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Developments in Canadian Maritime Law

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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.

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Synopsis of Important Developments

Admiralty Practice

Practice cases of interest include: *Roynat Inc. v Phoenix Sun Shipping Inc.*, 2013 ONSC 7308, where the Ontario Superior Court referred applications concerning the sale of a ship to the Federal Court; *0871768 BC Ltd v The Ship "Aestival"*, 2013 FC 899, where it was held that an *in rem* action was available whenever damage was done by those in charge of a ship with the ship as the instrument; *DHL Global Forwarding (Canada) Inc. v CMA-CGM S.A.*, 2013 FC 534, where a jurisdiction clause in a bill of lading was enforced against the shipper's agent; *Comtois International Exports Inc. v. Livestock Express BV*, 2013 FC 1239, where an arbitration clause in a charter party/booking note was not given effect to as the jurisdiction chosen had no connection with the dispute; *Woodbury v Woodbury*, 2013 ONSC 7736, where liability issues were severed from damages issues in a personal injury action; *Hagedorn v The "Helios"*, 2013 FC 101, where a Prothonotary's order respecting privileged documents was held not to be discretionary; and *Cameco Corporation v The "MCP Altona"*, 2013 FC 177, where a party was ordered to pay the costs of a priorities hearing.

Limitation Periods

In *Sperling v. The Queen of Nanaimo*, 2014 BCSC 326, the court addressed, *inter alia*, the time from which the limitation period in s. 140 of the MLA commences to run and in *G.B. v L.Bo.*, 2014 QCCS 18, the court held, in respect of an event that occurred before s. 140 of the *Marine Liability Act* was enacted, that the three year limitation period under that section commenced to run on the date s.140 came into force.

Jurisdiction/Canadian Maritime Law

In *Marine Services International Ltd. v Ryan Estate*, 2013 SCC 44, the Supreme Court of Canada held that the bar to litigation in a workers compensation statute was constitutionally valid and applicable to fatal injuries involving crew of a vessel. In so doing the Supreme Court has clarified the constitutional analysis required when dealing with Canadian maritime law and expanded the opportunities for provincial statutes to apply to maritime law matters. Other notable cases include: *SDV Logistiques (Canada) Inc. v Dieselgenset Type 8M 25, Engine No. 45085 EX the Barge Andrea*, 2013 FC 671, where the court held that it had no jurisdiction to sell property that was not located in Canada; and, *Canada v Toney*, 2013 FCA 217, where the Federal Court of Appeal held that the Federal Court had no *in personam* jurisdiction over the Province of Alberta. Also noteworthy is *9171-7702 Quebec Inc. v Canada,* 2013 FC 832, where the court held that the sale of a vessel in Quebec was governed by the Quebec Civil Code but in *AK Steel Corporation v Acelormittal Mines Canada Inc.*, 2014 FC 118 (digested under "Carriage of Goods") the same court held that the sale of cargo to be transported by ship was a matter of navigation and shipping, a federal power.

Carriage of Goods

Notable cases involving carriage of goods include: *AK Steel Corporation v Acelormittal Mines*

Canada Inc., 2014 FC 118, where the purchaser of a cargo of iron ore pellets obtained a judgment for indemnity against the vendor of the pellets on the basis that the pellets delivered had excessive moisture content; and, *The "Mercury XII" v The "MLT-3"*, 2013 FCA 96, where the Federal Court of Appeal held that the hire of a tug and barge was not a contract of carriage to which the Hague-Visby Rules applied.

Limitation of Liability/Marine Insurance

In *Peracomo Inc. v. TELUS Communications Co., 2014 SCC 29,* the Supreme Court of Canada overturned a decision of the Federal Court of Appeal in which a vessel operator was held to be disentitled to the benefit of limitation of liability. The Supreme Court of Canada held that limitation of liability was available to the operator who had intentionally cut a submarine cable. However, the operator's conduct did constitute "wilful misconduct" within the meaning of the *Marine Insurance* Act and, as a consequence, the loss was excluded from the insurance coverage.

Collisions

In Grieg *Shipping A/S v The "Dubai Fortune" and Fortune Marine Ltd.*, 2013 FCA 218, the Federal Court of Appeal confirmed the trial judgment that, in the circumstances, the vessel was not vicariously liable for the negligent acts of the master of the tug.

Liens, Mortgages and Priorities

Notable cases include: *Worldspan Marine Inc. v Caterpillar Financial Services*, 2013 BCSC 1593, where the British Columbia Supreme Court held that the super priority given to a monitor under the *Companies Creditors Arrangement Act,* trumps the ranking of claims *in* rem under Canadian maritime law; *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; *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; and *Offshore Interiors Inc. v Worldspan Marine Inc.*, 2013 FC 221, where the court confirmed that a builder's mortgage given as security for advances made by the purchaser created a lien or charge on the vessel.

Offences

In *R v Lilgert*, 2013 BCSC 1329, the fourth officer of the passenger ferry "Queen of the North", which struck Gill Island and sank on 22 March 2006, was sentenced to four years imprisonment for criminal negligence causing death. In *R v Ralph*, 2013 NLCA 1, convictions for various offences under the *Canada Shipping Act* against the master of a vessel that rolled over and sank were mostly upheld.

Miscellaneous

In *Byatt International S.A. v Canworld Shipping Company Limited*, 2013 BCCA 427, where the British Columbia Court of Appeal confirmed the ship owner's right to direct the payment of sub-

freights to itself.

Admiralty Practice

Insolvency Proceedings - Judicial Sale of Ship - Competing Jurisdiction of Federal Court and Provincial Superior Court

Roynat Inc. v Phoenix Sun Shipping Inc., 2013 ONSC 7308

The ship "Phoenix Sun" was arrested in Federal Court proceedings by two creditors. The mortgagee subsequently commenced proceedings in the Ontario Superior Court and obtained an order for the appointment of a receiver over the assets of the ship owner. The mortgagee also obtained a very detailed sales order from the Federal Court that, among other things, appointed the receiver as "Acting Admiralty Marshall" to sell the ship and set up a priorities claims process. The receiver found a buyer for the ship and now brought applications in the Ontario Superior Court for an order approving the sale and for directions regarding the disposition of the sale proceeds.

Decision: The applications should not be brought in the Ontario Superior Court but in the Federal Court.

Held: Although the provincial superior courts and the Federal Court have overlapping jurisdiction in maritime law matters, a creditor must take great care that it sets up a process by which one court will have primary carriage of the realization proceedings. Once *in rem* proceedings are commenced in the Federal Court the provincial superior court should pay due regard or deference to the Federal Court proceedings. Considering the extensive order made by the Federal Court, it is not appropriate for the Ontario Superior Court to exercise any of its jurisdiction and the motion should be brought before the Federal Court. Any residual matters the Federal Court cannot deal with can then be brought in the Ontario Superior Court.

