

## **SUPPLEMENT**

**Christopher Giaschi, "Developments in Canadian Maritime Law, 2007 to May 31, 2009"**

**Canada Gazette, Part I, "Rules Amending the Federal Court Rules (Summary Judgment and Summary Trial)"**

**David Wotherspoon et al., "Summary Trial at the Federal Court"**

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## *Developments in Canadian Maritime Law*

*01/01/2007- 31/12/2008*

*With Addendum to May 2009*

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## Synopsis of Important Developments

### Canadian Maritime Law

The most significant developments of 2007-2008 in relation to the scope and content of Canadian maritime law were the decisions of the Supreme Court of Canada in *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, [2007 SCC 22](#) (a non-marine case) and *British Columbia (Attorney General) v. Lafarge Canada Inc.*, [2007] 2 S.C.R. 86, [2007 SCC 23](#). In these cases the Supreme Court of Canada has said that constitutional issues relating to the application of provincial statutes to matters within the constitutional jurisdiction of the federal Parliament should preferably be resolved by the application of the paramountcy doctrine rather than the interjurisdictional immunity doctrine. The interjurisdictional immunity doctrine should be limited to cases where the provincial legislation actually “impairs” or places in jeopardy the core of the federal power. Merely affecting the federal power is not sufficient to invoke the doctrine. The paramountcy doctrine will apply where there are valid provincial and federal laws and it is either impossible to comply with both laws or the application of the provincial law would frustrate the purpose of the federal law. This restatement of the law means that there is a greater possibility of provincial statutes of general application applying to maritime matters which is reflected in: *R. v. Mersey Seafoods Ltd.*, [2008 NSCA 67](#), where the provincial Occupational Health and Safety Act was held to apply to fishing vessels; and, *Salt Spring Island Local Trust Committee v. B & B Ganges Marina Ltd.*, [2008 BCCA 544](#), affirming [2007 BCSC 892](#), where local land use controls were held to apply to a floating camp that was held not to be a ship because it was not being used in navigation.

### Marine Insurance

There were relatively few cases dealing with marine insurance in 2007-2008. *Timberwest Forest Corp. v. Pacific Link Ocean Services Corporation*, [2008 FC 801](#), summarized below under “Carriage of Goods”, is a case of particular interest in that it suggests that a waiver of subrogation clause can be extended beyond the entities named in the clause. *McIntosh v Royal & Sun Alliance*, [2007 FC 23](#), is a case that notes that marketing a vessel can be a breach of a pleasure use warranty and holds that a pleasure use warranty is a true warranty and not a suspensive condition.

### Carriage of Passengers

There have been a number of cases of interest in 2007-2008 relating to the carriage of passengers. *Russell et al. v. MacKay*, [2007 NBCA 55](#) and *Frugoli c. Services Aériens des cantons de L'Est inc.*, [2007 QCCS 6203](#) confirm that the limitation periods for passenger claims are to be found in the *Marine Liability Act* and *Athens Convention* and further hold that there is no power to extend such limitation periods. *Gundersen v. Finn Marine Ltd.*, [2008 BCSC 1665](#) is of interest in that it holds that the *Athens Convention* will apply domestically to a non-paying guest onboard a vessel used for commercial purposes and it also confirms the very heavy onus on a plaintiff who wishes to challenge the defendant’s right to limit liability. Finally, *McDonald v. Queen of the North (Ship)*, [2008 BCSC 1777](#) is the first case to hold that dependents claiming under the *Marine Liability Act* and *Athens Convention* may not claim punitive, aggravated or exemplary damages.

### Carriage of Goods

The most interesting case of 2007-2008 in relation to carriage of goods is *Boutique Jacob Inc. v. Pantainer Ltd.*, [2008 FCA 85](#), where the Federal Court of Appeal corrected an error of interpretation in respect of s. 137 of the *Canada Transportation Act* holding that “shipper” means the entity that contracted with the rail carrier. The case also dealt with the intricacies of multiple bills of lading and Himalaya clauses as does the case of *Alcoa, Inc. v. CP Ships (UK) Ltd.*, [2007 ONCA 686](#). In *Timberwest Forest Corp. v. Pacific Link Ocean Services Corporation*, [2008 FC 801](#), the Federal Court held that the Hague-Visby Rules will not apply to cases where the incorporated standard bill of lading states the cargo is carried on deck even though the bill of lading is not actually issued.

### Jurisdiction Clauses

In *Mitsui O.S.K. Lines Ltd. v. Mazda Canada Inc.*, [2008 FCA 219](#), the Federal Court of Appeal has clarified that when conducting a *forum non conveniens* analysis the policy reasons behind s.46 of the *Marine Liability Act* should not be taken into account and neither should the fact that the other jurisdiction has a different limit of liability.

### Collisions

*Laichkwiltach Enterprises Ltd. v. F/V Pacific Faith (Ship)*, [2007 BCSC 1852](#), additional reasons [2008 BCSC 282](#), and *Omega Salmon Group Ltd. v. The “Pubnico Gemini”*, [2007 BCCA 33](#), reversing in part [2006 BCSC 59](#), are two cases in which ships were held liable for colliding with stationary objects (a moored ship and a fish farm). *R. v. Cloutier*, [2007 QCCQ 13533](#), *R. v. Bridle*, [2008 BCPC 52](#), and *R. v. MacKay*, [2008 NSPC 8](#), are three noteworthy cases where criminal or quasi criminal charges were laid following a collision.

### Mortgages, Liens and Priorities

The more interesting developments in 2007-2008 in relation to mortgages, liens and priorities include: *Kent Trade and Finance Inc. v. JPMorgan Chase Bank*, [2008 FCA 399](#), where the Federal Court of Appeal held that a choice of American law in a supply contract can result in priority for the supplier; *Nanaimo Harbour Link Corp. v. Abakhan & Associates Inc.*, [2007 BCSC 109](#), where the British Columbia Supreme Court confirmed that maritime lien claimants are to be treated as equivalent to secured creditors in bankruptcy situations and are free to pursue their remedies and priorities under Canadian maritime law; and *Royal Bank v. 1132959 Ontario Ltd.*, [2008 CanLii 40231](#), where the Ontario Supreme Court held in respect of a vessel registered under the *Canada Shipping Act* that a PPSA security interest had priority over an interest registered under the CSA.

### Admiralty Practice

Notable developments in 2007-2008 in relation to Admiralty practice include: *Phoenix Bulk Carriers Ltd. v. Kremikovtzi Trade*, [2007 SCC 13](#), where the Supreme Court of Canada adopted a broad interpretation of s.43(2) of the *Federal Court Act*; *Hansen v. The Trinity (Ship)*, [2007 BCSC 225](#), where the British Columbia Supreme Court held that there is a requirement to make full disclosure in an affidavit to lead warrant; *Aosta Shipping Co. v. Gulf Overseas General Trading LLC*, [2007 BCSC 354](#), where a mareva injunction was refused, *inter alia*, on the grounds that there was no substantial connection to the jurisdiction; and, *Labrador Sea Products*

*Incorporated v. Northern Auk (Ship)*, [2007 FC 679](#), where a party was found guilty of contempt of court for removing equipment from a vessel under arrest.

### *Pollution*

Notable developments in 2007-2008 in relation to pollution include: *Canada v. Ship Source Oil Pollution Fund*, [2008 FC 1094](#), where the Federal Court was required, for what is believed to be the first time, to set a standard for review of a decision by the Administrator of the Ship Source Oil Pollution Fund.

