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Citation: *Broders v. Canada (Minister of Transport)*, 2013 TATCE 10 (Review)

Date: 20130416

Docket: MA-0138-33

MoT File No.: A20110822-101-00541

IN THE MATTER OF the Review Hearing requested by Austin Broders with respect to a violation of section 187 of the *Canada Shipping Act, 2001*, S.C. 2001, c. 26, as alleged by the Minister of Transport.

BETWEEN:

AUSTIN BRODERS, Applicant

and

MINISTER OF TRANSPORT, Respondent

Before: C. Michael Keefe, Member

Heard at St. John's, Newfoundland and Labrador, on August 28, 2012

For the Applicant: Mark Murray

For the Respondent: Frank Ritchie

REVIEW DETERMINATION AND REASONS

Held: The Minister of Transport did not prove, on the balance of probabilities, that Austin Broders discharged a prescribed pollutant, thereby contravening section 187 of the *Canada Shipping Act, 2001*. Therefore, I dismiss the monetary penalty of \$1 250, as imposed by the Minister.

I. BACKGROUND

A. Austin Broders (TATC File No.: MA-0138-33)

[1] On August 24, 2011, the Minister of Transport (Minister) issued a Notice of Violation (Notice) to the Applicant, Austin Broders, for violating section 187 of the *Canada Shipping Act, 2001 (Act)*. It is alleged that on or about August 11, 2011, Austin Broders discharged a prescribed pollutant at or near the harbour of St. John's, Newfoundland and Labrador (NL).

[2] Schedule A of the Notice states the following:

On or about August 11, 2011, at or near St. John's harbour in the province of Newfoundland and Labrador, Austin Broders, being the Chief Engineer on board the CCG Cape Roger, discharged a prescribed pollutant thereby contravening section 187 of the Canada Shipping Act, 2001.

Penalty \$1250.00

[3] On October 4, 2011, Mark Murray, acting on behalf of Austin Broders, filed a request for a review with the Transportation Appeal Tribunal of Canada (Tribunal)

B. Keith Forsey (TATC File No.: MA-0139-33)

[4] On August 24, 2011, the Minister issued a Notice to the Applicant, Keith Forsey, for violating section 187 of the *Act*. It is alleged that on or about August 11, 2011, Keith Forsey discharged a prescribed pollutant at or near the harbour of St. John's, NL.

[5] Schedule A of the Notice states the following:

On or about August 11, 2011, at or near St. John's harbour in the province of Newfoundland and Labrador, Keith Forsey, being the Second Engineer on board the CCG Cape Roger, discharged a prescribed pollutant thereby contravening section 187 of the Canada Shipping Act, 2001.

Penalty \$1250.00

[6] On October 3, 2011, the Applicant, Mr. Forsey, filed a request for a review with the Tribunal.

II. STATUTES AND REGULATIONS

[7] The relevant portions of the *Act* are as follows:

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

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

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

[...]

(c) respecting the carrying of pollutants on board a vessel, whether as cargo or fuel;

[...]

191. (1) Every person who, or vessel that, contravenes any of the following commits an offence:

(a) section 187 (discharge of a pollutant);

[...]

(d) a provision of the regulations made under this Part.

[...]

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

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.

254. (1) No person may be found guilty of an offence under this Act if the person establishes that they exercised due diligence to prevent its commission.

[8] The relevant portions of the *Regulations for the Prevention of Pollution from Ships and for Dangerous Chemicals*, SOR/2007-86, (*Pollution Regulations*), that were in force at the time of the alleged violation, state:

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

"loading facility" means any shore or sea installation that is used for the loading of oil or an oily mixture or a noxious liquid substance or a dangerous chemical onto a ship.

[...]

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

[...]

"transfer operation" means

(a) the loading of oil, an oily mixture, a noxious liquid substance or a dangerous chemical onto a ship from a loading facility or from another ship; or

[...]

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

(a) a Canadian ship anywhere; and

[...]

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

(a) oil and any oily mixture;

[...]