In Rem Actions - Arrest - Setting Aside - Whether Grinding Dust Damage is Damage Done by a Ship - Bail

0871768 BC Ltd v The Ship "Aestival", 2013 FC 899

The plaintiff's vessel was allegedly damaged by grinding dust that emanated from the defendant vessel while it was undergoing repairs. Both vessels had been hauled out of the water and were on land. The plaintiff commenced *in rem* proceedings and arrested the defendant vessel. The defendant brought this motion to set aside the arrest on the ground the plaintiff's claim did not disclose an *in rem* cause of action in that the damage was not "caused by a ship" as required by section 22(2)(d) of the *Federal Courts Act*. In the alternative, the defendant asked the court to set bail.

Decision: Bail fixed in the amount of $58,000.

Held: Section 22(2)(d) (which refers to "damage caused by a ship either in collision or otherwise") is to be interpreted using a functional and operational test. It is not necessary that the ship be engaged in navigation when the damage is done. It is also irrelevant if the ship is in the water, in dry-dock or on land. "Damage caused by a ship" includes damage done by those in charge of a ship with the ship as the noxious instrument. The language of s. 22(2)(d) is broad enough to cover any damage done to a third party by those in charge of the vessel. Pursuant to ss. 43(2) and 22(2)(d) of the *Federal Courts Act*, the plaintiff's claim is a valid claim *in rem*. With respect to bail, the general rule is that bail must be sufficient to cover the plaintiff's reasonably arguable best case, including interest and costs, but limited by the value of the arrested vessel.

Comment: This decision is in line with previous authority that has generally given a broad interpretation to the term "damage caused by a ship" and a corresponding wider scope for *in rem* actions.

Summary Judgment - Foreign Judgment - Sufficiency of Evidence - Mortgage Enforcement

Lakeland Bank v The Ship "Never E Nuff", 2013 FC 864

The plaintiff was the mortgagee of the defendant vessel and brought this motion for summary judgment to sell the vessel promptly. In support of its motion the plaintiff filed an affidavit which apparently attached a judgment of the United States District Court of Northern New York in which the plaintiff was awarded US$190,000 and given the right to take possession and dispose of the vessel. The motion was opposed by the defendants who claimed to be the owners.

Decision: Application dismissed.

Held: A motion for summary judgment requires that there be no genuine issue for trial. The evidence is insufficient to meet this threshold. Section 23 of the *Canada Evidence Act* requires that the US judgment be proven by certified copies not by affidavit. Further, the foreign judgment could not be the basis for execution without more. A full hearing is required.

Stays of Proceedings - Second action Pending - Setting Aside Arrest

Quin-Sea Fisheries Limited v The Broadbill I, 2013 FC 575

The plaintiff and defendants entered into an agreement whereby, in consideration of a loan by the plaintiff, the defendants granted a mortgage over the defendant vessel and agreed to make its catch available to the plaintiff for one year following the year the loan was repaid. The loan was repaid but the defendants failed to sell their catch to the plaintiff. As a result, the plaintiff commenced proceedings in the Supreme Court of Newfoundland for a mandatory injunction requiring the defendants to sell their catch to it. That injunction was refused on the grounds that there was no irreparable harm. The plaintiff then commenced these proceedings and arrested the vessel in Federal Court. The defendants brought this motion to stay the Federal Court proceedings on the grounds that parallel proceedings existed in the Supreme Court of

Newfoundland.

Decision: Motion dismissed.

Held: The plaintiff was not acting in a vexatious manner when it sought to arrest the vessel after failing to obtain the injunction. The Supreme Court of Newfoundland has no specific admiralty rules dealing with arrest and an injunction is a very different procedure from an action *in rem*. It is not unusual for a party to take action in the Federal Court merely to obtain security. It would be inappropriate to stay the Federal Court proceedings at this time although at some point in time one of the actions must be stayed.

Jurisdiction Clauses - Stays of Proceedings - Forwarding Agents

DHL Global Forwarding (Canada) Inc. v CMA-CGM S.A., 2013 FC 534

The plaintiff issued bills of lading for 68 containers carried by the defendant from Halifax to Ho Chi Minh City. Upon the arrival in Vietnam, the containers were put into storage because the bills of lading had not been released by the plaintiff. Apparently the shipper had failed to pay the freight charges owing to the plaintiff. The defendant brought proceedings before the Tribunal de Commerce de Marseille against the plaintiff and consignee for demurrage and storage charges. After receiving notice of the French proceedings the plaintiff commenced these proceedings in the Federal Court for a declaration it was not liable for demurrage and storage charges. The defendant then brought this motion under s. 50 of the *Federal Courts Act* for a stay of the Federal Court proceedings on the grounds of a jurisdiction clause in the bills of lading in favour of the Marseille tribunal.

Decision: Motion granted.

Held: Although the plaintiff was acting as agent for the shipper, the terms of the bill of lading define "holder" as any person in possession of the bill of lading and define "Merchant" as including anyone acting on behalf of a shipper. Under these definitions the plaintiff was a "Holder" and a "Merchant" and is bound by the jurisdiction clause in the bills of lading.

Booking Note - Arbitration Clause - Stay of Proceedings - s.46 MLA - s.50 FCA

Comtois International Exports Inc. v. Livestock Express BV, 2013 FC 1239

The defendant was the operator of the "Orient I", a special livestock carrier. The plaintiff entered into a voyage charter of the vessel for a single voyage between Canada and Russia. The charter party was apparently contained in a booking note issued in Belgium. The booking note incorporated an arbitration clause in favour of London and a choice of law clause selecting English law. The booking note also contained an ice clause which gave the defendant the option of loading the cargo in St. John, New Brunswick if the port of Becancour, Quebec was not in ice free condition. The defendant in fact did sail to St. John because of forecasted ice conditions at Becancour. The loading of the cargo at St. John increased the plaintiff's costs by $250,000. The plaintiff claimed this amount from the defendant alleging it had no right to change the port of

loading to St. John. The defendant brought this motion for a stay of proceedings on the basis of the arbitration clause in the booking note.

Decision: Motion dismissed.

Held: The first issue is whether s. 46 of the *Marine Liability Act* applies. Section 46 permits actions to be commenced in Canada notwithstanding an arbitration or jurisdiction clause selecting another jurisdiction if, among other things, the port of loading is in Canada. In *The Federal Ems*, 2012 FCA 284, the Federal Court of Appeal held that s.46 did not apply to charter parties. In this case the booking note is a charter party and, therefore, s. 46 does not apply. The second issue is whether there is nevertheless strong grounds for denying a stay based on s. 50 of the *Federal Courts Act*. This is the test that applies notwithstanding art. 8 of the *Commercial Arbitration Code* of Quebec (which says a court "shall" refer the parties to arbitration). Section 50 of the *Federal Courts Act* applies equally to jurisdiction and arbitration clauses. The plaintiff has discharged the heavy burden of establishing the existence of strong grounds for denying a stay. There is nothing linking this matter to England. The factual evidence and the majority of the witnesses reside in Canada, not England. None of the parties have any connection with England whereas the plaintiff resides and operates in Canada. Finally, an arbitration in England would result in prohibitive costs for the plaintiff, a small company of 6 employees, which would discourage it from pursuing its claim.

