E

International Oil Pollution Compensation Funds

Agenda Item 3	IOPC/NOV21/**3**/**10**	
Date	29 September 2021	
Original	English	
1992 Fund Assembly	92A26	
1992 Fund Executive Committee	92EC77	●
Supplementary Fund Assembly	SA18	

INCIDENTS INVOLVING THE IOPC FUNDS — 1992 FUND

NATHAN E. STEWART

Note by the Secretariat

Objective of document:	To inform the 1992 Fund Executive Committee of the latest developments regarding this incident.
Summary:	In October 2018, the Director was served with proceedings concerning an incident that occurred two years earlier, in 2016. On 13 October 2016, the articulated tug-barge (ATB) composed of the tug *Nathan E. Stewart* and the tank barge *DBL 55* ran aground 10 nautical miles west of Bella Bella, British Columbia, Canada. The tug subsequently sank and separated from the barge. Approximately 110 000 litres of diesel oil was released into the environment. A First Nation community consisting of five tribes, which allegedly has aboriginal title and rights over the area impacted by the incident, has brought a legal action against the shipowners, operators, the master and an officer of the *Nathan E. Stewart/DBL 55* ATB in the Supreme Court of British Columbia. The claimants also include as third parties, among others, the Ship-source Oil Pollution Fund (SOPF) in Canada, the 1992 Fund and the Supplementary Fund. The legal action brought by the First Nation community has been stayed by the Federal Court of Canada pursuant to an order rendered in July 2019 in the context of limitation proceedings commenced by the owners of the tug and the barge. The Federal Court has ordered that a limitation fund be constituted pursuant to the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (Bunkers Convention 2001), and the Convention on Limitation of Liability for Maritime Claims, 1976, as modified by the 1996 Protocol (LLMC 76/96), on the basis of the combined tonnage of the tug and barge. The Court has also concluded that there is no factual basis upon which a limitation fund could be constituted under the 1992 Civil Liability Convention (CLC) at this time.
Recent developments:	The next stage in the proceedings is the discovery, during which the parties list and communicate all relevant documents and submit them for examination. The IOPC Funds have to wait until the shipowners disclose their list of documents, at which point in time the IOPC Funds will consider presenting a motion to determine whether they should remain a party to these proceedings. Although this was expected to take place within months following the Federal Court judgment of July 2019, the case has remained inactive since the Spring of 2020 and there is no indication as to when the parties intend to proceed with this next step.

Relevant documents:	The online *Nathan E. Stewart* incident report can be found via the Incidents section of the IOPC Funds' website.
Action to be taken:	1992 Fund Executive Committee Information to be noted.

1 Summary of incident

Ship	Articulated tug-barge (ATB) composed of the tug *Nathan E. Stewart* and the tank barge *DBL 55*
Date of incident	13.10.2016
Cause of incident	Human error (probably due to fatigue)
Quantity of oil spilled	110 000 litres of diesel oil
Area affected	Entrance of Seaforth Channel, British Columbia, Canada
Flag State of ship	United States of America
Gross tonnage	ATB unit less than 5 000 units of tonnage (tug 320 GT)
P&I insurer	Starr Indemnity & Liability Company
Limitation of liability (LLMC 76/96)	CAD 5 568 000 (£3.3 million)[<1>]
Legal proceedings	The 1992 Fund and the Supplementary Fund have been named as 'other parties or persons' in legal proceedings by a First Nation community against the shipowners in the Supreme Court of British Columbia. The shipowners initiated limitation proceedings in the Federal Court of Canada. The Federal Court has issued directions for the establishment of a limitation fund and the filing of claims, pursuant to the Bunkers Convention 2001 and the LLMC 76/96. The proceedings at the Supreme Court of British Columbia have been stayed.

2 Background information

2.1 In October 2018, the Director was informed of an incident that occurred in 2016. On 13 October 2016, the articulated tug-barge (ATB) composed of the tug *Nathan E. Stewart* and the tank barge *DBL 55* ran aground on Edge Reef near Athlone Island, at the entrance to Seaforth Channel, approximately 10 nautical miles west of Bella Bella, British Columbia, Canada. The tug's hull was eventually breached and some 107 552 litres of diesel bunker oil and 2 240 litres of lubricants were released into the environment. The tug subsequently sank and separated from the barge.

2.2 The ATB was returning from Alaska where it had delivered jet fuel and gasoline and was on its way to the Port of Vancouver. After discharge in Alaska, on the return voyage the barge *DBL 55* was in ballast. On its previous voyage the *DBL 55* was loaded with jet fuel and gasoline.

2.3 When the *Nathan E. Stewart* was in pushing mode, the bow of the tug was secured to the V-shaped indent at the stern of the barge with pneumatically operated pins. When the two vessels were connected in this manner, they became an articulated tug-barge (ATB). It would appear the *Nathan E. Stewart* routinely transited from petroleum facilities in the State of Washington,

[<1>] Based on the exchange rate as at 30 June 2020 of £1 = CAD 1.6829.

United States of America (U.S.A), and Vancouver, British Columbia, Canada, with the *DBL 55* or one of the company's other tank barges loaded with refined petroleum products to be delivered to various ports in Alaska.

