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Developments in Canadian Maritime Law [1] *2001*

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[1]This paper contains summaries of cases decided during the period from January 1, 2001 to approximately February 28, 2002. Updates to these summaries can be found on the author's internet site at http://www.admiraltylaw.com.

1. Marine Insurance

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 "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 Trial 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.**

Warranties - Authority of Broker

Elkhorn Developments Ltd. v Sovereign General Insurance Co. et al.,
2001 BCCA 243, [2001] B.C.J. No. 630

This was an application by the Defendants for summary dismissal of the Plaintiff's claim for coverage under a hull and machinery policy. The policy contained a warranty that any movements of the barge would be subject to underwriters' prior approval. In breach of this warranty, the barge was moved without any notice to underwriters and sank four days after the move had been completed. A marine surveyor was appointed but he was unable to come to a firm

opinion on the cause of the sinking. Subsequent to the sinking, the insurers and the broker agreed to cancel the insurance policies effective the day of the move. The issues in the case were whether the warranty was a true promissory warranty or merely a suspensive condition and was the insurance policy properly cancelled retroactively. At first instance the motions judge held that in order for a clause to constitute a promissory warranty there must be "a substantial relationship between the warranty and the loss incurred". The motions judge further held that in order to answer this question there was a need for further evidence concerning the cause of the sinking of the barge. The motions judge therefore dismissed the application and ordered that the matter proceed to trial. On appeal, the British Columbia Court of Appeal held that the motions judge erred in requiring that a "substantial relationship" exist between the warranty and the loss incurred. Such a test was retrospective in nature and would be a serious practical impediment to the marine insurance business. The Court of Appeal went on to find that the clause in issue was clearly intended by the parties to be a promissory warranty the breach of which discharged the insurers from any liability. The Court of Appeal further held that the cancellation of the policy by agreement between the insurers and the broker was effective as the broker had the apparent or ostensible authority of the assured.

Stay of Proceedings

Waterworks Construction Ltd. v Liberty Mutual Insurance Co.
2001 NSSC 125, [2001] N.S.J. No. 355

This action arose out of the sinking of a concrete casing which was determined to be a hazard. The Plaintiff alleged that its liability for the cost of removal of the casing was covered by an insurance policy issued by the Defendant. There was, however, a second action between the Plaintiff and other parties relating to the liability for the sinking. The Defendant insurer brought this application to stay the insurance action pending the outcome of the liability action. The Court declined the stay holding that there were separate issues in the two actions.

Subrogation

Chubb Insurance Co. of Canada v Cast Line Ltd.
[2001] Q.J. No. 2363

This was a subrogated action by a cargo insurer against an ocean carrier for damage occasioned to a container of cheese. The Defendant carrier brought this motion arguing that the Plaintiff insurer had no right to bring the action as it had no rights of subrogation. The Defendant relied upon the terms of the receipt signed by the assured which referred to the payment by the insurer as a loan. Notwithstanding the language of the receipt, the court held that the payment by the insurer was a true insurance indemnity as it was reimbursable by the assured only in the event that it should obtain indemnification from another source. In result, the Defendant's motion was dismissed.

2. Carriage of Goods

Freight - Set-off - Hague-Visby Rules - Limitation/Prescription - Exculpatory Clauses

Mediterranean Shipping company S.A. v Sipco Inc.,
2001 FCT 1046

The Plaintiff in this action claimed against the Defendant for ocean freight owing in respect of the carriage by sea of nine containers from Toronto to the Persian Gulf. The Defendant admitted non-payment of freight but alleged that it was entitled to a set-off and brought a counterclaim alleging breaches of the contract by the Plaintiff. Specifically, the Defendant alleged that seven of the containers were shipped together, that six of those seven containers arrived on time at the port of discharge, that the seventh container did not arrive until months after its scheduled arrival, and that as a consequence the clearance through customs of all of the containers was delayed. The issues in the case were the entitlement to set-off and whether the Plaintiff had been negligent in its handling of the containers. On the first issue the Trial Judge reviewed the Anglo-Canadian authorities and concluded that there could be no right of set-off against freight under a contract for the carriage of goods by sea unless the contract specifically provided otherwise. As the contract did not provide otherwise, there was no right of set-off. The Trial Judge next turned to the counterclaim. The first defence raised against the counter-claim was that the claim had not been brought within the one year time period fixed by the Hague-Visby Rules. The success of this argument depended upon whether the prescription period set by the Rules ran from the date of discharge or the date of actual or constructive delivery to the consignee. The Trial Judge held that the prescription period runs from delivery not discharge and that any clauses in a bill of lading declaring delivery takes place at discharge are null and void. The Trial Judge further held that delivery takes place on the day the last piece of cargo is delivered, the seventh container in the case at bar. Accordingly, the Judge held the counterclaim had been commenced within time. The Judge next considered various defences raised by the clauses in the bill of lading, namely: a scope of voyage clause which gave the carrier complete discretion as to the ports at which to call; a period of responsibility clause which provided the carrier was not liable for damages occurring in the period before loading or after discharge; and a clause providing that there could be no claims for failure of the carrier to meet arrival or departure dates. The Judge held that these various clauses were contrary to the Hague-Visby Rules and therefore null and void pursuant art. 3 r. 8 of the Rules. The Judge next considered the damages suffered as a consequence of the breach of contract by the Plaintiff but found that the Defendant had failed to prove any damages. In result, therefore, the claim for freight was allowed and the counterclaim was dismissed.

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 Plaintiff 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 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.

Deck Carriage - Exclusions - Hague-Visby Rules

Timberwest Forest Products v Gearbulk Pool Ltd. et al.,
(June 15, 2001) Vancouver Reg. Nos. C986748 & C085749 (B.C.S.C..)

This was a summary trial application by the Plaintiffs for judgment against the Defendant carriers. The Plaintiffs' cargo of lumber was carried partly on deck and partly under deck. The on deck cargo was damaged at the discharge port when the Defendants were unloading soda ash. The Defendants failed to cover the lumber and it was dusted by the soda ash. Thereafter, the Defendants attempted to clean the lumber by washing it to remove the soda ash but this merely exacerbated the problem. The Defendants sought to avoid liability by arguing that the damaged lumber was "cargo carried on deck" within the meaning of the Hague-Visby Rules and by relying upon an exclusion clause in the bill of lading for damage to deck cargo. The Plaintiffs, on the other hand, argued that the cargo was not exempt from the application of the Hague-Visby Rules. The Plaintiffs led evidence to show that the bills of lading had not properly described the proportions of cargo carried on deck and under deck. The Motions Judge agreed with the Plaintiffs that this mis-description created an uncertainty making it unclear what cargo would be carried on deck at shippers' risk and what cargo would be carried under deck. In result, the carriage was governed by the Hague-Visby Rules and the exclusion clause was inapplicable.

Standing to Sue - Collisions

Porto Seguro Companhia De Seguros Gerais v The "Federal Danube" et al.,
(January 31, 2001) No. T-2057-85 (F.C.T.D.), [2001] F.C.J. No. 152

This was the re-trial of an action that had been previously dismissed by the Federal Court Trial Division in a judgment reported at [1995] 82 F.T.R. 127. That judgment was ultimately overturned by the Supreme Court of Canada and a new trial ordered on the grounds that the Trial Judge erred in refusing to hear three expert witnesses because assessors had been appointed by the court (see [1997] 3 S.C.R. 1278).

