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Developments in Canadian Maritime Law

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Synopsis of Important Developments

Canadian Maritime Law

The extent to which provincial statutes apply to maritime matters continues to trouble the courts and confound litigants. In *Jim Pattison Enterprises v. Workers' Compensation Board*, 2009 BCSC 88 affirmed 2011 BCCA 35, the British Columbia Court of Appeal dismissed an appeal from the B.C. Supreme Court and held that the *Occupational Health and Safety Regulation* under the provincial *Workers Compensation Act* was applicable to commercial fishing vessels. The intraprovincial nature of the fishing activities was an important factor in the decision. Similarly, in *Durham v. Todd*, 2010 ONCJ 122 and *R. v. Latouche*, 2010 ABPC 166, provincial statutes and municipal bylaws were held to apply to anchoring in a local harbour and river rafting respectively. Also, In *Québec v Croisières Charlevoix Inc*., 2010 QCCQ 10990, the Quebec *Transport Act* was held to apply to the intraprovincial carriage of passengers. However, in *Ryan Estate v. Universal Marine*, 2009 NLTD 120, the Newfoundland Supreme Court held that the bar against actions for injuries or fatalities in the course of employment contained in the provincial *Workplace Health, Safety and Compensation Act* was not applicable to an accident on board a fishing vessel. (The author recently presented a paper entitled Confused Seas: The Application of Provincial Laws to Maritime Matters at a seminar held by the Judicial Council and Canadian Maritime Law Association in Ottawa on April 15, 2011. Readers interested in this topic can download the paper at AdmiraltyLaw.com.)

Marine Insurance

Marine insurance cases of interest include: *Feuiltault Solution Systems Inc. v. Zurich Canada*, 2011 FC 260, where a defence to a claim under an all risks cargo policy was upheld on the basis that the cause of the loss was inherent vice or insufficient packaging and that the assured had not proven a fortuity; *Société Telus Communications v. Peracomo Inc.*, 2011 FC 494, where the Court upheld a denial of coverage on the basis of the wilful misconduct of the assured in deliberately cutting a submarine cable; *More Marine Ltd. v. Axa Pacific Insurance Company***,** 2010 BCSC 88, where the Court upheld an annual aggregate deductible clause and dismissed a claim against the broker; and *Oppenheim v Midnight Marine Ltd*., 2010 NLTD 3, reversed 2010 NLCA 64, where there were two different clauses relating to jurisdiction and arbitration but the Court of Appeal gave effect to the London arbitration clause.

Carriage of Passengers

A number of the cases summarized under this topic relate to the sinking of the "Queen of the North" on 22 March 2006. The most significant of these is the decision in *Kotai v The "Queen of the North",* 2009 BCSC 1405, 2009 BCSC 1604, which addresses the assessment of damages for psychological injury. (The recoverability of such damages under the *Athens Convention* was admitted and presumed.) The Court held that there must be a recognized psychiatric illness before a plaintiff may recover such damages. Damages were assessed at relatively small amounts. Other cases include: *Frugoli v Services Aériens des cantons de L'Est Inc*., 2009 QCCA 1246 affirming 2007 QCCS 6203, where it was held that the two year limitation period in the *Marine Liability Act* applied to a claim for fatal injuries to passengers and that there was no discretion to extend the period; and Nicolazzo v Princess Cruises, 2009 ONSCDC 08-82, where the Court gave effect to a jurisdiction clause in a cruise line ticket.

Carriage of Goods

In *Les Courtiers Breen Ltee. v Mediterranean Shipping Co*., 2010 QCCQ 583, the carrier was held to be liable for damage to a fruit cargo caused by temperature fluctuations after discharge from the vessel. The exclusion clauses relied upon by the carrier were held not to apply to negligence. In *Kuehne & Nagel Ltd. v. Agrimax Ltd.*, 2010 FC 1303, the defence advanced to a claim for freight was that the carrier had refused to issue bills of lading with an incorrect date of loading. The defence was rejected. In *Cami Automotive, Inc. v. Westwood Shipping Lines Inc*., 2009 FC 664, 2010 FC 26, the Court had to consider the differences between a waybill and a bill of lading and determine the limitations of liability applicable in intermodal carriage. Among other things, the Court held that the rail carrier could choose the limitation that was the most beneficial to it. In *Allianz Global Risks US Insurance Co. v Moosonee Trans. Ltd*., 2009 QCCQ 7569, the carrier successfully defended a claim for loss of deck cargo on the basis of an exclusion clause in the shipping receipt. In *Timberwest Forest Corp. v. Pacific Link Ocean Services Corporation*, 2009 FCA 119 affirming 2008 FC 801, the Federal Court of Appeal upheld the dismissal of a claim against a carrier on the basis of a waiver of subrogation clause in the cargo policy and a waiver of rights clause in the bill of lading.

Jurisdiction Clauses

In *Hitachi Maxco Ltd. v. Dolphin Logistics Co. (2010)*, 2010 FC 853, the Federal Court refused to enforce a jurisdiction clause in a bill of lading and dismissed an application for a stay of proceedings. The case is surprising as the reasons disclose little connection between the claim or parties and Canada. In *T. Co. Metals LLC v. The "Federal Ems"*, 2011 FC 291, the Court held that a charterparty was a "contract of carriage" within the meaning of s. 46 of the MLA.

Collisions/Limitation of Liability

Société Telus Communications v. Peracomo Inc., 2011 FC 494, is the first Canadian decision in which the test to break limitation under the 1976 Convention is held to have been met. The defendant intentionally cut a submarine cable that he had snagged believing it to be abandoned. Other collision/Limitation cases include: *Buhlman v. Buckley*, 2011 FC 73, where the Court had to consider the differences between sections 28 and 29 of the *Marine Liability Act* and which limitation applied to a collision between two pleasure craft; and, *Laichkwiltach Enterprises Ltd. v. F/V Pacific Faith (Ship)*, 2009 BCCA 157 (additional Reasons at 2009 BCCA 308), a case involving a collision between a ship and a fish farm, which is of interest for its treatment of betterment in the assessment of damages.

Mortgages, Liens and Priorities

Canadian courts have continued to define the boundaries applicable to the recognition of American maritime liens. *World Fuel Services Corporation v. The "Nordems"*, 2010 FC 332, affd. 2011 FCA 73, is the latest pronouncement on this issue. At both the Trial Division and the Court of Appeal the recognition of a lien for bunkers supplied outside of Canada or the U.S.A. to a ship under time charter was denied.

Admiralty Practice

The supply of bunkers also gave rise to an interesting practice case in *Alpha Trading Monaco Sam v. The "Sarah Desgagnés"*, 2010 FC 695, affd. 2011 FCA 41, where the Federal Court

granted an anti-suit injunction restraining a foreign bunker supplier from continuing proceedings in Belgium and Italy. The fact that the foreign bunker supplier initially commenced the Canadian proceeding was the determining factor that led to the granting of the injunction. Other practice cases of interest include: *Artificial Reef Society of Nova Scotia v Canada*, 2010 FC 865, where it was confirmed that *in rem* actions are not permissible against Crown ships; *Keybank National Association v. The "Atchafalaya"*, 2010 FC 406, where an *in rem* judgement was set aside for failure to give notice to another claimant against the ship; *Morecorp Holdings Ltd. v Island Tug & Barge Ltd.*, 2009 BCSC 1614, where an arrest was set aside and an *in rem* claim dismissed on the grounds that the claims did not relate to the ship; *Olsen v. The Bank of Nova Scotia*, 2011 BCSC 111, where an injunction was sought, and denied, to restrain payment under a letter of credit that had been given to secure the release of a vessel from arrest; and *Shell Canada Energy v. General MPP Carriers*, 2011 FC 217, where, in an action *in rem*, the plaintiff was refused leave to add an *in personam* claim against the owners after the expiry of the limitation period.

Pollution

There are only two pollution cases. In *R. v. M/V "Kathy L" et al.*, 2010 BCPC 30, the owner was found guilty of polluting but the charges against the Captain were dismissed as the defects in the barge were not obvious to a casual observer. In *FFS HK Ltd. v. The "P.T. 25"*, 2010 BCSC 1675, the Court had to consider apportionment of fault between a bunkering barge and receiving ship for a spill that occurred while bunkering.

Miscellaneous

Notable cases under this heading include: *656925 B.C. Ltd. v. Cullen Diesel Power Ltd.*, 2009 BCSC 260, where the court said that the enforceability of exclusion clauses could be assessed both at the time of breach as well as the time the contract was concluded; *New World Expedition Yachts LLC v. P.R. Yacht Builders Ltd.*, 2010 BCSC 1496, where the court refused to set aside an arbitration award on the grounds of bias; and *R. v. Atlantic Towing Ltd.*, 2011 NSPC 10 and *R. v. Ralph*, 2011 NLTD 10 where the accused were charged with and convicted of various offences under the *Canada Shipping Act*.

Canadian Maritime Law/Admiralty Jurisdiction

Canadian Maritime Law - Application of Provincial Statutes - Occupational Health and Safety

Jim Pattison Enterprises v. Workers' Compensation Board, 2009 BCSC 88, affirmed 2011 BCCA 35

The central issue in this case was whether and to what extent the British Columbia *Occupational Health and Safety Regulation* ("OHSR") of the *Workers Compensation Act* applied to commercial fishing vessels. It was argued that the OHSR was constitutionally invalid or inapplicable on the grounds that the safety of ships and crew is a matter within the sole jurisdiction of Parliament under its navigation and shipping power or, alternatively, that fishing is a federal work or undertaking. The trial Judge began by reviewing the history of occupational health and safety in British Columbia in relation to fishing and reviewed various federal-

provincial agreements that had been entered into. The trial Judge then turned to the constitutional issue beginning, predictably, with the recent Supreme Court of Canada decisions in *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22 and *British Columbia (Attorney General) v. Lafarge Canada Inc.*, [2007] 2 S.C.R. 86, 2007 SCC 23. The trial Judge noted that the doctrine of interjurisdictional immunity goes against the dominant tide of constitutional interpretation and should be applied with restraint. The trial Judge further noted that the doctrine of interjurisdictional immunity does not apply except where the adverse impact of a law adopted by one level of government is such that the core competence of the other level of government (or the vital or essential part of an undertaking it duly constitutes) is placed in jeopardy. The trial Judge then dealt with the pith and substance analysis and concluded that the pith and substance of the OHSR were the health and safety of workers which are matters within the legislative competence of the province. The trial Judge then turned to the doctrine of paramountcy as there are many federal laws relating to the safety of ship and crew. The trial Judge summarized the test as requiring the petitioners to establish either that: (a) it is impossible to comply with both laws; or (b) that to apply the provincial law would frustrate the purpose of the federal law. After reviewing the legislation, the trial Judge concluded that there was considerable overlap and potential for confusion and that compliance with both regimes could be difficult and expensive, however, as it was not "impossible" to comply with both there was not operational incompatibility. The trial Judge further found that the OHSR did not undermine the purpose of the federal statutes and therefore concluded that the doctrine of paramountcy was not operative. The trial Judge then turned to the interjurisdictional immunity doctrine. The trial Judge first considered whether fishing was a federal undertaking and held that it was not because the undertaking did not play any role in "connecting" British Columbia with any other province or country. The trial Judge then considered whether the provincial law impaired or placed in jeopardy the core of federal competence over navigation and shipping and concluded that it did not.