49. The supervisor of a transfer operation on board a ship shall ensure that

[...]

(h) the following measures are taken to prevent the discharge of oil

[...]

(iii) all scuppers are plugged;

[...]

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

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

III. ELEMENTS TO BE PROVEN

A. Austin Broders

[10] Based on the Notice and the applicable legislation, I identified the following elements to be proven by the Minister:

1. There was a discharge of a prescribed pollutant.
2. The discharge originated from the Canadian Coast Guard Ship (CCGS) *Cape Roger*.
3. The discharge was in excess of that permitted by the *Pollution Regulations*.
4. Mr. Broders caused the discharge to occur.

B. Keith Forsey

[11] Based on the Notice and applicable legislation, I identified the following elements to be proven by the Minister:

1. There was a discharge of a prescribed pollutant.
2. The discharge originated from the CCGS *Cape Roger*.
3. The discharge was in excess of that permitted by the *Pollution Regulations*.
4. Mr. Forsey caused the discharge to occur.

IV. EVIDENCE

A. Minister

(1) Stan Gutt

[12] At the time of the alleged violation, Stan Gutt was employed by Transport Canada, Marine Safety, in St. John's, NL. He testified that he boarded the CCGS *Cape Roger* on August 12, 2011, at the Coast Guard wharf in St. John's, to investigate a pollution incident that was reported to have occurred the previous evening at the Irving Oil wharf, also in St. John's.

[13] While on board the ship, Mr. Gutt spoke to the Captain, the Chief Engineer – Austin Broders, and the Second Engineer – Keith Forsey, and requested that each of them give him a written statement with respect to the reported pollution incident. Mr. Gutt identified Mr. Broders' statement (Exhibit M-1) and Mr. Forsey's statement (Exhibit M-2).

[14] Under cross-examination, Mr. Gutt indicated that the decision to proceed with a Notice against Mr. Broders was based on the Captain's and Mr. Forsey's written statements. He acknowledged that Mr. Broders did not actually discharge a pollutant.

[15] When asked who was supervising the refuelling operation, Mr. Gutt stated it was, according to the Captain's statement, the First Engineer (herein after referred to as the Senior Engineer) and the Second Engineer. He later stated that it was the Chief Engineer, Mr. Broders, who was supervising the operation.

[16] Mr. Gutt stated that a meeting was held prior to bunkering, which was attended by Mr. Broders, and other engineers and shore-side personnel involved in the refuelling operation. At this point, the Minister objected, stating: "Mr. Gutt is making suppositions, he's not giving direct evidence of things". Mr. Gutt later stated that he had no knowledge of such a meeting taking place.

[17] When asked whether he had obtained a copy of the portion of the ship's *Fleet Safety and Security Manual* that deals with the handling of petroleum products (Exhibit A-1), Mr. Gutt replied in the negative. When asked if the pre-fuelling checklists had been completed, he replied that based on the contents of the letter from the Captain, they had not been.

[18] Mr. Gutt identified an excerpt from the ship's deck logbook (Exhibit A-2) where, opposite the time of 18:24, it states: "CH/O [Chief Officer] advised check list for bunkering complete".

[19] Mr. Gutt understood from the Captain that at the time of the alleged discharge, the Senior Engineer was on deck, at the fuelling station. Mr. Gutt later stated that he did not know where any of the engine room staff were during the refuelling operation. He had not asked for that information. He indicated that the Notice against Mr. Broders was issued solely because he was the Chief Engineer and it is Mr. Gutt's opinion that the Chief Engineer is responsible for the actions of the engine room staff.

[20] When asked how many persons were employed in the engine room, Mr. Gutt replied three engineers: a Chief Engineer and one or two Oilers. He then said that he didn't know, he wasn't interested, and it was irrelevant to his investigation. He acknowledged that it would require more than one person to perform the refuelling operation.