### *Miscellaneous*

Notable miscellaneous developments in 2007-2008 include: *Hansen v. "Trinity" (The)*, [2007 BCSC 821](#), where the plaintiff forfeited substantial part payments on a boat building contract; *Nanaimo Shipyard Ltd. v. Keith*, [2008 BCSC 1150](#), where a shipyard was found to have acted unconscionably with respect to a ship owner; *Wilcox v The Miss Megan*, [2008 FC 506](#), affirming [2007 FC 1004](#), where the Federal Court held that dependents claims for loss of care guidance and companionship under the *Marine Liability Act* should be assessed on a case by case approach and with reference to Ontario case law; and, *Wozniak v Alexander*, [2008 ABQB 430](#), where a boat rental company was found 50% liable for a plaintiff's injuries for failing to properly instruct the renters.

## Canadian Maritime Law/Admiralty Jurisdiction

### *Constitutional Law – Application of Provincial Statutes - Harbours - Municipal By-Law*

**British Columbia (Attorney General) v. Lafarge Canada Inc.**, [2007] 2 S.C.R. 86, [2007 SCC 23](#)

The issue in this case was whether the Vancouver Port Authority was required to obtain a City development permit to build a ship unloading facility on port lands. The Supreme Court of Canada noted that the development of waterfront lands could come under either federal or provincial jurisdiction but applied the doctrine of paramountcy and held that the City bylaw was not applicable. In reaching this conclusion the Court considered and rejected the doctrine of interjurisdictional immunity. The Court said the doctrine of interjurisdictional immunity should generally not be applied where the subject matter has a double aspect and both the federal and provincial governments have a compelling interest. Further, the Court said the interjurisdictional immunity doctrine does not apply to every element of a federal undertaking but is restricted to the "essential and vital elements" of the undertaking. Here, the land use controls in the *Canada Marine Act* were not a core or vital element of the federal power over navigation and shipping and therefore, the interjurisdictional immunity doctrine did not prevent the province and City from legislating. However, the Supreme Court went on to find that the preconditions for the application of the paramountcy doctrine were met. Those preconditions are: 1. valid and applicable federal law; 2. valid and applicable provincial law; and, 3. these valid laws are incapable of simultaneous enforcement. (Note: In separate reasons Justice Bastarache reached the same conclusion as the majority but did so solely on the basis of the interjurisdictional immunity doctrine.)



*Constitutional law- Application of Provincial Statutes - Occupational Health and Safety*

**R. v. Mersey Seafoods Ltd.,** [2008 NSCA 67](#), reversing [2007 NSSC 155](#)

The accused in this case was a corporation that operated various factory fishing vessels. The accused was charged with offences under the Nova Scotia *Occupational Health and Safety Act* ("OHSA"). The charges were dismissed in the lower courts on grounds that the safety and operation of vessels was within the exclusive jurisdiction of the Federal Government and the OHSA was inapplicable. On appeal to the Nova Scotia Court of Appeal, the Court first considered whether, and had little difficulty in concluding that, the pith and substance of the OHSA was within a head of power granted to the provinces. The Court next considered whether the OHSA infringed Parliament's constitutional powers in relation to navigation and shipping. The Court referred to and relied extensively on the Supreme Court of Canada's decisions in *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, [2007 SCC 22](#) and *British Columbia (Attorney General) v. Lafarge Canada Inc.*, [2007] 2 S.C.R. 86, [2007 SCC 23](#). The Court noted that under the revised test established in those cases a provincial statute will only attract federal interjurisdictional immunity when the statute "impairs" (rather than merely "affects") either (1) the "core" of a federal competence or (2) a vital or essential part of a federal undertaking. The Court held that any impact of the OHSA on navigation and shipping was merely incidental. The Court therefore held that the interjurisdictional immunity doctrine did not apply to oust the application of the OHSA. The Court next considered the paramountcy doctrine and noted that for the doctrine to apply there must be both federal and provincial laws and that it must be impossible to comply with both laws or that to apply the provincial law would frustrate the federal law. The Court found that the only applicable federal law was the *Canada Shipping Act* but held that there was no "operational conflict" between the OHSA and the *Canada Shipping Act* and the OHSA did not frustrate the purpose of the *Canada Shipping Act*. Accordingly, the Court confirmed that the OHSA applied to vessels operated by the accused.

*Meaning of Ship - Constitutional Law – Application of Provincial Statutes - Land use By-Law*

**Salt Spring Island Local Trust Committee v. B & B Ganges Marina Ltd.,** [2008 BCCA 544](#), affirming [2007 BCSC 892](#)

The issue in this case was whether a municipal bylaw limiting the size and height of buildings applied to an oil-tank barge that had been converted to a two storey floating camp. The Defendant marina argued the bylaw was constitutionally invalid or inapplicable which turned, in part, on whether the floating camp was a ship. The marina had originally been given a temporary permit allowing it to use the floating camp as an office but the permit was conditional on the redevelopment of the marina. The redevelopment did not proceed and the marina was eventually asked to remove the floating camp. The evidence disclosed that the floating camp had electrical, water and telephone connections with the land. At first instance, the motions Judge held that the floating camp was not a ship (although he recognized that it might in the future be used as a ship) and held that the bylaw applied. The Judge held that the paramountcy doctrine did not invalidate the bylaw because there was no conflicting federal legislation. The Judge further held that the interjurisdictional immunity doctrine did not invalidate the bylaw because land-use control is not "absolutely indispensable or necessary" to federal jurisdiction over shipping and navigation. The bylaw incidentally affected the federal power over navigation and shipping but did not impair or paralyze the core of the federal power. In result, the bylaw was valid. The marina appealed.

On appeal to the British Columbia Court of Appeal, two separate sets of Reasons were given. The majority agreed with the motions Judge that the floating camp in its present configuration and use was not a ship or vessel or boat. In fact, the majority suggested that once it was converted from an oil-tank barge to a floating camp it was no longer designed to be used in navigation and no longer a ship. The majority then declined to consider the constitutional issues saying that because the floating camp was not a ship the constitutional issue did not arise. The minority did consider the constitutional issues and agreed with the motions Judge that the doctrine of paramountcy did not apply. The minority held that paramountcy requires a direct collision between federal and provincial legislation and there was no such collision in this case. The minority also agreed that the interjurisdictional immunity doctrine did not apply, noting that the key consideration in the case was the "use" to which the floating camp was put. If an object is being used as a ship, that use may engage the federal power over navigation. If an object is not being used as a ship, the federal power over navigation is not engaged.

*Constitutional law- Application of Provincial Statutes - Validity of Local Bylaw Prohibiting Mooring*

**Ramara (Township) v. Guettler**, [2007 CanLII 16453](#)

The Defendant argued that a municipal bylaw prohibiting mooring in any "canal, waterway or slip" owned by the municipality was constitutionally invalid. In very short reasons the Court held that as the municipality owned the lands above and below the water of the canal it had the power to legislate. The Court noted that the federal Parliament also had the power to legislate and this was a straightforward case of overlapping jurisdiction.

*Mortgages - Priorities - Application of Provincial Statutes*

**Royal Bank v. 1132959 Ontario Ltd.**, [2008 CanLii 40231](#)

See summary below under Liens and Mortgages.

