Giaschi & Margolis
BARRISTERS AND SOLICITORS

401-815 Hornby Street
Vancouver, B.C.
V6Z 2E6
CANADA

Telephone (604) 681-2866
Facsimile (604) 681-4260
Email: giaschi@AdmiraltyLaw.com
Internet: www.AdmiraltyLaw.com

Developments in Canadian Maritime Law

01/01/2012- 01/04/2013

Prepared By:

Christopher J. Giaschi*

For the Annual Seminar
of the Canadian Maritime Law Association
at Toronto, Ontario
7 June 2013

Table of Contents

NOTE: All of the summaries contained in this paper are from Admiraltylaw.com. Readers are advised to consult Admiraltylaw.com for updates and recent developments.

*Christopher Giaschi is a partner of Giaschi & Margolis, President of the Canadian Maritime Law Association and the founder of, and main contributor to, Admiraltylaw.com.

Synopsis of Important Developments

Admiralty Practice

Practice cases of interest include: *Hagedorn v The "Helios"*, 2013 FC 101, where a Prothonotary's order respecting privileged documents was held not to be discretionary*; Cameco Corporation v. The "MCP Altona"*, 2013 FC 177, where a party was order to pay the costs of a priorities hearing; *Seanautic Marine Inc. v. Jofor Export Incorporated*, 2012 FC 328, where the court affirmed that dismissal of a prior proceeding without an adjudication on the merits is not a bar to later proceedings; *Cameco Corporation v. The "MCP Altona"* , 2012 FC 324, where the court declined to return security given by cargo interests even though the shipowner was bankrupt, unbeknownst to the parties, at the time security was given; *Secunda Marine Services Ltd. v. Caterpillar Inc*., 2012 NSSC 53, where the plaintiff was allowed to amend its claim by adding a new plaintiff 10 years after the incident giving rise to the claim; and, *TAM International Inc. v. The "MCP Altona"*, 2012 FC 128, where costs were awarded against a party that withdrew a claim against proceeds of sale.

Jurisdiction/Canadian Maritime Law

The nature and scope of Canadian maritime law and the constitutional limits of Parliament's jurisdiction over navigation and shipping continues to generate cases. Most recently, in *Tessier Ltee. v. Quebec*, 2012 SCC 23, the Supreme Court of Canada addressed whether and when stevedoring activities are governed by provincial occupational health and safety legislation. Notably, the court said that shipping activities undertaken solely within a province are subject to provincial law. To similar effect is the judgment of the Quebec Court of Appeal in Croisières *Charlevoix Inc. v. Quebec, 2012 QCCS 1646,* where it was held that intra-provincial carriage of passengers was subject to provincial law. Other cases of interest include: *Canada v. Toney*, 2012 FCA 167, and *Ship Source Oil Pollution Fund v. British Columbia (Finance)*, 2012 FC 725, where the admiralty jurisdiction of the Federal Court was held to include jurisdiction in actions against a provincial crown.

Carriage of Goods

In *Mitsubishi Heavy Industries Ltd. v. Canadian National Railway Company*, 2012 BCSC 1415, the British Columbia Supreme Court held a rail carrier was entitled to limit its liability even though there was no contract between it and the plaintiff. In *Cami Automotive, Inc. v. Westwood Shipping Lines Inc.,* 2012 FCA 16, the Federal Court of Appeal upheld a decision of the Federal Court holding that a rail carrier could choose the limitation that was the most beneficial to it. In *The "Mercury XII" v The "MLT-3",* 2013 FCA 96, the Federal Court of Appeal held that the hire of a tug and barge was not a contract of carriage to which the Hague-Vsiby Rules applied.

Collisions/Limitation of Liability

There have been three significant collision/limitation cases, namely: *Siemens Canada Limited v. J.D. Irving, Limited*, 2012 FCA 225, where the Federal Court of Appeal upheld the decision of the trial Judge enjoining proceedings in a provincial superior court while a limitation action was

proceeding; *Peracomo Inc. v. Société Telus Communications*, 2012 FCA 199, where the Federal Court of Appeal upheld the decision of the trial division holding that a fisherman who had intentionally cut a submarine was disentitled to limit his liability; and, *Buckley v. Buhlman*, 2012 FCA 9, where the Federal Court of Appeal upheld a decision of the Federal Court wherein it was determined that the limits of liability under the MLA applicable to "passengers" apply only to persons on board the ship seeking to limit liability. Other cases of interest include: *Grieg Shipping A/S v. The "Dubai Fortune",* 2012 FC 1110, where the Federal Court considered the vicarious liability of a ship for damage done by an assisting tug; and, *Hogan v. Buote*, 2012 PESC 10, where liability for a collision was apportioned 75% to the give way vessel and 25% to the other vessel.

Liens, Morgages and Priorites

Notable cases include: *Cameco Corporation v. The "MCP Altona",* 2013 FC 23, where s. 139 of the MLA was considered and the priority of a mortgagee was confirmed; and *Comfact Corporation v. Hull 717*, 2013 FCA 93, where the Federal Court of Appeal agreed with the trial Judge that s. 139 of the MLA did not give a lien to a subcontractor who supplied manpower to construct a vessel.

Marine Insurance

Marine insurance cases of interest include: *Feuiltault Solution Systems Inc. v. Zurich Canada*, 2012 FCA 215, where the Federal Court of Appeal dismissed an appeal relating to insufficient packaging and discussed at length the burden of proof under an all risks policy; *Universal Sales Limited v. Edinburgh Assurance Co. Ltd.*, 2012 FC 418, where underwriters were required to reimburse the assured for a settlement payment made in respect of an action for wreck removal costs; and, *Peracomo Inc. v. Société Telus Communications*, 2012 FCA 199, where the Federal Court of Appeal upheld a denial of coverage on the basis of the wilful misconduct of the assured in deliberately cutting a submarine cable.

Offences

R v. Kerr, 2012 BCSC 1311 and *R v. Escott*, 2012 BCSC 1922 address what is required to convict an accused on a charge of dangerous driving.

Miscellaneous

Cases under this heading include: *Offshore Interiors Inc. v. Worldspan Marine Inc*., 2013 FC 221, where a Prothonotary held that a builder's mortgage did not create a lien or charge on a vessel other than to secure delivery; *Shipping Fed. of Cda. v. Vancouver Fraser Port Authority*, 2012 FC 301, where the court dismissed a challenge by ship owners to a container fee imposed under the *Canada Marine Act*; *M.V. "Stormont" v. Canada*, 2012 FCA 93, where a challenge to an ice breaking services fee was dismissed; and, *Adventure Tours Inc. v. St. John's Port Authority*, 2012 FC 305, where an application challenging the power of the Port Authority was struck.

Admiralty Practice

Discovery - Privilege – Appeals - Whether Order of Prothonotary Discretionary

Hagedorn v. The "Helios", 2013 FC 101 (2013-01-30)

A fire broke out on board the "Helios" owned by the defendants and spread to other nearby vessels. The broker of the "Helios" appointed a surveyor and fire expert to attend the scene and investigate the fire on behalf of underwriters. The surveyor and fire expert were told they were being retained by counsel and would report directly to counsel. The broker next retained counsel who in turn retained a claims service to interview one of the owners of the "Helios". The moving party brought an application to compel production of various documents over which privilege was claimed including survey reports, the report of the fire expert and reports from the claims service which attached an interview and pre-fire survey reports. At first instance the Prothonotary was not convinced the documents were created "wholly or mainly" with litigation in mind and held they were not privileged. The "Helios" defendants appealed.

Decision: Appeal allowed, in part.