The Plaintiff was the cargo underwriter who had indemnified the cargo owners for damages suffered as a result of a collision in the St. Lawrence Seaway between the "Beograd" and the "Federal Danube". The Plaintiff argued that the "Federal Danube" was wholly at fault for the collision and liable for the damage to the cargo in the principal amount of $4.4 million. There were two issues in the case; the standing of the Plaintiff to bring the action in its own name and the liability for the collision. On the first issue, the Defendant argued that under Canadian maritime law the Plaintiff ought to have commenced the action in the name of the cargo owners. The Court, however, held that the matter was governed either by the law of Brazil (where the insurance contract was made) or the law of Quebec and that in either case the insurers became subrogated to the rights of their insured upon payment and were entitled to bring the action in their own name. With respect to the second issue, the liability for the collision, the Court held that the "Beograd" was wholly at fault for the collision. The faults found against the "Beograd" included: navigating through the anchorage area rather than in the navigation channel; navigating at an unsafe speed; and, failing to keep out of the way of an anchored vessel. In reaching the conclusion that the "Beograd" was wholly at fault the Court noted that where a vessel underway strikes a vessel at anchor the underway vessel is *prima facie* at fault unless it is proven the accident could not have been avoided by the exercise of ordinary skill. In the result, the Plaintiff's action was dismissed.

Hague-Visby Limitations - Turkish Law

Barzelex v The "EBN Al Waleed",
2001 FCA 111

This was an appeal from the Federal Court Trial Division. The bill of lading contained a general paramount clause incorporating the Hague Rules as enacted in the country of shipment. The country of shipment was Turkey. However, Turkey had enacted the Hague Rules twice into its legislation. Initially, the Rules were enacted through ratification of the convention. This enactment gave a limitation of 100 pounds sterling gold value (approximately $12,500) per package or unit. Later the Rules were enacted as part of Turkey's Commercial Code. This enactment, as amended, gave a limitation of 100,000 Turkish Lire (approximately $2.31) per package or unit. At issue in the case was which of these limitations applied. The Plaintiff argued and led expert evidence that the enactment in the Commercial Code applied only to internal shipments. The Trial Judge found as a fact however that under Turkish law the Commercial Code applied to international shipments as well as internal shipments. The Plaintiff then argued that a $2.31 limitation per package or unit was unconscionable and should not be enforced. The Trial Judge held that it was the result of a contractual provision which the Plaintiff could have avoided by declaring a value for the goods. The Plaintiff appealed. The Federal Court of Appeal dismissed the appeal saying they were not satisfied the Trial Judge had erred and that on the

evidence before him it was open to him to make the findings he did.

Road Carriage - Limitation of Liability

Paine Machine Tool Inc. v Can-am West Carriers Inc.,
2001 BCSC 1633

This case arose out of damage to two high precision machine tools carried by the Defendant when they struck an overpass. The Defendant argued that its liability was limited to $4.41 per kilogram pursuant to the uniform conditions of carriage in Part 7 of the Motor Vehicle Act Regulations of British Columbia. The Court, however, held that the Defendant was not entitled to avail itself of the limitation provisions since the bill of lading did not substantially comply with the requirements of s.9.21 of the Regulations and was never sent to the Plaintiff and, therefore, was never "issued". Further, the Court held the bill of lading failed to reflect the prior course of dealings between the parties. The Court found as a fact that the carrier had previously advised the Plaintiff that insurance up to a value of $500,000.00 was included in freight rates.

Air Carriage - Warsaw Convention

MDSI Mobile Data Solutions Inc. v Federal Express
2001 BCSC 1411

This was 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. The Plaintiff sought to recover the full amount of its loss or, in the alternative, the declared value amount of $214,000. The Defendant carrier admitted liability but argued that its liability was limited to 250 francs per kilogram as per Art. 22(2) of the Warsaw Convention or, in the alternative, $50,000 as per its standard terms and conditions or, in the further alternative the declared value of $214,000. The Defendant 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 Court found this argument wholly without merit. The Defendant next argued that its service conditions limited the amount that could be declared to $50,000. The Court held, however, that such a limit was contrary to Art. 23 of the Convention which renders null and void any provision "tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention". The Plaintiff argued that the Defendant could not rely upon any limitations or the declared value as the air waybill was deficient. Specifically, the Plaintiff argued that contrary to Art. 8 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. The Court rejected both of these arguments. The Court held that as there was no stopping place actually agreed between the parties the carrier was free to stop wherever it saw fit and further held that a statement in the air waybill that the Convention "may" be applicable was sufficient compliance with Art. 8. In result, the Court granted summary judgment in the amount of the declared value.

3. Arbitration/Jurisdiction Clauses

Marine Liability Act - Retrospective Application

Incremona-Salerno v The "Castor"
2001 FCT 1330

This case arose out of a contract for the carriage of goods by water from Italy to Canada in 1999. In February and March 2001 the Defendants brought applications to stay the proceeding relying upon a jurisdiction clause in the bill of lading that gave exclusive jurisdiction to the courts of Hamburg. The stay motions were not set down for a hearing and were not abandoned. On 8 August 2001 the *Marine Liability Act* came into force. Section 46(1) of the *Marine Liability Act* provides that notwithstanding any jurisdiction or arbitration clause claims arising under a contract of carriage of goods by water may be brought in Canada where *inter alia* the port of loading or port of discharge is in Canada. The issue in the present application was whether s. 46 applied to render moot the Defendants' stay application. The Motions Judge held that it did.

Stay of Proceedings - Arbitration Clause - Commercial Arbitration Code

Stella Jones Inc. v The "Mariana",
2001 FCT 1148

This was 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 actual bill of lading that was 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. Accordingly, the motion was dismissed.

Stay of Proceedings - Jurisdiction Clause - Proper Test - Deviation

Ecu-line N.V. v Z.I. Pompey Industrie,
(January 25, 2001) No. A-29-00 (F.C.A.), [2000] F.C.J. No. 96

This was an appeal from a decision of a Motions Judge upholding the decision of a Prothonotary denying the Defendant's application for a stay of proceedings based on a jurisdiction clause in the bill of lading. At first instance, the Prothonotary considered the usual factors that are weighed on a stay application and determined that the balance of convenience was marginally in favour of

granting the stay. However, the Prothonotary held that there had been an unreasonable deviation in that the bill of lading called for the cargo to be shipped from Antwerp and discharged at Seattle whereas the cargo was, in fact, discharged at Montreal and carried by rail to Vancouver. Accordingly, the Prothonotary held that the Defendant was not entitled to rely upon the jurisdiction clause in the bill of lading. On appeal, the Motions Judge held that the Prothonotary had taken into account all of the circumstances of the case and did not err by taking into the account the breach of contract by the Defendant. On further appeal the Court of Appeal upheld the decisions of the Prothonotary and the Motions Judge. However, and most importantly, the Court of Appeal held that the proper test to apply in stay applications is the tripartite test employed in applications for interlocutory injunctions. That test requires the court to consider; first, is there a serious issue to be tried; second, whether the party seeking the injunction (or stay) would suffer irreparable harm if the injunction (or stay) was not granted; and third, which party would suffer the greater harm as a result of the granting or refusal of the injunction (or stay). (Editor's Note: This is arguably a much more difficult test for a Defendant seeking a stay to meet than is the test set out in *The Eleftheria,* [1969] 1 Lloyd's Rep. 237, which has until now been the test applied to such matters.)