Personal Injury - Practice - Trials - Bifurcation

Woodbury v Woodbury, 2013 ONSC 7736

The plaintiff was injured while being towed on an inner tube behind a boat operated by the first defendant when the inner tube and plaintiff collided with a boat operated by the second defendant. The second defendant brought this motion for an order severing the issues of liability from the other issues in the action arguing that the liability issues were relatively simple in comparison to the damages issues which were complex. The plaintiff opposed the motion arguing that severance would result in additional delay and expense.

Decision: Motion granted.

Held: The power to bifurcate proceedings is narrow and should only be ordered in the interest of justice and in exceptional cases. This is one of those rare and exceptional cases. The liability issue is discreet and straightforward. In contrast, the damages issues are complex as the plaintiff's injuries are very severe. If the second defendant is successful on the liability issue, there will be a significant savings in time and expense.

Discovery - Privilege - Appeals - Whether Order of Prothonotary Discretionary

Hagedorn v The "Helios", 2013 FC 101

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 - Priorities - Costs - Procedure in Priorities Disputes

Cameco Corporation v The "MCP Altona", 2013 FC 177

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. Ltd.*, 2012 FC 1192, costs should be based on the tariff.

Comment: In *Universal Sales, Ltd v Edinburgh Assurance Co. Ltd.*, 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

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.

Limitation Periods

Pleasurecraft Accident - Personal Injury - Limitation Period - Date From Which s.140 MLA Limitation Period Runs

G.B. v L. Bo., 2014 QCCS 18

The plaintiff was injured on 4 July 2008 while surf skiing behind his own boat which was being driven by the first defendant. At the time, the plaintiff and first defendant were living together. On 13 June 2012, almost four years after the accident, and one year after the couple separated, the plaintiff commenced these proceedings against the first defendant and against his insurance broker, the second defendant. The defendants brought these motions to dismiss the proceedings on the grounds, inter alia, that the limitation period had expired.

Decision: Motions dismissed.

Held: The issue of the applicable law governing limitation periods in a case such as this is a difficult one. In *Frugoli v Services aeriens des Cantons de l'Est inc.*, the Quebec Court of Appeal affirmed that the two year limitation period in s. 14(1) of the *Marine Liability Act* applied to a claim by dependants of two passengers who were drowned when their boat capsized on a lake in Northern Quebec. On the basis of this case, it is concluded that Canadian maritime law governs the limitation period in the present case. However, as this is neither a claim by dependants nor an accident arising out of a collision between two vessels, ss. 14 and 23 of the *Marine Liability Act* have no application. The relevant section would be s. 140 which provides a period of three years "after the day on which the cause of action arises". However, s. 140 was not enacted until 23 June 2009 and became law on 21 September 2009. Therefore, there was no limitation period in effect during the period from the date of the accident, 4 July 2008 to 21 September 2009. The three year period under s. 140 did not begin to run until 21 September 2009 and did not expire until 21 September 2012. This action was therefore commenced within the limitation period.

Comment: A similar issue was consider by the Ontario Court of Appeal in *St. Jean v Cheung*, 2008 ONCA 815. That court held that whether the newly enacted limitation period applies to a prior claim depends on whether the matter is classified as purely procedural or substantive. If the new limitation provision extinguishes an existing claim, it is substantive and will not have retrospective effect. However, if the new provision merely abridges the time left to bring a claim, it is procedural and will be given effect to.

Substitution/Addition of Party After Limitation Period Expiry - Limitation Period Applicable to Claim by Passenger Against Repairer – When s. 140 MLA Commences to Run

Sperling v. The Queen of Nanaimo, 2014 BCSC 326

The plaintiff was injured when the ferry "Queen of Nanaimo" hit the dock at Village Bay Terminal on 3 August 2010. A malfunction in the propulsion equipment of the ferry was implicated in the cause of the accident. The plaintiff originally commenced proceedings on 2 August 2012 against the owner/operator of the ferry as well as "John Doe 1, ABC Company and John Doe 2". The plaintiff now sought to add a number of additional companies alleging they were involved in the installation or repair of the malfunctioning equipment. The plaintiff argued the proposed parties could be substituted for "ABC Company" on the basis of correction of a misnomer in the pleading or, in the alternative, that the rules permitted the addition of the proposed parties in the circumstances. The proposed defendants challenged the motion on the basis, *inter alia*, that the limitation period had expired. The issues were:

1. Can the proposed parties be substituted for "ABC Company" on the basis of a misnomer in the pleading?

2. If this is not a case of misnomer, can the additional parties be added if a limitation

period has intervened?

3. What is the applicable limitation period? Is it two years under the *Athens Convention* or three years under s. 140 of the *Marine Liability Act?*

4. If the Limitation period is under s. 140 of the *Marine Liability Act,* from what date does the limitation period commence to run and has it expired?

Decision: Motion allowed, in part.

Held:

1. There is an important distinction between amendment applications to correct a misnomer in a pleading and applications to add a party. The correction of a misnomer is permitted notwithstanding the expiration of a limitation period after the action was originally commenced. On the other hand, where the application is to add a party, the expiration of a limitation period will be one of the factors taken into account in the court's determination of whether it is "just and convenient" to add the new party.

   The test for correcting a misnomer is whether the party is sufficiently described in the pleading as an identifiable and identified person by role, responsibility or involvement. In this case the plaintiff lumps defendants together and makes blanket allegations without meaningful distinctions. The activities described are so broad they could apply to many people. There is insufficient particularity in the pleading to point the finger at any distinct person. Therefore, this is not a case of misnomer.

2. A new party may be added at any stage of a proceeding where it is just and convenient to do so. The existence of a limitation defence is a relevant but not a determinative factor. In this case the parties disagree as to whether a limitation defence has accrued. The proposed defendants argue that the court has no discretion to add them as parties, if the limitation period under the *Marine Liability Act* has accrued. The court does not agree. Even if a limitation period has accrued under the *Marine Liability Act*, the court still has a discretion to add parties.

3. The limitation period of two years in art. 16 of the *Athens Convention,* enacted by the *Marine Liability Act* applies only to "carriers" and has no application to the proposed defendants. The application of the three year limitation period in s. 140 of the *Marine Liability Act* is challenged by the plaintiff on the grounds that the negligent acts alleged against the proposed defendants have nothing to do with navigation and shipping. The proposed defendants, on the other hand, say that the subject matter of the claim is squarely in the domain of federal maritime negligence law and s. 140 of the *Marine Liability Act* therefore applies. This is a difficult issue but it need not be decided since, in any event, the discoverability issue is to be resolved in the plaintiff's favour.

4. The *Marine Liability Act* does not provide for the postponement or extension of the three year limitation period. However, the limitation period commences on the day the cause of action arose which, pursuant to the discoverability principle, means it does not commence until the underlying material facts and the extent of injury are known. The plaintiff did not receive the investigation report identifying the malfunctioning equipment until 20 May 2011. This is the earliest date from which the limitation period could commence. Therefore, even if the three year period applies, it has not expired.