Held: If the Prothonotary's order was discretionary in nature, the appellate Judge must determine if the order was vital to the issue in the case and, if so, the matter must be determined *de novo*. If the order was discretionary and not vital, the appellate Judge should only interfere if the order was clearly wrong. If the order is not discretionary and concerns a question of law, the standard on appeal is one of correctness. If the order is not discretionary and concerns a question of fact, the appellate Judge should only interfere if there is a palpable and overriding error. Although the parties proceeded as though the Prothonotary's order was discretionary in nature, the order was not discretionary. Therefore, the correct standard of review on appeal is correctness (for errors of law) and palpable and overriding error (for errors of fact). The documents are privileged with the exception of the pre-fire survey reports. The Prothonotary clearly erred in his findings of fact. The parties were in an adversarial position from the outset.

Judicial Sales - Priorites – Costs – Procedure in Priorities Disputes

Cameco Corporation v. The "MCP Altona", 2013 FC 177 (2013-02-20)

The "MCP Altona" was sold by judicial sale following a spill of yellowcake uranium in one of her holds. Following the sale, the mortgagee of the vessel brought an application for payment out of the proceeds of sale. Cameco, the owner of the uranium cargo, defended that motion arguing that it had priority over the mortgagee. The court ultimately determined (at 2013 FC 23) that the mortgagee had priority and ordered payment of the proceeds to it. The mortgagee now moved for costs from Cameco on an enhanced basis.

Decision: The mortgagee is entitled to its costs against the cargo owner based on the Tariff.

Held: The procedure in priorities disputes is similar to that for applications. Each party is to file

written submissions supported by affidavits and documents to be relied on. Parties are entitled to cross-examine affiants. Although Cameco was unsuccessful in challenging the mortgagee's priority, it had legitimate points. Further, although the issues were complicated and interesting, for the reasons given in *Universal Sales, Ltd v Edinburgh Assurance Co*, 2012 FC 1192, costs should be based on the tariff.

Comment: In *Universal Sales, Ltd v Edinburgh Assurance Co*, 2012 FC 1192, the court held that there must be reprehensible conduct to justify an order for enhanced costs.

Assessment of Sheriff's Costs

TAM International Inc. v. The "MCP Altona", 2013 FC 9 (2013-01-07)

The defendant ship was ordered to be sold and the order of sale provided that all reasonable expenses and agency fees necessary for the preservation, safekeeping or maintenance of the vessel were to be treated as sheriff's costs. Upon assessment of the sheriff's costs certain invoices and expenses were contested by one of the parties. The contested invoices included: amounts paid to the ship's manager; invoices for parts ordered before the arrest; invoices to maintain the registration of the vessel; wages and associated expenses of a full complement of crew members; invoices for alcohol; and other miscellaneous invoices. The Assessment Officer (2012 FC 1168) allowed some but not all of the disputed amounts. The Assessment Officer found the expenses paid to the ship's manager were reasonable and necessary and were allowed. Invoices for items or services not necessary for the preservation, safety or management of the vessel were disallowed. The invoices for parts ordered outside of the period covered by the order of sale were not allowed. The invoices for maintaining the registration of the vessel were allowed only for the period applicable to the arrest and sale, which was 1/24 of the entire period. The wages and associated expenses of all but two crew members were allowed, the number being arrived at based on the safe manning certificate of the vessel. Invoices for alcohol were disallowed as not reasonable. The mortgagee appealed those parts of the award with regard to manning and flag registration.

Decision: Appeal Dismissed.

Held: The Court should not intervene in an assessment officer's decision absent an error in principle or an award of an amount so unreasonable as to suggest such an error. With regard to manning, no evidence was submitted as to the minimum crew required during anchorage. With regard to the flag registration, the decision to allow the expenses only to the date of sale does not reflect an error in principle.

Practice - Other Proceedings – Stay - Abuse of Process

Seanautic Marine Inc. v. Jofor Export Incorporated, 2012 FC 328 (2012-03-20)

The plaintiff filed a claim against the defendant for outstanding freight charges in the Small Claims Court. The plaintiff failed to set the matter down for trial and the Small Claims Court action was subsequently dismissed. There was contradictory evidence as to whether the parties

had agreed at a Small Claims Court Settlement Conference that the matter would proceed in the Federal Court. The plaintiff commenced this action in the Federal Court. The defendant filed an application to stay the action on the basis of, *inter alia*, abuse of process. At first instance the Prothonotary dismissed the application holding that the dismissal of the Small Claims Court action without a decision on the merits did not prevent the plaintiff from re-commencing the action in the Federal Court. The defendant appealed.

Decision: Appeal dismissed.

Held: The abuse of process doctrine is a flexible doctrine to protect litigants from abusive, vexatious or frivolous proceedings. Its application depends on the circumstances and is fact and context driven. The Prothonotary correctly held that, in the absence of a deliberate flouting of a Federal Court Order, the dismissal of the Small Claims Court action did not prevent the plaintiff from re-commencing the action in the Federal Court.

Arrest - Security - Bankruptcy of Shipowner - Return of Security

Cameco Corporation v. The "MCP Altona", 2012 FC 324 (2012-03-19)

The defendant vessel was forced to return to Vancouver after a cargo of yellowcake uranium spilled in the hold of the vessel. The vessel was arrested upon its arrival and multiple actions were commenced including this action by the shipowner against the owner of the uranium to recover the damages incurred by the owner as a consequence of the spill and for contribution or indemnity in respect of claims made against the shipowner by other parties. The owner of the cargo voluntarily posted security for the shipowner's claim in the amount of $4.6 million. However, unbeknownst to counsel involved, the shipowner had declared bankruptcy. When the owner of the cargo learned of the bankruptcy it brought this motion for the return of the security or, alternatively, to reduce the amount of the security. The cargo owner argued that the agreement to post security was void and was tainted by mutual mistake.

Decision: Application dismissed, in part.

Held: The Court held that there was insufficient evidence to set aside the security. The Court did, however, reduce the amount of the security on the grounds that one of the claims for which it was given had not been pursued against the vessel.

Practice – Addition of Party

Secunda Marine Services Ltd. v. Caterpillar Inc., 2012 NSSC 53 (2012-02-03)

The plaintiff's vessel was damaged by fire in 2001 and the plaintiff commenced proceedings in the Nova Scotia Supreme Court in 2004. In 2008 the plaintiff advised the defendants that the proper plaintiff was Secunda Marine Atlantic and not Secunda Marine Services. In September 2011 the plaintiff brought this application to amend its pleading to correct the name of the plaintiff. The defendants also brought an application to dismiss the action on the grounds of the plaintiff's admission that it was not the owner of the vessel. A key issue was the applicable

limitation period and whether it had expired.

Decision: The plaintiff's application was allowed and the defendants' application was dismissed.

Held: The Court held that either the defendants had not established a valid enforceable limitation defence or, if there was such a defence, then allowing the defendants to rely on it would create an unfair advantage. This was an appropriate case to exercise the Court's discretion in favour of the plaintiff.

Comment: This case turns largely on the Rules of the Nova Scotia Supreme Court.

Costs – Abandonment of Claim – Liability of Claimant

TAM International Inc. v. The "MCP Altona", 2012 FC 128 (2012-02-01)

The defendant vessel was forced to return to Vancouver after a cargo of yellowcake uranium spilled in the hold of the vessel. The vessel was arrested upon its arrival by the plaintiff TAM, one of the voyage charterers, as well as by another claimant. Other parties filed caveats against release including the mortgagee. Eventually the ship was sold by court order. Subsequent to the sale but after some additional steps had been taken by competing claimants to investigate TAM's claims, TAM withdrew its claim to the proceeds of sale. The mortgagee of the vessel sought costs against TAM in the amount of $2,000.

Decision: The application was allowed, in part.

Held: The motions Judge noted that the mortgagee would probably be entitled to $2,000 in costs in a taxation but also noted that the Court should not discourage the discontinuance of unmeritorious proceedings by penalizing parties in costs. The motions Judge ordered TAM to pay $1,000 in costs.

