltas did not have a wilful intention to omit to make such an entry (indeed, there was no evidence of wilfulness in omitting to make a bunkering entry) and, in any event, that evidence would not shift, from Captain Antonellos to Mr. Baltas, the obligation to ensure the recording or signing of the entry.

[118] Pursuant to paragraph 8(1)(b) of the *VCRs*, the Authorized Representative of the *S.S. Oceanic* had to ensure that the requirements which were to be met for the issuance of an IOPP Certificate were in fact met. It was not established that any of those requirements relate to recording a bunkering entry in the Oil Record Book. Furthermore, the obligations under subsection 8(1) of the *VCRs* are those of the Authorized Representative, which in this case is the Master (pursuant to section 2 of the *Act*). None of the obligations are for Mr. Baltas.

[119] The Member determines that the first element of Violation No. 1 has not been proven.

[120] With regard to the second element, as the Member has determined that Mr. Baltas did not commit a violation as alleged in Violation No. 1, there is no proven violation for which the vessel *S.S. Oceanic* can be determined vicariously liable pursuant to subsection 238(2) of the *Act*.

[121] The elements of Violation No. 2 that the Minister's Representative must prove, on a balance of probabilities, are that, on or about July 27, 2009, at or near the City of Vancouver in the province of British Columbia:

1. there was an internal oil spill in respect of which Mr. Baltas wilfully omitted to make an entry in a log book required to be kept under the *Act*; and
2. while committing that violation of paragraph 23(b) of the *Act*, Mr. Baltas was an employee or agent of the *S.S. Oceanic* acting in the course of his employment or within the scope of his authority (as an agent), thereby rendering the *S.S. Oceanic* liable for the violation.

[122] With regard to the first element, section 51 of the *RPP* and subsection 8(1) of the *VCRs* applied to the *S.S. Oceanic* on July 27, 2009, as the vessel was in Canadian waters on that date. Pursuant to subsection 51(1) of the *RPP* (along with the deemed continuation provisions of paragraph 44(g) of the *Interpretation Act*) and pursuant to paragraph 8(1)(a) of the *VCRs*, an Oil Record Book was required to be kept on board the *S.S. Oceanic* under the *Act*.

[123] Pursuant to subsection 51(3) of the *RPP*, the Master of the *S.S. Oceanic*, Captain Antonellos, had to ensure that the machinery space operations referred to in regulation 17.2 of Annex I to MARPOL and the discharges referred to in paragraphs 8(a), (b) and (d) of the *RPP* were recorded in the Oil Record Book. Pursuant to subsection 8(1) of the *VCRs*, the Authorized Representative of the *S.S. Oceanic* had to ensure that the requirements for the issuance of an

IOPP Certificate were met. It was not established that any of those requirements under the *RPP* or *VCRs* relate to recording an entry in an Oil Record Book with respect to an internal oil spill.

[124] While there was some eyewitness evidence of sawdust being used to clean up what might have been oil in a storage room of the *S.S. Oceanic* and of a black substance remaining on items in the storage area, there was insufficient evidence as to when any internal spill of such oil or black substance might have occurred. Furthermore, the obligations under subsection 51(3) of the *RPP* are those of the Master and the obligations under subsection 8(1) of the *VCRs* are those of the Authorized Representative, which in this case is the Master (pursuant to section 2 of the *Act*). None of the obligations are for Mr. Baltas. There was also no evidence of wilfulness in omitting to make an internal oil spill entry.

[125] The Member has determined that the first element of Violation No. 2 has not been proven.

[126] With regard to the second element, as the Member has determined that Mr. Baltas did not commit a violation as alleged in Violation No. 2, there is no proven violation for which the vessel *S.S. Oceanic* can be determined vicariously liable pursuant to subsection 238(2) of the *Act*.

B. Violation No. 3

[127] For Violation No. 3, the relevant provisions of section 187 of the *Act* provide that no vessel shall discharge a prescribed pollutant, except in accordance with the regulations or a permit. Pursuant to paragraph 4(a) of the *RPP* (along with the deemed continuation provisions of paragraph 44(g) of the *Interpretation Act*), oil and any oily mixture are prescribed for the purposes of section 187 of the *Act*.

[128] As a result, the elements of Violation No. 3 that the Minister's Representative must prove, on a balance of probabilities, are that, on or about July 30, 2009, at or near the City of Vancouver in the province of British Columbia:

1. the *S.S. Oceanic* discharged oil or an oily mixture; and
2. that discharge was not in accordance with the relevant regulations or a permit.

[129] With regard to the first element, section 187 of the *Act* applied in respect of the *S.S. Oceanic* on July 27, 2009, as the vessel was in Canadian waters on that date.

[130] There was extensive evidence about the nature of the black substance in the water around the *S.S. Oceanic*, on the hull of the *S.S. Oceanic* and on the pilings of the Pier beside the *S.S. Oceanic* in the early morning hours of July 30, 2009. The evidence consisted of eyewitness accounts of what the witnesses saw and smelled, as well as photographs taken by some of them. With regard to identifying the substance they saw or smelled, the eyewitnesses were more definitive under examination-in-chief than they were under cross-examination. The eyewitnesses had some knowledge of what oil looks or smells like, but they were not qualified as experts in identifying or analysing substances for oily composition. The eyewitness accounts and photographs indicate that something was being discharged into the water from a hole in the side of the vessel, but there was insufficient evidence to establish what was inside of the vessel at the

location of that hole. The photographs of an oily water separator pipe leading to some hole on the side of the vessel (not necessarily the same hole from which a substance was seen being discharged from the vessel) did not show any substantial evidence of oil or an oily mixture. Samples of the black substance were analysed and a report of the analysis was prepared but the evidence presented did not include that report. The evidence did not provide a comprehensive trail showing the same substance inside the vessel, at the hole on the side of the vessel and in the water near the hole at the side of the vessel. There was also the evidence of the letter signed by Mr. Baltas (Exhibit M-7), wherein he indicated that there was nothing coming from the side of the vessel on the morning of July 30, 2009. There was also evidence that, on July 30, 2009, the *S.S. Oceanic* was involved with clean-up efforts regarding the black substance in the water, but this does not add sufficient evidence that the substance came from the *S.S. Oceanic*. There was also evidence about the diminishing amount of fuel in the tanks of the *S.S. Oceanic* on July 28, 29 and 30, 2009 (Exhibit A-4), but also about the high fuel consumption of the vessel.