4. Canadian Maritime Law/ Federal Court 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.

Jurisdiction - Fisheries - Agency

Radil Bros. Fishing Co. Ltd. v. Her Majesty the Queen et al.,
(19 October 2001) No. A-786-00 (F.C.A.)

The facts of this case are quite complicated involving licence swaps, fishing quotas and catch history. One of the issues in the case was whether the Federal Court had jurisdiction to entertain a claim arising out of an agreement of purchase and sale of a fishing licence. The Federal Court of Appeal concluded that such a claim did not fall under section 91(10) of the *Constitution Act* (navigation and shipping) as it was more specifically dealt with under section 91(12) (Sea Coast and Inland Fisheries). The Federal Court of Appeal also extensively reviewed the jurisprudence in relation to the definition of Canadian Maritime Law and concluded that Canadian Maritime Law does not include a claim arising out of an agreement to purchase a fishing licence or to matters arising out of a breach of an agency contract entered into for the purpose of purchasing a fishing licence. The Court of Appeal noted that agency claims cannot be entertained under the court's admiralty jurisdiction " unless the true essence of the contract relied upon is maritime".

Jurisdiction - Claims Against Insurance Brokers

Royal & Sun Alliance v The "Renegade III",
2001 FCT 1050

This case is fully summarized under the heading "Admiralty Practice". During the course of his reasons the Prothonotary seemed to suggest that Canadian maritime law had developed to the point where claims against brokers in a marine insurance context might be within the jurisdiction of the Federal Court.

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 damages.

Insurance - Subrogation

Porto Seguro Companhia De Seguros Gerais v The "Federal Danube" et al., (January 31, 2001) No. T-2057-85 (F.C.T.D.), [2001] F.C.J. No. 152

This case is summarized above under "Carriage of Goods". One issue in this case was whether the Plaintiff cargo underwriters had standing to bring suit in their own name for damage caused to the cargo they insured and for which they indemnified the cargo owners. The Defendant argued that under Canadian maritime law the Plaintiff ought to have commenced the action in the name of the cargo owners. The Court, however, held that the matter was governed either by the law of Brazil (where the insurance contract was made) or the law of Quebec and that in either case the insurers became subrogated to the rights of their insured upon payment and were entitled to bring the action in their own name.

5. Limitation of Liability

Collisions - Limitation - Damage to Fishing Net

Capilano Fishing Ltd. v The "Qualicum Producer", 2001 BCCA 244, [2001] B.C.J. No. 631

This was an action for damages suffered during the 1997 herring fishery when the Defendant's vessel cut the net of the Plaintiffs' vessel. The Plaintiffs claimed damages for the net, for the value of the lost catch and for the costs of fishing licences thrown away. The Defendants denied negligence and claimed the right to limit liability. On the issue of liability the trial judge found that the Master of the Defendant vessel was negligent in that he was aware of the Plaintiffs' vessel yet manoeuvred his vessel in a direction that ultimately led to the collision. On the matter of limitation, the trial judge found that the Defendant vessel was well equipped and had a competent Master and crew and, therefore, held that the Defendants were without "fault or privity" and entitled to limit their liability to the amount of approximately $40,000.00. On appeal, the Court of Appeal upheld the finding on liability but overturned the finding on limitation. The appeal court adopted the reasoning from *North Ridge Fishing Ltd. et al. v The "Prosperity" et al.*,(2000) 78 B.C.L.R. (3d) 388 and held that any owner who permits his vessel to participate in the roe herring fishery is not entitled to limit liability since the fishery compels the sacrifice of safe navigation and good seamanship. (Note: This case was decided under the old limitation of liability regime. Under the new regime the limitation amount is substantially higher ($500,000.00 for vessels under 300 tons) and the owner is entitled to limit unless the claimant establishes a personal act or omission committed with intent to cause loss, or recklessly, with the knowledge that loss would probably result.)

Collisions - Limitation - Small vessels

Leggat Estate v Leggat,
(March 30, 2001) No. 1954/97 & 3419/98 (Ont. Sup. Ct.), [2001] O.J. No. 1301

In this case, also decided under the old limitation regime, the Court held that the operator of a small vessel was entitled to limit his liability but the owner was not. See the full summary below under "Miscellaneous".

6. Admiralty Practice

Service ex juris - *In Rem* action

McCain Produce Inc. v Visser Potato Ltd.,
2001 FCT 994

This was an ex parte motion by the Plaintiff for judgment in default of defence against the Defendant ship and her owners. The Defendants, including the ship, were apparently served in the Netherlands and a certificate of the Government of the Netherlands was offered in proof of service. Although the certificate did not indicate what was served or where the Prothonotary was prepared to assume the document served was the Statement of Claim. Nevertheless, the Prothonotary denied the motion on the grounds that there is no authority for the service on a ship outside of Canada nor for the service on a ship other than in an action *in rem* and the action was not styled *in rem.*

Stay of Proceedings - Insurance

Royal & Sun Alliance v The "Renegade III",
2001 FCT 1050

This was an application for a stay of proceedings. The applicant was the owner of the Defendant yacht which had been damaged during the 2000 Victoria-Maui race. The applicant made a claim under his insurance policy for approximately $122,000 which was paid except for the sum of approximately $12,000. Subsequent to the payment the underwriters learned of circumstances which might void the policy and advised the applicant of this. On the same day the applicant commenced proceedings in the British Columbia Supreme Court for payment of the $12,000 he alleged was owing under the policy. Underwriters later did purport to void the policy for material non-disclosure and commenced *in rem* and *in personam* proceedings in the Federal Court claiming the return of the moneys paid. The applicant then brought this motion to stay the Federal Court proceedings. The application for a stay was denied. The Prothonotary noted that the Court would grant a stay only in the clearest of cases. The onus was on the applicant to prove (1) the continuation of the action would cause prejudice or injustice, not merely inconvenience or additional expense and (2) the stay would not be unjust to the Plaintiff. The Prothonotary held

that although the British Columbia Supreme Court was a convenient forum it was not clearly the more appropriate forum. The Prothonotary noted that if underwriters were forced to bring their claim in the British Columbia Supreme Court they could not bring an in rem action by way of counterclaim and would have to start new proceedings and arrest the vessel for a second time. Further, the Prothonotary noted, without deciding, that there might be an issue as to whether the British Columbia Supreme Court had *in rem* jurisdiction. The Prothonotary concluded that there was no real prejudice or injustice to the applicant and that to allow the stay would deprive the underwriter of a legitimate juridical advantage. It is noteworthy that during the course of his reasons the Prothonotary considered whether a claim by the assured against his broker could be properly brought in the Federal Court. The Prothonotary seemed to suggest that Canadian maritime law had developed to the point where claims against brokers in a marine insurance context might be within the jurisdiction of the Federal Court.

Action In Rem - Necessaries

Balcan ehf v The "Atlas"
2001 FCT 1328

At issue in this case was the validity of the Plaintiff's claim against the Defendant ship. The Plaintiff alleged it had a valid claim as a supplier of necessaries. The Court held, however, that the Plaintiff had neither supplied necessaries to the ship nor had it paid for the necessaries that were supplied by third parties. Consequently, the Plaintiff was not a necessaries claimant and the Statement of Claim and Warrant of Arrest were struck.

