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Developments in Canadian Maritime Law 2002 [1]

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1 This paper contains summaries of cases decided during the period from January 1, 2002 to approximately December 31, 2002. Updates to these summaries can be found on the author's internet site at http://www.admiraltylaw.com.

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Marine Insurance

Bad Faith - Punitive Damages

Whiten v Pilot Insurance Co.,
2002 SCC 18

Although not a marine insurance case, this decision by the Supreme Court of Canada is of significant interest to marine insurers. The facts were that the Plaintiff's home was destroyed in a fire. The Defendant, the Plaintiff's insurer, denied the claim made under the insurance policy on the grounds that the fire had been deliberately set even though the local fire chief, the Defendant's own fire investigator and the Defendant's initial expert all agreed that there was no evidence of arson. At trial, the jury awarded the Plaintiff $1 million in punitive damages against the Defendant for bad faith denial of coverage. On appeal to the Ontario Court of Appeal the punitive damage award was reduced to $100,000.00. On further appeal, the Supreme Court of Canada stated that although the $1 million award of the jury was higher than the court would have made it was within the high end of the range where juries are free to make their assessment. Accordingly, the Supreme Court reinstated the jury's punitive damage award of $1 million for failure to act in good faith.

Liability Policies - Interpretation - Illegality - Pay to be Paid

Conohan v The Cooperators,
2002 FCA 60

This case arose out of a collision between the "Lady Brittany" and the "Cape Light II" off Prince Edward Island. At the time of the collision the "Cape Light II" was at anchor. Following the collision, blood alcohol readings were taken from the Master of the "Lady Brittany" which indicated his blood alcohol content was above the legal limit. An action was commenced by the owners of the "Cape Light II" against the "Lady Brittany". The insurers of the "Lady Brittany" refused to defend or participate in that action alleging that the insured was in breach of the terms of the policy in that the vessel was being operated in an illegal manner. The owner of the "Lady Brittany" thereafter admitted liability for the collision, confessed to judgment and assigned all of his rights of claim against his insurers to the owners and underwriters of the "Cape Light II". The owners and underwriters of the "Cape Light II" then brought this action against the Defendant, the insurer of the "Lady Brittany". The Defendant denied it was liable on various grounds. First, it alleged that there was a breach of the implied warranty of legality contained in s. 34 of the *Marine Insurance Act*. Second, it alleged that the collision was caused by "wilful misconduct", an excluded peril under s. 53 of the *Marine Insurance Act*. Third, it alleged that the collision was caused by "drunken or impaired operation of the vessel or other wrongful act", an excluded peril under the policy of insurance. Finally, it alleged that it was only liable to pay the insured if the insured has "become liable to pay and shall pay by way of damages to any other person any sum...". As the insured had not actually paid any sum it argued that its liability was not invoked. At trial the Judge held: first, that the implied warranty of illegality did not apply to the third party

liability portions of the policy; second, that there was no "wilful misconduct"; third, that on a proper reading of the policy the exclusion of "drunken or impaired operation of the vessel or other wrongful act" did not apply to the third party liability clause of the policy as that clause contained its own separately enumerated exclusions. The trial Judge did, however, hold that the policy was, in fact, a pay to be paid policy and that the Defendant was, accordingly, not liable. The Plaintiff appealed. The Federal Court of Appeal reviewed the case authorities relating to "pay to be paid" clauses and affirmed the decision of the trial Judge.

Liability Policies - Exclusions - "course of transit"

Garfield Container Transport Inc. v Chubb Insurance Co. of Canada,
(2002) 114 A.C.W.S. (3d) 1100

The Plaintiff was a transportation company specializing in taking cargo from ships and delivering such cargo to the customs clearance warehouse and, eventually, to the purchaser. The Plaintiff was insured by the Defendant under a policy which provided coverage for goods shipped under a bill of lading and in due course of transit. In this instance the Plaintiff delivered equipment to the customs clearance warehouse as required by the bill of lading. While the equipment was at the warehouse the Plaintiff contacted the purchaser and was instructed to deliver the equipment to another trucking firm. The Plaintiff transported the equipment to another warehouse where it had the specialized loading equipment necessary to do the task. During the course of loading the equipment was damaged. The Defendant insurer denied coverage saying that the carriage under the bill of lading and in the due course of transit came to an end at the customs clearance warehouse. This argument was accepted at first instance. On appeal to the Quebec Court of Appeal, however, the Court of Appeal held that the carriage and course of transit did not come to an end at the customs clearance warehouse despite the fact that the ultimate destination was not specified in the bill of lading. The Court held that the Plaintiff was obliged to deliver the equipment to the ultimate destination and temporary disruptions that were not unreasonable did not break the chain of transit.

Service Ex Juris - Stay of Proceedings

Continental Insurance Co. v Almassa International Inc.,
[2002] O.J. No. 202, affirming [2001] O.J. No. 3229

This matter concerned a cargo policy taken out by a Quebec merchant from an Ontario based insurer insuring a cargo of lumber carried from Quebec to Saudi Arabia. During the course of the voyage the ship suffered engine damage and called at an intermediate port for repairs. As a result of the delay, the lumber cargo was damaged and a claim was made under the policy. The insurer initially made a payment on account but later denied coverage. The assured brought an action in Quebec against the insurer and the insurer brought an action in Ontario against the assured to recover the monies paid. The assured brought the present motion to stay the Ontario proceedings. The motion was granted. The motions Judge held that mere residency of the insurer in Ontario was insufficient to create a real and substantial connection with Ontario and that the appropriate forum was Quebec. The judgement was appealed. In a short endorsement the Ontario Court of

Appeal affirmed the decision of the motions Judge.

Carriage of Goods

Burden of Proof - Apparent Good Order - Hidden Damage

American Risk Management Inc. v APL Co. Pte. Ltd.,
2002 FCT 1023

This was an action for damage to a cargo of 52 rolls of fabric carried by land, sea and rail from Pakistan to Toronto, Ontario. The cargo was initially received at its destination without any notations as to damage. However, a few days later it was discovered that the rolls were damaged by mould and stains. The Plaintiff argued that the carrier was prima facie liable having received the cargo in good order and condition and delivered it in a damaged condition. The court held, however, that the damage was hidden and that under these circumstances the Plaintiff was required to prove delivery in good order and condition by means other than the bill of lading. The court further noted that the absence of evidence of damage to other cargoes carried in the containers buttressed the Defendant's contention that nothing out of the ordinary transpired during the carriage.

Hague Visby Rules - Burden of Proof - Water Damage

Nova Steel Ltd. et al. v The "Kapitonas Gudin" et al.,
2002 FCT 100

Samuel Son & Co. v The "Kapitonas Gudin" et al.,
2002 FCT 101

These cases were for damage to rolled coils carried from Latvia to Montreal. The coils were "pitted", allegedly by sea water. The Defendants denied liability arguing the damage was caused by the excepted perils of peril of the sea (condensation), act or omission of the shipper (defective packaging) or inherent defect (mill defects in the coils). After reviewing the evidence, the trial Judge considered whether the Plaintiffs had satisfied their initial burden of proving tender of the cargo in good condition and held that the Plaintiffs had not met this burden. In so holding, the Judge noted that the bill of lading was claused "partly rust stained wet before shipment". Further, there was no evidence of how the cargo was stored before shipment or how it was conveyed to the loading port. The fact that the Plaintiffs had not proven tender of the cargo in good condition did not, however, end the matter. The Judge held that the Plaintiffs could still establish liability by showing by a preponderance of evidence that the Defendants were the proximate cause of the damage. The Judge held that the Plaintiffs had met this burden through "overwhelming" evidence that the coils were damaged by exposure to sea salt during the voyage. The Judge found that the Defendant ship was unseaworthy in that it was not watertight and had allowed sea water to enter the holds during the voyage. On the issue of damages, the Defendants challenged

the allowances that had been established and agreed between the Plaintiffs and their insurers. The Judge held that these allowances were supported by evidence and represented the loss actually suffered by the Plaintiffs.