## Marine Insurance

*Warranty of Legality – Breach of Express Warranties – Disclosure of Material Circumstances – Waiver*

**Ocean Masters Inc. v. AGF M.A.T. (Allianz AGF MAT Ltd.)**, [2007 NLCA 35](#), affirming [2006 NLTD 140](#)

The Plaintiff's fishing vessel caught fire and sank 40 miles off the coast of Newfoundland. At the time, the vessel was en route to recover its crab gear which was already in the water at a location 170 miles off the coast. However, the vessel's CSI certificate limited the vessel's operation to within 120 miles of the coast and the certificate of the Master of the vessel imposed a similar restriction. A request for coverage under the vessel's hull policy was denied by the Defendant underwriters on the grounds of breach of an express warranty that the vessel would be operated in compliance with its CSI certificate, breach of the warranty of legality and failure to disclose material facts. The Court of Appeal for Newfoundland held that the trip was not illegal in its entirety, as held by the trial Judge, but was only illegal during the time the vessel was beyond the

120 mile limitation contained in its certificate. Accordingly, at the time of the loss there was no breach of this warranty. In reaching this conclusion the Court gave effect to clause 8 of the policy which provided "If any breach of a clause or condition of insurance shall occur prior to a loss under this insurance, such breach shall not avoid the coverage...unless such breach shall exist at the time of such loss." With respect to the implied warranty of legality, the Court held that when the vessel sank it was not being operated illegally and therefore the warranty did not apply. Finally, the Court noted that the fact the vessel had been operated beyond the limit imposed by its CSI certificate had no bearing on the loss and that any failure by the assured to disclose this could not be relied upon to release the insurer from liability.

*Carriage of Goods - Deck Carriage- Marine Insurance - Waiver of Subrogation - 3rd parties*  
**Timberwest Forest Corp. v. Pacific Link Ocean Services Corporation, [2008 FC 801](#)**

See summary below.

*Insurance Breach of Pleasure Use Warranty - Liability of Broker*

**McIntosh v Royal & Sun Alliance, [2007 FC 23](#)**

In 2002 the Plaintiff/assured purchased a high performance power boat and took out insurance with the Defendant/insurer through the co-Defendant broker. The Plaintiff intended at some point to use the boat in a business but obtained a policy that was for pleasure use only. The Plaintiff's broker knew of the assured's intended use and attempted to obtain commercial coverage but was unable to do so. The Plaintiff was specifically advised by the broker that commercial coverage was not available and that the boat was only insured for pleasure use. Nevertheless, the Plaintiff set up a company called Offshore Performance Tours, had "Offshore Performance Tours" decals put on the boat and took the boat to a number of meets during the summer of 2002 to promote the business. It was claimed that no paying customers were carried in 2002. The following year the policy was renewed with the pleasure use warranty and the assured continued to market the boat by taking it to meets. Again, the Plaintiff claimed he was unable to attract any paying customers. During the fall of 2003, after having used the boat for pleasure purposes, the vessel was stolen while on a trailer at the Plaintiff's cottage. Not surprisingly, the insurer denied coverage for the theft on the grounds that the assured had breached the pleasure use warranty. The denial was upheld by the Judge who did not believe the Plaintiff's claim that there were no paying passengers. The Judge found as a fact that there were paying customers and, therefore, a breach of the pleasure use warranty. The Judge further held that the pleasure use warranty was a true warranty and not a suspensive condition. The Judge then turned to the claim by the Plaintiff against the broker. The Judge found that the broker had not met the required standard of care of a broker in that he failed to sufficiently explore the Plaintiff's business plans and provided inaccurate information that the pleasure use warranty would only be breached when a paying customer was taken on the boat. The Judge held that the mere act of using the boat to promote a charter business amounted to a commercial use of the boat. However, the Judge held that there was no causal link between the breach of duty by the broker and the Plaintiff's damages. Specifically, the Plaintiff did not rely upon the broker's advice and instead chose to deliberately ignore it by taking paying passengers onboard. In result, the action against the broker was also dismissed.



## Carriage of Passengers

*Personal Injury - Athens Convention - Limitation Period - No Power to Extend - Applicable Law*

**Russell et al. v. MacKay**, [2007 NBCA 55](#), reversing in part [2006 NBQB 350](#)

The Plaintiff was a passenger on a whale watching vessel and was injured at sea when she tripped over a cooler while leaving the washroom on the vessel. The accident occurred on 3 August 2003 but action was not commenced until 20 July 2006. The Defendants brought this motion to dismiss the Plaintiff's claim on the grounds that it was statute-barred by the two year limitation period in the *Athens Convention* as enacted by the *Marine Liability Act*. The Plaintiff argued that the applicable limitation period was six years as provided the New Brunswick *Limitation of Actions Act*. Alternatively, the Plaintiff argued that the Court had the discretion to suspend or interrupt the running of the limitation period. The trial Judge concluded that the Plaintiff's claim was in pith and substance in relation to navigation and shipping and governed by federal Canadian maritime law and not the provincial limitations statute. The trial Judge then considered whether the court had discretion to suspend or interrupt the running of the limitation period. The trial Judge referred to art. 16(3) of the *Athens Convention* which provides that "The law of the court seized of the case shall govern the grounds of suspension and interruption of limitation periods..." The trial Judge held that the phrase "law of the court seized of the case" referred to Canadian maritime law and not the law of New Brunswick. The trial Judge noted that a three part test had been established to determine when an extension of a limitation period should be made under s. 572(3) of the *Canada Shipping Act* and that this was the appropriate test to apply. The test was: 1. did the Plaintiff have a valid prima facie case; 2. was the Defendant aware of the claim and would it suffer prejudice by an extension, other than the loss of the limitation defence; and 3. having regard to all the circumstances, was it in the best interest of justice that time be extended. Applying this test the trial Judge held it was in the best interests of justice that the limitation period be interrupted or extended.

On appeal to the New Brunswick Court of Appeal, the Court of Appeal agreed with the trial Judge that the case was to be governed by federal maritime law and further agreed that the limitation period was to be found in the *Athens Convention* but disagreed with respect to the powers of the court to suspend or extend the limitation period. Specifically, the Court of Appeal said that the trial Judge erred in relying upon and applying the test flowing from the old s. 572(3) of the *Canada Shipping Act* which dealt with collisions between ships (as does its successor in s.23 of the *Marine Liability Act*) not injuries to passengers. The Court said that Art. 16 of the *Athens Convention* did not include any power to extend the limitation period and held that superior courts do not have inherent powers to extend limitation periods. The Court of Appeal next considered the meaning of Art. 16(3) and noted that the reference to the law of the court seized of the case did not imply such law would necessarily provide grounds for suspension or interruption. The Court held that there was no federal legislation that would provide grounds for suspension or interruption. Finally, the Court considered whether the law should be reformed to include a power to suspend or interrupt a limitation period and suggested, without deciding, that 1) waiver; (2) estoppel; (3) absence from the jurisdiction; (4) infancy; and (5) mental incompetency might be grounds. However, as the evidentiary record supported none of these grounds, the matter was not decided.