Upon appeal, the British Columbia Court of Appeal began its analysis noting that the modern approach to Canadian federalism is "cooperative federalism". It then turned to the pith and substance analysis and found the purpose and effect of the provincial legislation to be the occupational health safety and well-being of workers employed on fishing vessels, a matter of labour relations and, as such, coming within provincial jurisdiction over "property and civil rights". The Court next considered whether the fishing operations at issue were a provincial or federal undertaking. The appellants argued that as the normal fishing activities of the concerned vessels were beyond the limits of the province their operations should be characterized as a federal undertaking. However, the Court found that the business of the appellants was exclusively intraprovincial and there was no operational connection to another jurisdiction. Accordingly, the Court held that the operational activities were a provincial and not a federal undertaking. Although not necessary, the Court did go on to consider the doctrines of interjurisdictional immunity and paramountcy but held that neither applied. The impugned provisions did not impair the core competence of federal jurisdiction over navigation and shipping and there was no evidence of operational conflict or frustration of the purpose of the federal legislation.

Canadian Maritime Law - Application of Provincial Statutes - Workers Compensation

Ryan Estate v. Universal Marine, 2009 NLTD 120

This was a judicial review of a decision of the Workplace Health, Safety and Compensation Commission of Newfoundland. The issue was whether the *Workplace Health, Safety and Compensation Act* of Newfoundland prohibited an action by the estates and dependents of two crew members who lost their lives when their fishing vessel sank. It was undisputed that the deceased crew members had been "workers" under the Act and that the defendants were "employers" under the Act. The Court noted that questions of liability in a marine context "clearly and obviously fall within federal jurisdictions" and said that the issue was whether the statutory bar in the *Workplace Health, Safety and Compensation Act* was "merely casual or incidental" such that it would not give rise to the doctrine of interjurisdictional immunity. The Court noted that the interjurisdictional immunity doctrine would be invoked where a provincial statute intrudes on the "core" of a federal power to the extent that it "impairs" that power. The Court further said that "there can be no greater level of impairment of the power to sue then to bar the exercise of that power" and held that the *Workplace Health, Safety and Compensation Act* must be read down so as not to apply. Although this was sufficient to dispose of the case, the Court did consider the paramountcy doctrine and held that it was also applicable. (Note: This is a very controversial topic and the decision in this case is currently under appeal. The decision in this case is, arguably, inconsistent with that in *Laboucane v Brooks* et al. 2003 BCSC 1247.)

Constitutional Law - Application of Municipal by-Laws

Durham v. Todd, 2010 ONCJ 122

In this matter the defendant boat owner was charged with trespass under the Ontario *Trespass to Property Act* and with infractions of various municipal by-laws. The charges all related to anchoring in Port Whitby Harbour which was a harbour designated under the *Fisheries and Recreational Harbours Act*. The harbour was administered by the municipality pursuant to an agreement with the Department of Fisheries. The accused defended the charges on the grounds that the province and the municipality had no constitutional jurisdiction. The Court, however, found that the agreement between the municipality and the Department of Fisheries gave the municipality the requisite authority and rendered nugatory any issue of interjurisdictional immunity. (Note: Has the learned Judge in this case confused an agreement for the administration of a harbour with a delegation of legislative authority?)

Constitutional Law – Division of Powers – Municipal Bylaw

R. v. Latouche, 2010 ABPC 166

In this case the applicants were charged with not wearing life jackets while floating on an inflatable raft down the Elbow River in Calgary contrary to a municipal bylaw. The applicants challenged the constitutional validity of the bylaw saying that the bylaw encroached on Parliament's exclusive jurisdiction over navigation and shipping. It was conceded that Parliament had jurisdiction over navigation and shipping but was argued that the incidental application of local law was permissible. The Court found that the pith and substance of the impugned bylaw was the promotion of safety of Calgarians and that the bylaw did not impair an essential or vital element of a federal power over navigation and shipping. Further, the Court said there was no incompatibility between the bylaw and the federal legislation. Accordingly, the

Court held the bylaw was valid. (Note: In the view of the author, this is a questionable decision. Even if there was no incompatibility between the federal regulations and local bylaw, the local bylaw still frustrates the purpose of the federal law (uniformity) and ought to attract the paramountcy doctrine.)

Constitutional Law – Regulation of Intra-Provincial Passenger Carriage

Québec v Croisières Charlevoix Inc., 2010 QCCQ 10990

The defendant in this matter was charged with carrying paying passengers on a ship contrary to the Quebec *Transport Act*. The defendant alleged that the *Transport Act* was unconstitutional as invalid encroachment on the federal power over navigation and shipping. The Court held that jurisdiction over shipping depends on whether the shipping activities extend beyond the borders of a province. Purely intraprovincial shipping, the Court held, is within the jurisdiction of the province. Further, it was held that sporadic extra-provincial activities do not change the character of a local transport company. Consequently, the constitutional challenge was dismissed.

Constitutional Law - Boating Restriction Regulations - Right to Anchor - Charter of Rights

R. v. Lewis et al., 2009 BCPC 386

The issue in this case was the constitutional validity of the *Boating Restrictions Regulations* under the *Canada Shipping Act*. Specifically, the challenge was to restrictions imposed on anchoring in False Creek, Vancouver. The accused were charged with anchoring without a permit. The defence was that the *Boating Restrictions Regulations* was an attempt by the Federal Government to legislate in respect of property and civil rights, a provincial jurisdiction, and were contrary to the Charter of Rights. The Court first noted that there is a common law right to navigation which includes a right to anchor but said this was a right to anchor for a reasonable time, not permanently. The Court then considered the constitutional validity of the regulations which required a consideration of the pith and substance of the regulations having regard to both their purpose and effect. The Court had little difficulty in concluding the regulations were in pith and substance in relation to navigation and therefore valid. The Court next turned to the Charter of Rights. The argument was that the regulations were contrary to s. 7 of the Charter which provides that everyone has the right to life, liberty and security. Essentially, the accused argued that they needed to anchor in False Creek for reasons of safety and could not obtain anchorage elsewhere. The Court accepted that False Creek was a safe anchorage and that alternative moorage facilities were limited, however, the Court found that the accused anchored in False Creek for economic or lifestyle reasons, not for reasons of safety or shelter.

Federal Court Jurisdiction - Dispute Between Shareholders over Funds in Court

JP Morgan Chase Bank v. Mystras Maritime Corporation, 2010 FC 1053

This matter concerned a dispute between two former shareholders and directors of the judgment creditor concerning who was entitled to the proceeds of an *in rem* action. The Court held that it was without jurisdiction to determine the dispute which was held not to be integrally connected to maritime matters.

Marine Insurance

Marine Insurance – Cargo All Risks - Burden of Proof – Sufficiency of Packing

Feuiltault Solution Systems Inc. v. Zurich Canada, 2011 FC 260

The plaintiff was the owner of a cargo of machines stowed in three containers and shipped by sea from Montreal to Europe. Two containers were stowed under deck and the third was stowed on deck. Upon delivery of the containers it was discovered that all of the units were damaged by rust. A claim by the plaintiff under its cargo policy with the defendant was denied on the grounds of inherent vice or insufficiency of packaging. Specifically, the defendant alleged that the damage occurred because the timbers used to brace the cargo had excessive water content which condensed during the voyage. The evidence established that the three containers were in good condition and that there was no ingress of water into the containers. The plaintiff relied on the fact that it had previously sent several similar shipments packed in the same way without incident. However, the Court found as a fact that the packing was insufficient in that the wood used to brace the cargo was unsuitable and the individual units should have been wrapped in some manner. The Court accepted that an all risks policy requires that there be a "fortuity" and that the burden was on the plaintiff to prove such fortuity.

Insurance – Wilfull Misconduct

Société Telus Communications v. Peracomo Inc., 2011 FC 494

In this case the Court held that the intentional cutting of a submarine cable was "wilful misconduct" on the part of the assured that rendered the insurance void. See the full summary below under Collisions/Limitation of Liability.

Marine Insurance – Interpretation of Policy - Annual Aggregate Deductible - Liability of Broker

More Marine Ltd. v. Axa Pacific Insurance Company, 2010 BCSC 88

The policy in issue in this case contained a clause stipulating an annual aggregate deductible ("AAD") of $250,000. The assured alleged that the clause was added without its knowledge and without consideration. Additionally, the assured alleged that its broker was negligent. The evidence established that in the initial correspondence between the broker and the insurer the AAD clause excluded claims for constructive total loss and total loss, however, the endorsements ultimately issued did not exclude such claims. The Court found that this was a deliberate decision even though there was no direct evidence on how or why the change was made. The Court further found that the assured was aware of the AAD clause. The AAD clause was initially in the amount of $100,000 but it was later increased to $250,000 due to the poor claims history of the assured. Again, the Court found that this was known to the assured. The assured argued that a concluded policy of insurance could not be amended and that it had not expressly approved the AAD. The Court held that clearly a policy can be amended and further that the broker was the agent of the assured and had the authority to bind the assured. The Court additionally held that the assured had ratified the acts of the broker by taking advantage of those acts. The assured additionally argued that there was no consideration for the AAD clause and that on its proper interpretation it did not apply to a constructive total loss. The Court held that there was

consideration in that the changes to the policy benefitted both parties. Further, the Court held that the AAD clause was not ambiguous and did apply to a constructive total loss. The Court then turned to the allegations against the broker. The Court noted that a broker owes a stringent duty to provide both information and advice to an assured, however, held that there was no breach of duty in the circumstances. The Court noted that the broker did not communicate some aspects of its negotiations with underwriters but held the assured did not suffer any loss as a result. The Court found as a fact that in order to obtain insurance coverage the assured had to agree to an AAD clause that included constructive total losses and total losses.