2.4 The ATB was insured by Starr Indemnity & Liability Company (a fixed premium insurer).

3 Applicability of the Conventions

3.1 Canada is a Party to the 1992 Civil Liability and Fund Conventions and the Supplementary Fund Protocol.

3.2 The application of the Conventions, however, is not clear in this case. Firstly, there is a question over whether the *Nathan E. Stewart*/*DBL 55* ATB falls within the definition of 'ship' under Article I(1) of the 1992 Civil Liability Convention (CLC).

3.3 Secondly, at the time of the incident, the barge was empty and was therefore not carrying oil in bulk as cargo. In addition, it has not been established whether during any previous voyage it had carried any persistent oil in bulk as cargo. Its last known cargo was jet fuel and gasoline, which are non-persistent products.

3.4 If the ATB carried non-persistent oil on previous voyages, it would appear that the 1992 CLC and 1992 Fund Convention would not be applicable. In that case, since the spilled oil was bunkers, the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (Bunkers Convention 2001) should apply instead.

4 Civil proceedings

4.1 In October 2018, a First Nation community consisting of five tribes brought a legal action against the owners, operators, the master and an officer of the *Nathan E Stewart/DBL 55* ATB in the Supreme Court of British Columbia. The claimants also include as third parties: the Ship-source Oil Pollution Fund (SOPF), the 1992 Fund and the Supplementary Fund.

4.2 The claimants say they have aboriginal title and sovereign rights in the affected area. They also state that the area affected by the spill is a traditional harvesting site for food resources such as clams and abalone. The claimants allege that the spill caused immediate and long-term impacts or risks of impacts on populations of marine resources, with loss of harvesting opportunities. The claim includes losses relating to past and future interference with the claimants' use and enjoyment of the area. The claim is also for expenses in connection with response efforts, including impact assessment. The claimants also request that the shipowners take necessary action to evaluate the long-term impact of the spill.

4.3 The claimants argue for the application of the Bunkers Convention 2001 or, as an alternative, the 1992 CLC and, in the latter case, they seek from the 1992 Fund and the Supplementary Fund compensation for any damage in excess of the 1992 CLC. Furthermore, the claimants challenge the validity and application of the limitation of liability or other restriction on the type of damage they can recover under the Conventions, claiming it to be illegal and an infringement of their aboriginal rights since they were not consulted, nor did they agree to any restriction on the right to full compensation.

4.4 The shipowners filed an application to stay the proceedings at the Supreme Court of British Columbia. The shipowners contest the jurisdiction of the Supreme Court of British Columbia and maintain that the Federal Court of Canada is a more suitable forum for those claims to be adjudicated (see section 5).

4.5 The claimants filed a motion seeking to have the Supreme Court of British Columbia confirm its jurisdiction to adjudicate the claims against the shipowners, despite the Federal Court limitation action. However, they have since adjourned the presentation of that motion.

4.6 Following an order from the Federal Court of Canada in July 2019, the proceedings at the Supreme Court of British Columbia have been stayed pending final determination of the limitation action instituted by the shipowners in the Federal Court of Canada (see section 5).

5 Limitation proceedings

5.1 In May 2019, the shipowners filed an action before the Federal Court of Canada to establish a limitation fund and stay the Supreme Court of British Columbia proceedings.

5.2 Also, in May 2019, the First Nation community filed a notice of motion objecting to the jurisdiction of the Federal Court over the limitation action.

Shipowners' arguments

5.3 The owner of the barge *DBL 55* is an affiliate of the owner of the tug *Nathan E. Stewart.* The shipowners allege that, notwithstanding the use of the coupling system, the tug and the barge remained two separate vessels.

5.4 In support of their motion to constitute a limitation fund, the shipowners filed an affidavit from one of their employees stating that the tug navigated from petroleum facilities in the State of Washington, U.S.A to the Port of Vancouver, British Columbia, Canada, with the barge (or another tank barge) loaded with refined petroleum products and that at no time did the barge carry any type of persistent oil as cargo.

5.5 The shipowners also argued that the 1992 CLC was not applicable in this case, as neither the tug nor the barge falls within the definition of 'ship' in the 1992 CLC. In particular, the shipowners argue that:

- the barge is not a 'ship' because at no time did it carry any type of persistent oil as cargo;
- the tug and the barge are to be considered as two separate ships for the purposes of a limitation of liability analysis. The tug is not a 'ship' because it was not capable of carrying oil as cargo. The diesel fuel and lubricants that were released during the incident were bunkers used solely for the operation or propulsion of the tug.

First Nation community's arguments

5.6 The First Nation community has argued that, at the time of the grounding, both the tug and barge were maneuvered, navigated and lighted as a single ship (being rigidly connected together through a 'JAK' (ATB-coupling system) so that, for the purpose of ascertaining the basis of the limitation of liability, the articulated tug and barge assembly (the 'ATB') was a 'form of composite vessel' (within the meaning of the International Regulations for Preventing Collisions at Sea, 1972 and the corresponding Canadian Collision Regulations) 'that was in fact and in law a single ship'.