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 disclose owner's work from fire damage work. 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.

Dismissal for Failure to Produce Documents

Finora Canada Ltd. v Clipper Spirit Shipping Ltd.,
2001 BCSC 862, [2001] B.C.J. No. 1266

This was an application by the Defendant carrier to dismiss the claims of three Plaintiffs for failure to produce documents which had previously been ordered to be produced. Two of the Plaintiffs had produced the required documents but did so after the deadline imposed by the order requiring production. The other Plaintiff had failed to produce the invoices but advised that the

documents had been destroyed. The Court dismissed the claim of the Plaintiff that had failed to produce the documents but declined to mete out this "drastic remedy" for the other two Plaintiffs.

Dismissal For Delay

Ferrostaal Metals Ltd. v The "Herakles" et al.,
2001 FCA 297

This was an appeal from an order made by the Prothonotary and affirmed by the Motions Judge dismissing the action for delay. The facts were that the Statement of Claim was filed on December 12, 1995 but was not served until a year later. The Plaintiff further delayed in waiting almost one year to file a Reply to a Statement of Defence. With the introduction of the Case Management Rules, an order was made on March 16, 1999 requiring the parties to file Affidavits of Documents by May 10, 1999. The Plaintiff failed to file its Affidavit of Documents by May 10, 1999 and made application on January 25, 2000 for an additional 30 days to complete this step. At first instance, the Prothonotary declined the extension of time and struck the claim for delay. In doing so the Prothonotary noted that unjustified non-compliance with a court order is a serious matter which is even more so when the order is made pursuant to a Notice of Status Review. The Prothonotary further noted that prejudice to a party is not a factor to be taken into account in such applications. On appeal, the Motions Judge agreed with the reasons given by the Prothonotary. The Motions Judge dealt with an additional submission not made before the Prothonotary, i.e. that the delay was due to the fault of counsel and not the fault of the party. However, the Motions Judge found that the Plaintiff was itself partly responsible for the delay. On further appeal, the Federal Court of Appeal held the Motions Judge had considered the relevant principles and committed no error of law.

Extension of time - Stay

Global Enterprises International v The "Aquarius", "Sagran" and "Admiral Arciszewski",
2001 FCT 605

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 authorizing the sale of the Defendant ships and for a stay of the sale proceedings. The Prothonotary reviewed the case authorities on time extensions and noted that an applicant must generally show an intention to appeal before the time ran out, that the appeal has merit, a reasonable explanation for the delay and that the other parties are not prejudiced. The Prothonotary held that the applicant had failed to address these issues in its affidavit evidence and further found that there was prejudice to the other parties given that the vessels were incurring substantial expenses and a delay might frustrate a sale. The Prothonotary next considered the stay application. The proper test on such an application is that there must be a serious question to be tried, there must be irreparable harm if the application is refused and the balance of convenience must be considered. The Prothonotary noted that the applicant's material did not suggest the sale order was in error and was silent as to irreparable harm. On the matter of balance of convenience, the Prothonotary was of the view that the balance

of convenience favoured an early sale of the ships.

Extension of time

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 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.

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.

Security For Costs - Priorities claimant

Nedship Bank N.V. v The "Zoodotis",
2001 FCT 706

This was an application by the Plaintiff mortgagee for an order that one of the claimants to a priorities action be required to post security for costs. The Plaintiff argued that the claimant was a foreign corporation and that it was participating in the proceedings more as a party than a traditional lien claimant. Specifically, the claimant was challenging various aspects of the mortgagee's claim. The Prothonotary declined the motion holding that there was no authority for ordering security for costs against a claimant. However, the Prothonotary noted such a claimant might be joined as a Defendant to the action and as a Defendant it would then be liable for security for costs.

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

Quebec Court of Appeal held that even if the matter was properly characterized as one of bankruptcy and not maritime law, the Superior Court did not have any jurisdiction to make an order against the Federal Court. Both the judgment of the Federal Court of Appeal and the judgment of the Quebec Court of Appeal were appealed to the Supreme Court of Canada.

With respect to the appeal from the Federal Court of Appeal, the Supreme Court of Canada held that the Federal Court of Canada was not obliged to defer to the bankruptcy courts of the bankrupt's domicile and did not lose its jurisdiction by reason of the bankruptcy. The Supreme Court further held that the Federal Court had a discretion to decide whether to stay the Canadian proceedings. The Court noted that the Trial Judge addressed the relevant factors in determining whether to stay the proceedings and committed no error in principle. In particular, the Supreme Court held that the Trial Judge was justified in putting considerable weight on the fact the Respondent would not enjoy the same priority in Belgium as in Canada. The Supreme Court also considered and rejected an argument that the bankruptcy gave the Trustee a valid claim to the ship. The Court held that the bankruptcy operates as an assignment of the bankrupt's property to the trustee but is subject to any existing charges.

With respect to the appeal from the Quebec Court of Appeal, the Supreme Court of Canada held, in addition to the above, that once the Quebec Superior Court recognized the Federal Court had maritime jurisdiction to deal with the "Brussel" it should have directed the Trustee to apply to the Federal Court for a stay and should not have issued what amounted to an anti-suit injunction.

Applicable Law

Imperial Oil Limited v Petromar Inc.,
2001 FCA 391

This was an appeal from a decision of the Trial Division declaring that the Defendant had a maritime lien. The issue in the case was whether the contract for the supply of marine lubricants was subject to American law and, consequently, whether the Defendant had a maritime lien. The Defendant, an American corporation, supplied lubricants through a sub-contractor to two Canadian registered ships owned by the Plaintiff at various Canadian ports. The ships were under demise charter to another Canadian corporation and were managed by an American corporation. The contract between the Defendant and the ships' manager contained a choice of law provision calling for American law to be applied. Similarly, the contract between the Defendant and its sub-contractor who actually delivered the lubricants contained an American choice of law provision. There was no direct contract between the Defendant and the Plaintiff shipowner. The Plaintiff argued that the supply of lubricants should be governed by Canadian law because of s. 275 of the *Canada Shipping Act* (which provides a choice of law rule that matters relating to a ship shall be governed by the law of the port of registry) and because Canada was the place with the closest and most real connection to the transactions. At trial, on the issue of the application of s. 275 of the *Canada Shipping Act*, the Trial Judge held that this section applied only to matters dealt with in Part III of the *Act* (ie. in relation to seamen) and had no application to the case at bar. On the second issue, the Trial Judge recognized that there were a number of factors connecting the matters in issue to both Canada and the United States. However, the most significant factors were the contracts relating to the supply of lubricants both of which applied

American law. In the result, the Trial Judge held that the contracts for the supply of lubricants were governed by American law and that the Defendant had a maritime lien.

On appeal, the Federal Court of Appeal reviewed the nature of a maritime lien and noted that such liens arise not from contract but by operation of law. The Court concluded that the Trial Judge had correctly determined that the law to be applied was the law with the "closest and most substantial connection" to the transaction and that this involved weighing various factors. The Court of Appeal held, however, that the Trial Judge erred in holding that the United States contracts were the most significant factors. The Court of Appeal considered that the most significant factor was that the demise charterer had its base of operations in Canada where the vessels traded and were based. When that factor was weighed with other factors connecting the transactions to Canada the proper law was the law of Canada. In result, the appeal was allowed and the Defendant did not have a maritime lien.