Marine Insurance – Stay of Proceedings - Arbitration Clause- Inconsistent Clauses – Waiver- Appeals – Standard of Review – Interpretation of Contracts

Oppenheim v Midnight Marine Ltd., 2010 NLTD 3, reversed 2010 NLCA 64

The plaintiff's barge sank at sea while carrying cargo and while being towed by one of the plaintiff's tugs. The cargo owners subsequently commenced proceedings against the plaintiff and arrested the tug. The plaintiff advised the defendant, the insurer of the barge, of the action but the insurer refused to provide security or a defence as it was investigating whether the barge had been unseaworthy. The plaintiff ultimately settled with the cargo owners and commenced this action for indemnity. The defendant insurer brought this application to stay the proceedings on the grounds of an arbitration clause in the policy. The main difficulty was that there were two arguably inconsistent clauses in the policy. The cover note said that it was subject to English law and practice and to the non-exclusive jurisdiction of the English courts. However, within the policy itself was a clause that required any dispute to be referred to arbitration in London. The arbitration clause included words that it was to apply "notwithstanding anything else to the contrary" and that in the event of conflict "this clause shall prevail". At first instance the motions Judge dismissed the application holding that the contract of insurance must be interpreted as a whole.

On appeal to the Newfoundland Court of Appeal, the Court first addressed the standard of review applicable when dealing with interpretation of contracts. The Court agreed that the interpretation of a contract was a question of mixed fact and law but did not agree that this meant in every case the standard of review was palpable and overriding error as opposed to correctness. The Court said that if a decision-make fails to consider a relevant factor this is an error of law reviewable to a standard of correctness. The Court went on to find that the motions Judge had made just such an error by failing to give any meaning to the arbitration clause in the policy. The Court resolved any conflict between the arbitration clause and the clause in the Cover Note by finding that the reference to "non-exclusive" in the Cover Note recognized the jurisdiction of the arbitrator in the arbitration clause and the jurisdiction of foreign courts over enforcement proceedings. The Court refused to apply the *contra proferentum* rule of contract interpretation noting that resort should be had to the rule only when all other rules of construction fail. A secondary issue was whether insurer had waived the right to rely upon the arbitration clause having not invoked the clause in prior years in prior disputes. On this issue the Court of Appeal accepted the evidence of a witness on English law to the effect that a failure to invoke an arbitration or jurisdiction clause for practical and commercial reasons is not a waiver in a subsequent dispute. In result, the appeal was allowed and the present action was stayed in favour of arbitration proceedings in London.

Marine Insurance - Subrogation - Control of Action - Admiralty Practice - Striking Pleadings

Hodder Tugboat Co. Ltd. v JJM Construction Ltd. et al., 2010 FCA 279, affirming 2009 FC 161

This case involved damage to two barges that were under charter. Following the incidents giving rise to the damage an action was commenced in the name of the owner and the charterer against Texada and Pacific. This action was essentially a subrogated action brought by the underwriters of the barges. Subsequently a second action was commenced by the owner against the charterer as well as Texada and Pacific. Texada and Pacific then brought this motion to strike the second action on the grounds that it was frivolous and vexatious. The motions Judge declined to completely strike the second action as there were aspects of the second action, including uninsured losses, which were not included in the first. Instead the Judge ordered that the actions be restructured such that the owner was the plaintiff in one action and the charterer the plaintiff in the other. Additionally, the Judge ordered that the actions be specially managed and heard together. During the course of his reasons the motions Judge also had to consider whether the underwriter or the insured had the right to control the subrogated action. The Judge held that even though the underwriter may have paid the full amount under the policy the insured retains the right to control the proceeding until it is fully indemnified. A subrogation receipt did not alter the common law on this point. The underwriters were subsequently granted status to appeal the order (2009 FCA 209) and launched an appeal. The appeal was dismissed with the Court merely saying that the order was a response to unusual circumstances, did not offend any principal of law or procedural fairness and was not prejudicial to any party.

Marine Insurance - Discovery – Privilege – Coverage Advice

Universal Sales Limited v. Edinburgh Assurance Co. Ltd., 2009 FC 150

The plaintiffs (the insureds) sought indemnity from the defendants (the insurers) for a settlement payment made by the plaintiffs to the federal government related to the sinking and raising of the "Irving Whale". The insurers denied coverage alleging the settlement was made without their consent contrary to the terms of the policy. In these applications the plaintiffs/insureds sought production of various letters between the defendants/insurers and their counsel relating to coverage advice. The plaintiffs said the documents were relevant in that they might show the decision to deny coverage pre-dated the settlement with the government. The plaintiffs applications were dismissed both at first instance before a Prothonotary and on appeal. It was held that the documents were protected by solicitor-client privilege and that such privilege had not been waived.

Carriage of Passengers

Carriage of Passengers - Settlement of Class Action - Psychological Injuries

Kotai v. "Queen of the North" (The), 2010 BCSC 1180

This was an application under the B.C. *Class Proceedings Act* for court approval of a settlement reached between the parties relating to the sinking of the "Queen of the North" on 22 March 2006. The Court balanced the position of the class members other than the infants against the position of the public guardian and trustee, who did not support the settlement. The Court

concluded that the proposed settlement was fair and reasonable, was in the best interests of the class as a whole and should be approved.

Fatal Injury - Infants - "In Camera" - Damages

McDonald v The "Queen of the North", 2009 BCSC 646

This was an application seeking court directions with respect to the process to be followed under the B.C. *Infants Act* which requires court approval of any settlement involving minors. The plaintiff requested that the hearing for court approval be held "in camera" and that the settlement not be publicly divulged. The Court noted that it had the power to do as requested but said such decisions should not be lightly made and denied the request.

Fatal Injury - Damages

McDonald v The "Queen of the North", 2009 BCSC 1129

This was an application under the B.C. *Infants Act* for court approval of a settlement reached with the plaintiffs, the two surviving children of one of the passengers who died as a result of the sinking of the "Queen of the North" on 22 March 2006. The Court assessed the headings of loss of love, guidance and affection, past loss of financial support, loss of future financial support and loss of inheritance and approved the settlement as entirely fair and advantageous to the infants. The total amount of the settlement approved was $200,000.

Personal Injury - Psychological Injury – Passengers - Athens Convention

Kotai v The "Queen of the North", 2009 BCSC 1405, 2009 BCSC 1604

This was a preliminary decision in the class action arising out of the sinking of the "Queen of the North". This decision assessed the damages of a representative sample of the plaintiffs who were passengers on the vessel at the time of the sinking. The most important aspect of the decision relates to the assessment of psychological injures allegedly suffered. The Court reviewed the authorities on psychological injury or nervous shock and ultimately held that a plaintiff must establish he or she suffered a recognized psychiatric illness to recover for psychological injury or nervous shock. Mere psychological disturbance or upset is not sufficient. The Court further held that the test was the same regardless of whether the plaintiff was actually involved in the accident or merely witnessed the accident. With this framework, the Court then evaluated the claims of six plaintiffs. The Court found that three of the plaintiffs had suffered no recognizable psychological injury. The other three plaintiffs were awarded damages of $500, $7,500 and $12,000 respectively. (It should be noted that the defendant in the case admitted that psychological injuries were recoverable under provincial law and withdrew its earlier position that such injuries were not compensable under the Athens Convention. Thus the compensability of psychological injuries under the Athens Convention was presumed and was not decided. This was clarified in supplementary reasons issued at 2009 BCSC 1604.)

Fatal Accident - Limitation Periods - Application of Provincial Statutes

Frugoli c. Services Aériens des cantons de L'Est inc., 2009 QCCA 1246 affirming 2007 QCCS 6203

This was an action by dependents of two persons who were presumed drowned when the boat they were in capsized. The boat had been chartered and operated by the defendant. The issue was whether the limitation period was the three year period prescribed in the Quebec Civil Code, the two year period prescribed by s. 14(2) of the *Marine Liability Act* (MLA") or the two year period as prescribed by Art. 16(2) of the *Athens Convention* as enacted by the MLA. Due to a mistake by plaintiff's counsel, the action was commenced more than two years after the accident but less than three years. The Trial Judge reviewed the various authorities and held without much difficulty that the claim should be subject to federal maritime law and not the Quebec Civil Code. The Trial Judge next considered whether it was the two year period in the MLA or the two year period in the *Athens Convention* that applied and whether the period could be extended. The issue was relevant because Art. 16(3) of the *Athens Convention* provides that "the law of the court seized of the case shall govern the grounds of suspension or interruption" of the limitation period. The Trial Judge held that the "law of the court seized of the case" meant Canadian maritime law. The Trial Judge then thoroughly reviewed the authorities and ultimately held that there was no discretionary power to extend the limitation period under maritime law except with respect to a collision action governed by s. 23 of the MLA. Finally, the Judge was of the view that in any event an error of counsel was not sufficient grounds for interruption or suspension of the limitation period in the circumstances. On appeal, the Quebec Court of Appeal held that it was "perfectly clear" the matter was governed by Canadian maritime law, that the provincial legislature had no jurisdiction and that the provincial limitation statute had no application. The Court of Appeal next addressed the issue of whether the court had a discretion to extend or suspend the two year limitation period in the MLA and agreed with the Trial Judge that the express inclusion of the discretionary remedy in s. 23 of the MLA dealing with collisions implied, as a matter of statutory interpretation, that there was no discretion for other limitation sections of the MLA. Although this was sufficient to dispose of the appeal, the Court of Appeal went on to consider whether there was inherent jurisdiction to extend the limitation period and held that there was not.

Carriage of Passengers - Athens Convention - Jurisdiction Clause

Nicolazzo v Princess Cruises, 2009 ONSCDC 08-82

The plaintiffs in this matter had booked a cruise with the defendant through the plaintiff's travel agent in Hamilton, Ontario. They embarked in Italy and disembarked in England. During the cruise $5,000 was stolen from the safe in the plaintiffs' stateroom. The plaintiffs commenced this action to recover the stolen money. The defendant brought a motion to dismiss the claim on the basis that the court lacked territorial jurisdiction over the action. The motion was denied at first instance. On appeal, the appeal Judge held that the Athens Convention applied and that pursuant to Article 17 of the Convention the action could not be brought in Canada as the defendant had no place of business in Canada. The appeal was allowed and the action was dismissed.

Air Carriage - Passengers - Montreal Convention - Damages for Mental Anguish

Lukacs v United Airlines, 2009 MBCA 111

This was an application for leave to appeal a trial decision refusing general damages under Article 19 of the *Montreal Convention* for mental anguish and a missed opportunity resulting from a cancelled flight. The Court of Appeal denied leave on the basis that Article 19 of the *Montreal Convention* has been previously examined by appellate courts around the world and the law is clear that general damages for inconvenience or mental anguish are not compensable under the *Montreal Convention*.