[21] Mr. Gutt identified the engine room (bunkering of vessel) checklist (Exhibit A-3) and stated that it was the Chief Engineer's responsibility to ensure that the tasks on the list were completed before he was to sign it. He agreed that the Captain had told him, in her written statement (not entered into evidence), that the Senior Engineer was in charge of all fuelling operations. During his on-board investigation, Mr. Gutt had not seen or asked for the engine room checklist, nor had he interviewed or requested a statement from the Senior Engineer.

[22] Furthermore, in cross-examination, Mr. Gutt opined that the cause of the alleged discharge was that a wrong valve had been opened, crew members were sounding the wrong tank, and the deck scuppers had not been plugged.

[23] Mr. Gutt identified the deck (Bunkering Checklist Bridge) checklist (Exhibit A-4). When asked if he had made any notes during his investigation or as the result of discussions with his manager, Mr. Gutt stated that he had made no notes. He also stated that he had not inquired if Mr. Broders had delegated any of his authority to his staff, or how the Senior Engineer ended up being at the refuelling station.

[24] Mr. Gutt stated that the Chief Engineer, Mr. Broders, had been working on the vessel for a number of years.

(2) *Mary Margaret Chislett*

[25] Mary Chislett identified herself as being the Commanding Officer of the CCGS *Cape Roger* at the time of the alleged discharge.

[26] Captain Chislett testified that on the evening of August 11, 2011, the ship was secured at Pier 24 in St. John's harbour to take on fuel. After all checklists were completed and logged as being complete, the refuelling commenced at approximately 7:00 p.m. Two deep tanks (herein after called "wing tanks") were first filled and then, shortly after switching over to fill the No. 2

double bottoms, she was informed that a fuel spill had occurred. She proceeded to the site of the spill, by the vent for the starboard wing tank, checked, and saw that the plugs for the save-alls and the scuppers were not in place.

[27] Captain Chislett testified that shipboard instructions, part of the International Safety Management (ISM) Code checklists, state that all scuppers and save-alls are to be plugged. She questioned the Chief Officer as to why the plugs were not in place and he replied that they don't normally plug them. She stated that she then went to the engine control room where Mr. Forsey admitted that he had opened the wrong valves.

[28] During cross-examination by Mr. Broder's Representative, Captain Chislett confirmed that she had provided a statement to Mr. Gutt. She agreed that her statement indicated that at 6:24 p.m., she heard the Chief Officer call the Third Mate on the radio with the request to make a note in the deck log that the bunkering checklist had been completed.

[29] Captain Chislett confirmed that both checklists (Exhibits A-3 and A-4) require all scuppers and save-alls to be plugged. She had relied on the Chief Officer, acknowledging his years of experience on board the ship, stating he had also previously served as Commanding Officer and that she had no reason to doubt him when he said that the checklists were completed. She described the Senior Engineer as being a very competent and conscientious individual who had served on the ship since 2006 and who had been in charge of bunkering activities before this alleged incident. It is normal practice, in her experience, that the Senior Engineer is in charge of bunkering operations.

[30] It was Captain Chislett's understanding that three separate checklists were used prior to bunkering and that each of these checklists indicated that the save-alls and scupper plugs were in place. The third checklist (not entered into evidence) was one that the fuel supplier used. Captain Chislett testified that she had seen the checklist and that it had been signed as being complete by the ship's Chief Officer.

[31] Sometime after the overflow, the Captain spoke to the Senior Engineer, requesting a statement of what had happened. It was determined that approximately 80 litres of fuel had escaped overboard.

[32] During cross-examination by Mr. Forsey, Captain Chislett stated that the normal practice is for a member of the deck crew to ensure that the save-alls and scuppers are plugged. Ensuring that the plugs are in place is also an item on the engine room checklist (Exhibit A-3). The Captain stated that when the Senior Engineer was asked about the scuppers not being plugged, he informed her that he had checked it off as being done based on the Chief Officer's word.

[33] Mr. Forsey questioned Captain Chislett about the names of the fuel tanks and the labeling of three fuel tank fill valves. When asked if the ship had a No. 2 fuel oil wing tank, the Captain replied in the negative, stating that it only had port and starboard wing tanks.