Admiralty Jurisdiction/Canadian Maritime Law

Canadian Maritime Law - Application of Provincial Statutes - Workers Compensation

Marine Services International Ltd. v Ryan Estate, 2013 SCC 44

This was a judicial review of a decision of the Workplace Health, Safety and Compensation Commission of Newfoundland. The issue was whether the *Workplace Health, Safety and Compensation Act* ("WHSCA") of Newfoundland prohibited an action under s. 6(2) of the *Marine Liability Act* ("MLA") by the estates and dependents of two crew members who lost their lives when their fishing vessel sank. It was undisputed that the deceased crew members had been "workers" under the WHSCA and that the defendants were "employers" under the WHSCA. At first instance, the trial Judge noted that questions of liability in a marine context "clearly and obviously fall within federal jurisdiction" and said that the issue was whether the statutory bar in the WHSCA was "merely casual or incidental" such that it would not give rise to the doctrine of interjurisdictional immunity. The trial Judge noted that the interjurisdictional immunity doctrine would be invoked where a provincial statute intrudes on the "core" of a federal power to the extent that it "impairs" that power. The trial Judge further said "there can be no greater level of impairment of the power to sue than to bar the exercise of that power" and held that the *WHSCA* must be read down so as not to apply. Although this was sufficient to dispose of the case, the trial Judge also considered the paramountcy doctrine and held that it was also applicable.

On appeal, the Newfoundland Court of Appeal upheld the judgement of the trial Judge but with one dissent. The majority began its analysis by applying the pith and substance doctrine and had no difficulty finding that the WHSCA was valid provincial legislation. It then considered the interjurisdictional immunity doctrine noting that this involved answering two questions: (i) does the provincial law trench on the core of a federal power and (ii) is the provincial law's effect on the federal power sufficiently serious (i.e. does it impair and not merely affect the federal power). Relying heavily upon the Supreme Court of Canada's decision in *Ordon v Grail*, [1998] 3 SCR 437, the majority held that the doctrine of interjurisdictional immunity applied and the statute should be read down. The majority also considered and applied the paramountcy doctrine holding that "if a maritime claimant wishes to avail of the right to sue, he or she will be precluded from doing so. He or she cannot comply with the federal law without violating the provincial law. The two provisions cannot, in an operative sense, co-exist." The dissenting

Justice would have held: that the WHSCA was in pith and substance a no fault insurance scheme and not maritime negligence law; that there was no operational conflict under the paramountcy doctrine as the federal law did not compel claimants to make claims; and the interjurisdictional immunity doctrine did not apply because the core of the federal power was not engaged. A further appeal was launched to the Supreme Court of Canada. The issues addressed by the Supreme Court were:

(1) Does the WHSCA apply to the facts?

(2) Is the WHSCA constitutionally inoperative or inapplicable:

a. by reason of interjurisdictional immunity?

b. by reason of paramountcy?

Decision: Appeal allowed. The bar to actions in the WHSCA applies.

Held:

(1) The WHSCA and the similar schemes in other provinces, as well as the federal *Government Employees Compensation Act* and *Merchant Seamen Compensation Act,* establish a no-fault compensation scheme for workplace related injuries that are distinct from and do not interact with any tort regimes. Disregarding the constitutional issues, the first question is whether the WHSCA applies to the facts. The statutory bar in the WHSCA benefits not only the "employer" of the injured employee but any employer that contributes to the scheme so long as the injury occurred in the course of employment and "occurred . . . in the conduct of the operations usual in or incidental to the industry carried on by the employer". There is no dispute the deaths arose in the course of employment. The Commission found that the deaths "occurred . . . in the conduct of the operations usual in or incidental to the industry carried on by the employer" and their decision is entitled to deference. Therefore, absent the constitutional issues, the statutory bar in the WHSCA applies.

(2) The first step in the resolution of the constitutional issue is an analysis of the "pith and substance" of the impugned legislation. This is an inquiry into the true nature of the law in question for the purpose of identifying the "matter" to which it essentially relates. Two aspects of the law are analyzed: the purpose of the enacting body and the legal effect of the provision. In this case, the constitutional validity of the WHSCA is not challenged and a full pith and substance is not required.

<u>Interjurisdictional Immunity</u>

a. Interjurisdictional immunity protects the "basic, minimum and unassailable content" or core of federal jurisdiction under ss. 91 and 92 of the *Constitution Act, 1867*. A broad application of the doctrine is inconsistent with a flexible and pragmatic approach to federalism. The doctrine is of limited application and should be reserved for situations

already covered by precedent. There is prior precedent favouring its application to the subject matter of this appeal, namely, the decision in *Ordon v Grail* where it was held that maritime negligence law is part of the core of the federal power over "Navigation and Shipping". Like *Ordon v Grail* the present appeal involves the application of a provincial law to a maritime negligence action. The test to trigger the application of the interjurisdictional immunity doctrine is two pronged. The first step is to determine if the provincial law trenches on the protected core of a federal competence. If it does, the second step is to determine if the effect is sufficiently serious to invoke the doctrine. The impugned legislation must "impair" the core rather than merely affect it. "Impair" implies adverse consequences, a significant and serious intrusion.

Maritime negligence law is indeed at the core of the federal power over navigation and shipping, as stated in *Ordon v Grail*. The WHSCA precludes the dependants of the deceased crew members from bringing proceedings under the MLA and does, therefore trench on the core of the federal power over navigation and shipping. The first prong of the test is therefore met. However, the effect of the intrusion is not sufficiently serious to satisfy the second branch of the test. Although *Ordon v Grail* held that interjurisdictional immunity applied, that decision predated the jurisprudence that set out the two step test and established the necessary levels of impairment. The level of intrusion of the WHSCA is not significant or serious when one considers the breadth of the federal power over navigation and shipping, the absence of an impact on the uniformity of Canadian maritime law and the historical application of workers compensation schemes in the marine context.

Paramountcy

b. The paramountcy doctrine applies where there is inconsistency between a valid federal enactment and an otherwise valid provincial enactment. Where there is such conflict, the federal enactment prevails and the provincial enactment is inoperative to the extent of the incompatibility. Paramountcy does not apply to an inconsistency between the common law and a valid enactment. The inconsistency required to invoke the paramountcy doctrine can be of two types. The first is an actual operational conflict in the sense that one enactment says "yes" and the other "no". The second form of conflict is when the provincial enactment frustrates the purpose of the federal enactment but the standard is high. The fact that Parliament has legislated in respect of a subject does not lead to a presumption that Parliament intended to rule out any possible provincial action in respect of that subject. The federal statute should be interpreted, if possible, so as not to interfere with the provincial statute. The purpose of s. 6(2) of the MLA, which provides dependants with a right of action where the deceased had such an action, was to fill a gap in maritime tort law identified in *Ordon v Grail*. Section 6, when properly interpreted, accommodates the bar to actions in the WHSCA. The words of s. 6 are permissive, "may", which suggests there are situations where dependants may not bring a claim, such as where the action is barred by a workers compensation scheme. The deceased crew members would have had no cause

of action because of the operation of the WHSCA and, therefore, their dependants also have no cause of action. On this reading, there is no conflict between the statutes.