Priorities - Bankruptcy - Striking Claim of Trustee

Global Enterprises International v The "Aquarius", "Sagran" and "Admiral Arciszewski"
2001 FCT 1311

In this case the Polish trustee in bankruptcy of the owner of the Defendant ships had filed an affidavit of claim claiming the entire proceeds of sale of the vessels for the purpose of distributing the proceeds in the Polish bankruptcy proceedings. An Intervening creditor brought this application to strike the trustee's affidavit of claim. The Prothonotary commenced his analysis with the observation that parties ought not generally be permitted to strike out each others affidavits. The exceptions are where the affidavit is abusive or clearly irrelevant or is an abuse in the sense of prejudicing or delaying an orderly and fair hearing. The Prothonotary noted this was a heavy burden but did go on to find that the burden had been met. The Prothonotary struck out the affidavit on three grounds. First, the Prothonotary held that the affidavit of the trustee was not a claim *in rem* and did not even purport to be so. It being a pure claim *in personam* it was irrelevant and liable to be struck. Second, that as the claim of the trustee was purely a claim in bankruptcy the Federal Court was without jurisdiction. Finally, the Prothonotary ordered the affidavit struck on the grounds that the conduct of the trustee was an abuse of the process of the Court. The abuse consisted of the placement by the Trustee of an advertisement in Lloyd's List declaring any sale of the vessels by the Federal Court to be illegal. Further, the Prothonotary noted that the Trustee had hampered the efficient and orderly progress of the action by filing appeals which were not proceeded with.

Priorities - Fines - Forfeiture

Neves v The "Kristina Logos",
2001 FCT 1034

This was an appeal from an Order of a Prothonotay 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 Court altered the priorities. The Judge on appeal 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. It is noteworthy that the Judge on appeal held that the Crown's claims in respect of the crew, the forfeiture and the fine were not *in rem* claims but nevertheless ordered that they be paid out of the proceeds of sale.

Supplies to Ships Under Charter

Finansbanken ASA v The "GTS Katie",
2001 FCT 1316

In this case a bunker supplier claimed a priority over mortgage creditors under Egyptian law for bunkers ordered by the charterer of the Defendant ship and supplied to the ship at Gibraltar while it was under charter. The bunker delivery receipt stated that the vessel was under charter and that the charterer had no right to subject the ship to maritime liens. The bunker supplier relied upon a term in the bunker invoice that the agreement was to be determined by the law of Egypt. The Court held that the owner of the ship was not bound by the choice of law clause.

Priorities - Validity of Seizure Under Mortgage

Greeley v The "Tami Joan"
2001 FCA 238

This was a contest between the mortgagee and lessee of the fishing vessel "Tami Joan". The Plaintiff had leased the vessel from its owner and had effected improvements to it. Unknown to the Plaintiff the vessel was mortgaged and the mortgage was in arrears. The mortgagee seized the vessel pursuant to the mortgage and it was eventually sold. The Plaintiff alleged that the mortgagee had wrongly deprived him of possession of the vessel and that he was entitled to a possessory maritime lien for the materials and services he had supplied to the vessel. The Trial Judge held that the mortgagee was entitled to seize the vessel because the mortgage was in arrears and its security was impaired by reason that the vessel was uninsured. The Trial Judge further held that the Plaintiff was not entitled to a possessory lien because he had lost possession of the vessel to the mortgagee. The Plaintiff was, at most, entitled to a statutory right of action *In*

Rem which gave him no priority. The Plaintiff appealed and further claimed monetary relief for equipment he alleged he supplied to the ship. On appeal the Court of Appeal affirmed the decision of the Trial Judge and further held that the Plaintiff had failed to properly prove any damages as a result of equipment he supplied to the vessel.

Production of Documents - Cross-examination

Unitor ASA v The "Seabreeze I",
2001 FCT 416

In this matter a claimant alleged that the Defendant vessel was sold by judicial sale to a nominee of the ship's mortgagee. This information came from various published newspaper reports. The claimant sought to compel the mortgagee to answer questions on cross-examination and to produce documents relating to the identity of the purchaser at the judicial sale, its corporate relationship to the mortgagee and whether the ship was resold or whether there was an agreement to resell the ship. The application was denied by the Court on the grounds that the evidence was not relevant to any of the issues then before the Court. Those issues were the entitlement of the mortgagee to reimbursement for the costs of repatriating the crew and maintaining the vessel while under arrest and for the value of the bunkers on board the vessel at the time of sale. The Court appeared to acknowledge that different considerations might apply when the claim of the mortgagee as mortgagee was considered.

Lien For Necessaries - American Law

Richardson International Ltd. v The "MYS CHIKHACHEVA" et al.,
(February 2, 2001) No. T-1944-98 (F.C.T.D.), [2000] F.C.J. No. 138

This was an action 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. The Court reviewed the evidence of ownership and noted that the vessel had been registered both in Cypress and Russia with different registered owners. The Court concluded that Stardubskoe was not the registered owner but held that it was nevertheless a bareboat charterer. The Court next considered the issue of applicable law and concluded that the contracts were governed by American law. In reaching this conclusion the Court 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 Court 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 Court 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". In result, the Plaintiff was awarded judgment.

8. Miscellaneous

Collision - Apportionment of Liability

De Merchant Estate v Price,
2001 NBQB 98, [2001] N.B.J. No. 328

This matter involved a collision between a small runabout and a sailboat under power in a narrow channel. The main issue in the case was liability and apportionment. The Trial Judge found the parties equally at fault. The operator of the sailboat was at fault for not having the proper lights, for operating on the wrong side of the channel and for failing to take evasive action. The operator of the runabout was at fault for operating his vessel while impaired by alcohol and for failing to observe the other vessel.

Collisions - Limitation

Leggat Estate v Leggat
(March 30, 2001) No. 1954/97 & 3419/98 (Ont. Sup. Ct.), [2001] O.J. No. 1301

This case arose out of a collision between a pleasure craft and a rock face in Lake Rosseau, Ontario. As a result of the collision two passengers were injured, one fatally. These actions were commenced against the owner of the pleasure craft and the driver of the pleasure craft, the owner's brother. The Court found the driver liable in that he was operating the vessel at an unsafe speed, failed to maintain a proper lookout, and failed to properly navigate the vessel. Interestingly, the Court also found the owner liable even though the owner was not in the boat at the time of the accident and the operator was apparently an experienced operator of small pleasure craft. The Court held that Part IX of the Canada Shipping Act clearly indicates the intention of Parliament to make owners of small vessels liable for the fault of their vessels and that since the vessel was at fault it followed that the owner was at fault. On the issue of limitation, the Court found that the operator could limit his liability but that the owner could not. The Court held that the owner was at fault or privity in that he failed to properly consider the trip to be undertaken by his brother. The Court said that the owner should have obtained an undertaking from the operator that the boat would be operated at less than planing speed until the rock face was rounded and then at higher speed with the operator looking above the windshield.

Collision - Tug and Tow - Towage Conditions - Damages

Gravel and Lake Services Ltd. v Bay Ocean Management Inc.,
2001 FCT 468

This 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 Court 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 Court 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 Court 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 Court 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 Court 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.