Judgments – Stay of Execution – Setoff

Calogeras & Master Supplies Inc. v. Ceres Hellenic Shipping Enterprises Ltd., 2012 FCA 79 (2012-03-08)

The plaintiff had obtained a judgment against the defendant for $100,000 plus interest and a costs award of approximately $35,000. The defendant had also been awarded costs in the amount of approximately $160,000 from the date of an offer it had made and had been given the right to set-off its costs award against amounts owing to the plaintiff. The defendant now applied for a partial stay of execution of the judgment to protect its right of set-off.

Decision: Application dismissed.

Held: The Court rejected the defendant's application on the grounds that it could have exercised its right of set-off earlier but did not do so.

Costs – Offer to Settle - Set-off

Calogeras & Master Supplies Inc v. Ceres Hellenic Shipping Enterprises Ltd., 2012 FCA 244 (2012-09-20)

The plaintiff, ship chandler, had been successful at trial and was awarded damages of approximately $100,000 for unpaid invoices. The plaintiff now sought to recover its legal fees, which were recoverable pursuant to the terms of the contract. The defendant also sought costs on the basis that the plaintiff's award did not exceed a settlement offer the defendants had made. Although the plaintiff claimed to have spent over $200,000 in legal fees, the Court assessed the reasonable legal fees at $35,000 as of the date of the defendant's offer and said that in the absence of the defendant's offer, it would have granted no more than $60,000 in total. The defendant was awarded its costs from the date of the offer but the Court only awarded the defendant's costs at 1.5 times the tariff rate. The defendant was awarded approximately $160,000 in costs. The defendant was also given the right to set-off the costs owing to it against the judgement amount owing to the plaintiff. Subsequent to these costs orders, the plaintiff's appeal was partially successful such that its award did exceed the defendant's offer. The plaintiff therefore appealed the costs awards.

Decision: Appeal allowed.

Held: Due to the plaintiff's success on appeal it is entitled to costs throughout. However, the trial Judge was prepared to award only $60,000 in recognition of the appellant's conduct, and the appellate Court held it should give effect to the suggestion made by the trial judge.

Admiralty Jurisdiction/Canadian Maritime Law

Federal Court Jurisdiction - Action vs Provincial Crown - In Rem Proceedings

Canada v. Toney, 2011 FC 1440, 2012 FCA 167 (2012-06-06)

This was an *in rem* and *in personam* action against both the federal and provincial crowns and a vessel owned by the Alberta government. The action concerned a fatal accident that occurred on an Alberta lake. The plaintiffs alleged that the defendants were negligent in their performance of search and rescue duties. The Alberta defendants moved to strike the *in rem* action on the basis that the vessel had been sold prior to the commencement of the action and also moved to strike the *in personam* action against them on the basis that actions against a provincial crown should be commenced in the provincial courts. The federal defendants also moved to stay the action or to have it struck as an abuse of process. At first instance, the trial Judge allowed the motions only with respect to the action *in rem*. The trial Judge held that the sale of the vessel prior to the commencement of the action did defeat the action *in rem* but it did not affect the action *in personam*. The trial Judge (2011 FC 40) held that the fact one of the defendants was a provincial crown was irrelevant as the action (and the Federal Court's jurisdiction) was not grounded in s. 17 of the *Federal Courts Act* (which governs actions against the Federal Crown) but in s.6 and following of the *Marine Liability Act*. The Alberta defendants appealed.

Decision: Appeal dismissed.

Held: The Federal Court of Appeal Court noted that it was undisputed the plaintiffs' claims fall within the subject of navigation and shipping and within the express terms of section 22 of the *Federal Courts Act*. It was not plain and obvious that the Federal Court was without jurisdiction.

Comment: It is arguable that this case must be read and applied with care. The Alberta statute permitting proceedings against the Alberta Crown does not limit the courts within which such proceedings must be commenced and, therefore, the above decision would appear to be correct. However, in some other provinces the statutes permitting actions against the provincial crown specify and require that actions be brought in the provincial Superior court. Where this is the case, the above holding may not apply.

Federal Court Jurisdiction over Provincial Crown – Practice – Motion to Strike

Ship Source Oil Pollution Fund v. British Columbia (Finance), 2012 FC 725 (2012-10-01)

This action by the plaintiff was pursuant to the *Marine Liability Act* to recover costs it paid to clean up oil pollution from a vessel that sank in Brittania Bay, British Columbia. The defendant was the Crown in right of the Province of British Columbia who had allegedly became the "owner" of the vessel when its registered and beneficial owner was dissolved under the *Society Act* of British Columbia. The BC Crown brought this application to strike the claim on various grounds including that the Federal Court does not have *in personam* jurisdiction against it or, alternatively, that that Federal Court is without subject matter jurisdiction because the issue of ownership depended on provincial law.

Decision: Application dismissed.

Held: The test on a motion to strike for lack of jurisdiction is whether it is plain and obvious the claim discloses no reasonable cause of action. For the purpose of the application, the allegations of fact in the pleadings are accepted as proved unless patently ridiculous or incapable of proof. The onus is on the party moving to strike the pleading. The BC Crown is asking the Federal Court to engage in a complex exercise of statutory interpretation to justify the "draconian" measure of striking the Statement of Claim. "A motion to strike is not the proper forum to make a final determination on such weighty matters." *Alberta v Toney*, 2012 FCA 167, is dispositive of the issue and, in any event, it is not plain and obvious the Federal Court is without jurisdiction. Jurisdiction is based on a three part test: there must be a statutory grant of jurisdiction; there must be an existing body of federal law essential to the disposition of the case that nourishes the statutory grant; and, the law on which the case is based must be "a law of Canada" within the meaning of s.101 of the *Constitution Act*. Section 22(2)(d) of the *Federal Courts Act* grants jurisdiction with respect to "damage done by a ship" and the sinking of a ship resulting in pollution is arguably damage within the meaning of s. 22(2)(d). There is case authority that the Federal Court has jurisdiction over a claim against a province as owner of a vessel where the claim is a maritime claim. Section 43(7) of the *Federal Courts Act* also suggests the Federal Court has in rem jurisdiction against a ship owned by a province. Section 3

of the *Marine Liability Act* also expressly provides that act is binding on a province. At the very least it is not plain and obvious the Federal Court does not have personal jurisdiction over the BC Crown. The fact that the ownership issue may require the application by the Federal Court of provincial law does not matter. The ancillary application of provincial law does not affect the jurisdiction of the Federal Court.

Constitutional Law - Division of Powers - Labour Relations - Stevedoring Activities

Tessier Ltee. v. Quebec, 2012 SCC 23 (2012-05-17)

The plaintiff was engaged in the business of renting heavy equipment, including cranes, and also in the business of equipment repair and road transportation. All of its activities were conducted in the Province of Quebec. Approximately 14% - 20% of its activities involved crane rentals for stevedoring services but the employees involved in these services were also involved in other activities. Because of its stevedoring activities, the plaintiff sought a declaration that it was subject to federal jurisdiction and not to Quebec's occupational health and safety legislation.

Decision: The plaintiff was subject to provincial law.

Held: The Supreme Court of Canada began its analysis by noting that legislation respecting labour relations is presumptively a provincial matter since it engages the provinces' authority over property and civil rights. The Court further noted that the federal government has jurisdiction to regulate employment in two circumstances: when the employment relates to a work, undertaking, or business within the legislative authority of Parliament; or when it is an integral part of a federally regulated undertaking. Although it was recognized that s.91(10) of the *Constitution Act* gives Parliament exclusive jurisdiction over navigation and shipping, the court said it did not give Parliament absolute authority. Section 91(10) had to be read in light of s. 92(10) which gives the provinces jurisdiction over local works and undertakings. Shipping undertakings within a province are subject to provincial jurisdiction. Therefore jurisdiction in a particular case depends on the territorial scope of the shipping activities in question. Moreover, since stevedoring is not a transportation activity that crosses provincial boundaries, it cannot come within federal jurisdiction under s. 91(10) but can only be subject to federal jurisdiction if it is integral to a federal undertaking. The test is met when the services provided to the federal undertaking form the exclusive or principal part of the related work's activities or when the services provided to the federal undertaking are performed by employees who form a functionally discrete unit that can be constitutionally characterized separately from the rest of the related operation. The plaintiff's stevedoring activities formed a relatively minor part of its overall operations which were local in nature and the stevedoring operations were integrated with its other activities and did not form a functionally discrete unit.