*Carriage of Passengers - Fatal Accident - Limitation Period - Applicable Law - Athens Convention - Extension*

**Frugoli c. Services Aériens des cantons de L'Est inc., [2007 QCCS 6203](#)**

This was an action by dependents of two persons who were presumed drowned when the boat they were in capsized. The boat had been chartered and operated by the Defendant. The issue was whether the limitation period was the three year period prescribed in the Quebec Civil Code, the two year period prescribed by s. 14(2) of the *Marine Liability Act* (MLA) or the two year period as prescribed by Art. 16(2) of the *Athens Convention* as enacted by the MLA. Due to a mistake by Plaintiff's counsel, the action was commenced more than two years after the accident but less than three years. The Court reviewed the various authorities and held without much difficulty that the claim should be subject to federal maritime law and not the Quebec Civil Code. The Court next considered whether it was the two year period in the MLA or the two year period in the *Athens Convention* that applied and whether the period could be extended. The issue was relevant because Art. 16(3) of the *Athens Convention* provides that "the law of the court seized of the case shall govern the grounds of suspension or interruption" of the limitation period. The Court held that the "law of the court seized of the case" meant Canadian maritime law. The Court then thoroughly reviewed the authorities and ultimately held that there was no discretionary power to extend the limitation period under maritime law except with respect to collision action governed by s. 23 of the MLA. Finally, the Court was of the view that in any event an error of counsel was not sufficient grounds for interruption or suspension of the limitation period in the circumstances.

*Carriage of Passengers - Athens Convention - Collision - Personal Injury - Limitation of Liability*

**Gundersen v. Finn Marine Ltd., [2008 BCSC 1665](#)**

The Plaintiff was seriously injured when the vessel in which she was riding ran into Salt Spring Island. The vessel was a commercial water taxi and at the time of the accident it was on its way to pick up passengers. The Plaintiff, however, was not a paying passenger but was onboard as a non-paying guest. The Judge found as a fact that the incident occurred when the operator of the vessel fell asleep. The Defendants, the owner and operator of the vessel, applied for an order that they were entitled to limit their liability pursuant to Part 4 of the *Marine Liability Act* ("MLA") dealing with carriage of passengers. The Plaintiff argued that the applicable limitation was found in Part 3 of the MLA, which would have been a substantially higher limitation. The Plaintiff also argued that the Defendants conduct was such that they had lost the right to limit. Dealing with the first issue the Judge agreed with the Defendants and held that the right to limit was to be found in Part 4 of the MLA and the *Athens Convention*. In so doing the Judge applied s.37(2) of the MLA which extends the *Athens Convention* "to domestic gratuitous passengers on a vessel operated for a commercial purpose". The Judge next turned to the issue of whether the Defendants had lost the right to limit by reason that "the damage resulted from an act or omission of the carrier done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result". The Judge noted that the onus of proof was on the Plaintiff, that it was a "heavy" onus, and that the reckless component required gross negligence and actual knowledge that the loss would probably result. The Judge ultimately held that the accident was not intentional, that the conduct of the operator was not gross negligence

and that, in any event, the Plaintiff failed to establish that the operator knew the Plaintiff's injuries would probably result. In result, the Defendants were entitled to limit their liability. (Note: If the vessel had been a pleasure craft being used for pleasure purposes then it is probable that Part 3 of the MLA would apply instead of Part 4.)

*Ferry Sinking - Athens Convention - Certification of Class Action*

**Kotai v. Queen of the North (Ship), [2007 BCSC 1056](#)**

This was an application to certify a class action on behalf of passengers (and their dependants) of the *Queen of the North* which sank after running into Gill Island on 21 March 2006. The Court reviewed the requirement for certifying a class action under the *Class Proceedings Act* of British Columbia. These are: 1. there is a cause of action; 2. there is an identifiable class; 3. there are common issues; 4. a class proceeding is the preferred procedure for the fair and efficient resolution of the common issues; and 5. there is a representative plaintiff who can fairly and adequately represent the class interest, has a workable litigation plan and is not in conflict of interest with other class members. The Court found that all of the requirements had been met except those requirements relating to a representative plaintiff. Thus the application was adjourned so an appropriate representative plaintiff could be found. (Note: This issue was later overcome and the class action was subsequently certified.)

*Ferry Sinking - Athens Convention - Fatal Accident - Juries - Severance of issues*

**Kotai v. Queen of the North (Ship), [2008 BCSC 1398](#)**

This was another application arising out of the sinking of the *Queen of the North* on 21 March 2006. This was an application by the ship owner for various relief including striking the jury notice. The ship owner argued, among other things, that the case was not appropriate for determination by a jury because the principal question in the action would be the construction of Article 13 of the *Athens Convention* relating to limitation of liability. The Court, however, noted that there is heavy burden to displace the plaintiff's right to have a trial by jury and held any issues of construction could be separated from issues of fact.

*Fatal Accident - Dependents Claims - Marine Liability Act - Athens Convention - Availability of Punitive and Aggravated Damages*

**McDonald v. Queen of the North (Ship), [2008 BCSC 1777](#)**

This is the final reported decision arising out of the sinking of the *Queen of the North*. The issue in this matter was whether punitive and aggravated damages are recoverable in a wrongful death action brought by dependents pursuant to the *Marine Liability Act* and the *Athens Convention*. The Court extensively reviewed the case law relating to the recovery of punitive and aggravated damages under wrongful death statutes. The Court concluded that claims under the *Athens Convention* and the *Marine Liability Act* are compensatory in nature and do not permit the recovery of punitive or exemplary damages. The Court further held that the *Marine Liability Act* did not permit recovery of aggravated damages. The Court also considered and declined a request by the Plaintiff to reform Canadian maritime law by permitting claims for punitive and aggravated damages in these circumstances.



## Carriage of Goods

*Multi-modal - Bailment on Terms - Himalaya Clause - Rail Carriage - s.137 Canadian Transportation Act*

**Boutique Jacob Inc. v Pantainer Ltd., 2008 FCA 85, reversing in part 2006 FC 217**

This was an action by the Plaintiff for damage to cargo caused during a train derailment. The Plaintiff had contracted with the first Defendant, Pantainer, for the carriage of its cargo from Hong Kong to Montreal. Pantainer then sub-contracted the entire carriage to OOCL. OOCL in turn contracted with Canadian Pacific for the carriage of the cargo by rail from Vancouver to Montreal and it was during this portion of the carriage that the damage occurred. The carriage documents were an express bill of lading issued by Pantainer and an electronic waybill issued by OOCL which referred to OOCL's standard terms that were available on the OOCL website. At issue in the case was the liability of each of the Defendants and which bill of lading exclusions or limitations they were entitled to rely upon. With respect to the liability of Pantainer, the trial Judge held that it would have been liable as a contracting carrier but it was entitled to rely upon a clause in its bill of lading that excluded its liability for loss or damage that could not be avoided by the exercise of due diligence. With respect to OOCL, the Judge held that it was liable as a sub-bailee on terms and that the terms were those referred to in the OOCL electronic waybill. The Judge further held that these terms exonerated OOCL from liability for loss or damage that could not be avoided by the exercise of due diligence. The trial Judge also held that OOCL was entitled to rely upon the similar exemption in the Pantainer bill of lading via the Himalaya clause in that bill of lading. With respect to the liability of Canadian Pacific, the Judge referred to s. 137 of the *Canadian Transportation Act*, which prohibits a railway from restricting or limiting liability except by written agreement signed by the "shipper". The trial Judge held that "shipper" in s.137 meant the plaintiff and not OOCL. As a consequence, this provision precluded Canadian Pacific from relying upon the Himalaya and limitation clauses in either the Pantainer or OOCL bills of lading. The trial Judge further held that Canadian Pacific could not rely upon any limitation clause in its published tariff as this had been displaced by a limitation provision in the confidential rate agreement between OOCL and Canadian Pacific. In result, Canadian Pacific was held liable for the Plaintiff's damages calculated at the discounted selling price of the goods.