Collisions - Mutual Legal Assistance Act - Standing

ALT Navigation Ltd. v United States of America,
[2001] N.J. No. 318

This case arose out of a collision 130 miles off the coast of Massachusetts between the F/V "Starbound" and an unidentified vessel. As a result of the collision the F/V "Starbound" sank and three of her crew drowned. The T/V "Virgo" subsequently called at ports in Newfoundland where she was inspected by Transport Canada officials and U.S. Coastguard. Three search warrants were obtained under the Mutual Legal Assistance Treaty and the Mutual Legal Assistance Act. As a result of the execution of those warrants some 98 exhibits were seized. The present application was to determine who would have standing at a subsequent hearing when it was determined what was to be done with the exhibits seized. The intervenors who requested standing were the owners of the "Virgo", the three crew members of the "Virgo" who had been charged in the United States and were subject to extradition proceedings, The remaining crew members of the "Virgo", the owner of the "Starbound" and the estates of the deceased seamen. The Court granted standing to the owner of the "Virgo", the owner of the "Starbound", the estates of the deceased seamen, the three crew members who were subject to extradition proceedings and two other crew members who "were directly connected to the chain of command" of the "Virgo.

Collisions - Damage to Fishing Net

Capilano Fishing Ltd. v The "Qualicum Producer",
2001 BCCA 244, [2001] B.C.J. No. 631

This case is summarized above under Limitation.

Collision - Liability - Damage to Fishing Net

Wilson Fishing Co. Ltd. v The "Western Investor",
2001 FCT 1390

This was another collision action that occurred during the shotgun roe herring fishery, a fishery which the Trial Judge described as "a most unusual kind of maritime adventure - one that compels masters to sacrifice good seamanship for profit". The Plaintiff alleged that due to the negligence of the Defendants , the Defendant vessel collided with the Plaintiff's skiff and the Plaintiff's net became entangled in the propeller of the Defendant ship. As a result, the Plaintiff was unable to participate in the fishery. The Defendant denied liability. The Trial Judge reviewed the circumstances leading to the collision. She found that the Plaintiff's Master was 100% responsible for creating a situation of imminent peril by failing to keep a proper lookout. She also found that the Plaintiff's skiff and the Defendant vessel were equally responsible for the collision because they failed to take evasive action. However, she held that the damage to the Plaintiff's net was not an inevitable consequence of the collision. She found that immediately after the collision the Plaintiff's net was not entangled in the propeller of the Defendant ship. Rather, the entanglement occurred when the Defendant Master ordered the engines to be restarted too soon after the collision and before the net could be towed a safe distance away. The Trial Judge therefore held the damage to the net was caused solely by the Defendants. On the issue of damages, however, the Trial Judge held that the Plaintiff was not entitled to damages for a lost catch since the Plaintiff had aborted his set before the collision when a third party vessel cut him off.

Ship Repair - Negligence - Damages

Matson Navigation v Victoria Shipyard Co.,
2001 BCSC 1344

The Plaintiff in this matter claimed that the Defendant Shipyard had obstructed a vent with sandblast grit in the No. 5 port wing ballast tank while sandblasting during a refit. As a result of the obstruction, the ballast tank became over-pressurized during ballasting operations and significant damage was caused to the hull. Upon inspection approximately 76 pounds of compacted sand blast grit was found inside and completely blocking the vent. It was not disputed that the sandblast grit came from the Defendant's sandblasting operations of the ballast tank. The Defendant nevertheless argued that it was not liable. The Defendant alleged that the damage was wholly or partly caused by the Plaintiff in that: the vents were fitted with flash screens which was unusual and permitted the accumulation of sandblast grit; the Plaintiff had specifically instructed the Defendant to sandblast the vents as well as the tank; that the Plaintiff failed to properly maintain the vents; and the Plaintiff failed to check the vents. The Court rejected all of these

him.

Sale of Vessel - Entitlement to Commission

Clifts Marine Sales(1992) Ltd. et al. v Moorco Inc. et al.,
2001 FCT 1369

This was a claim by a yacht broker for commission. The Defendant denied the broker was entitled to a commission as the Listing Agreement had been terminated and the vessel was sold to a person who had not been introduced by the broker. The Prothonotary found, however, that the Defendant terminated the Listing Agreement to sell the vessel himself and that the Defendant knew, or was wilfully blind, to the fact that the purchaser was purchasing the vessel on behalf of a person introduced by the broker. The Prothonotary therefore held that the yacht broker was the effective cause of the sale and was entitled to a commission of 10%. The Prothonotary was not satisfied, however, with the evidence as to the purchase price of the vessel since the price was paid in cash in paper bags. He therefore based the commission on a previous arms length offer.

Breach of Contract of Sale - Parole Evidence

Sproule v The "Compass Rose II",
2001 FCT 1304

This was an action by the Plaintiff to recover the balance of $25,000.00 alleged to be owing on a written contract of purchase and sale of a vessel. The defence was that there had been an oral variation of the written contract whereby the Plaintiff agreed to accept a lesser amount in return for prompt payment. The Plaintiff argued, *inter alia*, that the parole evidence rule applied to prohibit proof of an oral agreement that contradicted the written contract. The Court, however, held that the parole evidence rule had no application since the Defendant did not seek to adduce extrinsic evidence to add to, subtract from or vary the meaning of the written agreement but merely claimed that the agreement had been amended verbally. The Court found that there had been such an amendment and dismissed the action.

Immigration - Deportation Costs - Liability of 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 a cargo ship was not a "transportation company". Accordingly, the appeal was allowed and the agent was not liable for the costs of

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http://tetley.law.mcgill.ca/

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http:// www.admiraltylaw.com

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http://www.forwarderlaw.com

Canadian Maritime Law Association

http://www.cmla.org

Association of Maritime Arbitrators of Canada

http://www.amac.com

MRS MALAPROP AND MANGLED SYNTAX: NEW DEVELOPMENTS OR JUST BUSINESS AS USUAL?

John Weale*

"Many people, including politicians, celebrities and Mrs Malaprop, mangle meanings and syntax but nevertheless communicate tolerably clearly what they are using the words to mean."

Convention requires, I believe, that the layman invited to address such a splendid gathering as this should grovel a bit and make suitably fatuous remarks about poachers presuming to lecture game-keepers on how to breed pheasants. But, as we seem to be a little short on time, I propose to forego this ritual self-abasement, and will merely remark that a better analogy might be an ambulance driver speaking to pathologists. Broadly speaking, we are in the same line of business: it is simply that most of the contractual specimens which you will see will either be dead or very sickly by the time they reach you.

It may, therefore, come as a mild shock when I tell you that the area of contract law which most troubles commercial men is how to interpret their written agreements. The common question is: but what does this document actually mean?

Your natural reaction may be that this is a trite and arid topic, more suited to textbooks and the class-room; and, until a few years ago, you would be right. But in the last five years or so, the House of Lords has whipped up quite a lively discussion in this area. In such a context, "*lively*" is, of course, a relative term: the debate has all the spectator appeal of a fly-fishing contest - a perception which is reinforced by the polite tendency of the protagonists to pretend that they are really doing nothing more than restating the existing law. But, despite this disingenuous diffidence, the issues really are quite vital, and should occasionally keep you awake at night, let alone just after lunch.

