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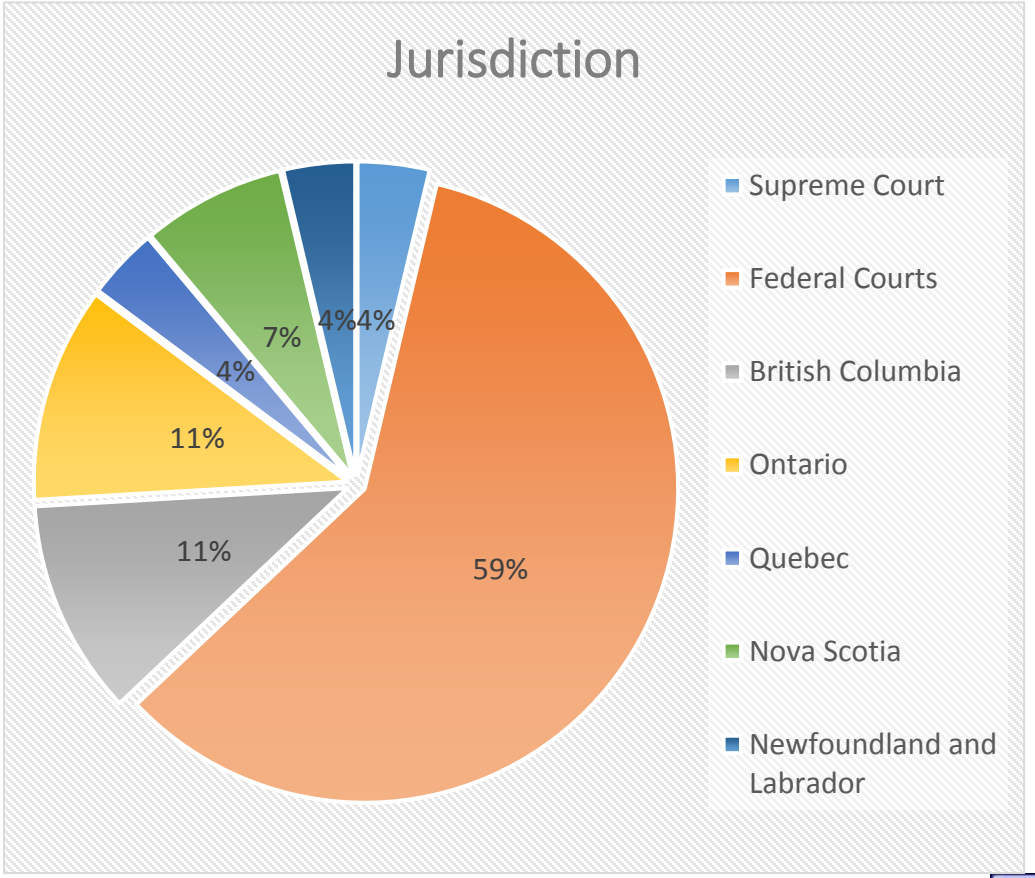
Canadian Maritime Law Case Review 2019-2020

Marc D. Isaacs

June 1, 2019 to June 1, 2020

27 Cases in total

- 1 Supreme Court
- 16 Federal Court
- 3 British Columbia
- 3 Ontario
- 1 Quebec
- 2 Nova Scotia
- 1 Newfoundland & Labrador



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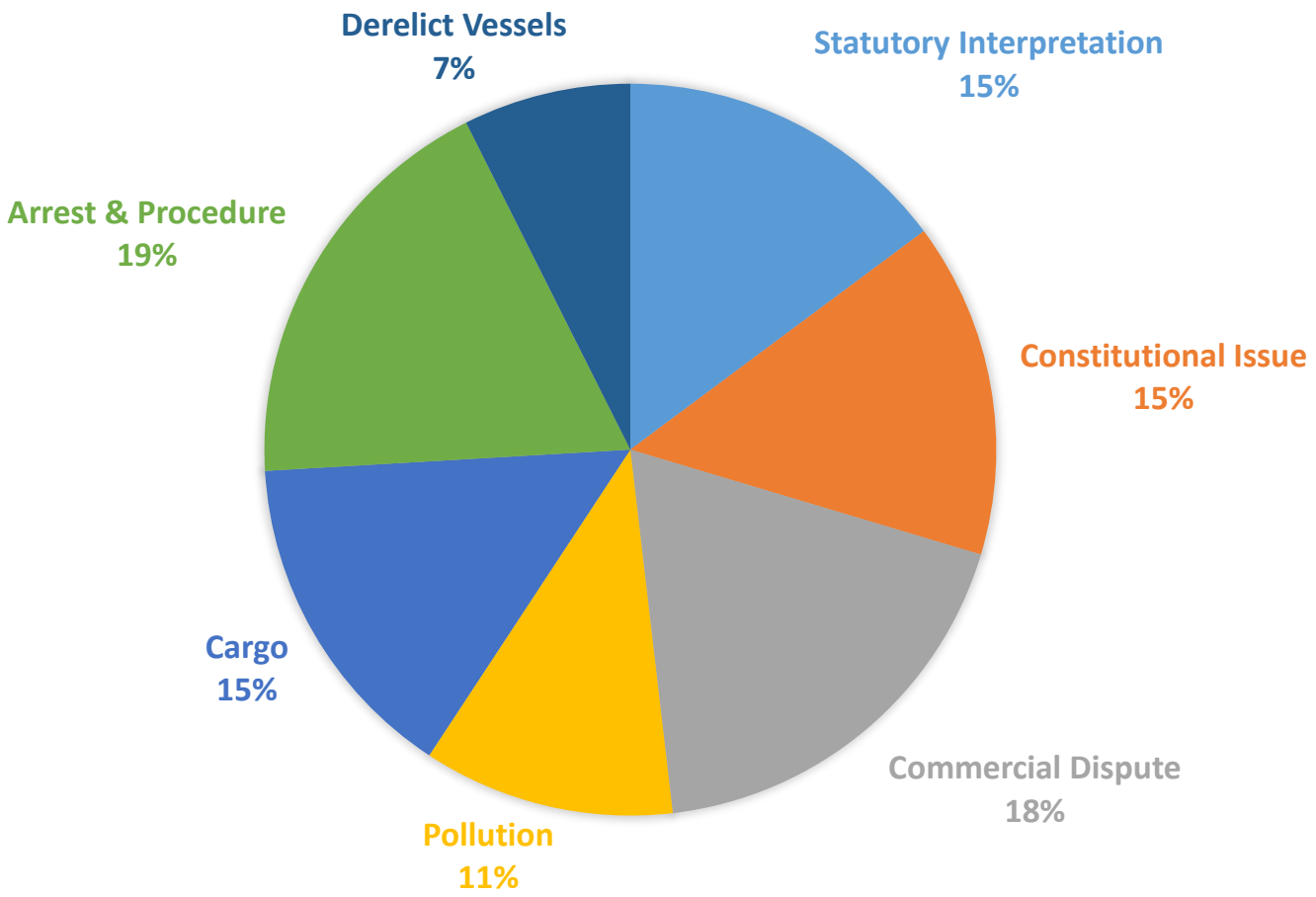
Breakdown by issue



The five cases that I consider the most important or interesting

1. *Desgagnes Transport Inc. v. Wartsila Canada Inc.*

2. *Global Marine Systems Limited v. Minister of Transport*

3. *Blackwell v. Genier*

4. *Royal Bank of Canada v. Seamount Marine Limited*

5. *Kirby Offshore Marine Pacific v. Heiltsuk Himas and Heiltsuk Tribal Council*

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Agency

Nirint Inc. v. Mega Trophy Limited

2019 FC 1015

July 29, 2019, Federal Court

Précis: Vessel agents that paid accounts on behalf of owners were entitled to reimbursement from owners.