Carriage of Passengers - Application of Provincial Laws

Croisières Charlevoix Inc. v. Quebec, 2012 QCCS 1646 (2012-03-19)

The appellant was a shipbuilder and tourist boat operator based in La Malbaie, Quebec, with

offices in Quebec City and Saint-Siméon. It primarily provided tourist excursions for watching whales and marine mammals on the St. Lawrence River in Quebec. In each of 2005 and 2006, the appellant made one excursion between Quebec and Ontario. In 2007 and 2008, the appellant organized three interprovincial cruises. The appellant was found guilty and fined for having operated as a carrier of passengers by water without the permit required by ss. 36 and 74.1 of Quebec's *Transport Act*, R.S.Q., c. T-12, and sect. 1 of its Regulation respecting the transport of passengers by water, R.R.Q., c. T-12, r. 15. The appellant appealed to the Quebec Superior Court, arguing that its operations were within exclusive federal jurisdiction and that it was not bound by the provincial statute and regulations. The appellant also argued that its tourist excursions did not constitute "transport" within the meaning of Quebec's *Transport Act*. Quebec's *Transport Act* applies to the "transport of persons... by... water from one place to another... by ship" . The appellant argued the Act did not apply because the tourists transported on the cruises concerned embarked and disembarked at the same "place".

Decision: Appeal dismissed and conviction upheld.

Held: The appellate Judge held that ss. 91(29) and 92(10)(a) and (b) of the *Constitution Act*, when read together, exclude marine transport operations carried on within the boundaries of a single province from the jurisdiction of Parliament. Where some operations of a marine carrier are carried on intraprovincially and others extraprovincially, the business becomes subject to federal legislation exclusively, but only if the extraprovincial operations are "regular and continuous" and not where such activities are merely "occasional or exceptional". The appellate Judge also rejected the appellant's argument that the provincial *Transport Act* did not apply holding that the appellant's interpretation was far too restrictive and one that would not coincide with the intention of the legislator. Moreover, the definition of "lieu" in Le Petit Robert dictionary (2000) was wide enough to include the site visited and the area travelled, as well as the points of embarkation and disembarkation.

Comment: Regrettably this decision is reported only in French. Therefore, this summary is based on a translation provided by Robert Wilkins of Borden Ladner Gervais, Montreal.

Carriage of Goods

Multi-modal Carriage - Right of Rail Carrier to Limit Liability - Application of Liability Limits to Cargo Owner

Mitsubishi Heavy Industries Ltd. v. Canadian National Railway Company, 2012 BCSC 1415 (2012-09-27)

As a consequence of a train derailment cargo owned by the plaintiff was severely damaged. The cargo was being carried under a "Master Transportation Agreement" between the plaintiff and Fujitrans, a freight forwarder. The cargo originated in Japan and was carried by sea to Vancouver where it was discharged for further carriage to Ontario by rail. The defendant rail carrier alleged, pursuant to s. 137(1) of the *Canada Transportation Act, S.C. 1996 c. 10* and an

agreement between it and Casco, another forwarder, that it was entitled to limit its liability to $50,000.

Decision: The rail carrier was entitled to limit its liability.

Held: The right of the defendant rail carrier to limit its liability depends on it establishing the existence of a "confidential contract" under ss. 126 and 137 of the *Canada Transportation Act* that is a "written agreement signed by the shipper" and that contains a limitation of liability. The "shipper" within the meaning of the *Canada Transportation Act* in the circumstances of this case was Casco not the plaintiff. The requirement of a "signed" copy of the agreement does not necessarily require that an actual signed copy be produced. In this case, the existence of signed assignment of the agreement was sufficient. The plaintiff impliedly or expressly consented to and authorized the subcontracting by Fujitrans to Casco and by Casco to the rail carrier. Moreover, the plaintiff had express knowledge of the terms of the agreement between Casco and the rail carrier. Accordingly, the plaintiff is bound by the limitation even without any privity of contract between it and the rail carrier.

Carriage by Sea - Application of Hague-Visby Rules - In Rem Actions - Change of Ownership - Damage Done by a Ship

The "Mercury XII" v The "MLT-3", 2013 FCA 96 (2013-04-10)

The plaintiff's truck was dumped into the water while being loaded onto a barge. At the time, the lines securing the barge to the loading ramp had been untied due to the rising tide. As a consequence, the barge moved away from the ramp when the truck was half on the barge. The driver of the truck applied the air brakes of the truck hoping to stop the movement of the barge away from the ramp but this was unsuccessful and the front end of truck became submerged. The parties then attempted to pull the truck onto the barge by attaching a line between the tug and truck. However, the truck tipped and sank. The plaintiff brought this action *in rem* against the barge and *in personam* against the owner/charterer of the tug and barge. In their defence, the defendants alleged the plaintiff was contributorily negligent and that there was no *in rem* action as the barge was not the instrument of damage. A further issue was whether the one year limitation period in the Hague-Visby Rules applied.

The trial Judge held (cited as *Wells Fargo v. The Barge "MLT 3",* 2012 FC 738) that the defendants were 90% at fault and the plaintiff 10%. The defendants were negligent for loading the truck without having the mooring lines attached. The plaintiff was negligent for applying the air brakes. Concerning the existence of a claim *in rem* against the barge, the trial Judge held s. 22(2)(d) of the *Federal Courts Act* requires that "the ship itself must be the actual instrument by which the damage was done". As the barge was not the actual instrument of the damage, he held there was no claim under s. 22(2)(d) and no action *in rem*. With respect to the application of the one year limitation period in the Hague-Visby rules, the trial Judge noted that section 43(2) of the *Marine Liability Act* provides that the rules apply to domestic carriage "unless there is no bill of lading and the contract stipulates that the Rules do not apply". The trial Judge held, however, that the lack of a bill of lading was sufficient by itself to oust the Rules. He said "oral

contracts not evidenced by or incorporated into a bill of lading or similar document are not caught by subsection 43(2) of the *Marine Liability Act*". The defendants appealed the ruling that that the one year limitation period in the Hague-Visby Rules did not apply.

Decision: Appeal dismissed

Held: The trial Judge decided this issue on a grounds that had not been argued before him and the parties were in agreement that the Judge was wrong in holding that s. 43(2) of the *Marine Liability Act* limits the application of the Hague-Visby Rules to written contracts. The conclusion of the trial Judge was, nevertheless, correct. The appellant must prove all elements of s. 43(2) for the rules to apply. The respondent argued that the contract was not "from one place in Canada to another place in Canada" since the contract was for a round-trip. This is "an unduly formalistic interpretation". However, the respondent's argument that there was no contract for the carriage of goods is accepted. A contract for the carriage of goods within the meaning of s. 43(2) does not include a contract for the charter or hire of a vessel. The plaintiff has not proven a contract for the carriage of goods. In fact, the evidence suggests a contract of hire rather than a contract of carriage. The contract was "for the use of the Tug and Barge" and charges were "on an hourly basis" regardless of whether there was cargo on the barge.

Comment: The parties also addressed whether the trial Judge had erred in holding the Hague-Visby Rules did not apply simply because no bill of lading had been issued and without considering the second part of s. 43(32), whether the contract expressly excluded the rules. The Federal Court of Appeal did not address these arguments since it concluded the rules did not apply on other grounds.