Two additional factors demonstrate that the MLA and workers compensation schemes do not conflict. First, an interpretation of the MLA that does not conflict with the WHSCA ensures consistency with the federal workers compensation schemes in the *Government Employees Compensation Act* and the *Merchant Seamen Compensation Act.* Under these schemes, covered employees and their dependants cannot bring a claim under the MLA. If it was to be concluded that s. 6(2) of the MLA did not accommodate the bar to claims, it would equally be that s. 6(2) does not accommodate the statutory bars in the *Government Employees Compensation Act* and the *Merchant Seamen Compensation Act*. This would be contrary to the presumption that parliament does not enact related statutes that are inconsistent. Second, the WHSCA and MLA are distinct in purpose and nature. The WHSCA is a comprehensive no-fault insurance benefits scheme that removes compensation for workplace injury from the tort system of which the MLA is a part. The WHSCA does not frustrate the purpose of the MLA which was to expand the range of claimants who could start an action in maritime negligence law. The WHSCA merely provides for a different regime of compensation that is distinct and separate from tort.

Comment: This is a very important decision but one which was not unexpected given the decisions of the Supreme Court of Canada in *Canadian Western Bank v Alberta*, [2007] 2 S.C.R. 3, *British Columbia (Attorney General) v Lafarge Canada Inc.*, [2007] 2 S.C.R. 86, *Quebec v Canadian Owners and Pilots Association*, 2010 SCC 39, and *Tessier Ltee. v Quebec*, 2012 SCC 23. The effect of this decision will undoubtedly be to seriously circumscribe the precedential value of *Ordon v Grail* and to increase the circumstances where provincial statutes will apply to maritime matters. The tests applied by the court are the same as those adopted in the decisions following *Canadian Western Bank.* However, the comment that the paramountcy doctrine does not apply where there is a conflict between common law and a provincial enactment is of particular interest. This is so because much of Canadian maritime law is common law that is continued by s. 42 of the *Federal Courts Act.* Until now it was an open question as to whether the maritime common law continued by s. 42 might be invoked under the paramountcy doctrine. This now seems unlikely.

Canadian Maritime Law - Application of Provincial Statutes - Sale of Vessel - Misrepresentation

9171-7702 Québec Inc. v Canada, 2013 FC 832

The plaintiff purchased a vessel from the defendant, Her Majesty the Queen in Right of Canada, and later discovered that the model of the engine in the vessel was not as had been described by the defendant. The plaintiff therefore commenced these proceedings against the defendant for breach of contract. The defendant denied breaching the contract but also commenced proceedings against the surveyor who was allegedly responsible for the erroneous description.

The error in the description was a single digit in the model number. The offer to purchase described the engine as a model 3612 whereas it was, in fact, a model 3512, which was about four times heavier and produced three times the horsepower of the 3612 model. Notably, the offer to purchase and the sale documents correctly identified the horsepower of the engine. The terms of sale also provided that the sale was "as is, on the spot" and that there were no warranties of quantity, nature, character, quality, weight, size or description.

The issues in the case were characterized as follows:

(1) What is the applicable law?

(2) Did the defendant breach the contract?

(3) If the defendant did breach the contract, is the surveyor liable?

Decision: Action dismissed.

Held:

(1) The applicable law could be Canadian maritime law or the law of the Province of Quebec, where the sale took place. The Supreme Court of Canada has not specifically ruled on the question of whether contracts for the sales of vessels are governed by Canadian maritime law. There is no close connection between the transfer of ownership of a vessel and maritime law and nothing to indicate that the objectives of uniformity or compliance with international conventions require the ouster of provincial law. This is one reason why various cases have in the past applied provincial law to property disputes. The decision of the Supreme Court of Canada in *Canadian Western Bank v Alberta* provides a new approach to interjurisdictional immunity and paramountcy. The application of provincial law would not impair federal jurisdiction over navigation and shipping. The applicable law is therefore the Civil Code of Quebec.

(2) Turning to the issue of whether the defendant had breached the contract, art. 1716 of the Civil Code contains implied warranties of ownership and quality but these were not breached as the vessel was adequately described overall. The result might have been different if the plaintiff had advised the defendant that the model number was an essential component. Further, absent fraud or misrepresentation, the conditions of sale being "as is, on the spot" and without warranties were a complete defence.

(3) The liability of the surveyor need not be addressed but, given the finding of the applicable law, the Federal Court probably has no jurisdiction to deal with the claim against the surveyor.

Comment: Given the recent decision of the Supreme Court of Canada in *Marine Services International Ltd. v Ryan Estate*, 2013 SCC 44, the holding that the Quebec Civil Code applied to a sale of a vessel may well be correct. However, any implication that the sale was solely governed by provincial law would not be correct. Sales of vessel are clearly also governed by

Canadian maritime law, at least in part, as any review of Part 2 of the *Canada Shipping Act, 2001* will confirm.

Jurisdiction - Sale of Property not in Canada

SDV Logistiques (Canada) Inc. v Dieselgenset Type 8M 25, Engine No. 45085 EX the Barge Andrea, 2013 FC 671

The plaintiff, at the request of a ship builder, arranged for the pick-up and storage of generators at the Port of Hamburg. The generators were intended to be installed in two vessels being built by the builder. The builder originally paid the storage charges but ran into financial difficulties and ceased to make payments leaving the plaintiff with a debt owing of in excess of $200,000. The plaintiff brought these proceedings *in personam* against the successor of the builder and the mortgagee of the vessels and also brought *in rem* proceedings against the generators and other cargo. A Warrant of Arrest was issued but was never served with the result that the action proceeded solely as an *in personam* action. The plaintiff, nevertheless, brought a motion pursuant to Rule 379 for an order that the generators be sold. At first instance, the Prothonotary refused the order. The plaintiff appealed.

Decision: Appeal dismissed.

Held: Rule 379 cannot be applied because the generators are not and have never been in Canada and there is no evidence the generators are likely to deteriorate. Further, for the court to order the sale of property outside of the jurisdiction, there must be some enabling statutory provision and there is none. Consequently, the court has no jurisdiction to issue the order requested.

Federal Court Jurisdiction - Crown Immunity - Federal Court Has No Jurisdiction Over Province

Canada v Toney, 2013 FCA 217

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 Province of Alberta objected to the jurisdiction of the Federal Court over it and initially brought a motion to strike the statement of claim. That application was dismissed (see: *Canada v Toney*, 2011 FC 1440 and 2012 FCA 167). The parties then agreed that the issue of the *in personam* jurisdiction of the Federal Court over the Province of Alberta should be determined as a question of law and Alberta brought this application for such a determination. Alberta argued that the doctrine of Crown immunity applied and that it could not be bound by a federal statute. The motions Judge disagreed and held (at 2012 FC 1412) that the Federal Court did have *in personam* jurisdiction. In reaching this decision the motions Judge noted that the Federal Court had subject matter jurisdiction and further noted that s. 3 of the *Marine Liability Act* and s. 43(7) of the *Federal Courts Act* both permitted actions against a province. The Province of Alberta appealed.

Decision: Appeal allowed.