[131] Concerning the issue of whether the black substance in the water near the Pier in the early morning of July 30, 2009 might have come from another ship, there was the evidence of Mr. Ferris that, early in the morning of July 30, 2009, another cruise ship was on the west side of the Pier, behind the *S.S. Oceanic*, and that there was not a ship on the east side of the Pier. The evidence of Mr. Bulgin and Captain Irani was that, early in the morning of July 30, 2009, a cruise ship named the *Seven Seas Mariner* was on the east side of the Pier, opposite the *S.S. Oceanic*. Mr. Bulgin could not say whether the black substance came from the *Seven Seas Mariner* and Mr. Waheed did not interview anyone on the *Seven Seas Mariner* as that ship had departed. Furthermore, there was also evidence as to the possibility that the black substance came from a spill involving a transfer from the *Seven Seas Mariner* to a truck on the Pier, although the Member does not place great emphasis on that evidence. Finally, the evidence was unclear as to how the tide might have affected the movement of the black substance in the water.

[132] The Member has determined that the first element of Violation No. 3 has not been proven.

[133] With regard to the second element, as the Member has determined that it has not been proven that there was a discharge of oil or an oily mixture from the *S.S. Oceanic* on July 30, 2009, it is unnecessary to determine whether any such discharge was not in accordance with the *RPP* or a permit granted under the *Canadian Environmental Protection Act*, 1999, S.C. 1999, c. 33.

C. Violation No. 4

[134] Concerning Violation No. 4, the relevant portions of paragraph 23(c) of the *Act* provide that no person shall wilfully obstruct any inspector that is exercising powers or performing duties under the *Act*. Under subsection 238(2) of the *Act*, a vessel is liable for a violation that is committed by an employee or an agent of the vessel acting in the course of the employee's employment or within the scope of the agent's authority, whether or not the employee or agent who actually committed the violation is identified or proceeded against in accordance with the *Act*.

[135] As a result, the elements of Violation No. 4 that the Minister's Representative must prove, on a balance of probabilities, are that, on or about July 31, 2009, at or near the City of Vancouver in the province of British Columbia:

1. Captain Antonellos wilfully obstructed Senior Marine Inspector Captain Irani or Mr. Waheed while either Inspector was exercising powers or performing duties under the *Act*; and
2. in committing that violation of paragraph 23(c) of the *Act*, Captain Antonellos was an employee or agent of the *S.S. Oceanic* acting in the course of his employment or within the scope of his authority (as an agent), thereby rendering the *S.S. Oceanic* liable for the violation.

[136] With regard to the first element, paragraph 23(c) of the *Act* applied in respect of the *S.S. Oceanic* on July 31, 2009, as the vessel was in Canadian waters on that date.

[137] Captain Irani characterized his involvement with the internal spill issue as a safety inspection, but during cross-examination he acknowledged that the purpose of the attendance by him, Mr. Waheed and others may not have been clear when they boarded the *S.S. Oceanic* on July 31, 2009. Mr. Waheed himself testified that he saw their involvement with the internal spill as a pollution investigation. Mr. Waheed's evidence was that they were heading towards the area where an internal oil spill might have occurred when they were told that the Master (Captain Antonellos) wanted to see them and that the Inspectors would not be allowed to go to the area with the two witnesses.

[138] The powers and duties of persons conducting an *inspection* can be quite different from those conducting an *investigation* and it would not be unreasonable for a master to seek clarification about the nature of an attendance and the roles of those attending. If there was any interference with the exercise of the powers or the performance of the duties of Captain Irani or Mr. Waheed as inspectors, it was minimal. Any possible interference was to clarify that the attendance was partly to complete the PSC inspection and partly to conduct an internal spill inspection or investigation; and to question the role of those attending with Captain Irani and Mr. Waheed. There was no evidence that the short delay which occurred was prejudicial to the exercise of their powers or the performance of their duties.

[139] The Member has determined that the first element of Violation No. 4 has not been proven.

[140] With regard to the second element, as the Member has determined that Captain Antonellos did not commit a violation as alleged in Violation No. 4, there is no proven violation for which the vessel *S.S. Oceanic* can be determined vicariously liable pursuant to subsection 238(2) of the *Act*.

D. Violation No. 5

[141] Violation No. 5 was withdrawn by the Minister's Representative during the Hearing.

VI. DETERMINATION

[142] The Minister of Transport has not proven, on a balance of probabilities, that the Applicant, the *S.S. Oceanic*, is liable for the violation alleged in Violation No. 1, Violation No. 2, or Violation No. 4 of the Notice of Violation or has violated the relevant provision of the *Canada Shipping Act, 2001* as alleged in Violation No. 3 of the Notice of Violation. As a result, the penalty of \$7 800 for each of Violation No. 1, Violation No. 2, Violation No. 3 and Violation No. 4 is dismissed. Violation No. 5 of the Notice of Violation was withdrawn by the Minister of Transport.

January 23, 2012

(Original signed)

Barrie LePitre

Member