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

Cami Automotive, Inc. v. Westwood Shipping Lines Inc., 2012 FCA 16 (2012-01-17)

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. At trial (2009 FC 664) the trial Judge dealt first with the limitation of the charterer and considered whether the "Shipping Document" was a bill of lading or a waybill. The trial Judge 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 trial Judge 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 trial Judge held in the circumstances that each pallet was a package and that the total limitation amount was US$50,000. The trial Judge 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 plaintiff was not a party to that contract. The trial Judge applied the doctrine of sub-bailment and held that the plaintiff was 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 trial Judge 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 trial Judge 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 trial Judge further noted that the rail carrier was free to choose the limitation most beneficial to it. The plaintiff appealed.

Decision: Appeal Dismissed.

Held: In very short reasons (2012 FCA 16) the Federal Court of Appeal dismissed the appeal saying merely that it had not been persuaded the trial Judge had made any errors warranting intervention.

Collisions/Limitation

Tug and Tow - Vicarious Liability of Vessel for Damage caused by Tug – Collisions - Limitation of Liability

Grieg Shipping A/S v. The "Dubai Fortune", 2012 FC 1110 (2012-09-21)

The ship "Star Hansa" was safely moored at her berth when her propeller was struck by the tug "Tiger Shark 2". At the time, the "Tiger Shark 2" was one of three tugs assisting in the berthing of the "Dubai Fortune". The "Dubai Fortune" was under the command of a compulsory pilots. As a consequence of the incident the plaintiff, the owner of the "Star Hansa" brought proceedings claiming damages of $2.7 million from the owner of the "Dubai Fortune" as well as the owner of the three tugs. The plaintiff and the owner of the tugs settled the action as between them by the payment of the limitation fund of $500,000 and the proceedings against the tugs were discontinued. The settlement was conditional on the plaintiff being able to pursue the claim against the owner of the "Dubai Fortune" on the basis that the "Dubai Fortune" was vicariously liable for the negligence of the Master of the "Tiger Shark 2". It was admitted that there was no negligence on the part of the pilot and that the "Dubai Fortune" was entitled to limit its liability. The only issues were whether the "Dubai Fortune" was vicariously liable for the negligence of the Master of the "Tiger Shark 2" and, if so, whether the limitation fund was to be calculated on the basis of the tonnage of the "Dubai Fortune" or that

of the "Tiger Shark 2".

Decision: Action dismissed.

Held: The imposition of vicarious liability requires justification which, in the case of an employer-employee relationship, is founded in the control the employer has over the manner in which the employee does his work. This control test applies to tug and tow cases. The question of whether the tug or tow has control is a question of fact. The focus of the inquiry is the relevant negligent act and who was entitled to give orders or directions as to how the work should be done to prevent it. In this case the pilots gave only general orders to the tugs and gave no orders at all to the "Tiger Shark 2". They do not control how a tug master manoeuvers his tug. The negligent act was the manner in which the "Tiger Shark 2" was manoeuvred. The evidence was overwhelming that the control test had not been made out. As the "Dubai Fortune" was not vicariously liable for the negligence of the "Tiger Shark 2", the Court did not need to consider the limitation issue.

Limitation of Liability - Jurisdiction - Concurrent Cases - Stay of Limitation Proceedings - Establishment of Limitation Fund - Enjoining Superior Court

Siemens Canada Limited v. J.D. Irving, Limited, 2011 FC 791, 2012 FCA 225 (2012-08-30)

Two steam turbine rotors were dropped into the waters of the harbour of St. John, New Brunswick in the course of being loaded onto a barge for transport. Siemens, the owner of the turbines, commenced proceedings in the Ontario courts for approximately $45 million against the carrier and a naval architect who provided consulting services to the carrier. The carrier and naval architect brought this action in the Federal Court for a declaration that their liability was limited to $500,000. Siemens brought applications (1) for an order staying the limitation proceedings on the basis that its claims were not governed by Canadian maritime law and the Federal Court was without jurisdiction; (2) for an interlocutory stay pursuant to s. 50 of the *Federal Courts Act* arguing that the Ontario proceedings were broader in scope than the Federal proceedings and that there was a risk of inconsistent findings if both proceedings were allowed to continue; and (3) for a final stay on the basis the carrier and naval architect were not entitled to limit their liability pursuant to Art. 4 of the Convention on Limitation of Liability for Maritime Claims. (Article 4 provides that a defendant is not entitled to limit liability if the loss resulted from the personal act or omission of the defendant "committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result".) Siemens relied upon an expert report for evidence that the carrier was reckless. The motions Judge dismissed all of Siemen's applications. She held that it was "clear" that "the nature of Siemens' claim is essentially maritime law" and that the Federal Court accordingly had concurrent jurisdiction with the Ontario Superior Court. Concerning the application for an interlocutory stay, the motions Judge noted that a stay order was discretionary and that the appropriate test was whether the continuation of the action would cause prejudice to Siemens and whether a stay would cause an injustice to the carrier and naval architect. She held that Siemens had not demonstrated that it would be prejudiced if the stay was not granted. On the other hand, the motions Judge expressly found that a stay would work an injustice to the carrier and the

architect who had "a presumptive right to limit liability". On the issue of the final stay, she held it was premature to determine such an issue and that a full trial would be required before a party could be denied the right to limit liability.

The carrier also brought an application for an order enjoining the Ontario action pursuant to s. 33(1)(c) of the *Marine Liability Act*. The motions Judge noted that the language of s. 33 was very broad and that the availability of the enjoining remedy illustrated "the value attached to the importance of adjudicating all issues relevant to the constitution and distribution of a limitation fund in one forum". She said the large discrepancy between Siemens' damage claim and the limitation amount was a significant factor in favour of enjoining the Ontario action. She also noted that there would be significant cost savings for all parties if the Ontario action was enjoined. Ultimately, having regard to all the facts, she concluded that it was appropriate to enjoin the Ontario proceedings and have all issues determined in the Federal Court. Siemens appealed.

Decision: Appeal dismissed.

Held: With respect to the issue of the Federal Court's jurisdiction, the motions Judge made no error of law in concluding the Federal Court had jurisdiction. The grant of maritime jurisdiction to the Federal Court is very broad. "It is indisputable that Siemens' claim arises from the movement of goods onto a ship...Siemens' claim against Irving and MMC is clearly of a maritime nature." With respect to the applications for stays, Siemens argued the Federal Court had no power to enjoin until the right to limit liability had been determined. This argument was rejected as being directly contrary to section 33(1) of the *Marine Liability Act*, the *raison d'etre* of which "is clearly to allow a shipowner against whom a claim has been made or where one is apprehended to have the Federal Court determine whether or not he can limit his liability". The Court next rejected an argument that the Federal Court cannot enjoin a proceeding where a limitation fund is not needed or a vessel is not arrested saying that there was no merit in this argument. Finally, the Court considered the appropriate test applicable under s.33(1) of the *Marine Liability Act* and concluded that the test is that of "appropriateness", a broad and discretionary test entitling the court to make an order enjoining proceedings where it is of the view that it would be appropriate. The motions Judge correctly applied this test when enjoining the Ontario proceedings. The circumstances that lead to the conclusion the motions Judge made no error include: the Federal Court is the only court that can adjudicate the right of the defendants to limit their liability; the defendants have a presumptive right to limit their liability; the limitation issue is the "fundamental issue" between the parties; and the dispute will likely be resolved when the right to limit liability is determined. In these circumstances, it would not be reasonable to permit the Ontario action to proceed and there is no prejudice to Siemens in temporarily preventing it from continuing the Ontario action.

Collisions – Cutting of Submarine Cable – Liability – Limitation – LLMC Convention - Insurance – Wilful Misconduct

Peracomo Inc. v. Société Telus Communications, 2011 FC 494, 2012 FCA 199 (2012-06-

29)

The plaintiff was the owner of two submarine cables on the bottom of the St. Lawrence River. The defendants were the corporate 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.