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Nirint Inc. v. Mega Trophy Limited

Facts: The defendants were the owners of a vessel that came in to Canada in November 2016. The vessel failed a port state control inspection and there were several deficiencies that had to be corrected before the vessel could sail. The vessel's local agents arranged for a number of contractors to perform the repair work. The agents proceeded to pay some of the contractors so that the vessel could be released from arrest a contractor and set sail before the Christmas holidays. The vessel owners refused to reimburse the agent on the basis that the agent was not authorized to pay the accounts.

Held: Canadian maritime law includes the law of agency. Under the law of agency, an agent is entitled to be reimbursed for all reasonable expenses incurred in carrying out its mandate. Similarly, an agent is liable to its principal if it is negligent. The Court found that the owners had instructed the agent to take all "necessary and needful" action for the vessel to depart without delay, including payment of the invoices. The agent properly carried out its mandate and acted reasonably in the payment of the invoices. The agent was entitled to reimbursement.

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Arrest & Bail

Provincial Holdings Limited v. Ocean Nouveau-Brunswick Inc.

2019 FC 1567

December 6, 2019, Federal Court

Précis: The Court refused to quash an arrest warrant and instead set bail for release of a ship in a dispute over possession of the ship.

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Provincial Holdings Limited v. Ocean Nouveau-Brunswick Inc.

Facts: The plaintiff was a New Brunswick Provincial Crown Corporation that hired the defendant ship builder to build a floating dry-dock at a naval yard in New Brunswick. A policy imperative was for the work to be done in New Brunswick by residents of New Brunswick.. As the shipyard was preparing to launch the substantially complete ship/floating dry-dock to take it to the Province of Quebec for finishing work, the ship was arrested by the plaintiff, claiming a possessory interest in the ship. The shipbuilding contract was subject to an arbitration clause and a dispute as to where the finishing work was to be completed was subject to arbitration. A motion was brought to quash the arrest warrant, release the vessel without bail or alternatively set bail.

Held: The defendant argued that the plaintiff did not have a right to arrest the vessel as there was no valid claim to possession of the ship. In addition, it was alleged that the arrest procedure was being used improperly as an injunction to force the ship to remain in New Brunswick where the finishing work would be completed. The Court agreed that the issue of where the finishing work was to be completed was subject to the arbitration. The Federal Court has jurisdiction to hear a claim over possession of a ship even though it may arise out of a personal obligation or undertaking in a contract. An arrest warrant can be quashed without striking the *in rem* claim, but the Court will only do so in exceptional circumstances. The Court was not prepared to make a finding as to whether the plaintiff was entitled to possession of the ship, only that it is entitled to pursue its claim. The arrest was not an abuse of process or an attempt at an injunction as the plaintiff followed the appropriate procedure in making a claim for possession of the ship.

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Provincial Holdings Limited v. Ocean Nouveau-Brunswick Inc.

With respect to allegations that the affidavit to lead warrant contained misleading information or did not contain sufficient information, the obligation to disclose in an affidavit to lead warrant is set out in the *Federal Courts Rules*. Although an arrest warrant is *ex parte*, it is not an injunction and not subject to the rule of full and frank disclosure applicable to *ex parte* injunctions. As long as the description of the claim is proper and truthful as to the nature of the claim, that is all that is required. There is no requirement that the arrest be taken at a time convenient to the shipowner.

Although the timing of an arrest may cause economic harm, the issue is whether the arrest is valid. In addition, the Court cannot impose a monetary limit or threshold on the value of a claim before a party may exercise its right to arrest.

A Court does have discretion to release a vessel without bail, but it is rare that a Court would do so. The plaintiff argued that the vessel should not be released as it was attempting to enforce a policy imperative that the work be performed in New Brunswick, which could not be monetized. An arrest is not meant to enhance the position of the arresting party or create rights which would not otherwise exist prior to the arrest. An arrest is a procedural mechanism to cure a claim or enforce it. The fact that a claim could not be easily quantified is not a basis to prohibit its release.

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Arrest & Bail

Norstar Shipping & Trading Ltd. v. The Ship Rosy

2019 FC 1572

December 9, 2019, Federal Court.

Précis: Bail was set at an amount equal to the plaintiff's reasonably best arguable case plus interest and costs (30%), limited by the value of the arrested vessel. The plaintiff was also obligated to post security for costs calculated at 12% of the amount of bail.

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Norstar Shipping & Trading Ltd. v. The Ship Rosy

Facts: The plaintiff was the charterer of the ship MV ROSY from the defendant ship owner. The charterers and owners had a dispute which was subject to London Arbitration. The charterer arrested the vessel in Canada, which was released after owners provided of a letter of undertaking. The defendants then sought to reduce the amount of bail.

Held: The general rule for bail is it should be set at an amount equivalent to the plaintiff's reasonably best arguable case, plus interest and costs, which is limited to the value of the arrested vessel. The Court has discretion to determine the reasonably best arguable case, but the Court must be mindful not to prejudge the ultimate merits of the case.

Bail is a rough measure and a close examination of the claim is not required. However, bail may be reduced where there are extraordinary or special circumstances such as major uncertainties in the claim or evidence that the amount sought is exorbitant. The failure to mitigate damages may be taken into account in moderating bail. There was insufficient evidence of extraordinary or special circumstances or failure to mitigate that merited departing from the general rule.

As the plaintiff was not a resident of Canada, it was also ordered to provide security for costs at rate of 12% to reflect the cost of borrowing the money necessary to post the security.

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Cargo

Elroumi v. Shenzhen Top China Imp. & Exp. Co. Ltd. China

2019 FCA 281

November 7, 2019, Federal Court of Appeal.

Précis: An appeal from the Federal Court dismissing a claim against a land based carrier for lack of jurisdiction was dismissed.

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Elroumi v. Shenzhen Top China Imp. & Exp. Co. Ltd. China

- **Facts**: A cargo was carried from China to Montreal. The cargo was stolen from a warehouse while in the possession of the local road carrier. The Federal Court determined that it lacked jurisdiction over the road carrier. A claim against a local road transporter or an operator of a warehouse distant from an ocean port is not a claim under Canadian Maritime Law within the jurisdiction of the Federal Court.