On appeal, the main issue was the trial Judge's interpretation of s. 137 of the *Canada Transportation Act*. The Court of Appeal overturned the trial Judge on the issue of the interpretation of s.137. Specifically, the Court of Appeal held that the term "shipper" meant OOCL, the entity that contracted with Canadian Pacific, and not the Plaintiff. Accordingly, there was a written agreement between Canadian Pacific and the "shipper" and the prohibition in s. 137 did not apply. The Court of Appeal next considered the applicable limitation amount. The Court noted that the agreement between OOCL and Canadian Pacific was subject to Canadian Pacific's tariff which limited liability, inter alia, to "an amount equal to the liability of the steamship company". The Court of Appeal held that this provision entitled Canadian Pacific to limit its liability to the amount prescribed by the OOCL bill of lading which was \$2 per kilogram. The Court of Appeal disagreed with the trial Judge concerning the inconsistency of the limitation provision in the confidential agreement and tariff. The Court of Appeal held that the provisions were not inconsistent. Finally, the Court of Appeal held that the Himalaya clauses in either the Pantainer or OOCL bills of lading entitled Canadian Pacific to rely upon the



limitation clauses in either bill of lading.

*Multi-modal - Theft - Limitation of Liability - Himalaya Clause*

**Alcoa, Inc. v. CP Ships (UK) Ltd.,** [2007 ONCA 686](#), reversing in part [2006 CanLii 34210](#)

The Plaintiff contracted with the first Defendant for the carriage of a cargo of aluminum from Massena, New York to Italy. The first Defendant had an arrangement with the second Defendant for the performance of the inland portion of the carriage from Massena to Montreal. It was intended that the first Defendant would then complete the carriage by sea from Montreal. However, during the course of the inland transit the container was stolen when left unattended by the truck driver. The main issue in the case was whether the Defendants were entitled to limit their liability for the loss pursuant to the terms of the first Defendant's standard bill of lading. The Plaintiff argued that a document entitled Straight Form Bill of Lading had been issued when the cargo was picked up by the second Defendant and that this bill of lading, which contained no limitation clauses, governed. The trial Judge held, however, that this bill of lading was a mere acknowledgement of receipt. The trial Judge noted that on four prior occasions the Plaintiff had shipped goods with the first Defendant and that on each occasion the Defendant had issued its standard form bill of lading. Based on this prior practice, the trial Judge held it was this bill of lading which governed even though it had not been issued at the time of the loss. The trial Judge next considered the Himalaya clause and the multi-modal clause in the bill of lading and concluded that they applied to the benefit of both Defendants. Finally, the trial Judge considered and rejected an argument that there had been a fundamental breach by the Defendants, noting that there was nothing deliberate about the conduct of the Defendants that would warrant denying them the protection of the limitation clause. In result, the Plaintiff was awarded \$4,000 being the limitation amount in the bill of lading.

On appeal, the Ontario Court of Appeal held that the trial Judge had applied the wrong limitation provision. Specifically, the bill of lading provided various limits depending on where the transport occurred. The trial Judge applied the limitation for "Multi-Modal Transport outside the United States where COGSA is not contractually applicable". The Court of Appeal said the appropriate clause was the one dealing with multi-modal transport in Europe or within a state other than the United States. This provision gave a higher limit of \$65,000.

*Carriage of Goods - Deck Carriage - Marine Insurance - Waiver of Subrogation - 3rd parties*

**Timberwest Forest Corp. v. Pacific Link Ocean Services Corporation,** [2008 FC 801](#)

This was a subrogated claim for the loss of approximately C\$1 million worth of logs while en route from Vancouver to California. The logs were all carried on the deck of a barge. The issues in the case were: first, whether the cargo was sufficiently described as deck cargo to remove it from the application of the Hague-Visby Rules ; and second, whether the waiver of subrogation clause in the Plaintiff's insurance policy protected all of the Defendants or just the specifically named contracting carrier. The contract of carriage was contained in a letter of understanding and set of standard terms and conditions which incorporated a bill of lading that was "contemplated" to be issued. The bill of lading, which was never in fact issued, included on its face a statement that "all cargo was carried on deck unless otherwise stated". The Plaintiff argued that a printed statement of deck carriage in a standard bill of lading that was not actually

issued was not sufficient compliance with Art 1(c) of the Hague-Visby Rules to oust the application of the Rules. The motions Judge held, however, that the Plaintiff was bound by the terms of the contract including the bill of lading terms and these contained a clear statement as to deck carriage. In result, the Rules did not apply. The second major issue in the case concerned a clause in the Plaintiff's policy of insurance which specifically waived subrogation against the contracting carrier. The contracting carrier had entered time charters for the tug and barge with two affiliated companies who actually carried out the contract through their employees. The issue was whether these other companies and their employees could take the benefit of the waiver of subrogation clause which did not name them specifically or by class. The motions Judge reviewed the complicated history of the waiver of subrogation clause and concluded that it was intended to waive subrogation against the "carrier" or "tower", terms that were used indiscriminately. As the other parties fell within the definition of "carrier" in the bill of lading, they were entitled to the benefit of the waiver of subrogation clause. He further held that extending the benefits of the waiver of subrogation to these other entities would be a permissible incremental change in the law. (See 2009 Addendum for Appellate Decision)

*Rail Carriage - Damage - Applicable Tariff - Limitation*

**Alstom Canada Inc. v. Canadian National Railway Company**, [2008 FC 1311](#)

The Plaintiffs claimed in excess of \$1.8 million for shock and impact damage caused to a transformer during rail carriage from Halifax to Manitoba. The Defendant rail carrier brought this application for summary judgment to limit its liability to \$50,000 pursuant to a term in its tariff. However, the Defendant had two tariffs, one of which contained a limitation clause and the other of which did not. Moreover, the one which contained the limitation clause was only given to the Plaintiff after the loss. In the circumstances, the Court was not able to determine which of the two tariffs applied and dismissed the application for summary judgment.

*Contract of Affreightment – Negotiations - Essential Terms - Damages*

**Catalyst Paper Corp. v. Companhia de Navegação Norsul**, [2008 BCCA 336](#), reversing [2007 BCSC 610](#)

This was an action for breach of a long term shipping contract. The contract was a three year contract of affreightment for the carriage of paper products to South America. The contract was negotiated using the "accept/reject" process. The main issue in the case was whether a final agreement had ever been concluded between the parties. The trial Judge found that there was a concluded agreement. On appeal, the British Columbia Court of Appeal extensively reviewed the evidence and concluded that a notional reasonable observer would not find a clear agreement between the parties on an essential term, cargo care. Accordingly, there was no agreement.

*Carriage - Freight - set off - jurisdiction - Ciffa Terms*

**Locher Evers International v. Canada Garlic Distribution Inc.**, [2008 FC 319](#)

This was an action for the recovery of freight in relation to the carriage of produce from China to Toronto. The Defendant did not dispute the freight was owed but alleged a right to set-off and argued that the agreement ousted the jurisdiction of the Federal Court. The agreement between the parties expressly incorporated the Ciffa terms and those terms contained a no set-off clause

which the Court had no difficulty enforcing. With respect to the jurisdiction issue, unfortunately, it is not clear from the judgment how this issue arose. There was apparently a jurisdiction clause but its contents are not set out. Nevertheless, the Court does say that the issue was raised too late.