Air Carriage - Warsaw Convention

MDSI Mobile Data Solutions Inc. v Federal Express,
2003 BCCA 9, affirming 2001 BCSC 1411

This was an appeal from an application by the Plaintiff for summary judgment for damage to computer equipment that occurred during the course of air carriage from Vancouver, British Columbia to Atlanta, Georgia. At trial, the Plaintiff sought to recover the full amount of its loss (approximately $240,000) or, in the alternative, the declared value amount of $214,000. The Defendant carrier admitted liability but argued that the Plaintiff was not entitled to recover the declared value amount since the Plaintiff's clerk who filled out the air waybill said on discovery that she believed the declared value amount set the amount that could be recovered from the Plaintiff's insurer. The trial Judge found this argument wholly without merit. The Defendant next argued that its liability was limited to 250 francs per kilogram as per Art. 22(2) of the Warsaw Convention or, in the alternative, to $50,000 as per its standard terms and conditions, which limited the amount that could be declared for carriage and limitation purposes to $50,000. The Plaintiff's position on these issues was that the Convention limit of 250 francs per kilogram did not apply because of the declaration of value and that the conditions of carriage were ambiguous and inconsistent and did not, in fact, limit the amount that could be declared to $50,000.00. Additionally, the Plaintiff argued that a provision limiting the amount that could be declared by a shipper for carriage and limitation purposes was null and void by Art. 23 of the Convention. The trial Judge agreed with the Plaintiff that the Warsaw Convention prohibited a carrier from limiting the amount that could be declared and further agreed that the declaration of value of $214,000 replaced the Convention limit of 250 Francs per kilogram. An additional issue was whether the air waybill failed to disclose the agreed stopping places and failed to include a statement that the carriage was subject to the Warsaw Convention, contrary to Art. 8. The trial Judge held that the air waybill did not contravene Art. 8 in these particulars as there was no stopping place actually agreed between the parties and the statement in the air waybill that the Convention "may" be applicable was sufficient compliance with Art. 8. In result, the trial Judge granted summary judgment in the amount of the declared value. The Defendant appealed to the British Columbia Court of Appeal. The only issues on appeal were whether the conditions of the Defendant limited the value that could be declared for carriage to $50,000 and whether such a limit was contrary to the Warsaw Convention. The Court of Appeal was divided on the first issue. The majority found that the clauses relied upon by the Defendant were unclear and inconsistent and concluded that there was no $50,000 limit on the amount that could be declared for carriage. In view of this holding, the majority did not find it necessary to decide whether a $50,000 limit was contrary to the Warsaw Convention, however, they did say they tended to agree with the dissenting Judge that the Convention would not prohibit the parties to a contract of carriage by air from agreeing on a limit of liability that was in excess of the 250 francs per kilogram provided by the Convention but less than the actual value of the goods carried. In result, therefore, the appeal was dismissed and the Plaintiff obtained judgment for the declared value

amount of $214,000.

Air Carriage - Notice Requirements - Limitation

Green Computer in Sweden AB v Federal Express Corp.,
2002 FCT1015

This was a claim for the loss of one carton of integrated circuits valued at $50,000.00 carried by air from Sweden to Markham, Ontario. The Defendant air carrier argued that it was not liable as the Plaintiff had not given the notice required by Article 26 of the Warsaw Convention. Alternatively, the Defendant argued it was entitled to limit liability pursuant to the terms of the convention to $851.00. With respect to the notice issue, Article 26(2) provides that notice must be given within 7 days of receipt in the case of damage to cargo and within 21 days in the case of delay. The Prothonotary held, however, that these notice requirements were not applicable to the instant case which was a case of non-delivery or loss of cargo. With respect to the limitation issue, the Plaintiff argued that the Defendant was not entitled to limit its liability as the Defendant had been guilty of wilful misconduct pursuant to Article 25. Specifically, the Plaintiff argued that an inference should be made that the lost cargo had been stolen. The Prothonotary was, however, not prepared to draw any such inference. He found that the Defendant had merely lost the shipment in transit, something which did not constitute wilful misconduct. Finally, the Plaintiff argued that the Defendant was not entitled to limit liability as it had not proved the cargo was lost during the carriage by air. The Prothonotary also rejected this argument. He referred to Article 18(3) which presumes, subject to proof to the contrary, that any damage occurred during carriage by air. Accordingly, the Prothonotary granted judgment in the limitation amount of $851.00.

Air Carriage - Limitation of Liability - Damages

Connaught Laboratories v British Airways,
[2002] O.J. No. 3421

This case concerned damage to four cartons of vaccines carried by air from Toronto to Sydney, Australia via Heathrow. The cartons bore labels directing that they be kept refrigerated at between 2 and 8 degrees Celsius. A similar direction was printed on the air waybills. At Heathrow, the cartons were not placed in a refrigerated area and, as a consequence, the vaccines were spoiled upon arrival in Sydney. The main issue in the case was whether the carrier could limit its liability to approximately $2,500.00 pursuant to Article 22 of the Warsaw Convention. The Plaintiff argued that Article 25 of the Convention applied to disentitle the carrier from relying upon the Article 22 limits. Article 25 provides “The limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result”. In a thorough and well reasoned judgement, the trial Judge considered whether the test set out in Article 25 was subjective or objective. The trial Judge ultimately concluded the test was subjective and that the Plaintiff therefore had to prove not only that the carrier was reckless but also that the carrier knew damage would probably result from its

recklessness. There was, however, no evidence of why the cartons were not stored in a refrigerated area at Heathrow. The Judge noted that it could have been because the relevant person thought no damage would come to the vaccines if not refrigerated or because of mere inadvertence. Neither of these scenarios would meet the Article 25 test. However, the Judge also noted that it could have been that the relevant person knew there was a risk of damage but simply did not want to bother storing the cargo as directed. Such conduct would meet the Article 25 test. The Judge resolved this issue by drawing an adverse inference from the failure of the carrier to present any evidence as to what actually happened and why. In result, the Plaintiff was entitled to recover its expenses and the cost, but not the invoice price, of the shipment. (The invoice price of the shipment was not awarded as damages because the shipment was replaced. The Judge held that the invoice price included a profit component which was, in fact, recovered on the second sale.)

Road Carriage - Limitation - Himalaya Clause

Valmet Paper Machinery Inc. v Hapag-Lloyd AG,
2002 BCSC 868

The Plaintiff was the shipper of a piece of heavy equipment from Helsinki to Port Alberni, British Columbia. The equipment was carried by sea from Helsinki to Vancouver and by truck from Vancouver to Port Alberni. Ten kilometres short of its destination the equipment fell off the truck and was a constructive total loss. The Defendant motor carrier admitted liability but claimed to be entitled to limit liability pursuant to the provisions of the Hapag-Lloyd bill of lading or, alternatively, pursuant to the terms of its own bill of lading and the provisions of the Motor Carrier Act or, in the further alternative, pursuant to custom. The trial Judge found that the Defendant could not rely upon the Hapag- Lloyd bill of lading as this was a “port to port” bill of lading which did not apply to the carriage beyond Vancouver. This finding was primarily based on a notation on the face of the bill of lading that the carriage was “pier to pier traffic”. (Although obiter dicta, the Judge considered an argument by the Defendant that it could rely upon a Himalaya clause in the Hapag-Lloyd bill of lading notwithstanding that it had failed to ratify the clause. The Defendant argued based on recent developments in the law of privity of contract that ratification of a Himalaya clause is no longer required. The Judge agreed.) The Judge then considered the effect of the Defendant’s own bill of lading and the provisions of the Motor Carrier Act. The Judge found that the Defendant had not issued a bill of lading to the shipper at the commencement of the carriage and that the bill of lading that was later prepared during the course of carriage from Vancouver to Port Alberni did not comply with the requirements set out in the Motor Carrier Act. The Judge then considered the Defendant’s argument that it ought to be allowed to limit liability based on a custom in the industry that liability is limited to $4.40 per kilogram. The Judge found, however, that the custom was based on the legislation in the Motor Carrier Act and held that where the Act had not been complied with it would be inappropriate to circumvent the legislative requirements through the application of custom. The Judge did concede that in a case where both parties were aware that liability was to be limited the failure to issue a bill of lading would not prevent the court from enforcing the limitation. That was not the case here and, accordingly, the Judge held that the Defendant was not entitled to limit liability.