[34] At the time of the alleged incident, the valve for the starboard wing tank was labeled NO 2 F.O. WING TK FILL (Exhibit A-5-1). The day following the alleged incident, this valve

was relabeled STBD F/O WING TANK FILL (Exhibit A-5-2). Captain Chislett had difficulty reading the label on the third valve (Exhibit A-5-3) and identified it as being NO 2 F.O. (illegible) FILL STBD.

[35] Mr. Forsey introduced a photograph of the save-all that was mounted in way of the fuel tank vent from which the fuel escaped (Exhibit A-5-4). Mr. Forsey explained that the save-all could hold approximately 150 litres and that the spill was estimated to be 80 litres.

B. Applicants

(1) Austin Broders

[36] At the time of the alleged incident, Mr. Broders was Chief Engineer on board the CCGS *Cape Roger*. He has served with the Canadian Coast Guard for 26 years, as Senior Engineer for approximately seven of those years, and as Chief Engineer for five years.

[37] He testified that he had joined the ship at the Coast Guard base in St. John's, NL on August 10, 2011, never having served on the CCGS *Cape Roger* before. He had a familiarization tour with the outgoing Chief Engineer and met the engine room crew around noon that same day. The following day, the ship proceeded to the Irving dock with the intention of taking on approximately 100 000 litres of fuel. He met with the Senior Engineer, the Second Engineer, the Third Engineer and the Oiler, to assess their comfort level with taking on fuel and to determine if they were familiar with the operation. None of his crew indicated they were uncomfortable with the refuelling operation. Additionally, he had asked Captain Chislett if she was comfortable with the engine room crew. For the refuelling operation, the Senior Engineer was assigned to the fuelling station, the Second Engineer was in charge of the fuel manifold in the engine room, and the Third Engineer and the Oiler were assigned to sounding the tanks. He testified that the engine room checklist (Exhibit A-3) was reviewed to ensure everyone was familiar with what had to be done before bunkering commenced. The checklist was then passed to the Senior Engineer.

[38] Mr. Broders explained that during the refuelling, he monitored the process, checking on his staff and visiting the locations where refuelling duties were being carried out. Mr. Broders testified that the people involved with the refuelling operation in the control room were in radio contact with the people involved above decks.

[39] Mr. Broders testified that he was exiting the sewage compartment, where the sounding pipes for the No. 2 double bottom tanks were located, when he was informed that some fuel had been discharged overboard. It was his understanding that the valve marked NO 2 F.O. WING TK FILL (Exhibit A-5-1) had been opened in error and that the valve that should have been opened was NO 2 F.O. (illegible) FILL STBD (Exhibit A-5-3).

[40] Mr. Broders testified that it is his experience with the Coast Guard that the Senior Engineer handles the bunkering process.

[41] Under cross-examination, Mr. Broders explained that the Third Engineer and the Oiler were sounding the double bottom tanks. After dipping the starboard tank and not getting any

reading, they radioed Mr. Forsey and requested that he check to ensure the correct valve was opened. They dipped the tank four or five times and did not obtain any change in readings. As Mr. Broders did not have a radio, he was unaware of this. While this was happening, Mr. Broders visited the compartment where the Third Engineer and the Oiler were dipping the tanks; however, he was not informed of the lack of change in the soundings. The overflow occurred as Mr. Broders was leaving the compartment.

[42] In terms of the engine room checklist (Exhibit A-3), Mr. Broders explained that ensuring the scuppers were plugged was part of the Senior Engineer's job, as he was the one on deck by the fuelling station.

(2) Keith Forsey

[43] Mr. Forsey identified himself as being the person "who opened the wrong valve which was improperly labeled". He identified statements that Wade Sheppard, Chief Officer (Exhibit A-6) and Randy Roberts, Bosun (Exhibit A-7), had given him. He also identified a list of soundings (Exhibit A-8) he had recorded during the refuelling operation while he was at the fuel manifold.