At trial (2011 FC 494), the trial Judge 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 trial Judge 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 trial Judge held that the plaintiff was entitled to damages in the nature of superintendence and overhead and allowed 10% for this. The trial Judge 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 trial Judge held, for the first time in Canada, that this test had been met and the defendants were not entitled to limit liability. The trial Judge 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 trial Judge said the defendant operator intended the very damage but just did not think the cable would be repaired. The trial Judge further held that the defendant operator was "reckless in the extreme" and that the loss was a certainty. Turning to the insurance issue, the trial Judge 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 trial Judge had little difficulty in concluding this test had been met and the insurance coverage void. The defendants appealed.

Decision: Appeal dismissed.

Held: The Federal Court of Appeal (2012 FCA 199) agreed with the trial Judge on the issue of liability finding, among other things, that the defendants ought to have used up-to-date charts which disclosed the existence of the cable. A liability issue raised on appeal that does not appear to have been raised at trial was whether the individual defendant could be jointly and severally liable with the corporate defendant. The individual defendant argued that he should not be liable as his acts were those of the corporation. However, the Court of Appeal said that employees, officers and directors will be held personally liable for tortious conduct causing property damage even when their actions are pursuant to their duties to the corporation.

Concerning the limitation issue, the Court of Appeal also agreed with the trial Judge finding that the defendants intended to physically damage the cable and that it did not matter whether the defendants were aware of the actual loss that would result. Finally, on the insurance issue, the Court of Appeal was not persuaded the trial Judge had made an error in concluding that the conduct of the defendants was "a marked departure from the norm and thus misconduct". Further, the Court of Appeal agreed that this misconduct was the proximate cause of the loss.

Comment: This decision is somewhat troubling in that the LLMC Convention seems to require a specific intention to cause the precise loss or damage that results from the impugned act. The words in Art. 4 of the LLMC Convention are "…with intent to cause **such** loss…". If the defendant truly believed the cable had been abandoned, it is doubtful he could have intended the loss that resulted. It is understood that this decision is under appeal to the Supreme Court of Canada.

Collisions – Apportionment – Vessel Engaged in Fishing

Hogan v. Buote, 2012 PESC 10 (2012-03-07)

This case concerned a collision involving two fishing vessels. One vessel, under the command of the plaintiff, was in the process of laying lobster traps and proceeding in a northerly direction while the other vessel, under the command of the defendant, was proceeding westerly. The defendant argued he had the right of way pursuant to Rule 15 of the Collision Regulations (the vessel which has the other on her starboard side shall give way). The plaintiff, on the other hand, said he had the right of way as he was a vessel engaged in fishing pursuant to Rule 3.

Decision: The plaintiff was 75% at fault and the defendant 25% at fault.

Held: The plaintiff, although laying traps, was not restricted in his ability to manoeuvre and therefore Rule 3 did not apply. The defendant had the right of way but he ought to have exercised greater care and his failure to see the plaintiff's boat was a failure to keep a proper lookout contrary to Rule 5.

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

Buckley v. Buhlman, 2012 FCA 9 (2012-01-11)

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 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. At the time s. 29 applied to "passengers" of ships of less than 300 gross tons and provided a limit of liability of at least 2 million SDRs (approximately CDN$3 million). Section 28 applied to all ships of less than 300

gross tons except passenger claims under s. 29 and provided for a limit of liability of $1 million. (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, at trial, the Judge pointed out that this argument was misplaced. The trial Judge 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. 29 limitation did not apply. Accordingly, the limitation applicable was $1 million under s. 28. The trial Judge further dealt with a subsidiary issue of whether the limitation amount included interest and costs and held that it did not. The defendants appealed to the Federal Court of Appeal arguing that the limitation should have been under s. 29.

Decision: Appeal dismissed.

Held: The appellate Court agreed that s. 29 of the MLA had no application as the injured parties were not on board the first boat. The Court noted that Art. 7 of the Convention on Limitation of Liability for Maritime Claims, from which s. 29 of the MLA is derived, favoured the interpretation that s. 29 applies only to persons on board the ship seeking to limit liability. A cross-appeal from the trial Judge's decision that the limitation amount was exclusive of interest and costs was abandoned. The Court said this was a question to be left for another day.

Comment: This case concerns sections 28 and 29 of the *Marine Liability Act* but the Reasons for Judgment refer to the section numbers as they existed in 2006. This can be confusing for anyone familiar with the current numbering because the section numbers have since been transposed. What was s. 28 is now s. 29 and vice versa. To be consistent with the Reasons and to avoid adding to the confusion, I have decided to use the 2006 section numbers in this summary.

Liens, Mortgages and Priorities

Liens - Mortgages - Priorities - Necessaries Lien

Cameco Corporation v. The "MCP Altona", 2013 FC 23 (2013-01-10)

The "MCP Altona" was sold by judicial sale following a spill of yellowcake uranium in one of her holds. Following the spill, the plaintiff, the owner of the uranium cargo, arranged and paid for the discharge of the uranium cargo as well as other cargo on the ship and undertook remedial efforts to clean the ship. The plaintiff allegedly incurred expenses in excess of $8 million. The plaintiff sought priority to the proceeds of sale for these costs over the mortgagee of the vessel. The plaintiff argued that it should have priority on four grounds: 1. the discharge of the cargo and remediation of the ship were necessary to bring the ship to sale and those costs should

enjoy a priority akin to marshal's expenses; 2. the services it rendered to the vessel have the status of a maritime lien pursuant to s. 139 of the *Marine Liability Act*; 3. the services it rendered to the ship were in the nature of salvage services having a priority pursuant to the *International Convention on Salvage, 1989*; and 4. the court ought to exercise its equitable jurisdiction to alter the usual order of priorities in its favour.

Decision: The mortgagee has priority.

Held: The costs of discharging the cargo and cleaning the ship form part of the plaintiff's claim against the ship owner and are not to be equated with marshal's expenses. The plaintiff was not a volunteer but was acting under compulsion of law. With respect to s. 139 of the *Marine Liability Act,* which grants a maritime lien to Canadian suppliers of goods or services to a foreign ship, the goods or services must be supplied at the request of the shipowner. They were not so supplied. There was no contract with the shipowner. With respect to the claim for a salvage maritime lien, the law of salvage requires that the services be voluntary, the adventure be in danger at sea and the salvage efforts be successful. The *International Convention on Salvage, 1989* did not alter the law of salvage other than in relation to compensation for protection of the environment. The ship was not in danger once she arrived at the port and the plaintiff was not acting as a volunteer. Finally, with respect to the equitable ranking of priorities, the thread which ties recent cases on equitable ranking together is unjust enrichment. The mortgagee did not lull the plaintiff into doing something it would not have done in any event. The plaintiff acted not as a volunteer but as it was required to do by law. There is no reason to change the usual priorities.

Priorities - Ship Building - Whether s.139 MLA applies to construction of ships - Meaning of Foreign Ship - Whether personal liability of owner required

Comfact Corporation v. Hull 717, 2013 FCA 93(2013-04-08)

The builder of the defendant ship became insolvent and went under the *Companies Creditors Arrangement Act* while in the course of constructing the ship. The plaintiff was a subcontractor of the builder who had supplied welding services to the ship but had not been paid. The ship was being built for a Norwegian corporation but was recorded in the Canadian registry. The plaintiff claimed to have a maritime lien pursuant to s. 139 of the *Marine Liability Act*. The mortgagee of the ship (who defended the *in rem* action) denied the existence of a lien. The trial Judge agreed with the mortgagee and held that the plaintiff did not have a lien. In his reasons (at 2012 FC 1161) the trial Judge noted that s. 139 of the *Marine Liability Act* ("MLA") grants a maritime lien against a foreign vessel in respect of claims that arise out of the supply of goods, materials or services to the foreign vessel or out of a contract relating to the repair or equipping of the foreign vessel. He further noted that s. 139 does not expressly include ship construction. He said, as a matter of statutory construction, that the omission of a reference to ship construction in s. 139 and its inclusion in s.22(2)(n) of the *Federal Courts Act* gave rise to a presumption that the omission is deliberate. Further, although interesting issues were raised as to whether s. 139 of the MLA did away with the requirement that the liability of the owner be engaged before an action *in rem* could be maintained, the trial Judge said those issues would

have to be decided another day. The plaintiff appealed.