Road Carriage - Water Damage - Insufficient Packaging

Trident Freight Logistics Ltd. v Meyer's Sheet Metal Ltd.,
2002 BCSC 729

This was a counterclaim for water damage to a cargo of 19 pallets of galvanized sheet metal carried from Calgary to Nanaimo. The cargo was loaded onto a flat bed trailer in Calgary by employees of the shipper who placed tarpaulins over the pallets. The decision to use a flat bed trailer was made by the shipper because of the size of the various pallets. It was common ground that the usual method of conveyance was by a closed van. Upon delivery of the cargo at Nanaimo, it was received "clean and dry" without any exceptions. Under these circumstances, the Judge held that there was no liability on the part of the carrier. In fact, the Judge found that there was an implied agreement that the cargo owner assumed the risk of damage given that it chose to use a flat bed trailer and its employees loaded the cargo. The Judge further found that the cargo had not been properly prepared for shipment by the shipper.

Road Carriage - Damage to Cargo - Agreement to Insure

Wenner v Willow Creek Carriers Inc.,
2002 SKCA 113

This case concerned damage to two grain dryers carried from Nebraska to Saskatchewan. The damage occurred when the dryers struck an overpass. The Defendant carrier argued that it was entitled to limit its liability to $2.00 per pound pursuant to the provisions of the Motor Carrier Act and the Regulations. However, both at trial and on appeal it was found that there was an agreement that the Defendant would insure the cargo for its full value and that the Defendant had not done so. It was held that the limitation provisions of the Motor Carrier Act and Regulations did not apply to such a breach.

Road Carriage - Convenient Forum

SC International Enterprises Inc. v Consolidated Freightways Corp.,
2002 BCSC 767

This case concerned shortage to a cargo shipped from Mexico to New Jersey. The shortage was discovered during the course of carriage at Laredo, Texas. The issue in this motion was whether British Columbia was an appropriate jurisdiction. The motions Judge held that British Columbia had jurisdiction to hear the dispute based on the facts that the Plaintiff resided in British Columbia, the invoicing and payment for the shipment occurred in British Columbia and the damages were suffered in British Columbia. However, the Judge held that either Mexico or Texas would be a more convenient forum since the witnesses would be in those locations, the loss occurred in one of those locations and it might be necessary to prove the law of one of those locations. Accordingly, the Judge held that the case should be heard in either Mexico or Texas if the Defendants agreed. Absent an agreement, the British Columbia Supreme Court would assume

jurisdiction.

Freight Forwarder - Failure to Ship

Vandenburg v Randy Houston International,
[2002] O.J. No. 485

The Plaintiff hired the Defendant to ship her goods from Toronto to Nigeria. Based on representations made by the Defendant, she understood that it was experienced in the shipment of such goods. The Plaintiff travelled to Nigeria but her goods never arrived. She claimed against the Defendant for the return of the freight she had paid and for her expenses. The Defendant counterclaimed for the costs of storing the Plaintiff's goods. The court held that the contract had been frustrated by the failure of the Defendant to ship the Plaintiff's goods, a failure which the court found was due to the lack of expertise of the Defendant. Accordingly, the court awarded the Plaintiff damages of $10,000 (the maximum amount allowed within that court's jurisdiction). With respect to the counterclaim, the court awarded damages for storage in the amount of $2,000.00. (Editor's note: Unfortunately the Reasons do not indicate why the counterclaim was allowed in this amount or at all.)

Arbitration/Jurisdiction Clauses

Stay of Proceedings - Arbitration Clause - Commercial Arbitration Code

Mariana Maritime S.A. v Stella Jones Inc.,
2002 FCA 215

This was an appeal from an Order by the motions Judge dismissing an application by the Defendant carriers for a stay of proceedings. The facts were that the parties had entered into a "Conline" booking note for the carriage of the Plaintiffs' cargo. The booking note specified that its terms would be superceded by the terms of the bill of lading which were said to be set out in full on the reverse of the booking note. In fact, as the booking note had been sent by facsimile, the terms were not on the reverse. It was, however, common ground that those terms did not include an arbitration clause. On the bill of lading that was actually issued there was added a typed "Centrocon" arbitration clause in the margin which called for London arbitration. It was this clause which the Defendants sought to enforce. The motions Judge referred to Article 8 of the Commercial Arbitration Code and noted that the court had no discretion where it finds an arbitration clause. However, the motions Judge found that on the facts of the particular case there was no evidence the Plaintiff had ever signed or agreed to the arbitration clause contained in the bill of lading and held it was therefore not part of the contract. On appeal, the Court of Appeal affirmed the decision of the motions Judge holding that if the carrier wanted to make the contract of carriage subject to the arbitration clause they should have made their intention known to the Plaintiffs.

Stay of Proceedings - Jurisdiction Clause - Towage

Atlantic Cement Carriers Ltd. v Atlantic Towing Ltd.,
2002 FCT 761

This was an application by a tug owner to stay proceedings commenced in the Federal Court by the owner of a barge for damages sustained because of the sinking of the barge and for an indemnity for any amounts the barge owner might be required to pay to the owner of the cargo on board the barge at the time of the sinking. The sinking occurred during the course of a towing operation from Pictou, Nova Scotia to various ports in Newfoundland. The application for the stay was based upon a jurisdiction clause in the TOWCON agreement that specified the agreement was to be governed by English law and conferred jurisdiction on the High Court of Justice in London. The application was resisted on the grounds that s. 46 of the *Marine Liability Act* applied or, alternatively, that there were strong reasons to not enforce the jurisdiction clause. With respect to the application of s. 46 of the *Marine Liability Act* the Prothonotary held that the contract in issue was one of towage not carriage and that s. 46 therefore did not apply. With respect to whether there were strong reasons to deny the stay, the Prothonotary reviewed the various factors set out in the "Eleftheria" [1996] 1 Lloyd's Rep. 23, and held that there were no strong reasons. Accordingly, the stay was granted.

Canadian Maritime Law/ Federal Court Jurisdiction

Jurisdiction - Rail Carriage

Herrenknecht Tunnelling Systems USA Inc. v Canadian Pacific Railway,
2002 FCT 1089

The issue in this case was whether the Federal Court had jurisdiction over a claim for damage caused to cargo during the course of carriage from Quebec to Tacoma, Washington. The cargo was damaged when the train derailed in Ontario. The Judge identified the test as being: 1. There must be a statutory grant of jurisdiction by the federal parliament; 2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction; and, 3. The law on which the case is based must a "law of Canada" as the phrase is used in s. 101 of the *Constitution Act*. The Judge found the statutory grant of jurisdiction in s.23(c) of the *Federal Court Act* which vests the court with jurisdiction in all cases where a claim for relief or a remedy is sought in relation to works and undertakings connecting one province with any other province. The second branch of the test was met by sections 113 and 116 of the *Canada Transportation Act* which oblige railways to receive, carry and deliver cargo and which provide a right of action to any person against a railway for neglect or refusal to fulfill its service obligations. Finally, the Judge held that the *Canada Transportation Act* was a "law of Canada" within the meaning of s. 101 of the *Constitution Act* and hence satisfied the third branch of the test.

Jurisdiction - Meaning of Ship

Cyber Sea Technologies Inc. v Underwater Harvester,
2002 FCT 794

One of the issues in this matter concerned whether a submersible device used to cut trees in a flooded but unlogged reservoir was a ship so as to attract the admiralty jurisdiction of the Federal Court. The Prothonotary referred to the definition of ship in the *Federal Court Act*, being, "any vessel or craft designed, used or capable of being used solely or partly for navigation, without regard to the method or lack of propulsion...". The Prothonotary noted that this was a very general and broad definition that seemed to encompass anything on or in the water and ultimately concluded that the submersible was, in all probability, a ship and that the Federal Court therefore had jurisdiction.