5.7 The First Nation claimants also allege that, to the extent common ownership of the tug and barge is relevant to determine whether the limitation of liability should be based on the aggregate tonnage of the two vessels, both tug and barge were commonly-owned within the meaning of the Bunkers Convention 2001 and the Convention on Limitation of Liability for Maritime Claims, 1976, as modified by the 1996 Protocol (LLMC 76/96) since:

(a) the registered owners were part of the same corporate group with interrelated activities contributing to a common undertaking or with common management, control and direction; or

(b) the registered owners were subject to a sufficient degree of common corporate control to warrant the piercing of the corporate veil; or

(c) that the tug and barge had the same charterer, manager or operator, each of whom qualifies as a 'shipowner' in the said Conventions.

5.8 Although the claimants disputed the shipowners' assertion that the tug was a separate ship from the barge the claimants also argued that, if the shipowners should prevail on that point, that would be another reason why the 1992 CLC could not be applicable, since oil held as cargo in the barge would not be cargo of the tug and, therefore, the tug could not be considered as carrying oil in bulk as cargo, as required by the definition of 'ship' under the 1992 CLC.

Judgment by the Federal Court of Canada in July 2019

5.9 The Federal Court of Canada rendered a decision in July 2019, granting the shipowners' motion and ordering that any claimants are precluded from commencing or continuing proceedings against the shipowners before any court other than the Federal Court, until the limitation action has been determined. Therefore, the First Nation community could not continue its action in the Supreme Court of British Columbia against the shipowners. The Federal Court also decided that a limitation fund should be constituted pursuant to the Bunkers Convention 2001 and the LLMC 76/96, on the basis of the combined tonnage of the tug and barge. The Federal Court concluded that there was no factual basis upon which a limitation fund under the 1992 CLC could be constituted at that time.

5.10 As a result of the Court's decision, claims will be processed in the Federal Court as part of the limitation action.

5.11 Following the Federal Court's decision, the shipowners have since filed with the Court a bank guarantee in the amount of CAD 5 568 000 (£3.3 million), plus interest.

5.12 At a later stage, the Court will also have to determine whether or not, for the purpose of limitation, the barge and tug formed one unit.

5.13 Eventually, the shipowners will be subject to discovery and will have to communicate all relevant information/documentation which should include the details about the nature of the substances carried on board the tug and the barge. This should enable the Court to reach a decision on whether or not the incident falls within the scope of the 1992 CLC. However, since the Federal Court judgment of July 2019, very little development has occurred and in fact, no activity has been reported since the Spring of 2020. It is expected that the case will come up for case management review by the Federal Court in the next few months, at which point in time, the intentions of the main parties (the First Nation community and the shipowners), regarding the progression of the case, should become known.

6 Claims for compensation

6.1 The 1992 Fund has not received any claims in relation to this incident but based on the pleadings submitted in court, it is understood that the shipowners have paid some CAD 3.5 million (£2 million) to the First Nation community in respect of services rendered during the incident response and subsequent claims arising out of the incident.

6.2 The First Nation community has not yet quantified its claims but it alleges to have incurred:

(i) operational expenses in the course of the incident response and the subsequent environmental impact assessments which have not been fully compensated by the shipowners; and

(ii) losses resulting from the loss of marine resources based on:

(a) aboriginal rights to be established in the civil proceedings;
(b) commercial licences rights; and
(c) public rights to fish.

6.3 In addition, the shipowners have supported all the costs of the incident response, including costs incurred by the Canadian authorities.

7 Director's considerations

7.1 The application of the 1992 Conventions is not clear in this case, principally on two fronts: firstly, it has not been established whether the *Nathan E. Stewart*/*DBL 55* ATB could be considered a 'ship' under Article I(1) of the 1992 CLC and secondly, even if this was the case, the unit was not actually carrying oil in bulk as cargo at the time of the incident and it is not clear whether it was carrying any persistent oil during any previous voyage. Its last known cargo was jet fuel and gasoline, which are non-persistent products.

7.2 In July 2019, the Federal Court of Canada found that, based on the facts known to that date, there was no factual basis to invoke the application of the 1992 CLC. On the other hand, the claimants are not relying on the 1992 CLC but on the Bunkers Convention 2001, and as a precaution, they had pleaded the application of the 1992 CLC as an alternative. It is, therefore, unlikely that the IOPC Funds will remain involved in this case.

7.3 The next stage in the proceedings is the discovery during which the parties list and communicate all relevant documents and submit them for examination. Although this was expected to take place within months following the Federal Court judgment of July 2019, the case has remained inactive since the Spring of 2020 and there is no indication as to when the parties intend to proceed with this next step. A case management review by the Federal Court should take place in the coming months, at which point in time, it should become clearer when discovery will finally take place.

7.4 The IOPC Funds must wait until the shipowners disclose their list of documents, and then consider presenting a motion to determine whether the IOPC Funds should remain a party to these proceedings.

8 Action to be taken

1992 Fund Executive Committee

The 1992 Fund Executive Committee is invited to take note of the information contained in this document.