*Carriage of Goods - Rust Damage - Failure to Prove Damage on Discharge*

**Lovat inc. v. Blue Anchor Line**, [2007 FC 491](#)

This was an action for damage to a bearing shipped from Toronto to Turkey. The bearing was allegedly damaged by rust when it was delivered at its destination in Turkey. The evidence was that the cargo was in apparent good condition when discharged from the last carrying vessel at Istanbul, however, when it was delivered to its final destination in Turkey by truck it was found to be unwrapped and rust damaged. The contract of carriage with the Defendants was for carriage only to the Port of Istanbul. The on-carriage from Istanbul was under a separate contract with a non-party. The Court was of the view that the expert evidence submitted was not sufficient to establish the rusting damage occurred in the possession of the Defendants. The Court accepted the evidence of the Defendant's expert that an accurate assessment of the source of the rust damage required x-rays, chemical analysis and microscopic examination, none of which was done. Water samples and silver nitrate tests were inconclusive and there was no evidence submitted as to the composition of the alloy in the bearing or as to what might have caused the rust. Accordingly, the action against the carriers was dismissed.

*Carriage - Freight - Interpleader*

**Rio Tinto Shipping (Asia) Pte Ltd. v. Korea Line Corporation**, [2008 FC 1376](#)

In this matter the applicant, a voyage charterer, applied to pay into court the freight which it admitted owed. The reason was that there were conflicting claims by two parties as to entitlement to the freight. The Court recognized the conundrum of the applicant and allowed it to pay the freight into court in satisfaction of its liability in respect thereof.

**Arbitration/Jurisdiction Clauses and Stays of Proceedings**

*Carriage of Goods - Stay of Proceedings - s.46 M.L.A. - Jurisdiction Clause*

**Mitsui O.S.K. Lines Ltd. v. Mazda Canada Inc.**, [2008 FCA 219](#), leave to appeal dismissed [2008 CanLII 63491](#)

The *Cougar Ace* took on a list of 60 degrees while en route to Canada and the U.S.A. from Japan. As a consequence, a large number of automobiles destined for Canada and U.S.A. were damaged. All of the automobiles were subject to a contract of carriage that contained a jurisdiction clause in favour of Japan and a choice of law clause selecting Japanese law. This action was commenced by the Plaintiff to recover damages for those automobiles destined to be unloaded at Canadian Ports. A separate action was commenced in the U.S.A. in respect of the automobiles bound for U.S.A. ports but that action was dismissed based on the jurisdiction clause. Although the dismissal of the American action was under appeal, a separate action was commenced in Japan in respect of the U.S.A. bound automobiles. An action was also commenced in Japan in respect of some damaged trucks and the ship owner also commenced



proceedings in Japan for a declaration of non-liability. The ship owner brought this application for an order enforcing the jurisdiction clause and for a stay of the Canadian proceedings. The Plaintiff argued, in reliance on s. 46 of the *Marine Liability Act*, that it was entitled to bring the action in Canada notwithstanding the jurisdiction clause. At first instance (2007 FC 916), the motions Judge noted that s. 46 permits certain actions to be brought in Canada notwithstanding a jurisdiction clause but does not override the court's discretion to grant a stay of proceedings based on *forum non conveniens* factors. He then considered the various factors that are often considered and held that it had not been clearly established that Japan was a more appropriate forum than Canada. Factors that seemed to be of particular relevance to his decision included that Canada was the intended port of discharge, that the limitation amount would be higher in Canada and that the public policy behind s. 46 favoured Canada.

On appeal, the Federal Court of Appeal agreed with the motions Judge that jurisdiction clauses were no longer controlling but are now merely one of many factors to take into account in deciding the *forum non conveniens* issue. However, the Court of Appeal held that the motions Judge had made errors of law in his assessment of the various factors by undervaluing some and overvaluing others. Specifically, the court found that the motions Judge failed to attach sufficient weight to: the fact that there were three actions in Japan that were proceeding expeditiously; the fact that the residence of most witnesses would be Japan; the fact that applicable law was Japanese law; and, the fact of the jurisdiction clause in favour of Japan. The Court of Appeal also said it was unclear that greater damages would be available in Canada than in Japan and, in any event, suggested that this was not a reason justifying a refusal of a stay. The Court also said the motions Judge was wrong to reason that s. 46 evinced a policy in favour of Canada. In result, the appeal was allowed and the action was stayed.

## Collisions

### *Collisions - Investigations - Transportation Safety Board - Release of Seized Data*

#### **British Columbia Ferry Services Inc. v. Canadian Transportation Accident Investigation & Safety Board, [2008 BCCA 40](#)**

This application arose out of the sinking of a passenger ferry, the *Queen of the North*. The sinking was investigated by the Transportation Safety Board ("TSB") who, as part of the investigation, retrieved the electronic chart system ("ECS") hard drive from the sunken wreck. The data was provided to the ship owner by the TSB pursuant to an agreement in which the ship owner agreed to keep the data in confidence and only to use it to respond to the draft report of the TSB. The ship owner wanted to use the data for other purposes and brought this application for an order entitling it to do so. The ship owner argued that the disclosure of the data would not in any way impair the functions of the TSB. The Court, however, held that the terms of the agreement governed and should be enforced.



*Collisions - Ship at Moorage - Liability – Damages - Betterment - Expert's Reports - Representative Proceedings*

**Laichkwiltach Enterprises Ltd. v. F/V Pacific Faith (Ship)**, [2007 BCSC 1852](#), additional reasons [2008 BCSC 282](#)

This was an action for damages arising out of a collision. The Plaintiff's ship was moored at a wharf when the Defendant's vessel struck it while attempting to dock. The Court held that the Defendants were prima facie negligent as there is a presumption of fault when a moored vessel is struck by a moving vessel. The Court accepted that there was a clutch failure on the Defendant's vessel but, in the absence of evidence of the history or maintenance of the clutch, this did not absolve the Defendant of liability. The Plaintiff sought a total of \$105,000 in damages including approximately \$14,000 for lost fishing income. The Court, however, found that the Plaintiff had failed to prove much of the damages it claimed and those damages it had proved were reduced to reflect "new for old" or betterment. Part of the reason for the lack of proof was the Court gave no weight to the opinions of the Plaintiff's expert because the expert's report had apparently been drafted by a lawyer and the Court was uncertain as to whose opinions were expressed in the report. The claim for lost income was denied on the grounds that the Plaintiff had unreasonably delayed in effecting the repairs. (See 2009 Addendum for Appellate Decision)

*Collision with Fish Farm - Damages – Mitigation - Interest*

**Omega Salmon Group Ltd. v The "Pubnico Gemini"**, [2007 BCCA 33](#), reversing in part [2006 BCSC 59](#)

The Plaintiff was the owner of a fish farm that was damaged when the "Pubnico Gemini" collided with it. Liability for the collision was admitted and the only issues were in relation to damages. Specifically, the Defendants argued that: (i) the damages should be based on the cost to repair the damaged fish pens rather than the cost of replacement; (ii) the amount paid by the Plaintiff to expedite the delivery of the replacement section was excessive; and (iii) the Plaintiff failed to mitigate by not repairing and re-using the damaged section in another of its fish farms. The trial Judge decided all issues against the Defendants holding first that the damaged section was not a stand-alone fish pen but a component of a larger array and, in the normal course, such a single component would never be ordered or manufactured. Moreover, no expert evidence was led by the Defendants as to the cost of repairs and what evidence there was indicated the cost of repairs could exceed the cost of replacement. On the issue of whether the Plaintiff paid an excessive amount to replace the pen the trial Judge held that the pen system was a high end system and that the manufacturing had to be expedited to minimize production losses. The trial Judge considered the amount paid by the Plaintiff was not unreasonable given the urgent delivery requirements. On the final issue, the trial Judge noted that the Defendants had not offered any proof that the damaged section could be re-used or sold for salvage and held that the Defendants' arguments were mere conjecture. The trial Judge then turned to the question of interest and, after reviewing the various authorities on the point, declined to award compound interest and declined to award interest on damages for which the Plaintiff had been reimbursed by its insurer. The trial Judge did, however, award interest at a rate higher than prime based on evidence that the Plaintiff actually paid such higher rates. Not surprisingly, the Plaintiff appealed the failure to award interest on sums received from its insurer and the Court of Appeal had little difficulty in overturning this aspect of the decision. That the Plaintiff had received compensation from its

insurer was said to be *res inter alios acta*, or more simply, not relevant. The Defendant also successfully appealed the trial Judge's decision to award interest at rate higher than prime. The Court of Appeal reviewed the older authorities on interest and noted that the rate of interest awarded did not depend on the financial circumstances of the claimant. The Court therefore held that a conventional rate such as the prime rate was the appropriate rate.