Carriage of Goods

Carriage by Sea – Hague-Visby Rules - Interpretation of Exclusion/Limitation Clauses - Refrigeration Breakdown Post Discharge – Fruit

Les Courtiers Breen Ltee. v Mediterranean Shipping Co. 2010 QCCQ 583

The main issue in this case was the liability of the carrier for damage to a cargo of clementines carried from South Africa to Montreal via New York. The container in which the cargo was stowed had been stowed and sealed by the shipper and the carrier argued that the plaintiff had not proven the goods were received by it in good order and condition. The Court rejected this argument relying on the export certificates which provided *prima facie* evidence of receipt by the carrier in good condition. The Court next considered whether the carrier was liable for failing to maintain the goods at the required temperature. The goods were to be at 4.5 degrees and the container was set at this temperature but the records disclosed periods during which the temperature was between 6 and 8 degrees. The carrier argued that the higher temperatures were not the cause of the damage relying on an expert witness that said the optimum temperature for carriage of clementines was between 5 and 8 degrees. The Court rejected the testimony of the carrier's expert, in part because he confused the carrying temperature of mandarins and clementines. The Court then turned to the clauses of the bill of lading relied upon by the carrier to exonerate it from liability. One clause stipulated the carrier was not liable for breakdown of machinery unless caused by the carrier's negligence. The other clause stipulated that fruits and vegetables were carried at shipper's risk. The Court noted that both clauses would be invalid under the Hague-Visby Rules, however, because the relevant temperature fluctuations occurred after discharge, the Rules did not apply. Therefore, the Court had to interpret the clauses and held that neither clause excluded liability for negligence. (Note: The author thanks Messrs. Brisset Bishop of Montreal for providing an English translation of this decision which, unfortunately, is reported only in French.)

Carriage – Bills of Lading – Carrier Not Required to Issue False Bills of Lading – Conversion of Foreign Currency – Breach Date Rule

Kuehne & Nagel Ltd. v. Agrimax Ltd., 2010 FC 1303

This was an action by a freight forwarder for payment of freight. The forwarder also had the "pen" of the NVOCC and was authorized to issue bills of lading on its behalf. The defendant argued that it was not liable for the freight because the forwarder refused to issue bills of lading with a date of loading different than the actual date of loading. The defendant required a different

date to comply with the documentary requirements of a letter of credit. The Court held that the forwarder was absolutely right in refusing to amend the bill of lading and granted judgement to it. A subsidiary issue in the case was the proper date for conversion of foreign currency. The Court held that the proper date remained the date of breach and not the date of judgment.

Carriage of Goods - Deck Carriage - Marine Insurance - Waiver of Subrogation - 3rd parties

Timberwest Forest Corp. v. Pacific Link Ocean Services Corporation, 2009 FCA 119 affirming 2008 FC 801

This was a subrogated claim for the loss of approximately C$1 million worth of logs. The logs were lost from the deck of a barge while en route from Vancouver to California. The issues in the case were: first, whether the cargo was sufficiently described as deck cargo to remove it from the application of the Hague-Visby Rules (thus denying the defendants the right to rely upon exclusion or benefit of insurance clauses in the contract); and second, whether the waiver of subrogation clause in the plaintiff's insurance policy protected all of the defendants or just the specifically named contracting carrier. The contract of carriage was contained in a letter of understanding and set of standard terms and conditions which incorporated a bill of lading that was "contemplated" to be issued. The bill of lading, which was never in fact issued, included on its face a statement that "all cargo was carried on deck unless otherwise stated". The plaintiff argued that a printed statement of deck carriage in a standard bill of lading that was not actually issued was not sufficient compliance with Art 1(c) of the Hague-Visby Rules to oust the application of the Rules. The motions Judge held, however, that the plaintiff was bound by the terms of the contract including the bill of lading terms and these contained a clear statement as to deck carriage. In result, the Rules did not apply. The second major issue in the case concerned a clause in the plaintiff's policy of insurance which specifically waived subrogation against the contracting carrier. The contracting carrier had entered into time charters for the tug and barge with two affiliated companies who actually carried out the contract through their employees. The issue was whether these other companies and their employees could take the benefit of the waiver of subrogation clause which did not name them specifically or by class. The motions Judge reviewed the complicated history of the waiver of subrogation clause and concluded that it was intended to waive subrogation against the "carrier" or "tower", terms that were used indiscriminately. As the other parties fell within the definition of "carrier" in the bill of lading, they were entitled to the benefit of the waiver of subrogation clause. He further held that extending the benefits of the waiver of subrogation to these other entities would be a permissible incremental change in the law. On appeal, the Court of Appeal upheld the decision of the motions Judge but for different reasons. The Court of Appeal enforced the waiver of subrogation clause not on the basis of the intention of the parties but referred to a separate clause in the policy whereby underwriters waived rights of subrogation whenever the assured had waived rights of recovery. The Court of Appeal held that pursuant to the terms of the bill of lading recovery had been waived against all of the defendants and therefore rights of subrogation were also waived.

Carriage of Goods - Limitation Period - Counterclaim

Hapag-Lloyd Container Line GmbH v. Moo Transport & Commodities Inc., 2009 FC 201

The issue in this case was whether a counterclaim for damage to cargo and non-delivery should

be dismissed on the grounds that the counterclaim was made out of time. The moving party relied upon a clause in the bill of lading that stipulated the carrier would be discharged from all liability unless suit was brought within one year (almost identical wording to the limitation period in the Hague/Hague-Visby Rules). The Court gave effect to the clause noting that this wording had the effect of completely excluding any cause of action rather than merely barring a remedy. In result, the counterclaim was dismissed.

Carriage of Goods - Intermodal - Rail carriage - Himalaya Clause - Applicable Limitation Double Costs

Cami Automotive, Inc. v. Westwood Shipping Lines Inc., 2009 FC 664, 2010 FC 26

In this action the plaintiffs sued the defendants for damage to cargo carried under a through bill of lading. The cargo was damaged as a result of a train derailment. The defendants were the charterer of the carrying vessel, the owner of the carrying vessel and the rail carrier. The plaintiff and the charterer conducted business under annual service contracts for the carriage of containers from Japan to Toronto pursuant to which a "Shipping Document" was issued when containers were loaded for carriage. The charterer and the rail carrier conducted business under a "Confidential Contract". The issues for determination were the entitlement of the charterer and rail carrier to limit their liability under the terms of the various contracts. The Court dealt first with the limitation of the charterer and considered whether the "Shipping Document" was a bill of lading or a waybill. The Court held that it was a waybill noting that it was titled "Waybill" , it contained a stamp indicating delivery would be made to the named consignee (without production of the original) and only one copy was issued (bills of lading are usually issued in triplicate). As the "Shipping Document" was determined to be a Waybill and not a Bill of Lading, the Court further held that the Hague-Visby Rules were not compulsorily applicable. However, the Waybill incorporated the terms of COGSA which contains a US$500 per package limitation and this limitation was held to be applicable to the charterer. A secondary issue relevant to the charterer's limitation was the definition of a "package". The Court held in the circumstances that each pallet was a package and that the total limitation amount was US$50,000. The Court then turned to the limitation of the rail carrier and considered first whether the rail carrier could limit its liability under the "Confidential Contract" even though the plaintiffs were not parties to that contract. The Court applied the doctrine of sub-bailment and held that the plaintiffs were bound by the terms of the "Confidential Contract". There was, however, an issue as to the proper interpretation of the "Confidential Contract" and, specifically, whether the rail carrier's limitation was contained in a tariff or in the *Railway Traffic Liability Regulations*. The Court found that the tariff had not been properly incorporated into the "Confidential Contract" and, accordingly held that liability was to be determined in accordance with the regulations. The Court next considered whether the rail carrier could rely upon the limitation provisions in the "Shipping Document" and, applying the Himalaya clause in the "Shipping Document", held that it was entitled to do so. The Court further noted that the rail carrier was free to choose the limitation most beneficial to it.

In a later decision reported at 2010 FC 26 the Court addressed the liability of the parties for costs. The vessel and rail carrier each claimed entitlement to double costs on the basis that the rail carrier had paid the plaintiff Cdn$50,000 and the vessel had made an offer to settle in the amount of Cdn$50,001. The Court held that the payment by the rail carrier was not a clear and

unequivocal offer within the meaning the rules and that the rail carrier was not entitled to double costs. With respect to the vessel, the Court held that as there was not yet a final judgment, there was no basis for application of the rules relating to double costs. Moreover, the Court questioned whether the offer made by the vessel would be as favourable as the minimum amount of the eventual judgment (this was presumably because the Cdn$ was worth less than the US$ at the time). In result, the defendants were awarded only normal costs. Two interesting points were considered during the course of the reasons on costs. First, the Court considered whether the salvage obtained from the sale of the damaged cargo should be deducted from the limitation amount and held it was not appropriate to do so. Second, it was urged on the Court that the plaintiff's total claim was limited to US$50,000 rather than US$50,000 for each defendant. The Court declined to address this issue which was first raised at the hearing on costs.

Carriage of Goods - Liability for Storage Charges

American Transport Logistics v Kobi Group Inc., 2009 CanLii 65798 (ON S.C.)

This was a motion for summary judgment brought by the plaintiff, an international freight forwarder, against the defendant, an international importer and exporter of commercial goods for resale. In January 2007, the defendant contacted the plaintiff to arrange the carriage of perishable goods from Germany to Kingston, Jamaica. The destination was later changed to St. Lucia and in March 2007 the goods arrived at St. Lucia. Upon arrival at St. Lucia, the St. Lucia authorities found the goods had passed their expiry dates and therefore condemned the goods and imposed local storage/detention charges. The defendant paid the shipping cost but refused to pay the storage/detention charges alleging that the plaintiff had acted without instructions in changing the destination to St. Lucia. The Court found that the defendant had, in fact, instructed the plaintiff to change the destination to St. Lucia. The Court additionally found that the terms of the contract between the parties imposed on the defendant the responsibility of paying all storage and detention charges. Finally, the Court held that article IV(2) of the Hague-Visby Rules, exempted the plaintiff from liability for such charges.

Carriage of Goods – Domestic Carriage - Deck Carriage – Application of Hague-Visby Rules

Allianz Global Risks US Insurance Co. v Moosonee Trans. Ltd., 2009 QCCQ 7569

This was a subrogated claim for several vehicles and other cargo lost when a barge sank en route to James Bay. The defendants were a company that arranged the transportation and the actual carrier. A preliminary issue in the case was whether the claim was governed by Canadian maritime law or the Civil Code of Quebec. The Court had little difficulty in determining that the claim was governed solely by Canadian maritime law. The Court next considered whether the plaintiff was bound by the contract between the intermediary and the carrier and the exclusion clause contained therein. The Court held that the intermediary was a freight forwarder acting on behalf of the plaintiff and not a carrier and that, accordingly, the plaintiff was bound by the contract between the intermediary and the carrier. The Court next considered whether the contract of carriage was subject to the Hague-Visby Rules and held that the rules did not apply as the contract was evidenced by a non-negotiable shipping receipt (not a bill of lading) and the cargo was loaded on deck and was so stated in the contract. As a result, the exclusion clause in the shipping receipt was held to be applicable. (Note: Regrettably, this case, as with many cases decided by Quebec courts, is reported only in French. The author has relied on his limited

command of the French language and computer translation in preparing this summary.)