- **Held:** Relying on previous decisions of the Federal Court and Federal Court of Appeal, the land based carrier's operations were not integrally connected to a maritime contract over which the Federal Court has jurisdiction. It acted as a land carrier and is subject to Provincial law. As such, it was plain and obvious that the Federal Court lacked jurisdiction over the claim against the land based carrier.

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Cargo

Iamgold Corporation v. Hapag-Lloyd AG

2019 FC 1514

November 26, 2019, Federal Court

Précis: The theft of cargo from a port in Belgium was subject to German law under the contract of carriage (bill of lading). German law was such that this loss occurred during the road leg of multi-modal transport and therefore the *Convention on the Contract for the International Carriage of Goods by Road* (CMR) applied and not the *Hague-Visby Rules*.

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Iamgold Corporation v. Hapag-Lloyd AG

Facts: The plaintiff shipped four containers of a precious metal from Montreal to the Netherlands by way of a multi-modal contract with a German shipping company. The cargo was carried to Belgium by ship and was intended to be trucked to the Netherlands. Fraudsters obtained the container release numbers and stole three of the four containers from the Belgium port terminal. The shipping contract called for German law to apply to cargo claims. In this recovery action, the issue was whether the loss occurred during the ocean leg of transport in which the *Hague-Visby Rules* would apply (thereby limiting the claim to 2 SDRs per kilogram) or during the road leg of transport in which the CMR would apply (thereby limiting the claim to 8.33 SDRs per kilogram).

Held: The parties agreed that German law applied to this dispute and that the loss would have to have occurred either during the ocean leg or the road leg of multi-modal transport. After hearing from German law experts, the Court concluded that the loss occurred during the road leg, although there was no specific German authority on point. The determination of whether a particular loss occurred during the ocean or road leg of a multi-modal transport turns on whether the activity giving rise to the loss was characteristic of, or attributable to, or closely tied to a particular leg. There was no connection between the activity at issue in this case and the stowage of cargo with the preceding ocean voyage. Rather it was attributable to road transport leg and the preparation of the cargo for road transport.

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Cargo

Arc-en-ciel Produce Inc. v. MSC Belle et al

2020 FC 23

January 29, 2020, Federal Court.

Précis: The risk of a limitation period defence in the US Courts constituted a strong cause to avoid the effect of an exclusive jurisdiction clause.

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Arc-en-ciel Produce Inc. v. MSC Belle et al.

Facts: The plaintiff was an importer of fruits and vegetables from Central America. The cargo was carried by the defendant from a port in Central America to Wilmington, Delaware and then carried by truck to Toronto, Canada. The cargo arrived damaged and the plaintiffs commenced an action against the shipping line. The carriage of the cargo was pursuant to a service contract, which incorporated a "non-negotiable express release bill of lading". The bill of lading contained an exclusive jurisdiction clause in favour of the US Courts. The defendant brought a motion to stay the action based on the exclusive jurisdiction clause.

Held: Section 46 of the *Marine Liability Act* has the effect of removing the discretion of the Federal Court to grant a stay of proceedings based on exclusive jurisdiction clause when the requirements of Section 46 are met. However, it does not oust the Court's discretion to grant a stay when Section 46 is not clearly in issue. The defendants argued that the service contract did not constitute a contract for carriage of goods by water under the *Marine Liability Act* and the bill of lading was not a "true" bill of lading and therefore Section 46 did not apply. The plaintiff argued that the bill of lading and the service contract was sufficient to constitute a contract for the carriage of goods by water and furthermore that it had a strong cause for the denial of the motion for the stay of proceedings, namely that it would be out of time to commence an action in the United States. While the defendant submitted that it would not rely on the limitation defence if the action was brought in the United States District Court, the Court found that its position, "while admirable", would not be binding upon the foreign court and was of limited benefit. The issue of whether the bill of lading was a true bill of lading and the interpretation of the service contract was not necessary to dispose of the motion for stay based on the plaintiff establishing that it had strong cause for the denial of the motion.

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Coasting Trade

Global Marine Systems Limited v. Minister of Transport

2020 FC 414

March 25, 2020, Federal Court

Précis: A foreign flagged vessel on standby in Victoria Harbour to service sub-sea cables was engaged in marine activity of a commercial nature under the *Coasting Trade Act.*

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Global Marine Systems Limited v. Minister of Transport

Facts: This was a judicial review application brought by Global Marine, the operators of the British flagged MV CABLE INNOVATOR. The ship is used for repair for sub-sea fibre-optic cables. Global Marine maintained a contract with those interested in sub-sea cables off the west coast of North America. Global Marine received an annual fee from its customers to maintain the vessel and to have the ability to respond to repair a sub-sea cable within 24 hours. The vessel (and its predecessors) had been based in Victoria Harbour, British Columbia for the last 30 or 40 years. Although it was based in Canada, less than 3% of its work was in Canadian waters.

In May 2017 Global Marine was informed by Transport Canada that the ship needed a *Coasting Trade Act License* while it was on standby in Victoria Harbour. This led to an exchange of correspondence and meetings between Global Marine and Transport Canada, culminating in an email of June 2019 wherein Transport Canada finally decided that a *Coasting Trade* Act license was required. Global Marine brought a judicial review application of the decision. The issue was whether the ship's stand-by status while in Victoria Harbour was "marine activity of a commercial nature" as defined by the *Coasting Trade Act.*

Held: The email of June 2019 was subject to judicial review as it clearly and finally stated Transport Canada's position. It was an administrative action as it had a direct effect on Global Marine's rights. The interpretation by Transport Canada as to whether the *CABLE INNOVATOR* was engaged in the coasting trade was reasonable. Global Marine submitted that while the vessel was on standby it was not engaged in marine activity since the vessel was static and not conducting repair or service work in Canadian waters. However, Global Marine received a fee to keep the vessel on standby and the vessel was kept ready to respond within 24 hours of notification from a customers. This standby posture is not static, but the vessel is in an active state of readiness and active in pursuit of an objective, being to quickly respond to repair a sub-sea cable. Accordingly, the Minister's decision to find that the vessel was engaged in marine activity of a commercial nature was not unreasonable and judicial review dismissed.

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Injunctions

Her Majesty the Queen v. B & B Barges Ltd.

2019 BCSC 2160

December 13, 2019, Supreme Court of British Columbia.

Précis: The owners of two barges which foundered on Crown land were ordered to remove the barges despite a claim of impecuniosity.

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Her Majesty the Queen v. B & B Barges Ltd.

Facts: Two barges owned by the respondent foundered on an island off the British Columbia coast. The area in which they foundered was Provincial Crown land. The Provincial Government sought an injunction requiring the removal of the barges. The respondent owner claimed that an injunction should not issue because it was impecunious and could not comply with the order if made.