Application of Provincial Statutes

R v Kupchanko,
2002 BCCA 63, [2002] B.C.J. No. 148

This case raised the issue of the constitutional validity of an Order made pursuant to section 7(4) of the *Wildlife Act* of British Columbia prohibiting motorized vessels in excess of 10 horsepower from navigating part of the Columbia River. The accused argued that the Order was an invalid infringement on Federal Government jurisdiction over navigation and shipping. At first instance, the Provincial Court agreed and the accused was acquitted. On appeal, the summary conviction appeal Judge held that the impugned order was aimed at promoting the dominant purpose of the Act to which it was a part. That purpose was to protect wildlife and their habitat, a matter clearly within the constitutional jurisdiction of the provinces. The Judge held that the fact that the Federal Government through the *Canada Shipping Act* had also legislated restrictions on boating similar to those in the impugned Order did not render the Order invalid as the Federal Government had not legislated specifically with respect to that part of the Columbia River the Order regulated. The summary conviction appeal Judge held that there would have to be an express contradiction between federal legislation and provincial legislation before otherwise valid provincial legislation could be declared invalid. In reaching this decision the summary conviction appeal Judge relied in large measure upon dicta of the British Columbia Court of Appeal in *Windermere Watersports Inc. v Invermere*, (1989) 37 BCLR (2d) 112. On further appeal the Court of Appeal of British Columbia reconsidered the *Windermere* case in light of recent judgments of the Supreme Court of Canada which were recognized to significantly narrow the scope for the application of provincial laws to maritime matters. The Court of Appeal affirmed the result in the *Windermere* case but noted that the holding therein that the province could enact legislation affecting a matter of shipping and navigation was incorrect. Accordingly, the Court of Appeal allowed the appeal and held that the Order under the *Wildlife Act* was inapplicable to conveyances operating in navigable waters.

Log Salvage - International Convention on Salvage - application of Provincial Regulations

Early Recovered Resources Inc. v Gulf Log Salvage Co-Operative,
2002 FCT 184

This was a summary trial application by the Defendant, the Provincial Crown, dismissing the Plaintiff's claim for the salvage of logs in the Fraser River. The Defendant argued that the Plaintiff's claim was prohibited by the Log Salvage Regulations adopted under the provincial *Forest Act*. The Court dismissed the Defendant's application. The Court reviewed the *International Convention on Salvage, 1989* as enacted by the *Canada Shipping Act* and noted that it applied to vessels "and any other property in danger in navigable waters". The Court held that these words extended the concepts of salvage to include logs or booms of logs. The Court therefore concluded that the claim of the Plaintiff was within the jurisdiction of the Federal Court and that the provincial regulations did not play any role in the Plaintiff's claim for salvage.

Limitation of Liability

There have been no decisions rendered during 2002 relating to limitation of liability.

Admiralty Practice

Appeals - Stay Pending Appeal

Saskatchewan Wheat Pool v Armonikos Corp. Ltd.,
2002 FCA 444

In this matter the Appellant applied for a stay of a judgement pending appeal. The judgement appealed from had ordered that the Federal Court proceedings be stayed in favour of London arbitration pursuant to an arbitration clause in a charter party. The court noted that the test to be applied was three-fold: (a) there must be a serious issue to be tried; (b) the applicant must show irreparable harm will result if a stay is not granted; and, (c) that the balance of convenience favours granting a stay. The court held that the first part of the test had been met as the appeal was not frivolous or vexatious. The court held the second part of the test had also been met in that the London arbitration had already and prematurely been commenced and the Appellant had lost its right to appoint an arbitrator. Moreover, if the Respondent obtained and collected an award, the Appellant would not be able to recover the payment, if successful on the appeal, as the Respondent had no Canadian assets. Finally, on the question of balance of convenience, the court held that the balance favoured granting the stay to avoid the costs and effort of the arbitration and because the Appellant was prepared to post security.

Appeals - Dismissal for Delay

Korea Heavy Industries & Const. Co. Ltd. v Polar Steamship Line,

2002 FCA 173

This was an application to dismiss an appeal for delay in failing to file appeal books within the prescribed time. The facts were that the Plaintiffs had notified the Defendants of their intention to examine representatives of the Defendants for discovery but failed to do so and failed to move their case forward. As a consequence, a Prothonotary ordered that the Plaintiffs were precluded from examining the Defendants and set down guidelines for the continuation of the action. The Prothonotary's order was affirmed on appeal to a Judge of the Court. The Plaintiffs further appealed to the Federal Court of Appeal but failed to file the Appeal Books in time. The Defendants then brought this motion to dismiss the appeal for delay. The Plaintiffs did not appear on the motion and the Court of Appeal granted the order dismissing the appeal with costs.

Arrest - Ship's Equipment - Contempt

Whyte v The "Sandpiper VI",
2002 FCT 271

In this matter the Plaintiff had arrested the Defendant dredge and afterwards learned that the "spoils pipeline" had been rented to a third party and moved. The Plaintiff thereafter brought this motion which was treated as an application to show cause order. The Defendant argued that the rented pipeline was not caught by the arrest warrant. However, the Prothonotary held that an arrest warrant catches all of a ship's equipment including equipment not on board the ship. The Prothonotary further held that the Plaintiff had made a prima facie case for contempt and a show cause order was issued.

Arrest- Sheriff in Possession - Movement of Arrested Vessel - Building Contracts

Striebel v The "Chairman",
2002 FCT 545

This case concerned a ship building contract that went awry. The Plaintiffs, the mortgagees and intended owners of the defendant ship, commenced this action against the shipbuilder for damages. The Defendant shipbuilder counterclaimed for lost opportunity to complete the construction of the vessel. These reasons deal with three interlocutory motions. The first was an *ex parte* motion brought by the Plaintiffs for an order that the sheriff go into possession of the defendant vessel. The second motion was by the Defendant to set aside the *ex parte* Order. The third motion was by the Plaintiff for an order to move the Defendant vessel to the premises of another shipyard for completion. The Prothonotary allowed the motions by the Plaintiffs and dismissed the motion by the Defendant. With respect to the motion to put the sheriff into possession the Prothonotary noted that there was no authority setting a test to be met to put a sheriff or marshal into possession. The Prothonotary thought that the test should be set at a very low threshold and held that an appropriate test should be "reasonably plausible evidence that the vessel should have the protection afforded by a sheriff in possession". The Prothonotary found this test was met in the this case as there was evidence of petty vandalism and obstructionism by the Defendant's employees. With respect to the motion to set aside the *ex parte* Order, the

Defendant argued, *inter alia*, that the Order should be set aside because the Plaintiffs did not give full disclosure. The Prothonotary held that the facts relied upon by the Defendant were not material and further noted that the setting aside of an *ex parte* order putting a sheriff into possession should be upheld if there is any possibility that possession in the sheriff may be of reasonable value. Finally, with respect to the motion to move the vessel to another shipyard for completion, the Prothonotary allowed the motion noting that the Plaintiffs had exercised their right to take possession of the vessel as mortgagees which they were entitled to do and further that any damages the Defendant might suffer would be secured by a bond to be supplied by the Plaintiffs.

Arrest - Bail

Striebel v The "Chairman",
2002 FCT 925

The issue in this motion concerned the amount of security to be provided to a shipbuilder who had failed to complete construction of a yacht within the time frame required by the building contract. The purchasers took possession of the yacht as mortgagees and moved it to the yard of another builder for completion. The shipbuilder counterclaimed for lost profits in the amount of $1.8 million and sought security in the amount $2 million. The Prothonotary reviewed the evidence of the shipbuilder's counterclaim and found it contradictory and incomplete and concluded that the claim would not succeed in the amount presented. The Prothonotary therefore set the security required at $1 million.