[44] When asked by the Minister who was responsible for ensuring the deck scuppers were plugged, Mr. Forsey replied that it was his experience over 25 or 30 years that it was the responsibility of the deck department. He has never had to do it himself.

[45] Mr. Forsey explained that the Senior Engineer was on deck, at the fuelling station, in contact with the shore-side party, and fuelling began when he stated it was okay. The Senior Engineer, the Third Engineer and the Oiler, the mates, the bridge and Mr. Forsey all had radios. The dialogue between Mr. Forsey in the engine room and the crew sounding the tanks in the sewage compartment was broadcast and all of the above complement could hear that conversation. However, Mr. Broders didn't have a radio, as they were short one radio.

[46] Under cross-examination by Mr. Broders' Representative, Mr. Forsey stated that it was his experience on other Coast Guard ships that one might never see the Chief Engineer during a refuelling operation but that Mr. Broders' "...style is he keeps going around..."

V. ARGUMENTS

A. Minister

[47] The Minister submits that there were two causes of the alleged incident: an incorrect valve was opened, and the save-all and scupper plugs were not in place.

[48] The Minister claims that because Mr. Forsey opened the wrong valve, whether it was labeled incorrectly or not, he bears responsibility.

[49] It is the Minister's opinion that the Chief Engineer has overall responsibility for the bunkering operation, and it is his responsibility to monitor and ensure that it is done properly. His opinion is that the Chief Engineer was responsible for verifying that the scupper plugs were in place. He relies on the testimony of Mr. Gutt, who has many years of experience, that it is the Chief Engineer's responsibility to ensure that everything is ready prior to refuelling.

[50] Additionally, the Minister submits that Mr. Broders is Mr. Forsey's employer and can therefore be held liable for Mr. Forsey's actions. Even though the ISM Code was in place to help prevent accidental discharges, the onus was on the employer to ensure that the system was effective.

[51] With respect to the penalty, the Minister feels the minimum of \$1 250 is appropriate in both cases. He further states that it is his belief that the Tribunal has the ability to set an amount below the minimum, if it so chooses.

A. Applicants

(1) Austin Broders

[52] Mr. Broders' Representative submits that there has been no evidence that his client discharged a prescribed pollutant either directly or indirectly. He submits that there is no statutory requirement that Chief Engineers be held responsible for pollution incidents.

[53] He references section 254 of the *Act* and submits a booklet entitled *Applicants List of Authorities*, citing the availability of a due diligence defence for his client. He reminds the Tribunal that Mr. Broders checked with Captain Chislett before bunkering, asking if there were any competency issues with the engine room staff and was told there were none. Mr. Broders delegated his authority for bunkering according to normal Coast Guard practice, with the Senior Engineer being in charge. He reminds the Tribunal that the Captain testified that the Senior Engineer was in charge. Mr. Broders met with his staff, as confirmed by Mr. Forsey, to ensure all parties involved were comfortable with their duties. He individually assigned the staff their duties and no one raised any issues. Mr. Broders reviewed the bunkering checklist with the Senior Engineer who then took it up on deck and completed it. Mr. Broders relied on his second in command and during the bunkering process, he was monitoring the operation and neither he nor Captain Chislett was made aware of any problems.

[54] Mr. Broders' Representative submits that the investigation conducted by Mr. Gutt relied only on statements from Captain Chislett and Mr. Broders, and that if a more complete investigation had been carried out, other important factors would have come to light and the Notice would not have been issued in the first place.

(2) Keith Forsey

[55] Mr. Forsey submits that the discharge was accidental. Had the save-all and scuppers been plugged, there would have been no discharge. He refers to Captain Chislett's testimony where she stated the Chief Officer told her that he didn't normally plug the save-all for the tank that

overflowed. He maintains that he operates on the premise that when the bridge states something is done, he takes it for granted that it is.