Decision: Appeal dismissed.

Held: The Federal Court of Appeal was not persuaded that providing manpower to a shipbuilder for the construction of a vessel amounts to the provision of services within the meaning of s. 139 of the MLA.

Marine Insurance

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

Feuiltault Solution Systems Inc. v. Zurich Canada, 2012 FCA 215 (2012-07-30)

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 insufficiency of packaging and the damage was not caused by a fortuity. 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, at trial (2011 FC 260) the trial Judge 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 trial Judge also accepted that an all risks policy requires that there be a “fortuity” and that the burden was on the plaintiff to prove such fortuity. That burden had not been discharged. The plaintiff appealed.

Decision: Appeal dismissed (2012 FCA 215).

Held: The Federal Court of appeal agreed with the trial Judge that the packing was unsuitable and was the cause of the loss. Although this was sufficient to dispose of the appeal, the Court addressed at length the question of the burden of proof under an "all risks" policy. Specifically, the Court of Appeal held that the trial Judge had erred in holding the assured had the burden of proof. The Court of Appeal said that where an all risks policy contains exclusions that exclude non-fortuitous losses, such as inherent vice or wear and tear, the onus of proving lack of fortuity falls on the insurer. The insured under an all-risks policy need only show that the cargo was in good condition when the insurance attached and that the goods were damaged while the insurance was in force.

Marine Insurance - Wreck Removal - Liability of Underwriters for Expenses - Sue and Labour

Universal Sales Limited v. Edinburgh Assurance Co. Ltd., 2012 FC 418 (2012-04-12)

The plaintiffs (the insureds) sought indemnity from the defendants (their insurers) for a settlement payment of $5 million made by them to the federal government related to the costs of raising the "Irving Whale". The payment was made in settlement of a proceeding brought by the Crown for $42 million. The plaintiffs did not obtain the prior approval of their underwriters before making the settlement. The plaintiffs also claimed for sue and labour expenses of $3.6 million and defence costs of $1.8 million. The insurers denied coverage alleging the plaintiffs were not required to make the settlement payment and that there was no coverage under the policy.

Decision: Plaintiff awarded judgment, in part.

Held: With respect to the claim for sue and labour expenses, the trial Judge denied this claim on the basis that the expenses did not diminish or avert a loss under the policy. This was so because the estimated costs at the time the expenses were incurred were in excess of $21 million but the policy limit was only $5 million. Thus, the sue and labour expenses could not possibly have benefited the underwriter. With respect to the settlement payment, the trial Judge held that he was satisfied that the plaintiffs would have been held liable to the Crown in nuisance if the settlement payment had not been made. With respect to the claim for defence costs, the trial Judge was of the view that these should be apportioned between the plaintiffs and underwriters on the grounds that both benefited from these costs. He somewhat arbitrarily apportioned these defence costs 25% to underwriters and 75% to the plaintiffs.

Marine Insurance - Wreck Removal - Damages - Interest – Costs

Universal Sales Limited v. Edinburgh Assurance Co. Ltd., 2012 FC 1192 (2012-11-01)

In prior reasons (2012 FC 418) the plaintiff had been awarded judgment against the defendants in the amount of approximately $5 million. These reasons dealt with the outstanding issues of interest and costs. With respect to interest, the issues were: should the plaintiff be deprived of part of the interest because of delay in prosecuting the matter; from what date should interest run; what should the rate be; and, should interest be compounded. With respect to costs, the issues were: should the plaintiff be entitled to enhanced costs; should costs be reduced because the plaintiff obtained less than 50% of the damages they sought; and should a settlement offer made by the plaintiff in the amount of $4.5 million but withdrawn 8 days before trial be taken into account.

Decision: Pre-judgment interest awarded at the legal rate of 5%. Costs fixed at $85,000.

Held: In admiralty interest is a function of damages and the trial judge enjoys a wide discretion. The delays were no more caused by the plaintiff than by the defendants. In the circumstances the plaintiff should not be deprived of interest for delay. Given that a particularized claim was only given to underwriters on 10 November 2000 and aspects of the claim had to be investigated, a reasonable start date for the interest calculation is the date the defendants

were served with the Statement of Claim which was 12 July 2001. The rate of interest shall be at the legal rate of 5% as the commercial rates during the relevant period had been low. Although the court may order compound interest, the evidence must show compound interest is necessary to fairly compensate the plaintiff. As no evidence is led to justify compound interest, simple interest is awarded. Enhanced costs are not awarded merely because a case is complex. There must be more such as reprehensible conduct. The costs to be otherwise awarded to the plaintiffs should not be reduced because of partial success. The general principle is that costs follow the event and in this case the plaintiff obtained judgment. Rule 420 allows the court to consider offers of settlement in assessing costs that do not fall strictly within the Rule. The withdrawn settlement offer should have a bearing on costs.

Offences

Offences – Canada Shipping Act Violations

R. v. Ralph, 2013 NLCA 1 (2013-01-04)

The accused was the skipper of a sixty-five foot vessel that rolled over and sank. At the material time, the skipper was in the galley making a sandwich and no-one was on the bridge of the vessel. The accused was charged with eight offences under the *Canada Shipping Act* and convicted in Provincial Court of five offences, namely: (1) operating the vessel without certified crew to ensure a proper deck watch; (2) failure to maintain a proper deck watch; (3) failure to keep a proper lookout; (4) failure to ensure the crew understood lifesaving and firefighting equipment; and, (5) operating a steamship without a valid certificate. An appeal from the convictions was taken to the provincial Superior Court where all convictions were confirmed except for operating a steamship without a valid certificate. Both the Crown and the accused further appealed to the Newfoundland and Labrador Court of Appeal.

Decision: The accused's was appeal allowed, in part. The Crown's appeal was dismissed.

Held: The accused is acquitted of operating the vessel without the properly certified crew on the basis that the Crewing Regulations were misinterpreted by the courts below. The conviction was premised on an interpretation that the regulations required that the Mate have a certificate of at least "fishing master, fourth class". There is no such requirement. With respect to the charge of failing to maintain a proper lookout, the Crewing Regulations and the Seafarer's Training, Certification and Watchkeeping Code require that a person be on the bridge at all times. This requirement is not satisfied by monitoring instruments located elsewhere on the vessel. There was no-one on the bridge and the accused is guilty of not maintaining a proper deck watch. Similarly, the requirement in the Collision Regulations to maintain a proper lookout is not satisfied when there is no one on the bridge. With respect to the charge of failing to ensure the crew understood lifesaving and firefighting equipment, the trial Judge found as a fact that the accused made only "passing efforts" in this regard. There is ample evidence to support such findings. With respect to the final charge of operating a steamship without a valid certificate, the accused was initially convicted because he had not complied with a condition of

the certificate requiring that the Mate have a 4th class certificate. This was an error. The charge was not that the accused failed to comply with his certificate but that he did not have a certificate. As he had a certificate, he must be acquitted on this charge.