Arrest - Letter of Guarantee - Interpretation

Richardson International Ltd. v The "MYS CHIKHACHEVA" et al.,
2002 FCT 482

The issue in this motion was the interpretation of a letter of guarantee given by the Royal Bank of Canada to secure the release of the defendant vessel from arrest. By the letter of guarantee the bank agreed that if the owners did not pay a judgment against them execution could issue against the bank. The Plaintiff in due course obtained a judgment against the owners which was not paid and, consequently, made demand under the guarantee. The bank refused payment because the beneficiary of the guarantee was stated as being the Federal Court of Canada. Notwithstanding this wording, the Prothonotary held that the bank was liable under the guarantee. The Prothonotary stated that given the factual background it ought to have been clear to the bank that the guarantee was to secure the Plaintiff and not the Federal Court and he interpreted the guarantee accordingly. With respect to costs, the Prothonotary declined to award costs against the bank, a non-party.

Arrest - Release - Security - Arbitration

Cyber Sea Technologies Inc. v Underwater Harvester,
2002 FCT 794

In this matter a submersible was arrested and the Defendant brought an application, inter alia, to release the submersible without bail or, in the alternative, to post security. The grounds for the Defendant's application were that the action was without merit and that the dispute was subject to arbitration. The Prothonotary held that it is only in exceptional circumstances that a vessel will be released from arrest without bail. Moreover, the fact that the dispute was subject to arbitration did not disentitle the Plaintiff to security. The fact of arbitration was, however, relevant to the amount of security. In setting the amount of the security the Prothonotary took into account that each party was required to pay its own costs of the arbitration.

Arrest - Security

C.P. Ships (Bermuda) Ltd. v The "Panther Max",
2002 FCT 406

This was an appeal from an order of a Prothonotary requiring the Defendants to pay $780,500.00 as security to obtain the release from arrest of the Defendant vessel and an additional 20% as a provision for interest and costs. The appeal Judge affirmed the award of the Prothonotary holding that he had properly understood and applied the correct test, namely, that the Plaintiff was entitled to security in an amount sufficient to cover its reasonably arguable best case.

In Rem Actions - Arrest - Dispensing with Service

Brooks Aviation Inc. v Wrecked and Abandoned Boeing Sb-17g Aircraft,
2002 FCT 503

This very interesting application was for an order dispensing with service of the Statement of Claim, Affidavit to Lead Warrant and Warrant. The *res* was a B-17 aircraft that had crash landed on a lake in Labrador during the winter of 1947. The following year the aircraft sank during the spring thaw and it remains submerged. The wreck was discovered by the Plaintiff in July 1998. The story of the discovery of the wreck was widely publicized in both print and by a television documentary. The Plaintiff in its statement of claim alleged salvage rights to the wreck and, because it was impossible to serve the *res* brought this application. Given the special circumstances of the case, the court allowed the Plaintiff's application. In doing so the court noted that the Plaintiff had provided Federal and Provincial authorities with the court documents and that notice of the discovery and the salvage claim had been or would be given to all interested persons.

***In Rem* Actions - Service - Default Judgment - Interest - Costs for Lay Litigants**

Coath v The "Bruno Gerussi",
2002 FCT 385

This was an application for default judgment *in personam* and *in rem*. The Prothonotary granted the judgment *in personam* but refused the judgement *in rem* as the Statement of Claim had not

been served on the vessel but instead had merely been given to the person in charge of the vessel. The Prothonotary noted that such service would only be effective if the affidavit material disclosed that access to the ship was not possible. The Plaintiff requested interest on the judgment at 12.5% per annum compounded semi-annually. The Prothonotary noted that interest is governed by the principle of restitution and that interest is normally awarded at prevailing commercial rates. In the absence of any evidence as to prevailing rates, the Prothonotary awarded interest at the rate paid on monies paid into the Federal Court ie. 3.6%. With respect to compound interest, the Prothonotary again noted that this is discretionary and allowed compound interest as the Plaintiff would have received compound interest if it had been paid and the monies were deposited in a bank account. Finally, the Plaintiff, who was self-represented, requested costs of $500.00. The Prothonotary held that a lay litigant may receive out of pocket expenses for time spent pursuing his legitimate interests and awarded the Plaintiff $300.00.

In Rem Actions - Striking

Trawlercat Marine Inc. v The "Amity",
2002 FCT 1181

The Defendant obtained plans from the Plaintiff for a 55' catamaran which the Defendant intended to build. The Defendant decided not to proceed with the project and later retained a naval architect to design a 70' catamaran. The Plaintiff subsequently commenced this *in personam* and *in rem* action alleging breach of a contract to execute a purchase and construction agreement and breach of copyright. The Plaintiff arrested the 70' catamaran which was in the process of being built. The Defendant then brought this motion to strike the *in rem* portions of the Statement of Claim. The motion was allowed by the Prothonotary. The Prothonotary held that the copyright claim could not sound *in rem* and further held that the *in rem* contract claim against the 70' catamaran could not be supported by section 22(2) (m) (necessaries) or (n) (contracts relating the repair or building of a ship) of the *Federal Court Act* since the ship did not exist at the material time.

Summary Judgment - Agreement to Insure - Waiver of Subrogation

Pacifica Papers Inc. v The "Haida Monarch",
2002 FCT 676

This was a motion for summary judgment by the Plaintiff. The case concerned the partial loss of a cargo of logs being carried from Alaska to Powell River. It was common ground that the action by the Plaintiff was a subrogated action brought by the Plaintiff's insurer. The Defendants alleged, inter alia, that the Plaintiff's insurer was precluded from bringing the action because the Defendants were an "insured" under the policy and because of the waiver of subrogation clause contained in the policy. The motions Judge reviewed and summarized the principles applicable to motions for summary judgment and noted particularly that summary judgment was not appropriate where there was conflicting evidence or issues of credibility. The motions Judge then concluded that the issue of whether the Defendant was an insured was too complex for summary judgment and dismissed the motion.

Discovery - Failure to Provide Documents - Contempt of Court

Island Tug & Barge Ltd. v The "99 Haedong Star",
2002 FCT 432

This case once again illustrates the dangers of failing to comply with court orders. The Prothonotary had ordered that the Defendants provide the Plaintiff with originals of various documents and that the Plaintiff's surveyor be allowed to inspect the defendant vessel. The Defendants failed to provide all of the documents required and failed to allow the Plaintiff's surveyor to conduct the required inspection. As a consequence, the Defendants were found in contempt. The corporate Defendants were fined $25,000.00 and the Master of the defendant ship was fined $5,000.00.

Discovery Witness Travel Expenses - Business Class

Goodman Yachts Llc. v The "Gertrude Oldendorff",
2002 FCT1168

The sole issue in this matter was whether discovery witnesses travelling from India and Singapore to Vancouver were entitled to Business Class air travel. The Prothonotary held that in the circumstances of the case Business Class was appropriate. The Prothonotary cautioned, however, that such a premium mode of travel would not be appropriate in all instances.

Discovery - Implied Undertaking

N.M. Patterson & Sons Ltd. v The St. Lawrence Seaway Corporation
2002 FCT 1247

This important case reminds practitioners that documents produced on discovery and information received through the oral discovery process is subject to an implied obligation of confidentiality. Such documents and information may not be disclosed to any third parties or used for any purpose other than the litigation in which it is produced or given. The implied undertaking is only released if and when the document or information becomes publicly available by being tendered as evidence at trial. In this case, a breach of the implied undertaking was found to be contempt of court.

Discovery - Documents - Production - Average Adjusters Reports

Fiddler Enterprises Ltd. et al. v Allied Shipbuilders Ltd.,
2002 FCT 44

This was an application by the Defendant shipyard for production of a Statement of Particular Average. The underlying case was for fire damage caused to the Plaintiffs' vessel. The Defendant sought production of the adjuster's report as it would distinguish work done for the owner's

benefit from work necessitated by the fire damage. The Prothonotary ordered that the report be produced. In so doing he noted that although reports of average adjusters have no legal effect they are rarely questioned by the courts and are often looked upon as *prima facie* evidence of the matters disclosed.