VI. ANALYSIS

[56] Mr. Gutt gave very little direct evidence of the events surrounding the pollution incident. It was apparent to me that during his cross-examination, the majority of Mr. Gutt's responses were opinions and suppositions. He does not appear to have determined who, on board the ship, was supervising the refuelling operation. I am of the view that the investigation conducted by Mr. Gutt was superficial, at best. His conflicting responses, opinions, and guesses while being cross-examined are disturbing and cause me to give little weight to his testimony. Mr. Gutt was not qualified at this Review Hearing as an expert witness in shipboard refuelling operations in general, or specifically in Coast Guard assignments of refuelling duties and responsibilities. As such, I also give no weight to opinions he expressed regarding the responsibilities of any of this ship's complement.

[57] Captain Chislett's testimony provides sufficient evidence for me to determine, on the balance of probabilities, that there was a discharge of fuel oil from the CCGS *Cape Roger* and that some of this fuel oil found its way into the harbour water in St. John's, NL. As diesel fuel is a mixture of petroleum-derived products, it qualifies as an oily mixture and is therefore a pollutant, pursuant to paragraph 4(a) of the *Pollution Regulations*. Based on this, I find that the first two elements, (that there was a discharge of a prescribed pollutant and that this pollutant came from the CCGS *Cape Roger*), in the cases against Mr. Broders and Mr. Forsey, have been proven on the balance of probabilities.

[58] Captain Chislett's testimony was that the CCGS *Cape Roger* was secured to the Irving Oil wharf at the time of the alleged incident. The *Pollution Regulations* permit the discharge of a polluting substance only under certain conditions while a ship is underway. As the CCGS *Cape Roger* was secured and not underway, I find that the third element (that the discharge was in excess of that permitted by the *Pollution Regulations*) in the cases against Mr. Broders and Mr. Forsey, has also been proven on the balance of probabilities.

[59] However, there has been no direct evidence that Mr. Broders contributed in any way to the discharge of a pollutant.

[60] The Minister has put forward the argument that Mr. Broders was Mr. Forsey's employer and can therefore be held responsible for the discharge. While not referenced during the Minister's arguments, I believe he is relying on subsection 238(2) of the *Act*, which states that a person can be held liable for a violation committed by an employee whether or not the employee who actually committed the violation is proceeded against.

[61] *Black's Law Dictionary*, 8th Edition, defines an employee as: "A person who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance".

[62] An employer also has responsibilities and duties with respect to such things as work assignments, pay, taxes, union-management issues, and organizing leave or holiday schedules, amongst other things. To single out one aspect within an employer's realm of responsibilities and then to consider a person who performs that particular duty, but apparently, due to lack of evidence presented in this case, none of the others, as being an employer is not convincing. There has been no evidence submitted indicating that Chief Engineer Broders was anything more than a supervisor. Consequently, I do not accept that Mr. Broders was Mr. Forsey's employer. I would accept that the Coast Guard is Mr. Forsey's employer.

[63] It would appear that the Minister's case against Mr. Broders also rests on the notion that he permitted the pollution by failing to prevent it due to a lack of follow-up with regard to duties assigned to the Senior Engineer and Chief Officer, that is to say, the plugging of the save-alls and scuppers.

[64] For convenience, I quote section 187 of the *Act*: "No person or vessel shall discharge a prescribed pollutant, except in accordance with the regulations made under this Part..."

[65] While there is allowance in section 187 of the *Act* to hold a ship responsible for the actions of someone on board, there is no specific allowance in that section that would allow the Chief Engineer to be held vicariously responsible for this alleged pollution incident.

[66] We must also consider what the word "discharge" means in relation to a pollution incident. In *R. v. Sault Ste. Marie* [1978] S.C.R. 1299, Justice Dickson spoke to what the Supreme Court determined as being the meanings of the words "cause", "permit" and "discharge". This was a case dealing with a breach of subsection 32(1) of the *Ontario Water Resources Commission Act* that read, at that time, in part, as follows: "Every municipality or person that discharges or deposits or causes or permits the discharge or deposit of any material..."