Offences - Dangerous Operation of a Vessel

R v. Kerr, 2012 BCSC 1311 (2012-09-05)

The accused was charged with dangerous operation of a vessel causing death and two counts of dangerous operation of a vessel causing bodily harm. The charges stem from an incident on 1 August 2008 when a vessel he was driving collided with an island at night. At the time the vessel was proceeding at a rate of speed of approximately 30 miles per hour. The accused admitted that he did not have a complete understanding of navigation lights and buoys and no understanding of the colours of the lights. He merely knew they marked a hazard. The accused also had no navigation charts.

Decision: Accused acquitted.

Held: The Court reviewed the various authorities and noted that the Crown must prove both the *actus reus* of the offence (ie. whether the driving viewed objectively was dangerous to the public in all of the circumstances) and *mens rea* (ie. whether the dangerous manner of driving was the result of a marked departure from the standard of care which a reasonable person would have exercised in the same circumstances). The Court held that the *actus reus* had been proven in that operating the vessel at 30 miles per hour at night was dangerous. Turning to the issue of *mens rea*, the Court said this depended on two questions: (1) whether, in light of all of the relevant evidence, a reasonable person would have foreseen the risk and taken steps to avoid it if possible; and (2) whether the accused's failure to foresee the risk and take steps to avoid it, if possible, was a marked departure from the standard of care expected of a reasonable person in the accused's circumstances. The court noted that the conduct must go significantly beyond negligence but that the difference between a mere departure and a marked departure is one of degree. In making this assessment the court must look at all the circumstances including the accused's frame of mind. In this case the accused believed he had clear water ahead of him. Accordingly, although the accused's conduct went beyond mere negligence and the case was "close to the line", the Court concluded that there was reasonable doubt as to whether the *mens rea* had been proven.

Offences - Dangerous Operation of a Vessel Causing Death

R v. Escott, 2012 BCSC 1922 (2012-11-01)

The accused was charged with dangerous operation of a vessel causing death. The charge arose out of a collision between a vessel being operated by the accused and another vessel. A passenger in the accused's vessel died as a result. The collision occurred at night in total darkness. The accused's vessel was displaying no navigation or running lights. The accused's evidence was that the running lights impeded his night vision and his practice was to turn them off in conditions of reduced visibility. The accused's vessel was proceeding at a speed of 26

miles per hour and the other vessel was proceeding at 32 miles per hour.

Decision: Accused guilty.

Held: The Crown must prove both the *actus reus* (the act) and the *mens rea* (the mental element) of the offence beyond a reasonable doubt. In this case the *actus reus* is the operation of a vessel in a manner that is dangerous to the public having regard to all the circumstances. The focus is on the risks created by the manner of driving not the consequences. The focus of the *mens rea* is whether the manner of operation is a "marked departure" from the standard of care of a reasonable person. It is not required to prove the accused deliberately operated the vessel in a dangerous manner. The accused was operating his vessel at an unsafe speed, without navigation lights, in a narrow channel where there was a risk of collision and he did not keep a proper look-out. This is operation of a vessel in a manner dangerous to the public and the *actus reus* is proved. With respect to the *mens rea* element, the accused's manner of operation of the vessel displayed a reckless disregard of extreme risk and in the circumstances, exhibited a marked departure from the norm.

Miscellaneous

Construction Mortgage - Entitlement of Purchaser/Mortgagee to Return of Advances

Offshore Interiors Inc. v. Worldspan Marine Inc., 2013 FC 221 (2013-03-05)

Pursuant to a vessel construction agreement the builder was to retain title to the vessel until delivery to the purchaser and the purchaser was to make periodic payments in the nature of advances to the builder. The advances were to be secured by a continuing first party security interest supported by a mortgage. A current account Builder's Mortgage was filed in the ship registry in favour of the purchaser. Disputes arose during the course of construction of the vessel with the result that construction ceased and the builder filed a petition under the *Companies Creditors' Arrangement Act* of British Columbia. By order dated 29 August 2011 the Federal Court established a process for claims against the vessel which included a condition that the claimant have an existing enforceable claim in rem against the vessel. A claim was filed by the purchaser/mortgagee for repayment of the funds advanced. The builder brought this application for a declaration that the mortgage did not create a lien or charge on the vessel other than to secure delivery.

Decision: Declaration granted that the mortgage does not create a lien or charge in the vessel other than to secure delivery.

Held: The question of whether there was an obligation under the mortgage requiring that funds advanced be repaid depends on the construction of the vessel construction agreement and mortgage. There is no express provision requiring repayment of funds advanced for the construction of the vessel. Despite the mortgage stating it is a "current account" mortgage, there is no evidence that an account current is created by the vessel construction agreement

which clearly allowed the builder to retain all advances. The parties contemplated that all monies advanced would be used in the construction of the vessel and not exist as a fund.

Personal Injury - Tubing Accident - Summary Judgment – Liability

Woodbury v Hamilton, 2012 ONSC 4817 (2012-08-22)

The plaintiff was injured when riding in a tube being pulled behind a vessel operated by the first defendant. The tube crashed into a boat being operated by the second defendant. At the time of the incident the second defendant also had a tube at the immediate stern of the vessel upon which three children were sitting and waiting for a ride. The first defendant failed to deliver a statement of defence. The second defendant brought this motion for summary judgment on the grounds that there was no evidence of any negligence on his part.

Decision: Motion dismissed.

Held: There was some evidence to support a finding the second defendant was negligent in either moving his boat towards the centre of the bay or in failing to notice the other boat earlier. This is not a case in which a motion Judge can fully appreciate the evidence and make the findings necessary to render summary judgment.

Canada Marine Act – Container Fee – Fair and Reasonable

Shipping Fed. of Canada. v. Vancouver Fraser Port Authority, 2012 FC 301 (2012-03-12)

This was an application for judicial review challenging the ability of the Vancouver Fraser Port Authority to impose a fee on ship owners for container cargo. Section 49 of the *Canada Marine Act* specifically requires that any fees charged be "fair and reasonable". The applicants alleged the fee charged was not fair and reasonable as ship owners receive no benefit for the infrastructure improvements for which the fee was assessed. The applicants further argued that the fee was an illegal tax as it was unconnected with any service.

Decision: Application dismissed.

Held: The Court held that the fee was a charge connected with a regulatory scheme and therefore a regulatory charge and not a tax. The Court further held that there was no requirement to link the fee with a service or benefit.

Ice Breaking Services Fee

M.V. "Stormont" v. Canada, 2012 FCA 93 (2012-03-20)

The issue in this case was whether the ice breaking services fee in the *Oceans Act* applied to the defendants who operated a truck ferry service utilizing tug and barge between Windsor, Ontario and Detroit, Michigan. The defendants argued, inter alia, that they did not have to pay the fee as it was not applicable to international voyages and that the Minister did not have the power to impose such fees. The defendants' argument turned upon the interpretation of the

Oceans Act. The trial Judge rejected these and other arguments on the basis of simple statutory interpretation. The defendants appealed.

Decision: Appeal dismissed.

Held: The applicable sections of the *Oceans Act* and Fee Schedule authorized an ice breaking fee on each transit to or from a Canadian port. The Minister was both authorized and required to provide icebreaking services and was entitled to charge a fee for such services.

Judicial Review – Application to Strike – Port Authority Powers

Adventure Tours Inc. v. St. John's Port Authority, 2012 FC 305 (2012-03-14)

The applicant wrote to the St. John's Port Authority advising he wished to resume providing a tour boat service and inquiring whether a licence was required. The Authority wrote back advising that they had agreements in place with tour boat operators and were not accepting any further applications. The applicant brought an application for judicial review arguing that the Authority had no right to require him to obtain a licence. The Authority brought this motion to strike the application.

Decision: The motion to strike was allowed.

Held: The letter from the Authority did not attract rights of judicial review.

Comment: A second issue in the case was whether the Authority was a federal body exercising a public function and therefore subject to judicial review. Although the Court did not need to address this issue, it held that the Authority was a federal body exercising a public function.

Table of Cases

Cases