Carriage of Goods - Non-payment of Freight - "Freight Prepaid" Bills of Lading - Agency

H. Paulin & Co. Ltd. v. A Plus Freight Forwarder Co. Ltd., 2009 FC 727

The issue in this case was whether the receiver of cargo under "freight Pre-paid" bills of lading was liable for non-payment of freight. The parties were: H. Paulin, the receiver/consignee; A Plus, a local forwarder who issued bills of lading and was held to be a NVOCC; Scanwell, a forwarder who had contracted with A Plus and who issued "freight prepaid" forwarders receipts; and OOCL, the ocean carrier, who had been hired by Scanwell. H. Paulin paid freight to A Plus and Scanwell paid freight to OOCL but A Plus did not pay Scanwell's freight bill. Scanwell claimed the freight against H. Paulin. The first issue was the meaning of the term "freight prepaid". The Court noted that, although the statement would not preclude an action for freight as between Scanwell and A Plus (the carrier and shipper), the statement was effective to prevent either a claim *in rem* against the cargo or *in personam* against H. Paulin. The Court next considered whether principles of agency could apply to make H. Paulin liable for the freight, however, it was held that A Plus acted as principal for its own account. Accordingly, Scanwell's claim against H. Paulin was dismissed.

Road Carriage - Fundamental Breach - Limitation of Liability

Exalta Transport Corp. v. C & A Industries Inc., 2008 ABQB 637

This matter involved the failure of a road carrier to notify the shipper of the unsuccessful delivery of cargo. Pursuant to the applicable Alberta statute, the uniform conditions of carriage applied regardless of whether a proper bill of lading was issued. The issue was whether the statutory limitation applied in these circumstances. The statutory limitation provisions refer only to compensation arising out of "any loss or damage to" the cargo. On a thorough reading of the statute, the Court interpreted these provisions to not include a failure to notify on non-delivery and held that the carrier was unable to limit its liability.

Road Carriage - Dangerous Goods

Ridsdale Transport Ltd. v. Transwest Air, 2009 SKQB 380

This case involved the carriage of a drum clearly marked as containing dangerous goods along with other food cargoes. Upon arrival at the destination it was discovered that the contents of the drum had leaked contaminating the food cargoes. The carrier sought indemnification from the shipper and relied, *inter alia*, on the shipper's implied warranty that goods were safe for carriage. However, the trial Judge held that the carriage of dangerous goods was governed by the express provisions of the bill of lading and the uniform conditions of carriage. Because the shipper had fully disclosed the contents of the drum to the carrier prior to carriage, the trial Judge held that the shipper was not liable.

Rail Carriage - Demurrage

Railink v Fedmar Limited, 2009 ONSDC 08-031

This was an appeal from a Small Claims Court decision finding the defendant "FedMar" liable to

the plaintiff, "SOR", for demurrage charges on railcars at FedMar's premises. Although there was no direct contract between SOR and FedMar, SOR had issued tariffs to FedMar setting out the demurrage fees prior to the dispute. The trial Judge's decision was upheld on the basis that the delay and demurrage was the direct result of FedMar's actions, inactions and delay.

Carriage of Goods - Liability for Freight

Cargo Dynamics Logistics Inc. v. Apex Micro Manufacturing Corp., 2009 BCSC 832

This was an action for freight owing in respect of a number of shipments. The defendant was the consignee of the shipments and alleged that it was not liable for the freight as the plaintiff/carrier had contracted with the shipper. The evidence established, however, that the carriage arrangements were made between the plaintiff and defendant, and that the plaintiff was never advised that the defendant purported to act as agent only. In result, the defendant was liable for the freight.

Carriage of Household Goods - Limitation of Liability

Franklin v U Haul Co. (Canada) Ltd., 2009 SKPC 9

This was a claim for water damage to goods transported in a rental truck. There was heavy rain during the transportation and, upon arrival at the destination, the plaintiff kept the rental truck parked outside in heavy rain for an additional 2 days prior to unloading. On inspection of the truck, it was discovered that the rear door was not sitting "flat at the corners" and required cleaning to remedy. The defendant relied on a term of the rental contract which stated "…I understand that the equipment rented is water resistant and not water proof" as well as signs posted inside the rental truck to the same effect. The Court held that the defendant could not rely on the term of the rental contract given the problems with the door. However, the Court only apportioned 20% of the liability to the defendant on the basis that it was not responsible for the plaintiffs delaying the unloading for 2 days and thereby exacerbating the scope of the damage incurred.

Carriage of Household Goods - Limitation of Liability - Aggravated Damages

Wepruk v Great Canadian Van Lines Ltd., 2009 BCPC 0183

The main issues in this action were whether the defendant carrier could rely on the special conditions of carriage on the reverse of its bill of lading. The Court held that the conditions on the bill of lading did not apply as the bill of lading was delivered after the contract had been breached. The Court awarded general damages, aggravated damages for mental distress and punitive damages.

Arbitration/Jurisdiction Clauses and Stays of Proceedings

Stay of Proceedings – Arbitration Clause – Fraud – Res Judicata

New World Expedition Yachts LLC v. P.R. Yacht Builders, 2011 BCSC 78

In this action the plaintiff alleged that the defendant shipbuilders had engaged in a fraudulent

scheme in relation to a ship building contract. The vessel was being built under a contract between the plaintiff/purchaser, NWEY, and the defendant/builder, PRYB. PRYB sub-contracted the labour part of the build to a related company, FCY, also a defendant. Disputes arose during the course of the construction which were referred to arbitration and decided against the plaintiff in two arbitrations. The plaintiff's later attempt to set aside the arbitration awards was unsuccessful. The plaintiff's response was this action for damages alleging fraud. The defendants moved to stay the action on the basis of the arbitration clause in the building contract and on the grounds that the issues were *res judicata* having already been decided in the arbitrations. The Court agreed with the defendants on both counts holding that the plaintiff was seeking to re-litigate matters that were or could have been decided in the arbitrations.

Stay of Proceedings – Arbitration clause – Charterparty – s.46 MLA

T. Co. Metals LLC v. Vessel "Federal Ems", 2011 FC 291

This case concerned an action commenced by the plaintiff against the owners of the carrying vessel for damage to a cargo of steel coils carried from Brazil. The defendant shipowner commenced third party proceedings against the charterer. The charterer then brought this application to stay the third party proceedings on the basis of an arbitration clause in the charterparty or, alternatively, on the basis of *forum non conveniens*. The primary issue was whether a charterparty was a "contract for the carriage of goods by water" within the meaning of s.46 of the *Marine Liability Act*. If it was then the arbitration clause would not oust the jurisdiction of the court. The Court held that a charterparty was within the definition and s.46 applied. The Court noted that it was still required to consider *forum non conveniens* and further noted that it would only intervene if the charterer proved Canada was a clearly inappropriate forum. The Court reviewed and balanced the usual factors and held that the onus had not been discharged.

Practice - Carriage - Stay of Proceedings - Jurisdiction Clause

Hitachi Maxco Ltd. v. Dolphin Logistics Co. (2010), 2010 FC 853

This was a motion by the defendants for a stay of proceedings. The main issue was whether an admiralty action instituted in Canada *in personam* by two foreign corporations against four foreign corporations for the loss of cargo shipped from one foreign port and intended for discharge and delivery in another foreign jurisdiction should be stayed in favour of the jurisdiction stipulated in the bill of lading. The Court noted that there is no geographical limitation on the subject matter jurisdiction of the Federal Court and that it did not matter that the goods were not shipped from or to a Canadian port. The Court further noted that one may always institute an admiralty action in Federal Court that has absolutely no connection with Canada provided the defendants were served in Canada. The issue, the Court said, is whether it should maintain the jurisdiction or refer the matter to another court. The Court reviewed the authorities and the evidence and ultimately held that the defendants had not proven that there was a more convenient forum. The absence of evidence from the defendants was a significant factor in the decision.

Practice – Stay of Proceedings – Jurisdiction – Charter Dispute

McDermott Gulf Operating Company v. Oceanographia Sociedad Anonima de Capital

Variable, 2010 NSSC 118

This was an application to stay proceedings commenced in the Nova Scotia Supreme Court on the basis that the court lacked jurisdiction *simpliciter* or was otherwise not the appropriate forum. The underlying claim by the plaintiff was for charter hire and other charges allegedly owed by the defendants. The first plaintiff was a Panamanian company and was the owner of the vessel which was registered in Barbados. The second plaintiff managed the charter party for the first plaintiff and was a Nova Scotia company. The defendants were resident in the United States or Mexico. The area of operations of the vessel that were the subject of the proceedings were entirely in Mexico. The Charterparty provided for Nova Scotia jurisdiction and Canadian law. The moving defendant was not the charterer under the Charterparty but it was the entity that obtained the benefit of the vessel and it appears that it had essentially assumed the obligations of the charterer. The Court first referred to the Nova Scotia *Court Jurisdiction and Proceedings Transfer Act* ("CJPTA") which lists the circumstances where the court has jurisdiction. These include where there is an agreement on jurisdiction or where there is a real and substantial connection with the jurisdiction. The Court held that there was insufficient evidence of an agreement on jurisdiction given that the moving defendant was not a party to the Charterparty. The Court next considered whether there was a real and substantial connection with the province and noted that the CJPTA lists some of the factors to be taken into account when determining a real and substantial connection. The Court found that none of these factors were applicable but held that other factors may be taken into consideration including the connection of the parties to the jurisdiction, fairness, the involvement of other parties, comity and others. The Court reviewed these various factors and ultimately held that Nova Scotia did have jurisdiction. The Court further held that Mexico was not a more appropriate forum.

Collisions/Limitation of Liability

Collisions – Cutting of Submarine Cable – Liability – Limitation

Insurance – Wilfull Misconduct

Société Telus Communications v. Peracomo Inc., 2011 FC 494

The plaintiff was the owner of two submarine cables on the bottom of the St. Lawrence River. The defendants were the owner of a fishing vessel and the operator of the vessel who was also the principal of the owner. The operator snagged one of the submarine cables belonging to the plaintiff while fishing. The operator cut the cables with a saw believing that it was not in use. A few days later he snagged the cable a second time and did the same thing.The plaintiff commenced these proceedings alleging negligence and damages of approximately $1 million to repair the cable. The defendants denied liability saying insufficient notice had been given of the location of the cables and that, in any event, the cables should have been buried. The defendants further disputed the damages and claimed the right to limit liability. A further issue was whether the defendant's insurance coverage was jeopardized by reason of "wilful misconduct" on the part of the insured/defendants. On liability the Court found that the cables were included in notices to mariners and were shown on navigation charts and that it was the duty of the defendants to be aware of them. The Court further found that it was not practical to bury the cables and held that the sole cause of the loss was the intentional and deliberate act of the defendant operator. With

respect to damages, the Court held that the plaintiff was entitled to damages in the nature of superintendence and overhead and allowed 10% for this. The Court then turned to limitation of liability and noted that to avoid limitation the plaintiff had to prove a personal act or omission of the defendant committed either "with intent to cause such loss" or "recklessly and with knowledge that such loss would probably result". The Court held, for the first time in Canada, that this test had been met and the defendants were not entitled to limit liability. The Court said that the defendant operator had intentionally cut the cable and that the loss was the diminution in value of the cable, not the cost of repair. The Court said the defendant operator intended the very damage but just did not think the cable would be repaired. The Court further held that the defendant operator was "reckless in the extreme" and that the loss was a certainty. Turning to the insurance issue, the Court referred to authorities that established wilful misconduct "implies either a deliberate act intended to cause the harm, or such blind and uncaring conduct that one could say that the person was heedless of the consequences". The Court had little difficulty in concluding this test had been met and the insurance coverage void.