Held: The four basic principles are: first, the Crown (both federal and provincial) is *prima facie* immune from legislation; second, where Parliament (the federal Crown) has the authority to legislate in an area, a provincial Crown will be bound where Parliament so chooses; third, in order for a provincial Crown to be sued in the Federal Court, there must be some legislative provision permitting it; and fourth, the Federal Court must have jurisdiction over both the subject matter and the parties. The question is whether there is a legislative provision indicating a clear intent by Parliament to bind the province. The possibilities are ss. 22 and 19 of the *Federal Courts Act* and the Alberta *Proceedings Against the Crown Act*. Section 22 of the *Federal Courts Act* (granting jurisdiction "between subject and subject as well as otherwise") does not contain a clear expression of intention to bind a Province. Section 19 of the *Federal Courts Act* (intergovernmental disputes) does not apply to claims by a private citizen and is therefore of no assistance. Finally, even though the Alberta *Proceedings Against the Crown Act* does not expressly reserve jurisdiction to the courts of Alberta, it also does not expressly grant jurisdiction to the Federal Court. In result, the appeal is allowed and the Federal Court has no *in personam* jurisdiction over the Province of Alberta.

Carriage of Goods

Jurisdiction - FOB Contract of Sale - Liability of Vendor/Shipper to Indemnify Purchaser/Charterer for Demurrage and other Expenses

AK Steel Corporation v Acelormittal Mines Canada Inc., 2014 FC 118

The plaintiff was the purchaser of a cargo of iron ore pellets and the voyage charterer of the "Rt. Hon. Paul J. Martin", a self-unloading bulk carrier and the ship that was to carry the pellets. The defendant was the vendor of the pellets. The cargo was sold FOB ship's hold. The terms of sale specified the cargo was to have a maximum moisture content of 2.5% (to prevent freezing) and required the vendor to indemnify the purchaser for additional costs incurred in the event the pellets were frozen. The cargo of iron ore pellets was loaded in very cold weather, about -18 degrees Celsius, at Port Cartier, Quebec. The "Rt. Hon. Paul J. Martin" then sailed to Toledo, Ohio where it was to discharge the cargo. Upon discharge it was discovered that the cargo was frozen and, as a consequence, the plaintiff was required to pay to the ship owner demurrage, additional loading costs and costs to repair damage to the ship during the unloading. The plaintiff brought this indemnity action against the defendant alleging that the moisture content of the cargo was in excess of that required by the contract of sale. The defendant argued that it was not in breach of its contract with the plaintiff, that the cause of the loss was the failure of the carrier to properly load, carry and discharge the cargo and that it had not been given timely notice of the alleged breach of contract.

Decision: Judgment for the plaintiff.

Held: The first issue is whether the Federal Court has jurisdiction since an action for alleged

breach of a contract of sale is a matter that normally falls within provincial jurisdiction as "property and civil rights". However, the claim is really about the suitability or fitness of the cargo for transport, a matter of navigation and shipping, and therefore the court has jurisdiction. Regarding the substantive issue, the cause of the freezing was the pre-loading condition of the cargo, which had sat at the loading port exposed to the elements for at least one month and a half. The freezing was not due to any fault on the part of the carrier. In respect of the notice issue, the defendant was, in fact, aware of the breach before the plaintiff was.

Domestic Carriage - Application of Hague-Visby Rules - Dangerous Goods - Liability of Shipper for Damage Caused to Ship

Oceanex Inc. v Praxair Canada Inc., 2014 FC 6

The ship "Cabot" was damaged discharging cargo when a 20 foot tank container filled with liquid oxygen ruptured. The escaped liquid oxygen fell onto the ship's plating causing it to become extremely brittle which ultimately led to the plate cracking. The ship owner brought this action against the defendant, the lessee of the container, for the costs to repair the ship and for loss of revenue during the nine days required to repair the ship. The defendant counterclaimed against the ship for the damage to the container. The defendant alleged that the carrier had dropped or mishandled the container resulting in damage to the bottom railings and a misalignment of the piping which ultimately caused increased pressure on the valves and the leak. The defendant further challenged the damages claimed. In particular, the defendant argued that the plaintiff could not recover the costs of forwarding other cargoes to their consignees as it could have declared an event of force majeure.

Decision: Judgment for the ship owner.

Held: The evidence established that the container was leaking from two fire block valves, the purpose of which is to seal the tank in the event of a fire. The evidence further established that these valves had leaked previously and only one of them had been tightened. The valves leaked because they had not been sufficiently tightened and not because of the damage to the bottom rails of the container which, in any event, did not occur during or in connection with the voyage. Pursuant to the *Consolidated Transportation of Dangerous Goods Regulations*, dangerous goods must be loaded by the shipper in a "means of containment" in such a way as to prevent damage. Also, at common law a carrier is not liable for damage caused by insufficiency of packing. Concerning damages, the Judge held that mitigation of damages did not require the plaintiff to jeopardize its contracts with others by claiming force majeure. The costs of forwarding other cargoes to their consignees was recoverable.

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

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. The Federal Court of Appeal did not address these arguments since it concluded the Rules did not apply on other

grounds.

Limitation of Liability/Marine Insurance

Limitation of Liability - Marine Insurance - Wilful Misconduct

Peracomo Inc. v. Telus Communications Co., 2014 SCC 29

The respondent was the owner of two submarine cables on the bottom of the St. Lawrence River. The appellants were the corporate owner and operator of a fishing vessel. The operator snagged one of the submarine cables belonging to the respondent while fishing. The operator cut the cable 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 respondent commenced these proceedings alleging negligence and damages of approximately $1 million to repair the cable. The appellants 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 appellants further disputed the damages and claimed the right to limit liability. A further issue was whether the appellants' insurance coverage was jeopardized by reason of "wilful misconduct" on the part of the appellants.

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 appellants 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 appellant operator. With respect to damages, the trial Judge held that the respondent 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 respondent had to prove a personal act or omission of the appellants 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 appellants were not entitled to limit liability. The trial Judge said that the 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 operator intended the very damage but just did not think the cable would be repaired. The trial Judge further held that the 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.

On appeal, the Federal Court of Appeal (2012 FCA 199) agreed with the trial Judge on the issue of liability finding, among other things, that the appellants 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 operator could be jointly and severally liable with the corporate appellant. The operator 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 are personally liable for their 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 appellants intended to physically damage the cable and that it did not matter whether they 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 appellants 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. The appellants appealed to the Supreme Court of Canada. There were three issues on the appeal:

1. Is the operator personally liable?

2. Are the appellants entitled to limit their liability?

3. Was the loss caused by wilful misconduct such that it is excluded from coverage under the insurance policy?

Decision: Appeal allowed, in part. The appellants were entitled to limit liability but the loss is excluded from the insurance coverage.

Held:

1. The Federal Court of Appeal correctly held that the operator was personally liable even though he was carrying out his corporate duties.

2. The Federal Court of Appeal took too narrow a view of the intent requirement under art. 4 of the *Convention on Limitation of Liability for Maritime Claims*. The Federal Court of Appeal held that if the operator knew he was cutting a cable that the intent requirement is satisfied. This undermines the *Convention's* purpose to establish a virtually unbreakable limit on liability and does not accord with its text. The conduct barring limitation is expressed in restrictive language. The person is entitled to limit liability unless it is proved that "the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result". There is some dispute in the authorities as to how specifically the loss must have been intended. Some authorities say the "very loss" intended must have resulted. Other authorities say it is sufficient if the resulting loss was the "type of loss" intended. We do not have to take a firm position on this issue as, on either view, the appellants are entitled to limit their liability. The trial Judge found as a fact that the operator thought the cable was useless. The operator did not think his actions would damage someone's property or necessitate the repair of the cable. Therefore, there was neither "the intent to cause such loss" or "knowledge that such loss would probably result".