[67] Justice Dickson states:

...The "discharging" aspect centres on direct acts of pollution. The "causing" aspect centres on the defendant's active undertaking of something which it is in a position to control and which results in pollution. The "permitting" aspect of the offence centres on the defendant's passive lack of interference or, in other words, its failure to prevent an occurrence which it ought to have foreseen...

[68] In section 187 of the *Act*, the word "discharge" is an action verb that is directly linked to the polluting of the harbour waters. There is no suggestion that section 187 is meant to include permitting a discharge, that is to say, "permitting" it, as in allowing the discharge to happen through lack of supervision. Other legislation of the Parliament of Canada appears to acknowledge a difference between performing and permitting an action, and where Parliament has created legislation that makes an offence of both, it is clearly stated. For example, I refer to section 9 of the *Canada Water Act* (R.S.C., 1985, c. C-11): "...no person shall deposit or permit the deposit of waste of any type in any waters..."

[69] As such, it is my view that the word “discharge” in section 187 of the *Act* has the same connotation as described by Justice Dickson.

[70] Mr. Broder’s Representative submitted that if the evidence convinced me that Mr. Broders had somehow committed the offence, he felt that Mr. Broder’s actions leading up to and during the refuelling operation were sufficient to support a successful defence of due diligence, as allowed for under subsection 254(1) of the *Act*.

[71] Mr. Broders had just joined the ship for the first time, while Mr. Forsey and the Senior Engineer had both been on board for some time and both had experience with refuelling the ship. There is testimony from both Mr. Forsey and Mr. Broders that the determination of duties in the refuelling operation was done in a consultative manner and with reference to the ISM Code refuelling checklist. Mr. Broders has testified that he received assurances from Mr. Forsey, as well as the other engine room staff, that each was capable and comfortable with performing the duties assigned. Additionally, Mr. Broders has testified, and Mr. Forsey has stated, that throughout the refuelling operation, Mr. Broders was constantly visiting and checking with the involved engine room staff to ensure that there were no problems or concerns and that the refuelling operation was proceeding safely.

[72] I do not think it is unreasonable on Mr. Broders’ part to expect the Senior Engineer to complete his duties regarding the refuelling checklist. Mr. Broders was new to the ship, having been on board less than two days, while the Senior Engineer had some years of experience on the ship. My experience tells me that it is reasonable for a new Chief Engineer to rely upon an experienced Senior Engineer and the word of the Chief Officer in following the correct refuelling procedures. I feel that Mr. Broders’ actions are sufficient to support a finding of due diligence on his part. But in this case, I do not feel it is required.

[73] As I have determined that Mr. Broders was not Mr. Forsey’s employer, and in the absence of evidence that Mr. Broders took actions centered on the direct act of pollution, I find that the Minister has failed to prove the fourth element of the case against Mr. Broders; that being that he caused the discharge to occur.

[74] Mr. Forsey has stated that during the refuelling process, he mistakenly opened the wrong valve. This had the effect of allowing fuel to flow to a tank that was near full. The photographs (Exhibits A-5-1, A-5-2 and A-5-3) of fuel tank valve wheel labels were entered into evidence as proof that a tank was mislabelled and, I suspect, to support the notion that Mr. Forsey was a victim of that improper labeling. My examination of Exhibit A-5-3, the photograph having the valve wheel label that Captain Chislett had difficulty reading, reveals to me that it reads “NO 2 F.O. D.B. FILL STBD”. In my experience, this means No. 2 Fuel Oil Double Bottom Fill Starboard. This is the valve that should have been opened and, as per Mr. Broders’ testimony, it was labeled correctly at the time of the alleged incident. The mislabelled valve (Exhibit A-5-1) that was opened in error was labeled “NO 2 F.O. WING TK FILL”, a different name than the valve that should have been opened. Testimony from both Mr. Broders and Mr. Forsey indicates the tank that overflowed was one of the tanks that had just been filled by Mr. Forsey. An observant and diligent engineer should not have made such a mistake.