Held: There was no dispute that the barges constituted a trespass and nuisance on Crown land. The evidence offered that the respondent was impecunious and could not comply with the order was insufficient. The defendant company was able to raise capital for its operations when it needed to and the Court was not satisfied that it would not be able to access funds to remove the barges. An injunction was appropriate as previous efforts to remove the barges produced no compliance and an injunction was the appropriate next step.

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In Rem & Bankruptcy

Royal Bank of Canada v. Seamount Marine Limited

2019 FC 1043

August 2, 2019, Federal Court of Canada.

Précis: A creditor of a bankrupt vessel had his claim against the sale proceeds of the vessel stayed on the basis that it did not pursue its remedy under the *Bankruptcy and Insolvency Act*.

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Royal Bank of Canada v. Seamount Marine Limited

Facts: Seamount Marine Limited was the owner of the vessel *OCEAN MARAUDER*, which was its main asset. Stryder King loaned Seamount approximately two million dollars to purchase the vessel. Seamount failed to make payments and Stryder King commenced an action in the British Columbia Supreme Court to enforce payment of the debt, including arresting the vessel in the British Columbia Supreme Court. When the vessel was arrested it was also subject to registered mortgages and the plaintiff, Royal Bank of Canada commenced an action in the Federal Court subsequent to the British Columbia action. Stryder King also subsequently commenced an action in the Federal Court. The vessel was sold by the Federal Court pursuant to Court order. The judicial sale order required all claimants to file a claim by a specified deadline. Stryder King filed a claim on the basis that it had an unregistered or equitable mortgage on the vessel.

In the interim, Seamount had filed for bankruptcy and a Trustee in Bankruptcy had been appointed. The Trustee disallowed the claim of Stryder King from being a secured claim and classified it as an unsecured creditor. No further appeal was taken from that decision. The Trustee then sought to disallow Stryder King from advancing its mortgage claim and priority ahead of the Trustee in the Federal Court in rem sale proceedings.

Held: The *Bankruptcy and Insolvency Act* proceedings provided for a mechanism for Stryder King to appeal the Trustee's decision that its claim was not a secured claim against the vessel. Stryder King did not avail itself of that remedy. Stryder King was not permitted to advance its claim that it was a secured creditor against the vessel in the Federal Court sale proceedings as to do so would violate the rule of *res judicata* since the issue of whether Stryder King had a secured claim had already been decided in the bankruptcy proceedings. In addition, it would violate the rule of collateral attack or abuse of process. Stryder King's claim was stayed as it would work a prejudice or an injustice to the trustee as the claim had already been adjudicated.

Judicial Review

Oceanex Inc. v. Canada (Minister of Transport) and Marine Atlantic Inc.

2019 FCA 250

October 10, 2019 Federal Court of Appeal

Précis: The Federal Court of Appeal upheld the Federal Court's determination that neither the Minister of Transport nor a Crown Corporation, Marine Atlantic Inc., was subject to a requirement to consider the National Transportation Policy in setting rates for freight and passenger ferry service between Nova Scotia and Newfoundland and Labrador.

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Oceanex Inc. v. Canada (Minister of Transport) and Marine Atlantic Inc.

Facts: The Terms of Union between Newfoundland and Canada requires the federal government to maintain a freight and passenger ferry service, known as the "constitutional route" between a port in Nova Scotia and a port in Newfoundland. Marine Atlantic Inc., a federal Crown Corporation, has been Canada's principal instrument for carrying out this obligation.

Marine Atlantic receives substantial subsidies from the government for doing so. The *Canada Transportation Act* sets out a National Transportation Policy which promotes a competitive, economic and efficient national transportation system including promoting competition and market forces.

A competitor of Marine Atlantic, Oceanex, sought judicial review of the rates set by Marine Atlantic. Oceanex claimed the lower rates distorted the market and caused it harm.

The Federal Court held that the rate setting decision decision was not subject to judicial review and in any event that there was no legal requirement in setting the rates to consider the National Transportation Policy.

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Oceanex Inc. v. Canada (Minister of Transport) and Marine Atlantic Inc.

Held: The Federal Court's decision to grant Oceanex standing to bring the judicial review application was upheld on the basis of public interest standing.

The Federal Court, however, erred in deciding that the decision of the Marine Atlantic in setting freight rates was not subject to judicial review. Marine Atlantic is a Crown Corporation and is in essence a public body. The rate setting decisions made by it were of a public and not private character. As such, Marine Atlantic is a public body for the purposes of judicial review as it has a public policy objective in supporting Canada's constitutional obligation to provide a ferry service between Nova Scotia and Newfoundland.

However, the National Transportation Policy set out in the *Canada Transportation Act* is a purpose clause that does not create legally binding rights or obligations but rather aids in the interpretation the rights and obligations created elsewhere. There was no obligation on either the Minister of Transport or Marine Atlantic to consider the National Transportation Policy in the rate setting decision.

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Judicial Sale

The Administrator of the Ship-Source Oil Pollution Fund v. The Cormorant

2019 FC 977

July 23, 2019, Federal Court

Précis: The Court refused an application for the sale of a vessel *pendente lite* as it was not satisfied there was a valid reason for the exercise of the Court's discretion.

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The Administrator of the Ship-Source Oil Pollution Fund v. The Cormorant

Facts: The *CORMORANT* was a decommissioned navy vessel that was previously sold at a judicial auction. Attempts to recommission the vessel had ceased and the vessel sat abandoned since 2013. In 2015 the vessel sank at her moorings creating a pollution incident. The Canadian Coast Guard cleaned up the pollution and was reimbursed for its expenses by the Ship-Source Oil Pollution Fund, who became subrogated to recover those costs against the owners of the vessel. The issue of the proper owner of the vessel was in dispute and the subject of litigation. A creditor against the vessel, sought an order having the vessel sold before trial or *pendente lite.*

Held: The Federal Court has discretion to order the sale of a vessel before trial, *pendente lite,* if there is good reason to do so. The prior jurisprudence has set out various elements to be considered in deciding on a sale *pendente lite.* However, such elements are not to be applied as a mechanical test, but rather to assist the Court in balancing two competing interests: The interests of the creditors in preserving the value of the vessel; and the ownership interest of the owners. In this case, there was no evidence that a judicial sale of the vessel would reduce or abate the costs or liabilities associated with the vessel's continued arrest unless a buyer was able to safely remove and dispose of the vessel. No evidence was tendered to support any reasonable likelihood that any buyer could be found who would be willing and able to do so. The Court was satisfied that it was unlikely that any significant proceeds could be obtained from the sale of the vessel and that ordering the sale of the vessel would not further reduce any liabilities. The only material effect of a judicial sale at this point would be to deflect or displace future liabilities arising from ownership of the vessel from whomever is determined to be her current owner to a potential new owner. The Court was not satisfied that this was a valid reason for the exercise of its discretion.