Pleadings - Amendment - Striking Out - Length of Written Argument

Berhad v Canada,
2002 FCT 298

In this matter the Defendant brought a motion to strike the Statement of Claim on various grounds including that it failed to disclose a reasonable cause of action and was frivolous and vexatious. The Defendant additionally brought a motion for leave to amend its Statement of Defence to plead that the Statement of Claim failed to disclose a reasonable cause of action and was frivolous and vexatious. The amendments to the Statement of Defence were necessary as the case law establishes that a motion to strike out a Statement of Claim on any basis other than for failure to disclose a reasonable cause of action must be brought before the Defendant has pleaded and may only be brought subsequently if the Statement of Defence contained a reservation. The Statement of Defence in this matter contained no such reservation and hence the need for the amendment. The Prothonotary held that the Defendant did not need to amend its Statement of Defence to plead want of a reasonable cause of action in the Statement of Claim since this went to jurisdiction which could always be challenged regardless of whether the Defendant had filed a Statement of Defence. With respect to the amendment to plead that the Statement of Claim was frivolous and vexatious, the Prothonotary noted that such an amendment was of a merely procedural or technical nature and disallowed the amendment. Alternatively, the Prothonotary held that the Defendant ought to have applied for the amendment much earlier. A secondary issue in this case concerned the written argument filed by the Defendant for use on the later motion to strike which comprised 145 pages in length. The Prothonotary noted that such written arguments should generally not exceed 30 pages in length and ordered the Defendant to redraft the argument so that it did not exceed 45 pages.

Default Judgment - Requirement for Affidavit Evidence

249387 BC Ltd. v The "Edith Cavell",
2002 FCT 798

This was an application for *in rem* judgment in default of a defence. The Prothonotary granted the judgment but adjourned the balance of the motion to set the amount of the judgment pending the filing of proper affidavit evidence. The Prothonotary reviewed the authorities and held that the amount of the default judgment could not be based simply on allegations in the Statement of Claim but needed to be proved by proper affidavit evidence.

Default Judgment - Reference

Island Tug & Barge Ltd. v Haedon Co. Ltd. et al.,

2002 FCT 250

This was an application by the Plaintiff for judgment in default of defence. Although the motion was not opposed, the court considered whether a reference to determine damages was necessary given that the action was *in rem*. The Prothonotary held that he had the discretion to give default judgment without a reference provided the claim was well founded, which he found it was.

Dismissal - Breach of Peremptory Orders

Angloflora Ltd. v The "Cast Elk",
2002 FCT 1230

This was an appeal from an order of a Prothonotary dismissing the Plaintiff's claim for failure to comply with a peremptory order that required the Plaintiff to pay costs. The appeal Judge dismissed the appeal and upheld the order striking the Plaintiff's claim. The appeal Judge noted that the only relevant consideration on such a motion is whether there was justification for the non-compliance. The standard of justification was whether the party had clearly demonstrated that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances. The failure to comply must be beyond the party's control. Moreover, prejudice to the party that failed to comply is not a consideration in determining if the standard of justification is met.

Time - Extension - Late Expert's Reports

Armonikos Corporation Ltd. v Saskatchewan Wheat Pool,
2002 FCT 526

This was an application by the Defendant for an extension of time to file rebuttal expert evidence. The primary ground argued was that the report had not been filed in time because of the illness of Defendant's counsel. The Prothonotary allowed the application and in doing so identified the applicable test as being: a continuing intention to pursue the application; that the application has some merit; lack of prejudice; and that a reasonable explanation exists for the delay. The Prothonotary further noted that in applying the test there was a balancing of factors with the objective being that justice is done. The Prothonotary further noted that a party must not be deprived of his rights on account of an error of counsel where it is possible to rectify the consequences of the error without injustice to the opposing party.

Time - Extension

Global Enterprises International v The "Aquarius", "Sagran" and "Admiral Arciszewski",
2002 FCT 193

This was an application by the Polish trustee in bankruptcy of the Defendant shipowner for an extension of time in which to file an appeal of an order striking the trustee's affidavit of claim and of an order refusing the appointment of *pro bono* counsel. The Prothonotary dismissed the

application on the grounds that there was not a continuing intention to appeal (as evidenced by the lack of effort put into the filing of materials), that the appeals were without merit, and that the reason given for the delay (the absence of the trustee from his office) was not an adequate explanation.

Simplified Action - Striking of Affidavits Contradicting Interrogatories

Tempo Marble & Granite Ltd. v The "Mecklenburg I",
2002 FCT 1190

This was an application by the Defendants to strike two affidavits containing the evidence in chief of the Plaintiff in this simplified action. The basis for the application was that the evidence in the affidavits contradicted earlier evidence given at the discovery phase in answers to interrogatories. The Prothonotary found that the evidence did, in fact, contradict the earlier evidence and further found that the Defendants were prejudiced by the affidavits in that they did not have sufficient time to mount a proper defence. The Prothonotary noted that the policy today is to provide evidence in advance so each party knows the case it has to meet and is not taken by surprise. In result, the Prothonotary ordered that the affidavits be struck.

Effect of Mutual Release - Rule 220

Gearbulk Pool Ltd. v Scac Transport Canada Ltd.,
2002 FCT 353

This was an appeal from a determination of a point of law under Rule 220 of the Federal Court Rules, 1998 which proceeded under an Agreed Statement of Facts. The issue was whether a mutual release in a cargo action was a bar to the claim by Gearbulk, the Plaintiff in the present action, for damages for loss of freight arising out of a breach of a voyage agreement note. Gearbulk had entered into the voyage agreement note with the Defendants for the transportation of 10 transformers. The first of the transformers was damaged during loading. It was subsequently determined that all of the remaining transformers were packaged similarly to the first and were unsuitable for transportation. Accordingly, the remaining transformers were not loaded. The owner of the damaged transformer brought an action against Gearbulk and the other Defendants for the damage sustained to the transformer. This action was settled and a mutual release was signed. The cargo owner was paid $75,000, of which $10,311.48 was to be paid by the cargo owner to Gearbulk. The payment of $10,311.48 to Gearbulk was on account of costs incurred to clean up the spilled contents of the transformer. The mutual release provided that it was "with respect to any damage to the Cargo". Based on the wording of the release, the court held that it related only to claims arising out of the damage to the cargo and did not extend to bar the present action which was for freight. A noteworthy aspect of this case is that it illustrates the potential dangers of proceeding under Rule 220 on an Agreed Statement of Facts. The Judge on appeal noted that there was a significant possibility that the record before the court was defective but nevertheless proceeded to hear and decide the matter without correcting the defects as he considered that any injustice was "created by the parties who had ample opportunity to put the

complete record before the court".

Limitation Period - Extension of Time

Croisieres A.M.L. Inc. v Goelette Marie Clarisse Inc.,
[2000] F.C.J. No. 1559

This was an application to extend the two year limitation period set by s. 572(1) of the *Canada Shipping Act* for the commencement of an action against a ship for damage to property or personal injury. The evidence showed that the Plaintiff had sent the Defendant a notice of its claim within the two year period. The Defendant acknowledged the notice and requested the Plaintiff send relevant documentation "without prejudice and without making any admission". No further evidence or explanation was offered. The Court held that the evidence was not a sufficient explanation by the Plaintiff of the delay and dismissed the application.

Mortgages, Liens and Priorities

Canada v Neves (The "Kristina Logos),
2002 FCA 502, affirming in part 2001 FCT 1034

This was an appeal from an order of a motions Judge setting priorities to the sale proceeds of the Defendant vessel. The vessel had been seized by the Crown for violations of the *Fisheries Act* and was later arrested and sold at the application of the Crown. The claimants were the Crown, the mortgagee, and the co-owners of the vessel. The Crown claimed a priority for the costs of sale, the costs of maintaining the ship, for $50,000.00 ordered forfeited to the Crown and for a $120,000.00 fine imposed by the Supreme Court of Newfoundland for violations of the *Fisheries Act*. The Prothonotary granted the Crown priority ahead of the mortgagee for the costs of sale and for the $50,000.00 ordered forfeited. The Prothonotary refused to grant the Crown a priority for the $120,000.00 fine or for the costs of maintaining the vessel. The Prothonotary further ordered that the amount owing to the mortgagee should rank after the claim of one of the co-owners of the vessel to the surplus. On appeal the motions Judge altered the priorities. The motions Judge gave the highest priority to the Crown for the costs relating directly to sale. Second priority went to the mortgagee. Third in priority came the costs of the Crown incurred for the care of the crew. Fourth and fifth in priority, respectively were the claims for the $50,000.00 forfeiture and $120,000.00 fine. The balance of the fund was to be distributed to the owners of the ship. The Crown's claim for the costs of preserving the ship were disallowed. On further appeal the Federal Court of Appeal upheld the decision of the motions Judge except with respect to the $50,000.00 forfeited. With respect to the forfeiture, the Court of Appeal held that this was an *in rem* claim pursuant to s. 72(1) of the *Fisheries Act* and that pursuant to s. 75 of that act such a claim should be ranked in priority to all other claims.