*Collision - Breach of Collision Regulations - Offence - Due Diligence*

**R. v Cloutier**, [2007 QCCQ 13533](#)

This case arose out of a collision in the St. Lawrence Seaway between a freighter and a sail boat. Two of the four crew of the sailboat died as a result of the collision. The Pilot of the freighter was charged with failing to comply with the Collision Regulations. The Court extensively reviewed the evidence and ultimately dismissed the charges against the Pilot holding that he exercised the degree of diligence expected of a seaman.

*Collision - Breach of Collision Regulations - Offence - Due Diligence*

**R. v. Bridle**, [2008 BCPC 52](#)

This case arose out of a collision at night between two pleasure craft, one of which was at anchor. At the time of the collision the anchored vessel was not displaying the all-round white light required by the Collision Regulations. The accused was the owner/operator of the anchored vessel. The accused said that he only learned the anchor light was not working the night of the collision and attempted but was not able to repair it. He left an interior bathroom light illuminated in place of an anchor light. The Court found that the accused had not used due diligence in that the accused could have returned to a dock rather than stay anchored without a proper light. The accused was convicted.

*Collision - Fatal Injury - Criminal Negligence - Dangerous Operation of a Vessel*

**R. v. MacKay**, [2008 NSPC 8](#)

The accused was the owner and operator of a pleasure craft that collided with a buoy in Halifax Harbour. A passenger was killed in the collision. The Court noted that the test for criminal negligence "was a marked and substantial departure from the standard of the reasonable operator" and a wanton and reckless disregard for the lives and safety of others. Although the Court found as a fact that the vessel was proceeding at an unsafe rate of speed, the Court also found that the buoy with which the vessel collided had shifted its position unbeknownst to the accused. The accused was familiar with the area and had a reasonably held belief that it was safe to operate the vessel in the direction he was proceeding. Accordingly, the Court held the accused's conduct was not such as to support a charge of criminal negligence. However, the Court did find the accused guilty of dangerous operation of a vessel.

*Collision - Limitation Period - Extension*

**Rioux c. Bégin**, [2007 QCCQ 4119](#)

The issue in this case was whether the Court should exercise its discretion under s.23(2) of the *Marine Liability Act* to extend the limitation period. The Plaintiff was an infant and the limitation

period had apparently been missed because legal advisors thought the provincial limitation period of two years applied. The Court granted the request for an extension. (Note: Unfortunately, this decision is only published in the French language, a language in which the author is not fluent, and it is not entirely clear to the author why the extension was granted.)

### *Collision - Failure to give way - Contributory Negligence*

#### **Vogelsang v. Vandale** [2008 SKPC 137](#)

This was a collision between two small pleasure craft on a lake. The Defendant admitted negligence but also alleged that the Plaintiff, the operator of the other vessel, had been partly at fault. When the collision occurred the Plaintiff had been heading west and the Defendant North. The Defendant was towing water tubers. The Defendant's boat struck the Plaintiff's boat amidships. The Court found that the vessels were both proceeding at a safe speed, the Plaintiff's vessel had the right of way, and neither party saw the other before the collision. The Court held that the Plaintiff was not guilty of contributory negligence and the Defendant was solely liable. Damages were assessed at approximately \$7,000 including \$5,000 for pain and suffering. (Note: Even though the Defendant's vessel was the give-way vessel in this situation and clearly failed to comply with Rules 15 and 16 of the *Collision Regulations*, the Plaintiff failed to comply with Rule 17 and, given the Plaintiff had not seen the Defendant before the collision, also failed to maintain a proper lookout contrary to Rule 5. The finding that there was absolutely no contributory fault on the part of the Plaintiff is difficult to understand.)

## **Mortgages, Liens and Priorities**

### *Priorities - Necessaries suppliers - American Maritime Liens - Applicable Law - Foreign Law Experts*

#### **Kent Trade and Finance Inc. v. JPMorgan Chase Bank**, [2008 FCA 399](#), reversing [2005 FC 864](#), rev'd. in part [2006 FC 409](#)

This was a hearing to determine the priorities of various claimants to proceeds from the sale of the *Lanner*. The competing claimants were the mortgagee and 15 suppliers of necessities. The suppliers, who would normally rank below the mortgagee, challenged the validity of the mortgage. Some of them argued they had maritime liens under American law and, in the alternative, alleged special circumstances that should alter the normal order of priorities. At the initial hearing ([2005 FC 864](#)) the Prothonotary rejected all of these arguments. The challenge to the validity of the mortgage was based primarily on the absence of an expert's affidavit attesting to the validity of the mortgage under the applicable foreign law. The Prothonotary held that such an affidavit was not required. The argument by some of the suppliers that they had maritime liens through the application of American law was based upon choice of law clauses in the various supply contracts. However, the Prothonotary extensively reviewed the authorities and held that such choice of law clauses were not determinative. The applicable law was the law of the jurisdiction with the closest and most substantial connection to a particular transaction. The Prothonotary reviewed the factual circumstances of each claim and concluded that none of them were subject to American law. Accordingly, none of the suppliers had American maritime liens that would rank ahead of the mortgagee. In the course of his reasons the Prothonotary examined



the nature of a maritime lien and held that such a lien could not be created by contract either through a lien clause or a choice of law clause. Finally, the Prothonotary considered whether delay by the mortgagee in enforcing its mortgage was a special circumstance of sufficient weight to alter the usual order of priorities. The Prothonotary found that the mortgagee had acted in a commercially reasonable manner and refused to alter the priorities.

Five of the suppliers appealed the Prothonotary's order to a judge of the Federal Court ([2006 FC 409](#)). The appeal Judge agreed with the Prothonotary that the absence of an expert's affidavit attesting to the validity of a foreign mortgage was not required and further said that in the absence of such an affidavit Canadian law would apply. The appeal Judge also agreed with the Prothonotary that there should be no equitable adjustment of the priorities based on the alleged delay by the mortgagee. However, the appeal Judge disagreed, in part, with the Prothonotary on the issue of whether the suppliers had American maritime liens. Specifically, although the appeal Judge agreed that the Prothonotary had applied the proper test in determining the applicable law, the appeal Judge disagreed with the application of that test in respect of two claimants. The appeal Judge held that American law applied to the one corporate claimant that was an American company and also that American law applied to a foreign claimant who had supplied goods in the United States. A final issue of note dealt with on appeal concerned an order for costs made by the Prothonotary against the suppliers. This order was overturned on the grounds that the suppliers were not made parties to the proceedings nor had their caveats against release been transferred to this action. The appeal Judge noted that this should be done in future proceedings so claimants cannot avoid a cost order.