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Judicial Sale

Heddle Marine Service (NL) Inc. v. The Ship KYDY SEA

2019 FC 1140

September 5, 2019, Federal Court

Précis: The Court has discretion to extend the time for filing a claim pursuant to a judicial sale order.

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Heddle Marine Service (NL) Inc. v. The Ship KYDY SEA

Facts: The Federal Court ordered the ship to be sold and made a judicial sale order which required all claimants to submit their claims against the sale proceeds by a specified deadline. One claimant attempted to file its claim on the deadline, but it was rejected by the Court registry due to procedural irregularities. The claimant then brought a motion to extend the time for the filing of its claim to participate in the priorities hearing of the judicial sale.

Held: The Court has discretion to extend the time for filing a claim pursuant to a judicial sale order. This is based on the *Federal Courts Rules*, which permit the extension of time. The factors to be considered include: whether there was an intention to take the proceeding within the time; the existence of an arguable case; the cause and actual length of the delay; whether there is any prejudice caused by the delay. However, this list is not exhaustive. The weight of each factor will depend on the case. The overriding consideration is that justice be done. In the circumstances of this case, where the failure to file the claims affidavit on time was due to a procedural irregularity, the motion was allowed.

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Limitation of Liability

Kirby Offshore Marine Pacific v. Heiltsuk Himas and Heiltsuk Tribal Council

2019 FC 1009

July 26, 2019 Federal Court of Canada

Précis: A challenge to the limitation of liability regime in the *Marine Liability Act* based on aboriginal title and rights is not sufficient to prevent a limitation of liability proceeding from continuing.

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Kirby Offshore Marine Pacific v. Heiltsuk Himas and Heiltsuk Tribal Council

Facts: A tug and barge unit struck a reef and released pollutants into the sea. The area of the loss was near lands subject to a claim of aboriginal title. Claims were made against the vessel owners in the British Columbia Supreme Court related to the cleanup costs. The vessel owner brought a limitation of liability action in the Federal Court. Motions were brought to enjoin the local aboriginal nation/tribal council's action and also to stay the limitation action in the Federal Court. The claim of the tribal council in the Provincial Court sought to determine aboriginal title and rights in order to found a constitutional challenge to the limitation liability provisions in the *Marine Liability Act*.

Held: Relying on the precedent set by the Federal Court of Appeal in *Siemens Canada Limited v. J.D. Irving Limited*, 2012 FCA 225, the proper test for enjoining a civil claim for damages in the context of a limitation action is "appropriateness". The decision to enjoin a civil action is discretionary and is to be made taking into account all of the relevant circumstances. A limitation action is not a parallel proceeding to a liability action and it is preferable to have the limitation action proceed first.

It was appropriate to enjoin the provincial court action as the limitation action in the Federal Court is concerned with only whether the shipowner has a right to limit its liability. A challenge to the limitation of liability regime itself should not preclude the process where the right to limit liability is tied to a claim for aboriginal title and rights. To permit a limitation action to be tied to claims beyond the shipowner's right to limit would be to defeat the process.

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Limitation Periods

Labrador-Island Link & General Partnership Corporation et al v. Panalpina Inc.

2020 FCA 36

February 4, 2020, Federal Court of Appeal

Précis: An appeal from a trial judgment holding that the nine-month limitation period found in the terms and conditions of the Canadian International Freight Forwarders Association was dismissed.

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Labrador-Island Link & General Partnership Corporation et al v. Panalpina Inc.

Facts: The parties were involved in the construction of a hydro-electric project in Labrador. The project owner had contracted with Panalpina to provide freight forwarding services for the project. The project owner and Panalpina entered into a freight forwarding services agreement. Two of several hundreds of shipments were found to be damaged and an action was instituted against the companies alleged to have been responsible. The question arose as to which limitation period applied to the claims. The Trial Judge found that the nine-month limitation period which formed part of the terms and conditions of the Canadian International Freight Forwarders Association applied and the action was time barred. The cargo claimants appealed.

Held: The Trial Judge did not commit any palpable and overriding errors in his fact finding exercise or his application of the law to the facts as found. The Trial Judge found that notice of the CIFFA terms had been given to the appellants on each invoice that had been issued. The terms and conditions were brought to the appellants attention and they had notice of them, which included the nine month limitation period. As the appellants were unable to point to any palpable or overriding error, the appeal was dismissed.

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Limitation Periods

Jean Riley v. New Wave Expeditions Inc.

2019 QCCS 3697

August 14, 2019, Quebec Superior Court

Précis: An application to dismiss a personal injury claim based on a time bar was denied as it was not clear that the action was a result of a collision and commenced out of time.

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Jean Riley v. New Wave Expeditions Inc.

Facts: The plaintiff was a participant in a white water rafting excursion on a river in Quebec. There were four boats in the group. While two of the boats were in the rapids, they became entangled and the plaintiff was ejected from one of the boats and injured her back. She commenced an action just before the expiry of three years from the date of the incident. The defendant brought a motion to dismiss the action on the basis that the claim was time barred. The *Marine Liability Act* provides for a two year limitation period in cases of collision, whereas there is a general three year limitation period for claims arising under maritime law.

Held: The *Marine Liability Act* provides for a two year limitation period in cases of ships in collision and a three year limitation period for claims arising generally under maritime law. In order to dismiss the claim it would have to be clear that the incident was a result of ships in collision, which is a question of fact. The record as it stood did not make it possible to conclude clearly and unequivocally that this was a collision and only the trial judge would be able to determine that fact after hearing the evidence.

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Marine Insurance

Canadian Maritime Engineering Ltd. v. Intact Insurance Company

2019 NSSC 328

November 6, 2019, Supreme Court of Nova Scotia

Précis: An insurer was obligated to defend its insured and pay for independent counsel after it denied coverage to its insured.

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Canadian Maritime Engineering Ltd. v. Intact Insurance Company

Facts: A marine repair yard suffered a break-in and damage to a customer's vessel. The damage was caused by suspected vandalism. The vessel owner made demands upon the repair yard for the cost of repairing the damages, alleging vandalism, breach of contract as well negligence with respect to the premises' security. Although no action had been commenced, the vessel owner had delivered demand letters to the repair yard. The repair yard sought defence coverage from its insurers, which was denied relying on a malicious act exclusion. The repair yard sought a declaration that its insurer had a duty to defend and for the appointment of independent counsel.

Held: The language of the policy provided that it did not provide coverage for losses due to "any act of any person acting maliciously". A malicious act is distinct from vandalism. A malicious act must be intentional and motivated by malice. As such, vandalism is not specifically excluded by the policy. In any event, the owner also alleged negligence in the manner in which the vessel was secured within the repair yard. Even if vandalism was captured by the malicious act exclusion, coverage was available in respect of the negligence allegations. As the demand letters presented a claim in which there was a possibility of a duty to indemnify, the insurer had a duty to defend. The exclusion will not operate to exclude concurrent causes of loss unless the wording is clear. The alleged causes of damage, i.e. vandalism and negligence were separate and distinct.