Legal interpretation is, of course, something which the courts of common law have always jealously guarded. This is usually explained as a hangover from the days when civil suits had to be decided by illiterate jurors;[1] but the real reason, I would submit, is to be found in the four fictional premises of contractual construction. I wasn't at all sure that "*fiction*" was quite the right term to use here; but my dictionary defines it as: "*a supposition of law that a thing is true, which is either certainly not true, or at least is as probably false as true.*" If that is correct, then "*fiction*" is precisely the word I was looking for.

The first of these fictions is, of course, the premise of mutual intent. This implies that the parties did actually have such an intention, which, as experience has shown, is often not the case at all. This can occur for all sorts of reasons, most frequently perhaps because both parties overlooked the problem which has arisen in the course of performance. Or perhaps – and this happens a lot - one of them has foreseen the problem very clearly, but decides to remain silent in case it blows the deal away. "*Let's not go there - we'll deal with that if and when it arises,*" is a

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* *Vice President, Risk Management, Fednav Limited, Montreal.*
President, Association of Maritime Arbitrators of Canada

remark which is heard all too often on the broker's cell-phone.

The second and third premises are rather less logical: one is the assumption that there exists only one true and correct meaning for the bargain which the parties have struck; and the other is the assumption that this one true meaning may actually be something which neither of the parties intended.

Oddest of all, however, is the fourth fiction, which relates to the concept of objective interpretation. This rests on the sensible premise that the wording of the contract has simply to be construed in its context, from the objective point of view of reasonable persons standing in the shoes of the contracting parties. So far, so good; but the inherent illogicality appears when you look around the court-room, and discover that the only person who is actually dressing up as the reasonable man is the ranking pathologist – I mean, of course, the judge himself.[2]

Some judges will readily admit the inherent absurdity of this assumption. Lord Bramwell expressed it in his usual robust terms:[3]

> "*Here is a contract made by a fishmonger and a carrier of fish who know their business, and whether it is just or reasonable is to be settled by me who am neither fishmonger nor carrier, nor with any knowledge of their business.*"

But all too often, I am afraid, it happens that the judge will solemnly rely on his "*instinctive appreciation of commercial likelihood*"[4] (or some other, equally improbable abstraction), when everyone else in the room knows perfectly well that he has to rely on his wife to balance his cheque book.

But I must get to my main point. The case which really set the purposive cat among the literalist pigeons came to the House of Lords in 1997. Its unwieldy title was *Investors Compensation Scheme v. West Bromwich Building Society*.[5] I will, for convenience, just refer to it as "*ICS*". I do not intend to quote from *ICS* at length: the relevant passage is included in the dark blue folder, which you can pick up afterwards if you wish to.[6]

The defining speech was given by Lord Hoffmann. His message was quite simple. The meaning of a document or any other utterance is not necessarily the same as the meaning of its words. The meaning of the document is what the parties using those words in that context would reasonably be understood to mean. The context or background allows us not only to choose between alternative possible meanings, but even to conclude that the parties have used the wrong words or syntax. From this, it follows that you cannot properly construe any written document, unless you know its context and background. With the sole exception of the preceding negotiations, absolutely anything is admissible which could affect the way in which the language of the document might be understood by a reasonable man. (Here, I must echo Anna Russell and assure you that I am not making any of this up: Lord Hoffmann did actually say "*absolutely anything*".[7])

According to this view, the time-honoured "Golden Rule", that words should be given their "natural and ordinary meaning", simply reflects the common-sense proposition that we do not readily accept that people make linguistic mistakes in formal documents. But if it is clear from the background that something has gone wrong with the language, the law does not require the

court to attribute to the parties an intention which they plainly could not have had.

The *ICS* case concerned the interpretation of a legally drafted form of release. A few weeks earlier, Lord Hoffmann had applied his skills as a linguistic philosopher to a parallel problem in respect of a formal notice given under a lease. His remarks in that case present a lively and animated picture of his general approach: [8]

> *"No one ... has any difficulty in understanding Mrs. Malaprop. When she says 'She is as obstinate as an allegory on the banks of the Nile', we reject the conventional or literal meaning of allegory as making nonsense of the sentence and substitute 'alligator' by using our background knowledge of the things likely to be found on the banks of the Nile and choosing one which sounds rather like 'allegory'.*
>
> *Mrs. Malaprop's problem was an imperfect understanding of the conventional meanings of English words. But the reason for the mistake does not really matter. We use the same process of adjustment when people have made mistakes about names or descriptions or days or times because they have forgotten or become mixed up. If one meets an acquaintance and he says 'And how is Mary?' it may be obvious that he is referring to one's wife, even if she is in fact called Jane. One may even, to avoid embarrassment, answer 'Very well, thank you' without drawing attention to his mistake. The message has been unambiguously received and understood."*

Lord Hoffmann's easy and persuasive style, coupled with his coy description of his heterodoxy as "*some general remarks about the principles by which contractual documents are nowadays construed*", may have led some judicial commentators to conclude that, after all, there is nothing very revolutionary in his approach.[9] From a semantic point of view, his views make good sense; and he may be the first senior judge to recognise the relevance and importance of the work done by the linguistic philosophers at Oxford fifty years ago. But as a general rule for interpreting legal documents, *ICS* has undoubtedly turned things upside down and effected what Lord Mustill has correctly described as "*a sea change in the way contracts are to be interpreted*".[10]

For all sorts of reasons, including those which I mentioned earlier, legal construction is a highly contrived and artificial exercise; and there is really no logical reason why its rules should track those of everyday speech, any more than the rules of hockey should follow the Geneva Convention. But rules there are; and once the rule-making body decides to alter them, the rest of us must do what we can to assimilate the changes.

Before *ICS*, the traditional and "correct" approach was the one very neatly summarised by Mr Justice Saville (as he then was) in a 1988 case: I have quoted the relevant paragraph in the blue folder (together with some other specimens which may be relevant to your autopsy).[11]

Essentially, what he had to say was this: the whole exercise is simply to establish the objective intent of the parties from the words which they have chosen to use. If those words are clear and will allow only one sensible and acceptable meaning, then that is that. If, however, the wording is ambiguous, or will allow more than one sensible meaning then, and only then, do you turn to consider the aim and genesis of the agreement, and select from among the competing interpretations the one which makes most sense in the overall context of the contract when set

among the circumstances which surrounded its making.

In other words, in a written agreement, you must first concentrate exclusively on the wording, and you may only venture into the background if the words are ambiguous. The written agreement lives in one room, and the surrounding circumstances live in an adjoining room; and you only cross from the first room to the second if the first contains an ambiguity. If the words are clear and will carry only one relevant meaning, then that is where you must stop: the background is forbidden territory. It is this simple orthodoxy which Lord Hoffmann and his learned brethren have now overturned.

Not everyone has been convinced. In *ICS* itself, Lord Lloyd – himself quite open to the idea of purposive construction[12] – voiced a strong dissent:

> *"As Leggatt L.J. said in the Court of Appeal, such a construction is simply not an available meaning of the words used; and it is, after all, from the words used that one must ascertain what the parties meant. Purposive interpretation of a contract is a useful tool where the purpose can be identified with reasonable certainty. But creative interpretation is another thing altogether. The one must not be allowed to shade into the other."*

Soon afterwards, Lord Justice Saville expressed his own misgivings.[13] One could hardly quarrel, he said, with the proposition that the purpose was to work out what the parties really intended as opposed to analysing their words in a vacuum. But if that intention was clear from those words, there must be two serious objections to admitting the background and factual matrix to alter that meaning.