3. The policy of insurance covered the appellants in respect of their liability for damage to

any fixed or movable object arising from an accident or occurrence. The policy was subject to s.53 (2) of the *Marine Insurance Act* which excludes coverage for any loss attributable to the "wilful misconduct" of the assured. The standard of fault under s. 53(2) is not the same as the standard under the *Convention*. Both the purposes and the texts are different. The essence of wilful misconduct includes not only intentional wrongdoing but also conduct exhibiting reckless indifference in the face of a duty to know. The findings of fact by the trial judge make it clear that the operator's conduct constituted wilful misconduct. He had a duty to be aware of the cable and "he failed miserably in that regard". His conduct exhibited a "lack of elementary prudence". His actions were "far outside" the range of conduct expected of a person in his position. He was aware he was cutting a submarine cable and had knowledge of the risk that he could be cutting a live cable. His conduct is consistent with indifference to the risk in the face of his duty to know. The fact he believed the cable was not in use is beside the point. "To hold otherwise is to conflate recklessness with intention." Wilful misconduct does not require either intention to cause the loss or subjective knowledge that the loss will probably occur. "It requires simply misconduct with reckless indifference to the known risk despite a duty to know."

Collisions

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

Grieg Shipping A/S v The "Dubai Fortune" and Fortune Marine Ltd., 2013 FCA 218

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 pilot. 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". At trial (2012 FC 1110) the action was dismissed. The trial Judge 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 applied to tug and tow cases and the question of whether the tug or tow has control was held to be 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. The trial Judge said in this case the pilots gave only general orders to the tugs and gave no orders at all to the "Tiger Shark 2". The negligent act was the manner in which the "Tiger Shark 2" was manoeuvred. The trial Judge said 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 trial Judge did not need to consider the limitation issue. The Plaintiff appealed.

Held: Appeal Dismissed.

Decision: There was no reviewable error on the part of the trial Judge.

Liens, Mortgages and Priorities

Construction Mortgage - Entitlement of Purchaser/Mortgagee to Return of Advances – Standard of Review on Appeal from Prothonotary

Offshore Interiors Inc. v Worldspan Marine Inc., 2013 FC 22, 2013 FC 1266

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 in the British Columbia Supreme Court under the *Companies Creditors' Arrangement Act*. The plaintiff, a supplier of goods and services to the vessel, also commenced these proceedings in the Federal Court for unpaid invoices and had the vessel arrested. In the B.C. Supreme Court action an order was pronounced on 22 July 2011 providing that any claimant with an *in rem* claim against the vessel could pursue that claim in the Federal Court. The Federal Court issued an order on 29 August 2011 establishing a process for the filing of *in rem* claims against the vessel which included a requirement that any claim be described with sufficient particulars so the court could establish whether it was an *in rem* claim and determine its priority. A claim was filed in the Federal Court by the purchaser/mortgagee for repayment of the funds advanced. The plaintiff brought this application for a declaration that the mortgage did not create a lien or charge on the vessel other than to secure delivery of the vessel. If correct, the effect would be that the funds advanced by the purchaser/mortgagee would be excluded from its claim.

At first instance (2013 FC 221), the Prothonotary granted the declaration sought. The Prothonotary said the question of whether there was an obligation under the mortgage that funds advanced be repaid depended on the construction of the vessel construction agreement and mortgage. The Prothonotary held there was no express provision requiring repayment of funds advanced for the construction of the vessel. Despite the mortgage stating it is a "current account" mortgage, the Prothonotary found no evidence that an account current was created

by the vessel construction agreement which clearly allowed the builder to retain all advances. The Prothonotary found the parties contemplated that all monies advanced would be used in the construction of the vessel and not exist as a fund. The purchaser/mortgagee appealed.

Decision: Appeal allowed.

Held: The decision by the Prothonotary was not a discretionary order but involved gleaning the parties' intentions by interpreting the facts and agreements. These are questions of mixed fact and law and the normal standards of review apply (correctness for mistake of law and palpable and overriding error for mistake of fact).

The Prothonotary correctly recognized that he was to determine the intent of the parties based on the language of the contract documents and correctly identified the principles of interpretation as set out in *Salah v Timothy's Coffees*, 2010 ONCA 673. (These principles are: construe the contracts as a whole; have regard to the objective evidence of the factual matrix but not the subjective evidence of the intention of the parties; interpret the contract in accord with sound commercial principles and good business sense and avoid commercial absurdity; if the contract is ambiguous, resort may be had to extrinsic evidence to clear up the ambiguity; and where a transaction involves several documents, the interpretation of one may be drawn from the related documents.) However, the Prothonotary failed to properly apply these principles of interpretation so as to determine the true intent of the parties.

The purpose of the mortgage was to provide a continuing security interest in the vessel to secure the advances. It was intended to be effective as against third parties and was not limited to securing the delivery of the Vessel. Although the documents do not state the advances were a loan, they do state they would be made "on account". Further, although there was no express requirement for repayment of advances, considering the agreements as a whole and within the factual matrix, there was an implied obligation to repay the advances.

With respect to the Prothonotary's reasoning that the funds advanced were not a loan because they would be used in the construction and not available as a fund, the purpose of any loan is to permit the borrower to spend the monies lent. A commercial absurdity would result if the advanced funds could not be used for the intended purpose and instead had to be set aside to create a fund. The sums advanced comprised the "account current" secured by the mortgage, even in the absence of an explicit reference in the construction agreement. It was not necessary to specify the amount owing or the time of repayment in the mortgage when there was sufficient detail in the construction agreement. It is also difficult to see how the mortgage could be intended to only secure the delivery of the vessel when the construction agreement expressly states it is to create a first priority security interest to secure advances.

In addition, the purchaser has a claim pursuant to s. 22(2)(n) of the *Federal Courts Act* (which addresses claims arising out of the construction, repair or equipping of a ship), which can be addressed at the priorities hearing.