With respect to the appointment of defence counsel, a conflict exists between the insurer and its insured where it is possible that the insurer may frame the defence in a manner that the loss would not be covered. In the circumstances, the conflict existed and the insured was entitled to appointment of its own defence counsel at the expense of the insurer.

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Marine Insurance

Midnight Marine Limited v. Aviva Insurance Company of Canada

2019 NLSC 228

December 17, 2019, Supreme Court of Newfoundland and Labrador.

Précis: The Court dismissed the plaintiff's claim for insurance coverage as the insurance policy that was issued was in accordance with the insuring agreement. The broker was the agent of the insured, not the insurer.

Isaacs Odinocki LLP
BARRISTERS & SOLICITORS

Midnight Marine Limited v. Aviva Insurance Company of Canada

Facts: The plaintiffs owned a tug and barge unit and a material handler that was on board the barge to load and unload cargo. The barge rolled while in rough Caribbean seas and the material handler was lost overboard. The plaintiffs made a claim for the loss of the material handler under their contractor's equipment endorsement to a comprehensive general liability policy issued by the defendant insurer. The insurance policy excluded losses occurring outside the territorial limits of Canada and the United States and while the equipment was waterborne. The plaintiffs sued for coverage alleging that the insurance policy was not in accordance with the insurance agreement, which was to be all-risks coverage and without territorial restriction.

Held: An insurance policy is not necessarily the insurance contract. A policy is evidence of the contract and may set out all or some of the terms, but if there is a difference between the terms of the insurance contract and the policy, then the insuring agreement will prevail. In the circumstances of this case, the insurer did not agree to extend coverage for the material handler while it was waterborne or outside of Canada and the United States. In addition, the insurance broker that communicated the insurance needs to the insurer was found to be the agent of the plaintiff, and not of the insurer. The insurance contract included the territorial limit and the waterborne exclusion and therefore the claim on the policy was dismissed.

Isaacs Odinocki LLP
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Maritime Liens

ING Bank N. V. v. Canpotex Shipping Services Limited

2020 FCA 83

May 5, 2020, Federal Court of Appeal.

Précis: The Federal Court of Appeal affirmed the judgment of the Federal Court holding that the vessel charterer (Canpotex) was contractually bound to pay the physical bunker supplier for the supply of fuel.

Isaacs Odinocki LLP
BARRISTERS & SOLICITORS

ING Bank N. V. v. Canpotex Shipping Services Ltd.

Facts: This was an appeal from a judgment of the Federal Court relating to the interpretation of the contractual relationships between Canpotex Shipping Services Limited, OW Bunkers (UK) Limited and Marine Petrobulk Limited. Canpotex was the charterer of vessels and contracted with OW Bunkers for the supply of fuel to its vessels. Marine Petrobulk was the physical supplier of fuel to one of the Canpotex chartered vessels. OW Bunkers went bankrupt before it paid Marine Petrobulk. Canpotex paid the amount due for the bunkers into Court. The dispute was whether ING Bank, as the assignee and secured creditor of OW Bunkers, or Marine Petrobulk, the physical supplier of the bunkers, were entitled to the funds. The Federal Court held that based on the terms of the OW Bunkers contract, the terms and conditions of Marine Petrobulk had been incorporated into the agreement. The terms of the OW Bunkers contract with Canpotex provided that its terms and conditions were subject to variation where the physical supply of the bunkers was undertaken by a third party "which insists that the buyer is also bound by its own terms and conditions". The Marine Petrobulk terms and conditions made Canpotex jointly and severally liable to pay for the bunkers delivered by Marine Petrobulk. The Federal Court found that the word, "insist" means to require or demand forcefully, but does not require further negotiation. As such, Canpotex was obligated to pay Marine Petrobulk for the cost of the bunkers, with the differential to be paid to OW Bunkers for its services.

Held: The Federal Court did not make a palpable and overriding error with respect to its interpretation of the word "insist". Insist means to require or demand forcefully or not take no for an answer. The terms of the OW Bunkers contract was unusual but the Trial Judge did not err in finding that the Marine Petrobulk terms and conditions were incorporated into the OW Bunkers terms and conditions on the basis that Marine Petrobulk, "insisted" the buyer be bound by its own terms and conditions. Canpotex was liable to pay for the bunkers delivered by Marine Petrobulk.

Isaacs Odinocki LLP
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Maritime Security

Canadian Maritime Workers Council v. Canada (Attorney General)

2020 FC 177

January 30, 2020, Federal Court.

Précis: The *Maritime Transportation Security Regulations* are not unconstitutional violations of port worker's *Charter Rights.*

Isaacs Odinocki LLP
BARRISTERS & SOLICITORS

Canadian Maritime Workers Council v. Canada

Facts: A coalition of trade unions representing port workers brought a constitutional challenge to the *Maritime Transportation Security Regulations*. The *Regulations* allow the Minister of Transport to deny or cancel security clearances required to perform certain functions or have access to certain areas at a maritime port. The Minister exercises this power by considering regulatory criteria that include, among other things, the consideration of a port workers' associations with suspected or convicted criminals. The applicant alleged that the *Regulations* infringed upon the individual worker's rights to freedom of association, life, liberty and security of the person and their equality rights guaranteed under the Canadian *Charter of Rights and Freedoms*.

Held: There were prior decisions from the Federal Court of Appeal which dismissed similar challenges to the *Regulations*. There was no basis to depart from the rule of *stare decisis* as no new legal issue had been raised and there was no change in the circumstances or evidence that fundamentally shifted the parameters of the debate from prior decisions. The applicants were unable to establish that there was a widespread chilling effect on the workers' ability to associate freely such that the *Regulations* infringed upon their right to freedom of association. There was no evidence that the workers' right to liberty or security of the person were infringed or a violation of their protected equality rights. If there were any failings in the manner in which the security regulations were applied to an individual worker, then that is in the implementation of the *Regulations*, but not a failing in the legislation itself.

Individual challenges using judicial review or the manner in which the *Regulations* have impacted an individual worker in its implementation is still available.

Isaacs Odinocki LLP
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Navigable Waters

Blackwell v. Genier

2020 ONSC 1170

February 24, 2020, Ontario Superior Court of Justice.

Précis: The definition of navigable water in the Canadian *Navigable Waters Act* must be used to decide disputes relating to the right to use a lake and effectively replaces the common law navigability test that the water must be part of an aqueous highway.

Isaacs Odinocki LLP
BARRISTERS & SOLICITORS

Blackwell v. Genier

Facts: A group of cottage owners on a lake in Northern Ontario had a longstanding verbal agreement amongst them that allowed mutual access to the entirety of the lake, but limited the use of motorized watercraft in the interest of preserving its tranquility. The respondents purchased a property that abutted the lake and had a small piece of the shoreline. They began to use jet-skis on the lake. The applicants brought an application seeking to enjoin the respondents from trespassing on "their portion" of the lake by navigation or otherwise. The issue was whether the provisions of the Canadian *Navigable Waters Act* and its definition of navigable water applied to the dispute or whether it was the common law definition that the water must "form a part of an aqueous highway".