Limitation of Liability – Pleasure Craft – Collisions – Interest - Passengers

Buhlman v. Buckley, 2011 FC 73

The plaintiffs brought this action for limitation of liability under Part 3 of the *Marine Liability Act*. The plaintiffs were the owners of a fishing lodge that offered their guests the use of boats and motors. The defendants were a family of four who were guests at the lodge. During the defendants' stay at the lodge they were involved in a collision between two of the plaintiffs' boats. The first boat was operated by one of the plaintiffs and had two of the defendants as passengers. The second boat was operated by one of the defendants with the fourth defendant as a passenger. The two defendants in the second boat were injured. The main issue in the case was whether the applicable limitation was under s. 28 or s.29 of the MLA. Section 28 applies to "passengers" of ships of less than 300 gross tons and provides a limit of liability of at least 2 million SDRs (approximately CDN$3 million). Section 29 applies to all ships of less than 300 gross tons except passenger claims under s.28. (The limitations of Part 4 of the MLA, which implements the Athens Convention, were not applicable as the defendants were not passengers "under a contract of carriage".) The term "passenger" is a defined term in Part 3 of the MLA and includes a person carried on board a vessel "operated for a commercial or public purpose". The parties apparently presented arguments relating to whether the vessels were used for commercial purposes. However, the Court pointed out that this argument was misplaced. The Court noted that the two defendants who were injured were not aboard the vessel operated by one of the plaintiffs. Therefore, regardless of whether the vessels were used for a commercial purpose, the injured defendants were not passengers *vis a vis* the plaintiffs and the s. 28 limitation did not apply. Accordingly, the limitation applicable was $1 million. The Court further dealt with a subsidiary issue of whether the limitation amount included interest and held that it did not. (Note: some care must be taken when reading this judgment as the learned Judge has confused the section numbers.)

Collisions - Ship at Moorage - Liability – Damages - Betterment - Expert's Reports - Representative Proceedings

Laichkwiltach Enterprises Ltd. v. F/V Pacific Faith (Ship), 2009 BCCA 157 (additional Reasons at 2009 BCCA 308), aff'g in part 2007 BCSC 1852, additional reasons 2008

BCSC 282

This was an action for damages arising out of a collision. The plaintiff's ship was moored at a wharf when the defendant's vessel struck it while attempting to dock. The trial Judge held that the defendants were *prima facie* negligent as there is a presumption of fault when a moored vessel is struck by a moving vessel. The trial Judge accepted that there was a clutch failure on the defendant's vessel but, in the absence of evidence of the history or maintenance of the clutch, this did not absolve the defendant of liability. The plaintiff sought a total of $105,000 in damages including approximately $14,000 for lost fishing income. The trial Judge, however, found that the plaintiff had failed to prove much of the damages it claimed and those damages it had proved were reduced by 67% to reflect "new for old" or betterment. Part of the reason for the lack of proof was the trial Judge gave no weight to the opinions of the plaintiff's expert because the expert's report had apparently been drafted by a lawyer and the trial Judge was uncertain as to whose opinions were expressed in the report. The claim for lost income was denied on the grounds that the plaintiff had unreasonably delayed in effecting the repairs. The plaintiff appealed the damages issues. The Court of Appeal refused to intervene with respect to the findings of what had been damaged. These were findings of fact that were supported by the evidence. With respect to "betterment" the plaintiff/appellant argued that this concept did not apply to admiralty cases. The Court of Appeal disagreed holding that betterment was commercially realistic. The Court of Appeal did, however, find that the Trial Judge had not properly calculated the betterment. The Court noted that betterment calculations must be reasonable and fair to both parties and that it must be remembered that the cause of immediate repairs was the tortious act of the defendant/respondent. In result, the Court of Appeal adjusted the betterment reduction from 67% to 33%.

Mortgages, Liens and Priorities

In Rem Actions – Time Charters – Presumption

Liens - Availability of U.S. Maritime Lien where Vessel under Charter - Applicable Law

World Fuel Services Corporation v. Nordems (Ship), 2010 FC 332, affd. 2011 FCA 73

This interesting case probes the extent to which American maritime liens will be recognized by Canadian courts. Essentially, the issue was whether an American maritime lien would be recognized where bunkers were supplied to a ship under time charter outside of the United States or Canada and pursuant to a contract between the supplier and the time charterer. The bunker supply contract contained terms to the effect that: the bunkers were supplied on the faith and credit of the ship and her owners; the supplier was to have a lien over the vessel; and the supply contract was subject to U.S. law. The time charter party contract, on the other hand, contained the usual terms that the charterer was responsible for fuel and was prohibited from incurring liens. At first instance the Judge held the charterer had no authority, express or implied, to bind the owners to the supply contract and that therefore there was no *in personam* liability on the part of the owners to support a claim *in rem*. In reaching this conclusion, the Judge noted that the presumption as to the authority of a time charterer under Canadian law is much weaker than under U.S. law. Under U.S. law the presumption can only be rebutted by showing the supplier had actual knowledge of lack of authority whereas under Canadian law less than actual

knowledge is necessary. The Judge found that the suppliers' own terms and conditions referred to commercial ship registries such as Lloyds which identified the vessel's owner and held that the supplier was therefore on notice and should have verified whether the charterer had authority. The Judge next considered whether American law applied to the transaction and looked at the various connecting factors. In doing so he noted that because the owners were not a party to the supply contract the U.S. choice of law clause in the contract was of less significance than otherwise. He ultimately found that the applicable law was the place of the supply of the bunkers, which was South Africa, and as South African law had not been pleaded or proven, applied Canadian law. Although the Judge had held that U.S. law was not applicable to the transaction, he nevertheless continued to decide whether U.S. law would recognize a maritime law under circumstances where bunkers were supplied to a time charterer of a non-American ship outside of a U.S. port. He reviewed the affidavits of American attorneys that had been put before him and the various U.S. authorities and ultimately concluded that U.S. law would not recognize a lien under the circumstances.

On appeal, the Federal Court of Appeal dealt first with the presumption and then with the applicable law. On the presumption issue the appellate Court agreed with the trial Judge that the presumption was weaker under Canadian law than under American law. The Court said that the relevant question under Canadian law is whether there was behaviour or conduct on the part of the shipowner that would lead a supplier to believe the charterer was authorized to contract on the owner's behalf or on the credit of the ship. In the absence of any "holding out", the owner is not liable. The Court further noted that there is a duty on the supplier to make inquiries. Applying these principles to the facts of the case the Court held that the supplier knew or ought to have known that the charterer was not the owner and ought to have made inquiries. The Court further found that there was no 'holding out" by the owner. The Court then turned to the question of applicable law and specifically to the question of what weight should be given to the choice of law clause in the supply contract. The Court held that where the owner was not a party to the supply contract the choice of law clause should be given no weight. The Court further refused to interfere with the Trial Judge's balancing of the various factors and dismissed the appeal. The Court of Appeal did not address the Trial Judge's finding as to whether U.S. law would recognize a lien in the circumstances.

Liens and Mortgages- Mortgagee's Right to Possession

St. Anthony Seafoods Ltd. Partnership v. "F.V. Independence", (The), 2010 FC 634

This was an application by the plaintiff/mortgagee for possession of the defendant vessel for the purpose of selling it pursuant to s.69 of the *Canada Shipping Act, 2001* (s.69 gives the mortgagee of a registered vessel a power of sale). The plaintiff alleged that there had been various breaches of a loan agreement but the Court found that there were no breaches when demand was made or when the action was commenced. The motion was dismissed. (Note: Section 69 of the *Canada Shipping Act, 2001* does not require court authorization for a mortgagee to take possession. Although this formed no part of the Court's reasons, it is something which the Court appeared to recognize at para. 8.)

Admiralty Practice

Anti-Suit Injunction - Bunker Supplies

Alpha Trading Monaco Sam v. Sarah Desgagnés (Ship), 2010 FC 695, affd. 2011 FCA 41

This was an application by the defendant owner of the subject ship for an anti-suit injunction restraining the plaintiff from continuing proceedings commenced in Belgium. The plaintiff was a bunker supplier who had supplied the defendant ship with bunkers at various ports including ports in Canada. The ship was under time charter at the time of the supplies and the time charter contained a prohibition of lien clause and a clause that charterers were responsible for bunkers. The ship was arrested by the plaintiff in this action in Montreal and was later released on the undertaking of the owner to provide bail. Before bail was actually provided, the plaintiff advised that it would amend its statement of claim and proceed with only one supply claim. The plaintiff later commenced proceedings in Italy and Belgium and had the vessel seized in Belgium. The Court noted that the reason the plaintiff was "slicing and dicing" its recovery efforts was because Canadian law required personal liability on the part of the ship owner to support an action *in rem* whereas under Belgium law a ship may be arrested to secure a claim by a bunker supplier without personal liability of the owner. The Court further noted that the discretion to order an anti-suit injunction should be exercised most carefully. However, the Court did exercise its discretion and granted the injunction on the basis that the plaintiff had commenced these proceedings and accepted the defendant's undertaking to post bail. Importantly, the Court said that if the plaintiff had not commenced this proceeding in the first instance the defendants would have no standing whatsoever to bring this motion. The Court noted that the plaintiffs could properly have made their claims in a number of jurisdictions but that having made its choice it would be held to it. Accordingly, the Court granted the anti-suit injunction and ordered the plaintiff to release the ship from arrest in Belgium. On appeal to the Federal Court of Appeal, the Court of Appeal in brief reasons merely said that the re-arrest of the ship was, in the circumstances, an attempt to take unfair advantage by forcing the owners to provide security to guarantee a judgment against a third party.

Stay Pending Appeal

Alpha Trading v Sarah Desgagnés (Ship), 2010 FCA 209

In this matter the respondent had obtained an anti-suit injunction and an order requiring the appellant to release the defendant ship from arrest in proceedings in Belgium. The appellant sought a stay of the order pending the hearing of the appeal. The application was granted. The Court noted that the test for granting a stay required: that there is a serious question to be decided on appeal (a relatively easy condition to satisfy); refusing the stay is likely to cause irreparable harm; and, the balance of convenience favours granting the stay. The fact that the release of the vessel from arrest would result in the loss of the appellant's security was a paramount consideration. A request by the respondent for counter-security was also refused on the grounds that there was no basis for such a condition in the circumstances.