Allocation of Payments

Trans Tec Services Inc. v The "Lyubov Orlova",
2002 FCA 275, affirming 2001 FCT 958

This was an appeal from a summary trial application in which the Plaintiff's claim was dismissed. The Plaintiff had supplied bunkers to the defendant ship pursuant to a contract between the Plaintiff and the charterer. The Defendant was a sub-charterer who had paid to the Plaintiff the amounts said to be owing in respect of bunkers. The payments specified that they were for the amounts owing in respect of bunkers delivered to the defendant ship. The Plaintiff, however, applied the payments to other invoices owing to the Plaintiff by the charterer. The Plaintiff argued it was entitled to do so by the terms of its contract with the charterer. The motions Judge held, however, that the contract between the Plaintiff and charterer did not bind the Defendant and held that by retaining the payments the Plaintiff accepted the payment terms of the Defendant. On appeal, the Federal Court of Appeal agreed with the motions Judge that the Plaintiff's conduct made it clear that it accepted the funds in full payment of the claims against the Defendant ship.

Lien For Necessaries - American Law

Richardson International Ltd. v The "MYS CHIKHACHEVA" et al.,
2002 FCA 97

This was an appeal from a decision of the Trial Division allowing the Plaintiff's claim for necessaries supplied to the "Mys Chikhacheva". The facts of the case were very complicated. The Plaintiff and one Defendant, Starodubskoe, had entered into a series of agreements relating to the re-fitting of a vessel, the supply and purchase of fish products and the supply by the Plaintiff of provisions to the "Mys Chikhacheva". Starodubskoe later became bankrupt and the Plaintiff obtained a default judgment in Seattle, Washington. The "Mys Chikhacheva" was subsequently arrested in Nanaimo, British Columbia for the necessaries supplied to her and paid for by the Plaintiff. The Defendant resisted the Plaintiff's claim arguing, *inter alia*, that the "Mys Chikhacheva" was not owned by Stardubskoe, that the Plaintiff had no maritime lien for necessaries, that the matter was *res judicata* because of the Washington judgment and that the Plaintiff had waived any right to a maritime lien. At trial the Judge reviewed the evidence of ownership and noted that the vessel had been registered both in Cypress and Russia with different registered owners. The trial Judge concluded that Stardubskoe was not the registered owner but held that it was nevertheless a bareboat charterer. The trial Judge next considered the issue of applicable law and concluded that the contracts were governed by American law. In reaching this conclusion the trial Judge noted that the agreements called for American law, that the place of arbitration was Seattle, that the currency of payment was United States dollars, that payments were to be made in Washington and that interest was fixed by reference to the prime rate of the U.S. Bank of Washington. The trial Judge accepted the evidence of the Plaintiff's expert on American law that, under American law, the Plaintiff had a maritime lien for the necessaries supplied and paid for by the Plaintiff. The trial Judge further held that, under American law, a maritime lien could not be defeated unless there was an express waiver. On the issue of *res judicata* the Court held that the Washington judgment was not *res judicata* as the

Washington case was against Stardubskoe whereas the case at bar was based on a maritime lien on the vessel "Mys Chikhacheva". Finally, on the issue of damages the trial Judge held that there was no requirement to set off the lien amounts against the value of fish delivered by the Defendant to the Plaintiff and further allowed the Plaintiff to amend its Statement of Claim just prior to closing argument to increase the amount claimed. On appeal, the Court of Appeal upheld the trial Judge's determination of the proper law of the contract as being American law and noted that such a determination should be granted a high level of curial deference analogous to a finding of fact. On the issue of waiver the Court of Appeal stated that there was a strong presumption against such waiver under American law and upheld the trial Judge's finding that there had been no express waiver. On the issue of damages, the Court of Appeal agreed with the trial Judge that there was no right of set-off and further agreed that the amendments were appropriate as they did not cause prejudice in a meaningful way.

Taxation

Neves v The "Kristina Logos,
2002 FCT 239

In a previous priorities hearing the Crown had been awarded priority in respect of its costs incurred in the sale of the defendant ship in a reasonable amount to be agreed or, failing agreement, to be taxed. The issue in this case was whether the Crown's costs were to be taxed on a solicitor and client basis or on a party and party basis. The Taxation Officer held that in the absence of a special direction the costs were to be taxed on a party and party basis.

Lien for Necessaries - Vessel Under Charter - U.S. Law

Kirgan Holding SA v The "Panamax Leader",
2002 FCT 1235

In this case the Plaintiff had entered into a contract with the agent for the demise charterer of the Defendant ship for the supply of bunkers. The contract contained a provision requiring the application of U.S. law. Bunkers were supplied to the ship by sub-contractors of the Plaintiff and were not paid for by the demise charterer who became bankrupt. The Plaintiff therefore commenced this proceeding and arrested the defendant ship. The Defendant, the owner of the Defendant ship argued that they were not a party to the contract and that the Plaintiff had no right to a lien over the vessel. The Judge applied U.S. law and held that the demise charter had the presumed authority to bind the ship and to assert a lien unless the Plaintiff had been specifically notified otherwise. The Defendant relied upon a prohibition of lien clause in the charter party and on notices of the prohibition of lien clause posted throughout the ship. The Judge held, however, that these notices were never brought to the attention of the Plaintiff who did not personally deliver the bunkers. In result, the Plaintiff was held entitled to a lien for the bunkers supplied. The Judge did, however, disallow the claim for interest at 1.5% per month on the grounds that it was excessive and substituted an award of interest at 2% over prime.

Assignment of Crew Claims

Finansbanken ASA v The "GTS Katie",
2002 FCT 74,

The issue in this case was whether the claimant had a subrogated interest in the wage lien of the crew of the defendant vessel. The claimant alleged that he had entered into an agreement with the vessel owner to provide the owner with US$40,000.00 to pay the crew. In return, and with the full knowledge and participation of the crew, the claimant was to be subrogated to the crew's wage claim in the amount of US$ 50,0000.00 (ie. a 25% premium). Further, it was alleged that the agreement was subject to U.S. law. The Prothonotary rejected the subrogated claim primarily on the basis that the evidence was hearsay and did not establish an agreement in which the crew participated. Moreover, the Prothonotary held that there was no good evidence establishing an agreement that U.S. law would apply and that under Canadian law a wage claim could not be assigned or subrogated without the consent of the court. Finally, the Prothonotary held there were no equitable reasons to allow the claim since the claimant was not a voluntary organization that paid the crew wages out of altruism. The fact of the 25% premium discounted altruism as a motive.

Necessaries Suppliers

Finansbanken ASA v The "GTS Katie",
2002 FCT 73, affirmed 2002 CFPI 339

In this matter a supplier of necessaries attempted to obtain priority by entering into an agreement with the ship owner for the transfer of property on board the ship. The property transferred consisted of plans, manuals, drawings, 5 life rafts and 2 breathing apparatus. The agreement provided that the ship owner could retake possession and ownership of the property by the payment of the outstanding amount owed for necessaries. The mortagee of the defendant vessel challenged the agreement arguing that the property allegedly transferred was covered by the mortgages and was invalid as the transfer had not been consented to by the mortgagees. The Prothonotary agreed with the mortgagee. He reviewed the terms of the mortgage and the meaning of the term "appurtenances" and concluded that the property was subject to the mortgage. He further held that the consent of the mortgagee is required where the mortgage security is dealt with so as to reduce the value of the security. The decision of the Prothonotary was upheld on appeal.