Held: The intention of Parliament in enacting the *Canadian Navigable Waters Act* was clear: it was to protect the navigation rights of Canadians on more bodies of water by adopting a new and more comprehensive definition of navigable water. As such, Parliament intended to protect the navigation rights of Canadians and the expanded definition must be used in any legal proceeding that may affect or interfere with the navigation rights of Canadians. An application for an injunction prohibiting the respondents from trespassing on the applicant's property, which includes over 90% of the lake, by navigation or otherwise, was such a proceeding. The definition of navigable water in the *Canadian Navigable Waters Act* applied and effectively replaced the common law navigability test that the water must be part of an aqueous highway.

Isaacs Odinocki LLP
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Offences

R v. Kirby Offshore Marine Operating LLC

2019 BCPC 185

August 12, 2019, Provincial Court of British Columbia.

Précis: The owners and operators of a tug and barge that caused an environmental pollution incident pled guilty and were fined $2,905,000.00 in connection with three pollution offences.

Isaacs Odinocki LLP
BARRISTERS & SOLICITORS

R v. Kirby Offshore Marine Operating LLC

Facts: The defendant was the operator of a tug and barge unit that was travelling from Vancouver to Alaska. The tug operator fell asleep at the helm and the vessel ran aground and sank off the British Columbia coast. The incident caused the vessel to spill a significant quantity of diesel fuel and lubricating oil into an environmentally sensitive area near an indigenous community. The defendant plead guilty to three pollution related offences and there was a joint submission to impose a fine of $2,905,000.00.

Held: There are five principles of sentencing with respect to environmental offences. They are: 1) culpability; 2) prior record; 3) acceptance of responsibility; 4) damage caused; and 5) deterrence. Culpability is the dominating factor. It is judged on a sliding scale of an intentional act on one end to a "near miss" of the due diligence standard with respect to strict liability offences on the other. Although this was not intentional, it was also not a "near miss". The culpability was on the higher end of the scale. The accused had no prior record. The accused accepted responsibility by way of its guilty plea, was fully cooperative with investigators, attempted to mitigate the spill and paid cleanup expenses. The damage done was significant and affected an environmentally sensitive area. With respect to deterrence, there is specific and general deterrence to be considered. While the individual defendant has been deterred, general deterrence requires that all others must be aware that they owe a high duty to maintain a vigilant eye in protecting environmentally sensitive areas. The joint submission on fine was accepted with the fine to be paid to the Environmental Damage Fund, to be administered for the benefit of the local First Nations people for the purposes of restoration of the habitat affected by the damage.

Isaacs Odinocki LLP
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Offences

R. v. Vansickle

2019 ONCJ 777

October 24, 2019, Ontario Court of Justice

Précis: The failure to inform an accused of his right to counsel after being arrested for impaired operation of a vessel resulted in the exclusion of evidence.

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R. v. Vansickle

Facts: The accused was suspected of impaired operation of a vessel and the failure to exhibit proper navigation lights. A police boat pulled up behind the accused's vessel and an officer jumped on board and placed the operator under arrest. The vessel was directed to the dock where the operator was then placed in handcuffs and led to a police cruiser. The arresting officer failed to advise the accused of his right to counsel after he was taken off the vessel and placed into the back of the police cruiser. He was then asked about his alcohol consumption, which led to a breath test demand. The accused sought to exclude the evidence of his alcohol consumption based on a violation of his *Charter* rights.

Held: The accused was initially arrested pursuant to violations under the *Canada Shipping Act* (failure to exhibit navigation lights). At the time, the officer did not have reason to believe that the accused was a threat to the officer's safety in order to justify the use of handcuffs while on the dock and in the back of the police cruiser. The use of handcuffs as a standard procedure when making an arrest is an insufficient justification for the use of force. In the situation, the handcuffs were an unreasonable use of force. The officer also did not advise the accused that he had the right to retain counsel without delay, to which he is entitled under Section 10 (b) of the *Canadian Charter of Rights and Freedoms*. The officer asked the accused about his alcohol consumption after the arrest and before being given the "*Charter* warning". This was a breach of the *Charter of Rights and Freedoms*, in that he was not informed of his right to counsel. The evidence was excluded.

Offences

R. v. Great Lakes Stevedoring Company Ltd.

2019 ONCJ 895

December 18, 2019, Ontario Court of Justice

Précis: Provincial environmental laws apply to stevedoring companies operating on federal public property.

Isaacs Odinocki LLP
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R. v. Great Lakes Stevedoring Company Ltd.

Facts: A stevedoring company was charged under provincial environmental laws for discharge of a pollutant, specifically cement clinker while unloading a ship. The stevedoring company operated along the St. Lawrence Seaway on federal property. The stevedoring company claimed that the discharge occurred on federal property while stevedoring, which is subject to federal jurisdiction pursuant to the federal government's navigation and shipping power. The stevedoring company sought to have the charges dismissed on the basis that the provincial statute did not apply.

Held: The doctrine of constitutional inter-jurisdictional immunity does not apply in this case. The provincial environmental statutes do not impair a core federal power, being navigation and shipping. Parliament's exclusive jurisdiction over navigation and shipping includes stevedoring. However, the provincial requirement to load and unload ships in a manner that does not release contaminants does not impair the federal power over navigation and shipping or the use of federal public property.

In addition, the doctrine of federal paramountcy does not apply. The fact that the federal government permits an activity does not excuse compliance with otherwise provincial legislation unless there is a conflict.

Isaacs Odinocki LLP
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Oil Pollution Liability

British Columbia v. The Administrator of the Ship-Source Oil Pollution Fund

2019 BCCA 232

June 26, 2019 British Columbia Court of Appeal.

Précis: The appeal of a decision making the province liable for a claim for oil pollution prevention expenses was dismissed.

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British Columbia v. The Administrator of the Ship-Source Oil Pollution Fund

Facts: The company which was the registered owner of a vessel was dissolved in January 2014 due to its failure to file annual returns. As a result of the dissolution, the vessel ownership vested in the province pursuant to the *Business Corporations Act* of British Columbia. The vessel had been moored at a wharf for many years and had not been maintained. It was in danger of sinking and causing a pollution incident. The Canadian Coast Guard removed the hydrocarbons and the vessel, incurring substantial expense. The Administrator of the Ship-Source Oil Pollution Fund brought a subrogation action against the province as the owner on the basis of the liability provisions in the *Marine Liability Act*. The court at first instance held the Province liable.

Held: As a result of the corporate dissolution, a company ceases to exist for any purpose and its undistributed assets vest in the provincial government. When a vessel vests in the Provincial Crown, the province falls within the definition of "owner" in the *Marine Liability Act* for the purposes of the Ship-Source Oil Pollution Fund regime and compensation for oil pollution expenses. The plain wording of the *Marine Liability Act* imposes liability for the cost of preventative measures on the owner at the time that the preventative measures were taken. The liability for the expense to minimize pollution damage is not a matter of fault or neglect, rather it is an incident of ownership.