[75] As with most accidents on board ship, there is usually a series of events that must occur and such is the case here. We have Mr. Forsey opening the wrong valve; engine room staff who appear to be slow in realizing the implications of tank soundings that are not changing as they should; a Senior Engineer who did not ensure the scupper plugs were in place and who nevertheless indicated in his checklist that they were; and a Chief Officer who did not ensure scupper plugs were in place and who radioed the bridge, indicating that they were and thereby indicating that the refuelling operation could commence.

[76] The record of soundings (Exhibit A-8) taken during the refuelling operation indicates that the valve to the starboard wing tank was closed at 20:15 and at 20:19, four minutes later, Mr. Forsey opened the valve he had just closed, thinking, I presume, it was the valve for the No. 2 Starboard Double Bottom tank. Exhibit A-8 also appears to show that from 20:19 to 20:36, a period of 17 minutes, the soundings for the No. 2 Starboard Double Bottom tank did not change and that this was reported to Mr. Forsey several times by the engineer and the Oiler who were sounding the tank.

[77] Evidence from Captain Chislett and Mr. Forsey indicates that approximately 80 litres of diesel fuel were discharged overboard. Mr. Forsey has testified that the save-all could hold 150 litres. Had the plugs been in place, the diesel fuel would not have entered the harbour waters. It strikes me that because the Chief Officer and Senior Engineer did not ensure that the save-all and scupper plugs were in place while reporting that they were, they both bear some moral responsibility for the discharge. I believe that refuelling the ship would not have begun had the Chief Officer not radioed the bridge and stated that the checklist was complete, when in fact the plugs were not in place, or had the Senior Engineer not accepted his word that they were.

[78] Both Captain Chislett and Mr. Broders have indicated in their testimony that it is normal Coast Guard practice that the Senior Engineer supervises the refuelling operation. Mr. Gutt has testified that the statement he had received from the Captain indicated that the Senior Engineer was supervising the refuelling operation. Considering that testimony, and the testimony that Mr. Broders had just joined the ship for the first time while the Senior Engineer had some years' experience on the ship, I am convinced, on the balance of probabilities, that the Senior Engineer was supervising the refuelling operation.

[79] As the onboard supervisor of a transfer operation, the Senior Engineer is required, pursuant to subparagraph 49(h)(iii) of the *Pollution Regulations*, to ensure that all scuppers are plugged. Captain Chislett has testified that at the time of the discharge, she saw that the scuppers were not plugged. Failure to comply with the requirements of the *Pollution Regulations*, in this case the plugging of the scuppers, is an offence under paragraph 191(1)(d) of the *Act*.

[80] The failure to plug the scuppers led directly to the discharge of a prescribed pollutant. From the testimonies of Captain Chislett and Mr. Forsey, I accept that Mr. Forsey's mistake in opening the wrong valve would not have resulted in a discharge had the scuppers been plugged as required by the *Pollution Regulations*. The fuel oil polluted the harbour waters not because Mr. Forsey opened the wrong valve, but rather because another member of the complement did not ensure the scuppers were plugged.

[81] Therefore, I find that the fourth and final element in the case against Mr. Forsey (that he caused the discharge to occur) has not been proven on the balance of probabilities.

VII. DETERMINATION

A. Austin Broders

[82] The Minister of Transport did not prove, on a balance of probabilities, that Austin Broders discharged a prescribed pollutant, thereby contravening section 187 of the *Canada Shipping Act, 2001*. Therefore, I dismiss the monetary penalty of \$1 250, as imposed by the Minister.

B. Keith Forsey

[83] The Minister of Transport did not prove, on a balance of probabilities, that Keith Forsey discharged a prescribed pollutant, thereby contravening section 187 of the *Canada Shipping Act, 2001*. Therefore, I dismiss the monetary penalty of \$1 250, as imposed by the Minister.

April 16, 2013

C. Michael Keefe,
Member