Moorage - lien

False Creek Harbour Authority v The "Shoda",
2002 FCT 275

This was an action for outstanding moorage and miscellaneous charges. The moorage agreement required, *inter alia*, that the vessel owner not cause a nuisance or disturbance and provided that in the event the owner breached the terms of the agreement the Harbour Authority could seize the vessel and exercise a warehouseman's lien pursuant to the provincial *Warehouseman's Lien Act*.

In breach of the agreement the dock owner was involved in a physical altercation with another user of the dock and, as a consequence, the Harbour Authority terminated the agreement and advised the vessel owner to remove his boat. The owner did not do as requested and the Harbour Authority accordingly seized the boat and removed it to another marina where it incurred additional storage charges. The vessel owner argued that he was not responsible for the storage charges as the criminal charges that were laid arising out of the altercation had been dismissed. The Judge held, however, that the Harbour Authority was within its rights in terminating the lease and that the Harbour Authority had a lien on the vessel for the storage and miscellaneous charges pursuant to the *Warehouseman's Lien Act* as incorporated by the moorage agreement.

Miscellaneous

Refund of Excise and Sales Tax on Diesel Fuel

Seaspan International Ltd. v Canada,
2002 FCT 675

This case concerned the interpretation of section 23(8)(c) of the *Excise Tax Act* and in particular whether the Plaintiff was entitled to a refund of tax paid on diesel fuel used to generate electricity on board its vessels. The Court held that the Plaintiff was entitled to a refund of tax.

Collision - Tug and Tow - Towage Conditions - Damages - Standard on Appeal

Gravel and Lake Services Ltd. v Bay Ocean Management Inc.,
2002 FCA 465

This was an appeal from the Trial Division wherein the trial Judge apportioned liability for a grounding 75% to the "Lake Charles" and 25% to the "Robert John". The case arose out of an alleged collision between the "Lake Charles" and the tug "Robert John" in the Port of Thunder Bay. The Plaintiff, the owner of the "Robert John", alleged that, when the tug and another tug were hooked up to the "Lake Charles" to assist her to berth, the "Lake Charles" negligently drifted into the "Robert John" and caused her to go aground. The Defendants denied there was a grounding and denied negligence. The trial Judge found as a fact that there had been a grounding and further held that the parties were both partly at fault. Liability was apportioned 75% to the "Lake Charles" and 25% to the "Robert John". The Plaintiff also claimed that its standard terms and conditions entitled it to contribution and indemnity from the Defendants. The trial Judge held, however, that the towage contract was between the Plaintiff and the charterer of the vessel. The owners and managers of the "Lake Charles"were never a party to the agreement and were therefore not bound. On the issue of damages, the trial Judge allowed damages for replacement of a rudder stock on the principle that "no deduction is made from the damages recoverable on account of the increased valued of the tug or the substitution of new for old materials". The trial Judge disallowed damages for steering gear repairs on the grounds that the damage to the gear resulted from delay in drydocking the vessel and not from the original grounding. The trial Judge

also disallowed a claim for re-drydocking to re-install the original propeller holding that this could be done at the next scheduled five year drydocking. On appeal, the Federal Court of Appeal noted that the Appellant's arguments were virtually all related to findings of fact by the trial Judge and that such findings could not be reversed unless it was established that the trial Judge made a palpable and overriding error which affected his assessments of the facts. With respect to the trial Judge's apportionment of liability, these findings should not be disturbed unless it can be clearly shown that the trial Judge's conclusion was based on an error in law or a mistaken conclusion of fact. The Court of Appeal held that these tests had not been met by the Appellant and dismissed the appeal with the exception that the damages were reduced by $7,000.00 to take into account a concession that was made by the Respondent at trial.

Charter Parties

Armonikos Corp. v Saskatchewan Wheat Pool,
2002 FCT 799

The issue in this case was whether a charter party had been concluded between the brokers acting for the parties. The Defendant argued that no charter party had been agreed because there had not been a meeting of the minds regarding a significant term, notably, whether the vessel to be chartered was certified by the International Transport Workers Federation. The court held, however, that the broker for the Defendant had not been particularly attentive to this issue and had confirmed the charter party without the inclusion of an ITF clause. Further, the court held that the broker for the Defendant did not view the absence of an ITF clause as an impediment to the charter party and, once the issue was squarely raised, agreed to a charter party with a modified ITF clause. As a consequence of the court's finding that there was a binding charter party, the court stayed the present action in favour of London arbitration pursuant to an arbitration clause in the charter party.

Charter Parties

Champion International v The "Sabina",
2002 FCT 1122

Again the issue in this case was whether there was a concluded agreement between the parties. The Plaintiff and Defendant, through their respective agents, had entered into negotiations for the carriage of the Plaintiff's cargo. All substantial matters had been agreed with the exception of lay days and quantity of cargo which were characterized as "loose ends" by the Defendant. However, before these "loose ends" were dealt with the Defendant advised the Plaintiff that it had received another offer to time charter the ship which it intended to accept. The Plaintiff sued for breach of contract. The court agreed with the Plaintiff that although a formal contract was never signed there was agreement on the substantive terms and there was therefore an agreement which was breached by the Defendant.

Charter Parties - Set-off

Barber Dubai Shipping Agencies Co. v Angel Maritime Inc.,
111 ACWS (3d) 3

This was a dispute over fees payable to a broker by a shipowner. The charter party provided for daily demurrage which had been unpaid by the charterer. The shipowner attempted to set-off the unpaid demurrage from the fees payable to the broker. Both at first instance and on appeal the court held that the shipowner was not entitled to claim a set-off.

Immigration - Deportation Costs - Liability of Agent

March Shipping v Canada,
2002 FCT 1294

This was a request for judicial review of the filing of a certificate under the *Immigration Act* requiring the Applicant to post security in the amount of $120,000.00. The certificate was filed against the Applicant as the agent for the owner of a ship. The ship owner became insolvent and eight crew members deserted. The Applicant argued that it was not liable as it had ceased acting as agent for the ship owner upon the insolvency of the ship owner and prior to the desertion of the crew members. The Court held, however, that the Applicant was liable. The Court noted that the term "transportation company" in the Act should be given a broad interpretation and further noted that the Applicant had not advised the Ministry of Citizenship and Immigration that it had ceased acting as agent.

Greer Shipping Ltd. v Canada,
2002 FCA 80

This was an appeal from a decision of the Trial Division holding the agent of the ship liable for the costs of deportation of a crew member who deserted the ship while at Vancouver in 1992. The appeal turned on the definition of "transportation company" in the *Immigration Act*. The Federal Court of Appeal noted that the statutory definition had been changed in 1993 from "persons carrying or providing for the transportation of persons" to "persons carrying or providing for the transportation of persons or goods". The Court of Appeal held that the old definition applied and that under the old definition an owner or operator of a cargo ship was not a "transportation company". Accordingly, the appeal was allowed and the agent was not liable for the costs of deportation. (Note: The statutory amendment to the definition of "transportation company" severely limits the precedential value of this decision.)

Pollution - Sentencing

R v The "Tahkuna",
[2002] N.J. No. 62

This was an appeal of sentence imposed by a Provincial Court Judge. The Defendant ship was charged under the Oil Pollution Prevention Regulations of the *Canada Shipping Act*. The charges

stemmed from a spill of approximately 1,000 litres of fuel during refuelling operations. The cause of the spill was that a valve in the overflow line had been inadvertently left open. The spill affected 1,500 feet of shoreline and the clean up costs, which were paid by the shipowner, amounted to $65,000.00. Under these circumstances, the trial Judge imposed a fine of $20,000.00. The shipowner appealed the fine to the Newfoundland Court of Appeal arguing that the fine far exceed the range customarily imposed for similar offences. The Court of Appeal noted that it could only intervene to vary a sentence imposed at trial if the trial Judge committed "an error in principle" leading to a sentence that was "demonstrably unfit". Upon reviewing the circumstances, the Court of Appeal found no such error in principle and dismissed the appeal.

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