The imposition of liability on the person who has the rights of the owner of the ship with respect to its possession and use at the time that the cleanup expenses are incurred is consistent with the object of preventing and minimizing oil pollution damage. The rights of the Ship-Source Oil Pollution Fund arose during the period of time in which the registered owner had been dissolved and therefore the Administrator had a legitimate claim against the Province.

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Sale of Goods

Desgagnes Transport Inc. v. Wartsila Canada Inc.

2019 SCC 58

November 28, 2019, Supreme Court of Canada

Précis: The sale of marine engine parts is subject to provincial sale of goods law.

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Desgagnes Transport Inc. v. Wartsila Canada Inc.

Facts: The plaintiff shipowner/operator purchased marine engine parts for its Canadian flagged commercial vessel. The parts were supplied to the plaintiff in Quebec, who was also a Quebec based company. There was a failure of the parts resulting in damage to the ship. The shipowner sued the marine engine parts supplier who relied on a limitation of liability clause in the contract of sale. The plaintiff claimed that Quebec's *Civil Code* and the provincial sale of goods law applied, which invalidated the limitation of liability clause in the sale contract.

Held: The sale of marine engine parts is sufficiently and integrally connected to navigation and shipping so as to come within the federal legislative authority. However, the *Quebec Civil Code* also pertains to warranties in contracts of sale of goods and is validly enacted provincial law as it concerns a matter of property and civil rights. This particular situation gives rise to a double aspect scenario where both a non-statutory body of federal law (Canadian Maritime Law) and a provincial law directed at the same factual situation overlap. Since the provincial statute is a legislative enactment, Canadian non-statutory maritime law does not prevail over it. The sale of marine engine parts can be viewed from both the broad perspective of regulating the sale of goods which is within provincial jurisdiction, as well as from the narrower perspective of the exercise of the federal power over navigation and shipping. However, the provincial sale of goods law does not trench on the core of an exclusive head of power of the federal Government. The core of navigation and shipping does not apply to contractual issues raised in the claim and it is not essential for the exercise of federal competence over navigation and shipping such that only Canadian Maritime Law can regulate contracts of sale for marine equipment. It would be contrary to the purpose of the paramountcy doctrine to hold that non-statutory rules of Canadian maritime law prevail over valid provincial legislation. The paramount position of federal legislative intent over provincial legislative intent cannot be extended to the law developed by the Courts who exercise Admiralty jurisdiction. As the rules of Canadian Maritime Law in this case are non-statutory, there is no conflict between provincial and federal law so as to require federal law to be paramount.

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Salvage & Wreck

Beasse v. Canada

2019 FC 768

May 31, 2019 Federal Court

Précis: The concept of bailment was not applicable to the Canadian Coast Guard acting under the statutory authority of the *Canada Shipping Act* in removing a vessel where the Government has reasonable grounds to believe that the vessel is likely to discharge pollution.

Isaacs Odinocki LLP
BARRISTERS & SOLICITORS

Beasse v. Canada

Facts: The plaintiff was an owner of a wooden tugboat originally built in 1902. On January 14, 2014, the tugboat sank in a harbor in British Columbia. The Coast Guard raised the vessel and determined that it had to be towed to a salvage yard for further inspection due to the environmentally sensitive area. The Coast Guard hired a tow to take the tugboat to the shipyard, but the tug sank again on January 17, 2014 in deep water. The plaintiff sued the Canadian Coast Guard for the loss of the vessel.

Held: The Canadian Coast Guard was acting under its statutory authority to tow the vessel for further inspection after it was raised form the first sinking. The *Canada Shipping Act*, *2001* provides statutory authority to remove a vessel if there are reasonable grounds to believe that it will discharge a pollutant. The concept of bailment is not applicable in such circumstances. In any event, even if the Coast Guard was a bailee, and obligated to take such due and proper care as a prudent owner might reasonably be expected to take in similar circumstances, the Coast Guard did take such reasonable care during the tow operation. The Court reaffirmed that the tug has a duty to ensure that the tow is ready to be towed, but does not extend to the seaworthiness of the tow. As long as the tug has exercised competent skill and diligence to ensure that there is no neglect, misconduct or the creation of unnecessary risk, there is no warranty that the tug shall be able to accomplish the task in all circumstances and hazards. If there is any duty owed it is of the vessel owner to provide a seaworthy tow.

The Canadian Coast Guard was within its mandate to take the vessel and do what it considered necessary to prevent further pollution damage. In respect of the duty of care, once the Coast Guard had taken reasonable steps to determine that the tugboat was ready to be towed, it had no further duty to ensure that the tugboat was seaworthy. In any event, the Court found that the Coast Guard acted reasonably with due diligence. In addition, there was no evidence that the towing company failed to exercise due diligence in furnishing a seaworthy tug to conduct the tow or that the loss of the tugboat was caused by the lack of seaworthiness of the tug conducting the tow. The action was dismised.

Shipbuilding

G.C. Lobster Ltd. v. B. Atkinson Boat Builders Limited

2019 NSSC 342

November 19, 2019, Supreme Court of Nova Scotia

Précis: The parties by their respective conduct towards the end of a vessel construction agreement mutually repudiated the contract.

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G.C. Lobster Ltd. v. B. Atkinson Boat Builders Limited

Facts: The plaintiff hired the defendant to build a fishing vessel. Various disagreements arose in the course of construction culminating in an argument and altercation as the boat was being put into the water for final completion. The builder insisted that the buyer sign a liability waiver when he learned that the vessel would be used for scallop fishing in addition to lobster fishing. As the dispute escalated the builder refused to continue work and the owner took the boat away to another dock for completion of the work. The parties disputed amounts owing to one another under the vessel construction contract.

Held: The vessel construction contract did not specify an agreed completion date. It was therefore implied that the vessel would be completed within a reasonable time. The defendant boat builder had completed the vessel within a reasonable time when it was ready to put it in the water for final completion. The builder insisted that the buyer sign a liability waiver in order to continue working on the vessel and deliver it the buyer. The waiver was overly broad and insisting on it was a breach of the contract. The owner took the boat away to another dock for completion of the work which constituted repudiation. In the circumstances, there was mutual repudiation of the vessel construction agreement by both parties. The builder was entitled to recover the value of the contract price, less uncompleted work and costs of remedying deficiencies.

My reflections on the cases

1. Stop Drinking the Kool-Aid

- Maritime law is not as “special” as we would like to think it is - just because it is maritime law and the Constitution refers to “Navigation and Shipping”. Everything must be viewed in harmony with provincial legislation. Cooperative Federalism.

2. Polluters are going to pay

- Whether it be oil or abandoned vessels, there is going to be little tolerance for those who do not meet their good citizen obligations. Your vessel, your responsibility.

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Thank You

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