The first objection was clearly one of cost: the requirement to dig into the background to see whether it might change the meaning of the written words must add greatly to the length and complexity of the proceedings.[14]

The second objection was that this new doctrine must create serious problems for third parties such as endorsees or assignees: for how can a third party rely on the meaning of his document if that meaning may be governed by external events and situations of which he has no knowledge? But equally, how can it be satisfactory to have the same document carrying different meanings, quite possibly at the same time, depending on who relies on it?

This difficulty with the rights and obligations of such third parties is, of course, nothing new.[15] Nor is this the only area where interpretative problems can and often do arise: to take a topical example, the war clause of a time charter entered into last August might quite properly be construed to mean something entirely different in a back-to-back sub-charter entered into a week after the bombing began in Afghanistan.[16] The difficulties which such situations raise are certainly not semantic problems; and it would be unfair to lay these at Lord Hoffmann's door.

But *ICS* has clearly modified the traditional approach to contractual interpretation, and in doing so has effectively blurred the distinction between the construction of the written words within their documentary context, and the matrix of fact and circumstance which surrounded the genesis and creation of the contract itself.

Let me give you a simple example of what I mean. Suppose that an owner and a charterer are negotiating a voyage charter through an exchange of faxes. This is being done on an

"accept/except" basis, and the open issues are progressively reduced until there is very little left to be agreed apart from the rate of freight. At this stage, the owner sends a message saying that he repeats his last offer, with the freight rate to be $6.00 per ton. The charterer, who knows that the market is really closer to $16, loses no time in returning his clean acceptance; and at that point the contract is made.

This would be hard luck on the owner. Perhaps he might hope to persuade an arbitration tribunal to correct his mistake (although this is clearly not a case for rectification in the legal sense); but it would undoubtedly be an up-hill task. Now, armed with the authority of *ICS*, the owner can say: "*But a reasonable man standing in the shoes of the parties would understand immediately that something has gone wrong with the wording of the contract, because he would know that the market is not $6, but somewhere in the mid-teens, and would naturally recognise my typographical mistake for what it is. Any fool, let alone your reasonable and well-informed bystander, would have to know that I had mangled my numerical syntax.*" Of course, he could have said that before: the issue is whether the tribunal could properly listen to him and then search out some convenient device to free him from his inequitable trap.

Now, before you reject this example as too absurd for serious consideration, let me explain briefly what was the issue in *ICS*.

There was a scheme for compensating investors which was set up under a section of the Financial Services Act. The issue in the case concerned a single clause in the form of release to be signed by the investors when making their claim for compensation. An exclusion was carved out from the general surrender of the investors' claims in return for the compensation, where the offending words read:

> "*Any claim (whether sounding in rescission for undue influence or otherwise) that you have or may have against West Bromwich Building Society ...*"

The judge at first instance accepted that the construction offered by the investors and the building society was the more natural meaning of the words, so that the exclusion covered all possible claims, and not just claims for rescission; but he then went on to reject this interpretation, on the grounds that it produced a ridiculous result which was contrary to "*the demonstrable purpose of the parties in entering into the claim forms.*"

The Court of Appeal agreed about the natural meaning of the words, but declined to go any further: in giving the leading judgment, Lord Justice Leggatt said: "*There is simply no warrant for limiting the rights retained to claims for or consequent upon rescission.*"

With the exception of Lord Lloyd, the House concluded that the Court of Appeal had got it wrong: in effect, they said, the words "*in rescission*" did not belong inside the brackets, but outside. The text should not be read as: "*Any claim (whether sounding in rescission for undue influence or otherwise ...*", but as: "*Any claim in rescission (whether sounding for undue influence or otherwise ...*" In other words, they decided to rewrite the contract.

Part of the surrounding matrix was an Explanatory Note addressed in non-legal language to the investor himself, but which formed no part of the formal document itself. This stated: "*You also agree that ICS should be able to use any rights which you now have against anyone else in relation to the claim. ... You give up all those rights and transfer them to ICS.*" This Note, which was praised by Lord Hoffmann as "*a model of clarity*", obviously influenced the purposive interpretation which was finally upheld.

ICS should not be viewed in isolation: there are a number of earlier decisions in the Court of

Appeal as well as the House of Lords which show a tendency to move in the same direction, notably those which arose in the stream of litigation concerning the Lloyd's names and their reinsurers.[17] But none of these, I think, ever actually crossed the threshold between our first room and our second except by going through the single door to which ambiguity is the only key.

In *ICS*, however, Lord Hoffmann elected not to use the door at all: he simply knocked down the adjoining wall, and turned the two rooms into one. And that, surprising though it may seem, is the current state of the law on this point in England.

What has this to do with the Federal Court of Canada? Our common law has long since, you will say, thrown off the fetters of the English system: why, we even admit expert evidence in collision cases where the judge is sitting with assessors – and what could be more daring and grown-up than that?

The problem is that these issues of interpretation are already surfacing in arbitration; and with the introduction of Section 46 of the new Marine Liability Act, they are likely to arise much more frequently, not least because the usual claimant will be the third man: as endorsee of the contract of carriage, he will find that he has unwittingly picked up an arbitration agreement which is expressly subject to an alien jurisdiction.

So my question is this: how are our Canadian arbitrators to deal with arguments based on Lord Hoffmann's new approach to constructive home improvement?[18]

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1 " ... *in English jurisprudence, as a legacy of the system of trial by juries who might not all be literate, the construction of a written agreement, even between private parties, became classified as a question of law. ... A lawyer nurtured in a jurisdiction which did not owe its origin to the common law of England would not regard it as a question of law at all. ... Nevertheless, despite the disappearance of juries, literate or illiterate, in civil cases in England, it is far too late to change the technical classification of the ascertainment of the meaning of a written contract between private parties as being "a question of law" for the purposes of judicial review.*"
(*Pioneer Shipping Ltd v. B.T.P.Tioxide Ltd.* (*The* "***NEMA***") [1981] 2 Lloyd's Rep. 239, per Lord Diplock)

2 Cf: "*And so the argument between lawyers starts with the unexpressed major premise that any particular combination of words has one meaning, which is not necessarily the same as that intended by him who published them or understood by any of those who read them, but is capable of ascertainment as being the "right" meaning by the adjudicator to whom the law confides the responsibility of determining it.*"
(*Slim v. Daily Telegraph Ltd.* [1968] 2 Q.B. 157, per Diplock LJ)

3 *Manchester Sheffield & Leicestershire Railway Co. v Brown* [1883] L.R. 8 A.C. 703

Cf: "*I also accept, equally unreservedly, that arguments based upon apparent commercial absurdity need to be regarded with caution not least because, whilst Judges of commercial experience are in a position to make some evaluation of the benefits and burdens of liberties and limitations contained in a charter-party, they are unlikely to be able to evaluate the countervailing burden or benefit of a particular rate of hire or length of charter, which depends upon current market conditions, and because the alleged absurdity of a particular provision has to be judged in the context of the whole package.*"
(*The* "***WORLD SYMPHONY***" & "***WORLD RENOWN***") [1992] 2 Lloyd's Rep. 117, per Lord Donaldson MR)

4 *Sinochem International Oil (London) v. Mobil Sales & Supply Corp.* [2000] 1 Lloyd's Rep. 339, per Mance LJ