Practice – In Rem Proceeding – Intervention by Mortgagee – Collateral Attack

F.C. Yachts Ltd. v. P.R. Yacht Builders Ltd. (2010), 2010 FC 1066

This was an application by the mortgagee of a vessel under construction for intervenor status. The vessel was being built under a contract between the purchaser, NWEY, and the builder, PRYB. This contract contained an arbitration clause. PRYB had, however, sub-contracted the labour part of the build to a related company, FCY. The subcontract contained no arbitration clause. The funds for the build came from the mortgagee who was eventually to be the ultimate user of the vessel. Disputes arose during the course of the construction. Arbitration was initiated between NWEY and PRYB. FCY commenced this proceeding in Federal Court and had the vessel arrested. Later, pursuant to an agreement between NWEY, PRYB and FCY, the vessel was released from arrest upon the posting of security and this proceeding was stayed in favour of arbitration. FCY was ultimately successful in the arbitration and in the B.C. Supreme Court where aspects of the arbitration had been challenged. After the decision of the arbitrator and the B.C. Supreme Court, this application was brought for intervenor status. The purpose of the intervenor status was so that the applicant could then apply to set aside the arrest even though the vessel had already been released and was no longer in the jurisdiction. The Court noted that the granting of intervenor status is highly discretionary and listed some of the relevant factors. The Court further noted that the intervenor must take the case as the parties have framed it and cannot "hijack the parties' dispute". The Court said that the central theme of the proposed intervenor's case was that the transaction between FCY and PRYB was a sham and this went well beyond the matters the parties had put in issue. The Court further said that the proposed intervention had all the hallmarks of an end-run on the arbitration and B.C. Supreme Court proceedings and noted the absence of any evidence of fraud. Accordingly, the application was dismissed.

Injunctions – Security for Release from Arrest – Letters of Credit – Fraud

Olsen v. The Bank of Nova Scotia, 2011 BCSC 111

This was an application for an injunction restraining payment under a letter of credit. The letter of credit had been issued to obtain the release of a vessel from arrest and to secure claims that were the subject of arbitration. The arbitrations were decided in favour of the defendant ship builders and applications to review the arbitration awards were later dismissed. In this action the plaintiff alleged that the letter of credit was obtained by fraud. The plaintiff was not a party to the ship building contract but was to be the ultimate purchaser and had supplied the letter of credit as well as the funds to finance the construction. The Court dismissed the application holding that the plaintiff had failed to make out a strong *prima facie* case of fraud. The Court also disagreed with the plaintiff that an injunction was necessary to preserve the *status quo*. The Court noted that the defendants had the security of the vessel and agreed to release the vessel in substitution for the security of the letter of credit. The Court said that by seeking to invalidate the letter of credit and not returning the vessel the plaintiff "will have significantly altered the position of" the defendants. The Court was finally concerned that the action was simply a collateral attack on the arbitration awards.

Admiralty Practice - In Rem Actions - Arrest

Dragage Verreault Inc. v The M/V "Atchafalaya", 2009 FC 273

This matter arose out of a contract for the dredging of a channel. The plaintiff was the head

contractor under the dredging contract. The plaintiff subcontracted the job to a company known as B+B Dredging. The contract specified the work was to be done by the "Atchafalaya" which was owned by a company called Proteus and under bareboat charter to B+B. The plaintiff alleged there was delay on the part of the defendants in bringing the "Atchafalaya" on site as a consequence of which the plaintiff incurred liabilities under the head contract. The plaintiff commenced this *in rem* action and arrested the "Atchafalaya". The owner of the "Atchafalaya" brought this motion to set aside the arrest and strike the *in rem* action on the grounds that there was no in personam liability of the owner to support the action *in rem*. The motions Judge however found that there were some representations during the course of the contract negotiations that indicated the principal of B+B (who was also the principal of Proteus) had the authority to contract on the credit of the ship. Accordingly, the motion was refused. (See the associated action *Keybank National Assoc. v The "Atchafalaya"*, 2010 FC 406)

Practice - In Rem Actions - Arrest - Setting Aside

Morecorp Holdings Ltd. v Island Tug & Barge Ltd., 2009 BCSC 1614

This was an application to set aside the arrest of the "ITB Pioneer". The case concerned various allegations of breaches of a share purchase agreement between the parties. The plaintiff alleged, *inter alia*, that it was a term of the share purchase agreement that the parties would enter into a further agreement whereby the plaintiff's tugs would be used to deliver cargo to smaller communities on the British Columbia coast. This further agreement was never concluded and the defendants used their own tug, the "ITB Pioneer", to supply these communities. The Court held that none of the plaintiff's claims related to any aspect of maritime law in which the "ITB Pioneer" can be said to have been involved. The Court noted that there may have been a maritime claim against the cargo under s.22(1)(i) of the *Federal Courts Act* but did not decide on that issue. The Court set aside the arrest warrant and dismissed the *in rem* claims.

Practice - Arrest - Setting Aside - Crown Immunity

Artificial Reef Society of Nova Scotia v Canada, 2010 FC 865

The plaintiff in this matter arrested a decommissioned naval vessel. Although it is not obvious from the reported reasons, the plaintiff appears to have alleged an agreement with the Crown for the transfer of the vessel to it but the Crown intended to have the vessel scrapped. In any event, the vessel was arrested at the instance of the plaintiff and the Crown brought this application to set aside the arrest. The Court held that pursuant to s. 14 of the *Crown Liability and Proceedings Act* proceedings against the Crown must be *in personam* only and *in rem* actions are not permissible. Accordingly, the arrest was set aside.

Practice - Intervenors – Judicial Sale

Keybank National Association v. The "Atchafalaya", 2010 FC 406

This was a motion to intervene and to set aside an *in rem* judgment and order for sale. The intervenor was Dragage Verreault ("DV"), the plaintiff in another action who had a claim against the same vessel. The plaintiff in this action, Keybank, had been advised of the other action. Keybank obtained a judgment in this action on consent and provided DV with a copy of that judgment. Keybank later brought a motion for sale which DV attempted to delay but because DV

did not obtain intervenor status its requests were refused and the order for sale was granted. DV then brought this application. The Court held first that DV as an arresting party had an interest in the ship and was entitled to intervene. The Court further held that the judgment should be set aside, primarily on the grounds that Keybank ought to have given DV prior notice of its application for judgment. With respect to setting aside the order for sale, the Court said that this should be determined by the justice who ordered the sale.

Practice – Motion to Strike Statement of Claim

Freightlift Private Limited v. Entrepot DMS Warehouse Inc., 2011 FC 280

The plaintiff in this action was an Indian freight forwarder who had been retained to arrange shipment of four containers of clothing to Montreal. The bills of lading for the containers named the plaintiff as consignee because the purchaser had not paid for the cargo. The purchaser was in fact unable to pay for the cargo when it arrived and, as a consequence, arrangements were made by the purchaser and its freight forwarder for the containers to be stored while another buyer could be found. The cargo, however, mysteriously disappeared from the warehouse. The plaintiff brought this action alleging the defendants had conspired to release the goods to the purchaser. The defendants brought this motion to strike the Statement of Claim on the grounds that it was premature in that the plaintiff was not the owner of the goods and had not suffered a loss. The plaintiff was, in fact, being sued by its customer in India and was defending that suit. At first instance and on appeal the motion was dismissed.

Practice – Service – Addition of Parties - Limitation Periods

Shell Canada Energy v. General MPP Carriers, 2011 FC 217

This was an application by the owner of one of the defendant ships to set aside service and a corollary application to amend the Statement of Claim. The plaintiff had filed a Statement of Claim for damage to cargo on the last day of the one year limitation period. The Statement of Claim included the ship as a defendant but not the owner *in personam*. The Statement of Claim was sent by courier and fax to the owner but as service had to be effected in accordance with the Hague Convention the plaintiff obtained an *ex parte* order extending the time for service "on the owners" and ultimately effected service on the owner in Germany. The Court predictably held that service of the Statement of Claim on the owner was not service on the ship. The Court further held that the *ex parte* order extending the time for service did not indirectly create a right of action "*in personam*". With respect to the plaintiff's motion to amend the Statement of Claim by adding the owner as an *in personam* defendant, the Court refused the application on the basis that it was not the correction of a misnomer and the limitation period had passed.

Practice – Discovery- Appeals from Prothonotary

Galerie au Chocolat Inc. v. Orient Overseas Container Line Ltd., 2010 FC 327

Technically this was an application to appeal a case management order of a prothonotary, however, it raised issues relating to discovery. Specifically, the defendant had requested a case management conference to address whether the plaintiff had failed to provide satisfactory answers to requests/undertakings given at discovery. The prothonotary refused the request and ordered the defendant to produce a pre-trial conference memorandum. The appeal Judge noted

that "a discretionary order of a prothonotary ought not to be disturbed unless the issues it raises are vital to the final disposition of the case or the prothonotary exercised his or her discretion on the basis of a wrong principle or of a misapprehension of the facts". The Judge held that issues relating to discovery are not "vital to the final disposition of the case". The appeal was accordingly dismissed.

Practice - Stay of Proceedings - Supreme Court and Federal Court

Labki Finance Inc. v. Glovertown Shipyards Limited, 2010 NLTD 71

The underlying proceedings in this matter were commenced in the Supreme Court of Newfoundland by the defendant shipbuilder for an order requiring the owner of the vessel to remove the vessel from its shipyard and for storage fees of $1,000 per day. A second proceeding had also been commenced by the mortgagee of the vessel in Federal Court in which the mortgagee obtained judgment. The mortgagee brought this application in the Newfoundland proceedings for an order staying the proceedings. The application was refused. In reaching its conclusion the Court reviewed the authorities peculiar to the admiralty jurisdiction of the Newfoundland Supreme Court and concluded that the Newfoundland Supreme Court had concurrent admiralty jurisdiction with the Federal Court. The Court then questioned, without deciding, whether the Federal Court would have the jurisdiction to grant the relief sought in the Newfoundland proceedings. In any event, the Court held that the applicant had not established that the Federal Court was necessarily the more appropriate forum. The Court further found that there was little likelihood of conflicting orders affecting the vessel.