Liens and Mortgages - Ranking of CCAA Administration Charge - International Insolvencies

Worldspan Marine Inc. v Caterpillar Financial Services, 2013 BCSC 1593

The petitioner, Worldspan Marine Inc., was a builder of custom yachts who had entered into a contract for the construction of a 144' yacht. During the course of construction, a dispute arose with the purchaser. As a result, the purchaser ceased making payments and the petitioner sought the protection of the *Companies Creditors Arrangement Act* ("CCAA"). A Monitor was appointed by court order under that Act and a stay of all proceedings against the petitioner was ordered. The court's initial order included an "Administration Charge" to secure the fees and expenses of the Monitor which was to rank in priority to all other security in the "Non-Vessel Property". "Non-Vessel Property" was all property of the petitioner other than the 144' yacht. Caterpillar held a mortgage over another vessel owned by the petitioner, the "A129", which was located in the State of Washington. Caterpillar commenced foreclosure proceedings in Washington and had the "A129" arrested there. The U.S. Bankruptcy Court subsequently granted a "Recognition Order", at the request of the petitioner, under Chapter 15 of the U.S *Bankruptcy Code* recognizing the British Columbia CCAA proceedings as the "Foreign Main Proceeding" and staying any execution against the assets of Worldspan located in the United States. The "A129" was subsequently moved to British Columbia and sold in the CCAA proceedings. The sale order provided that Caterpillar was to have a first priority to the proceeds but subject to the potential claim of the Monitor for "Administrative Charges". Caterpillar now applied for an order declaring that the "Administration Charges" did not attach to the proceeds from the sale of the "A129" or, alternatively, that Caterpillar's claim under its mortgage had priority to the Administrative Charge. Caterpillar argued, *inter alia*, that under Canadian maritime law the "Administrative Charge" was a statutory lien which ranks below the mortgage.

Held: The "Administrative Charge" attaches to the proceeds from the sale of the A129 and ranks in priority to the mortgage.

Decision: Section 11.52 of the CCAA authorizes the courts to grant a super priority charge attaching to all or part of the property of the debtor to secure the fees and expenses of the Monitor. This serves the objectives of the CCAA by ensuring the Monitor will be paid for its services. When this court pronounced the order granting the "Administrative Charge" the "Non-Vessel Property" included the "A129". The initial order therefore attached to the "A129". Further, the recognition order of the U.S. Bankruptcy Court ordered that the realization of the "A129" was entrusted to the foreign representative, the Monitor, and deferred to this court on all issues relating to the administration and realization of assets, including whether the Administration Charge attached to the "A129". The super priority given by s. 11.52 of the CCAA trumps the ranking of claims *in rem* under Canadian maritime law. Had Parliament intended to exempt maritime *in rem* claims from the super priority, it would have done so.

Liens - Mortgages - Priorities - Necessaries Lien

Cameco Corporation v The "MCP Altona", 2013 FC 23

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

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 court is 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.

Offences

Offences - Criminal Negligence - Sentencing

R. v Lilgert, 2013 BCSC 1329

The accused was the fourth officer of the passenger ferry, "Queen of the North", and the officer on watch and in command of the bridge when the "Queen of the North" struck Gill Island and sank on 22 March 2006. At the time there were 101 passengers and crew on board the ferry. Two individuals lost their lives. The accused was charged and convicted by a jury of two counts of criminal negligence causing death. Following the conviction, this sentencing hearing was held to determine the appropriate sentence. The Crown sought a sentence of six years imprisonment. The defence argued for a conditional sentence of two years less a day to be served in the community.

Held: The accused was sentenced to four years.

Decision: It is clear the jury rejected the evidence of the accused that he was carrying out his duties to the best of his abilities and found he grossly neglected his duty. He failed to make a required course change and allowed the vessel to travel on autopilot at full cruising speed straight into Gill Island. The vessel was off course for 12 to 14 minutes. Had the navigational aids been used or used properly, they would have shown the vessel was off course. He demonstrated extreme and catastrophic dereliction of duty. He was clearly distracted by personal issues related to his relationship with the Quartermaster, who was the only other person on the bridge with him and with whom he had had an affair. The objectives of sentencing are: denouncing unlawful conduct; general and specific deterrence; separating offenders from society where necessary; rehabilitation; providing reparations for the harm done to victims and the community; and promoting a sense of responsibility in offenders. The

sentence imposed must be proportionate to the gravity of the offence and the degree of responsibility or moral blameworthiness of the offender. "This is one of those cases ... where rehabilitation and other restorative factors will not take precedence over the factors of denunciation and deterrence in the face of an avoidable, senseless crime." "This was a case of complete abdication of responsibility." Although the accused has no criminal record and has expressed remorse, "he has demonstrated a lack of insight in terms of his responsibility". Due to the high degree of moral blameworthiness on the part of the accused, the focus is on deterrence and denunciation.

Offences - Canada Shipping Act Violations

R. v Ralph, 2013 NLCA 1

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 appeal was 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.

Miscellaneous

Insolvency of Intermediate Charterer - Entitlement to Freight

Byatt International S.A. v Canworld Shipping Company Limited, 2013 BCCA 427

The owner of the ship "Loyalty" granted a time charter to KLC who, in turn granted a time charter to MUR who, in turn, granted a voyage charter to Canworld for a voyage from Vancouver to Australia carrying sulphur. Canworld contracted with the shipper, Prism, to carry the sulphur cargo to Australia. MUR paid its hire to KLC but KLC defaulted on its payment of hire to the owner. The owner then sought to exercise a lien on the freight owing by the shipper to Canworld and the shipper paid the freight into court. Insolvency proceedings were commenced in Korea concerning KLC. Those proceedings were settled on terms that the owner recovered approximately $10 million of the $16 million owed to it. However, the settlement terms further provided that any amounts recovered by the owner from sub-hires or sub-freights were to be deducted from the settlement amount. Subsequently, this motion was brought before the British Columbia Supreme Court for directions as to how the funds paid into court by the shipper ought to be paid out. The owner argued it was entitled to the funds on the basis of its lien rights and the terms of the bill of lading. MUR and others argued that, given the terms of the settlement in the Korean insolvency proceedings, it would be inequitable to order the payment to the owner since the person who would ultimately benefit would be KLC, the entity that was responsible for the dispute. At first instance, the motions Judge agreed and ordered the funds paid to Canworld who could then satisfy its debt to MUR. The ship owner appealed.

Decision: Appeal allowed.

Held: The motions Judge appears to have decided the case on the basis of his interpretation of what would be a fair result whereas he was required to base his decision on legal and equitable principles. There is no equitable principle supporting the motions Judge's conclusions. There is no unjust enrichment or double recovery and there is not sufficient evidence for a conclusion that a payment to the owner would benefit KLC. There seems little question that, pursuant to the terms of the head charter party, the owner has the right to direct the payment of sub-freights to itself.

Stay of Proceedings Pending Appeal to SCC - Insolvency of Intermediate Charterer – Entitlement to Freight

Byatt International S.A. v Canworld Shipping Company Limited, 2013 BCCA 558

This was an application to stay the order of the British Columbia Court of Appeal rendered in *Byatt International S.A. v Canworld Shipping Company Limited*, 2013 BCCA 427, wherein the court ordered that the ship owner was entitled to sub-freight paid into court. The grounds for the application were that an application for leave to appeal the decision had been filed with the Supreme Court of Canada.

Decision: Application dismissed.

Held: The test for a stay pending an appeal is: (1) that there is merit to the appeal in the sense that there is a serious question to be tried; (2) that irreparable harm would result if the stay was refused; and (3) that the inconvenience to the applicant if the stay is refused would be greater than the inconvenience to the respondent if the stay was granted. The merits test involves a consideration of whether the issues raised are of public importance. The issues raised here are not of such importance. This case involves the application of well settled legal principles and the fact that there is an argument the case may have been wrongly decided is not, by itself, sufficient to elevate the issue to one of national importance.

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