Ownership - Matrimonial Dispute – Sale – Stay of Proceedings

Ricci v. Tully, 2009 FC 493

This was a dispute between a husband and wife involved in divorce proceedings as to the ownership of a sailboat named "Forever Lost". The boat was purchased with funds raised by the plaintiff/wife from a mortgage on her home but was registered in the name of the defendant/husband. The plaintiff claimed that she was the equitable owner of the boat and the defendant claimed that the boat was a gift to him from the plaintiff. The defendant/husband was living on the boat but had failed to make payments as required by a previous court order and had failed to maintain insurance on the vessel as required. The issue before the Court was whether to grant the plaintiff an order of sale. The defendant argued that the Federal Court should stay the proceedings to permit the issues to be determined in the divorce proceedings in the Provincial Family Court. The Court held that it clearly had jurisdiction to deal with the sailboat but noted that it should not become "a surrogate divorce court for warring spouses". The Court ordered the sale of the vessel and directed how the proceeds were to be applied with the balance, if any, to be paid into the Court to await the outcome of the divorce proceedings.

Practice - Formal Offer to Settle

More Marine Ltd. v The "Western King", 2009 BCSC 504

In this matter the plaintiff made an offer to settle and the defendants subsequently made a number of counter-offers, none of which were accepted. The defendants then purported to accept the plaintiff's first offer. The issue was whether the counter-offers extinguished the plaintiff's

initial offer. The Court held that Rule 37B of the British Columbia Supreme Court Rules (which merely gives the court discretion to consider offers of settlement when deciding costs) did not alter the common law rule that a counter-offer extinguishes an offer.

Pollution

Pollution - Offences - Due Diligence

R. v. M/V "Kathy L" et al., 2010 BCPC 30

This case concerned the sinking of a barge while it was being towed which resulted in escape of pollutants. Charges were laid against the owner of the barge as well as the towing company and the captain of the tug. The Court dismissed the charges against all defendants except for the owner of the barge. The Court found that the sinking was caused by unseaworthiness of the barge for which the owner was responsible. The unseaworthiness was not obvious to a casual observer and the Court rejected the arguments of the Crown that the tug captain should have done a more thorough inspection of the barge.

Bunkering – Pollution – Apportionment of Fault

FFS HK Ltd. v. P.T. 25 (Ship), 2010 BCSC 1675

The issue in this case was the apportionment of fault for a spill that occurred in Vancouver Harbour during a bunkering operation which cost the vessel owner approximately $1 million. The owner/plaintiff accepted it was partially at fault in that one of the crew left open the valves to one of the ship's tanks and the crew failed to monitor the tank after bunkering commenced. However, the owner alleged that the crew of the bunkering barge was also at fault in that bunkers were transferred at a higher rate than agreed and the barge crew also failed to monitor the quantity transferred to the ship. The Court found that a bunkering operation is a joint operation with shared responsibilities and that the agreed transfer rate was a critical component of the transfer operation which should not be deviated from by the barge without clear and explicit instructions from the vessel. The Court found as a fact that the barge increased the transfer rate beyond that agreed and did not accept the evidence of the barge that the vessel asked for an increased transfer rate through hand signals. The Court further found that the increase in the transfer rate was a contributing cause of the spill. The Court then reviewed the faults of the two parties and held that they were equally at fault.

Miscellaneous

Ship Building - Negligence - Damages

Van Duren v. Chandler Marine Inc. (2010), 2010 NSSC 139

The plaintiffs contracted with the defendant for the building of a vessel. Upon completion, the vessel was sailed from Dartmouth, Nova Scotia to the island of St. Eustatius in the Netherlands Antilles. The evidence established the vessel experienced a multitude of problems during the voyage and the plaintiffs brought this action in contract and negligence against the shipbuilder.

The plaintiffs' first argument was that it was not economical to repair the vessel and presented expert evidence to this effect. The Court did not accept the expert evidence. The Court did, however, find that the defendant had breached the building contract and was negligent. The damages included a claim for mental distress which was allowed in the amount of $15,000. The plaintiffs' claim for lost income was disallowed on the grounds, *inter alia*, that it was not foreseeable.

Ship building - Government Procurement – Standing

Irving Shipbuilding Inc. v. Canada (Attorney General), 2009 FCA 116 affirming 2008 FC 1102

This was an application for judicial review under s. 18.1 of the *Federal Courts Act* challenging the awarding of a contract by the Government of Canada to provide service support for its Victoria Class submarines. The applicants were two sub-contractors of an unsuccessful bidder. Surprisingly, and fatally for the applicants, the unsuccessful bidder was not part of the proceedings. The applicants argued that there was a conflict of interest in that some employees of the successful bidder had been involved in an earlier test program that gave it inside knowledge and an unfair advantage. The application was dismissed on the grounds, first, that the applicants had no standing since they were not "directly affected" by the decision, and second, on the grounds that there was no conflict of interest. On appeal, the Court of Appeal upheld the Judge at first instance but for slightly different reasons. The Court of Appeal held that the applicants were not owed a duty of fairness either at contract, since they were not the unsuccessful bidder, or at common law. Further, since they were not owed a duty of fairness they were not "directly affected" by the decision awarding the service contract and, therefore, had no status under s. 18.1 of the *Federal Courts Act*. An application for leave to appeal the decision to the Supreme Court of Canada was dismissed (see 2009 CanLII 57521)

Ship Repair - Negligence - Exclusion Clauses - Summary Trial

656925 B.C. Ltd. v. Cullen Diesel Power Ltd., 2009 BCSC 260

This was a summary trial application by the defendant to dismiss the claim of the plaintiff on the basis that the contract of repair between the parties included an exclusion clause. The Court held there was insufficient evidence to grant a summary judgment and dismissed the application. However, in the course of its reasons the Court noted that exclusion clauses could be set aside "even in the context of a purely commercial relationship" where the enforcement of the clause would be unconscionable, unfair or unreasonable. The Court further noted that this could be assessed both at the time of breach as well as the time the contract was made.

Ship Repair - Repair Costs

Lindsay v. Spiller, 2009 BCSC 575

This was a dispute over the repair of a motor yacht. The repairer claimed for repair costs, storage and other costs. The boat owner alleged that some of the work and expenses were incurred without his authority and that other amounts were not properly itemized and were not reasonable. The Court extensively reviewed the evidence and agreed, in part, with the boat owner that some charges were not authorized and others were not properly itemized or reasonable. In result,

however, the repairer did recover a substantial portion of his claim.

Arbitration – Application to Set Aside Award – Bias

New World Expedition Yachts LLC v. P.R. Yacht Builders Ltd., 2010 BCSC 1496

This was an application under the *International Commercial Arbitration Act* to set aside an award of an arbitrator relating to the construction of a ship. The applicant argued, *inter alia*, that the award should be set aside on the grounds that the arbitrator was biased. The bias allegations included that there were private communications with the arbitrator and that there was a close and familiar relationship between counsel and the arbitrator. With respect to the issue of private communications, the Court noted that the arbitrator was asked to act as both mediator and arbitrator and that any private communications took place in the context of the mediation. With respect to the relationship between the arbitrator and counsel, the Court noted that arbitrators are often chosen from practicing lawyers in a specialized area who know one another. The Court considered the fact that first names were used did not give rise to a reasonable apprehension of bias.

Supply of Goods and Services

Sealand Marine Electronics Sales & Services Ltd. v. The "Lukey's Boat", 2009 FC 32

This was a simplified action for recovery of a balance owing on an invoice relating to the supply of electrical equipment to a vessel. The main factual issue in the case was whether, when the order for the equipment was placed, the price was to include a transducer. The Court found as a fact that there was no agreement to include a transducer and the plaintiff was awarded judgment.

Ship Supplier – Unpaid Invoices – Interest – Legal Fees

Calogeras & Master Supplies Inc. v. Ceres Hellenic Shipping Enterprises Ltd., 2010 FC 1318

The plaintiff in this matter was a ship chandler who had supplied various ships managed by the defendant over a number of years. This action was for payment of invoices in respect of those supplies as well as interest and legal fees. The case primarily turned on its particular facts . With respect to the claim for legal fees, this was based upon a term in the invoices that said such fees were recoverable. In respect of such clauses, the Court said that it always retains discretion to reduce the amount when there are special circumstances.

Harbour Dues - Unlawful Tax

Algoma Central Corporation v. Canada, 2009 FC 1287

The issue in this case was the validity of harbour dues in respect of public (regional) ports under the *Canada Marine Act*. The first issue was whether the case ought to have been brought by way of judicial review proceedings. The Court held that the case should have been so brought but nonetheless decided to hear the case on the merits. The second issue concerned whether the case was appropriate for summary judgment and the Court held that it was. The third issue was the validity of the harbour dues. The plaintiff's argument was that the dues were in the nature of a tax since the government provided no services and that pursuant to s. 53 of the *Constitution Act*

only Parliament had the authority to levy a tax. The Court reviewed the Act and noted that the Minister's authority to charge fees was not contingent on services being provided. The Court further reviewed the relevant authorities on the distinction between a regulatory charge and a tax and held that the dues were a regulatory charge. The final issue was whether the practice of not charging similar dues to U.S. ships was discriminatory. On this issue the Court held that the Minister had broad discretion to distinguish between different users and that the exercise of this discretion was not a grounds to invalidate the dues.

Offences – Sentencing Principles

R. v. Atlantic Towing Ltd., 2011 NSPC 10

The defendant was charged under s. 118 of the *Canada Shipping Act* with having taken actions "that might jeopardize the safety of a vessel or of persons on board". The charges stemmed from a sinking of one of the defendant's vessel in adverse weather. All crew members were saved. At the time of the sinking the vessel did not have a valid inspection certificate and was sailing 20 miles offshore whereas its documents restricted it to 15 miles. The defendant pleaded guilty to the charge but contested sentencing. The Court reviewed the principles of sentencing in safety legislation as being denunciation, deterrence, proportionality (the sentence is to be proportional to the gravity of the offence), parity (the sentence should be similar to that imposed in other cases) and restraint (the sentence should be a measured response). When dealing with corporations the Court noted that regard should be had to the conduct, circumstances and consequences of the offence, the terms and aims of the legislation and the participation, character and attitude of the corporation. In applying these principles, the Court said that a deliberate decision had been made to undertake a voyage in the face of gale warnings and farther from shore than it was supposed to be. Although there was no intention to jeopardize the safety of the crew, the risk assessment was seriously flawed. The fact that the defendant pleaded guilty was a mitigating factor as was the company's clean safety record. Ultimately, the Court held a fine of $75,000 was appropriate.

Offences – Canada Shipping Act

R. v. Ralph, 2011 NLTD 10

The accused was charged with various offences under the *Canada Shipping Act* stemming from the sinking of its vessel at sea. The charges included having an insufficient number of crew, failing to maintain a proper deck watch or look-out and failing to ensure the crew understood the use of lifesaving and firefighting equipment. The accused was found guilty and an appeal from the conviction was dismissed.

Offences – Assurance of Compliance

R. v. Island-Sea Marine Ltd. and Higgs, 2010 BCPC 355

This was an application by the accused to stay proceedings on the grounds that he had entered into an assurance of compliance agreement with the Department of Transport. However, the Court found that there was no such agreement and doubted whether an oral agreement would be sufficient.

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