The three unsuccessful necessities suppliers commenced a further appeal to the Federal Court of Appeal ([2008 FCA 399](#)). All three of these suppliers supplied fuel or other necessities under contracts that provided for the application of American law yet none of the suppliers were American and the supplies were not made in the United States. The Court of Appeal disagreed with the courts below and held that a contractual choice of law clause should normally govern maritime transactions including the rights which arise from those transactions. In reaching this conclusion the Court of Appeal acknowledged that in certain circumstances there may be such a strong connection to a jurisdiction that the choice of law clause should not apply, such as in *Imperial Oil Ltd. v. Petromar Inc. (C.A.)*, [2001 FCA 391 \(CanLII\)](#). However, the contractual choice of law should normally govern. The Court of Appeal next proceeded to consider whether American law in fact provided a priority lien in these circumstances. The Court noted that its role was limited to reviewing the affidavits and exhibits filed with the Court and that it should not conduct its own research into the foreign law. After reviewing the evidence, the Court concluded that American law would recognize a maritime lien in circumstances where a foreign supplier supplied goods in a foreign port under a supply contract governed by American law. Accordingly the appeals were allowed and the suppliers were entitled to priority. (Note: The Court of Appeal's discussion as to the role of expert witnesses on foreign law is also interesting and useful reading.)

### *Liens and Mortgages - Bankruptcy - Whether Bankruptcy Act Stays Apply to Maritime Liens*

**Nanaimo Harbour Link Corp. v Abakhan & Associates Inc.**, [2007 BCSC 109](#)

This matter concerned the bankruptcy of the owner and operator of a passenger ferry. The issue was whether maritime lien claimants are caught by the statutory stay of proceedings under the



*Bankruptcy and Insolvency Act*. More specifically, the issue was whether the maritime claimants could proceed with their actions in the Federal Court and have priorities determined in accordance with Canadian maritime law. The claimants were the Captain and crew of the vessel and two ship repairers with unpaid invoices for repairs done to the vessel. The mortgagee of the vessel opposed the application to lift the stay of proceedings arguing that the *Bankruptcy and Insolvency Act* and not Canadian maritime law determined the priorities. The Court held that the priorities were to be determined in accordance with Canadian maritime law, that the claims for seamen's wages were maritime lien claims, that the claims by the ship repairers, although not maritime liens, might be elevated by the court on equitable principles and they should have the opportunity to argue this, and, finally, that the fact that the ferry was an intra-provincial ferry did not oust Canadian maritime law.

### *Liens and Mortgages - Ranking of Claims*

#### **Nordea Bank Norge ASA v. KINGUK (Ship), [2007 FC 434](#)**

Two vessels had been sold by the Court for the sum of \$5.8 million and this case was to determine priorities and distribute the proceeds. The fees and disbursements incurred in selling the ships were incurred by the mortgagee. These fees and expenses, including solicitors' fees and brokerage fees, were given priority akin to Marshall's fees. The next claims in priority behind the Marshall's fees were the claims of the crew for wages and a claim by Canada Revenue for employee source deductions. It was not necessary to determine the priority as between these two claims. The next claim in the ranking was the claim of the mortgagee, which claim included amounts paid to solicitors and disbursements of a distress nature which were reasonably incurred for maintaining the ship. Following the mortgagee were claims by necessities suppliers and claims by Revenue Canada and the Workers Compensation Board of Nova Scotia. There were insufficient funds to satisfy these claims and the Court ordered that they share in the distribution *pari passu* while acknowledging that whether they should rank *pari passu* was not fully argued.

### *Mortgages - Priorities - Application of Provincial Statutes*

#### **Royal Bank v. 1132959 Ontario Ltd., [2008 CanLii 40231](#)**

This was an application by the Appellant bank (the "Bank") for possession of a yacht pursuant to rights allegedly acquired through a general security interest. The application was opposed by the Respondent, who was registered as the owner of the yacht under the *Canada Shipping Act* ("CSA"), on the grounds that the bank's interest was not registered under the CSA. The background facts are important. The Bank entered into a general security agreement dated 9 March 2001 with a numbered company ("Numbered Co.") and registered its interest under the *Ontario Personal Property Security Act* ("PPSA"). On 17 April 2004 the Numbered Co. acquired title to the yacht and, although it is not entirely clear from the judgment, it appears that the yacht was registered under the CSA at that time. On 13 February 2008 the sole shareholder of the Numbered Co. made an assignment in bankruptcy. On 12 March 2008 the Numbered Co. entered into a security agreement with the Respondent, the brother of the company's sole shareholder. The security agreement was allegedly to secure a prior debt owed to the Respondent. This security agreement was never registered under the PPSA. On 20 March 2008 the Respondent was given a marine mortgage over the yacht as further security for the debt allegedly owed between the brothers. This marine mortgage was registered under the CSA but not the PPSA. On

10 April 2008 the marine mortgage was discharged and the yacht was transferred to the Respondent in full payment of the debt allegedly owed. On these facts the Court held that there was no doubt that on 17 April 2004 the Bank acquired a perfected security interest in the yacht pursuant to the after acquired property clause in the security agreement. The Court further held that the Bank's interest had priority over any interest the Respondent had pursuant to the agreement of 12 March 2008 since that agreement was not registered. However, the Court recognized that the real issue was whether a registered interest under the CSA could take priority over a prior interest registered under the PPSA. The Respondent alleged that the CSA provided a complete code and registry of all interests in vessels. The Court disagreed and held that the CSA created two types of registers; mandatory and voluntary. Pleasure craft are not required to be registered and fall within the voluntary registry. Therefore, the Court held the Bank was not required to register its interest under the CSA registry. In result, the Court held the Bank's interest had priority. (Note: This has been a vexing issue for years and has the potential to cause serious difficulties for both lenders and borrowers. Although the equities of this case certainly favoured the bank, the Court's analysis does not withstand any serious scrutiny. The distinction between mandatory and voluntary registration is no more than descriptive and does not provide a legal basis for the decision. Also, the mandatory - voluntary distinction is probably not accurate in respect of a mortgagee. The prevailing view is that if the vessel is registered (whether voluntarily or mandatorily) then any mortgage or security interest must be registered. It is submitted that the Court should have done a proper constitutional analysis taking into account the dual aspect doctrine, interjurisdictional immunity and paramountcy. Also, one cannot help but think that if, after the constitutional analysis, Canadian maritime law applied, then equitable considerations would have played an important part in any ranking.)

## Admiralty Practice

### *In Rem Proceedings - Arrest - Breach of Charter - Failure to Load Cargo - Appeals*

#### **Phoenix Bulk Carriers Ltd. v. Kremikovtzi Trade, [2007 SCC 13](#), reversing [2006 FCA 1](#)**

By contract of affreightment between the Appellant and the Respondent, the Respondent agreed to ship a cargo of coal on the Appellant's vessel. In alleged breach of this contract, the Respondent entered into a second contract of carriage with another ship owner and loaded the coal on board that ship owner's vessel. The Appellant commenced an *in rem* proceeding against the cargo and caused the cargo to be arrested while on board the other ship. The Respondent then brought an application to strike the Statement of Claim *in rem* and set aside the arrest. At first instance the application was refused but, on appeal to the Federal Court of Appeal, the appeal was allowed and the Court ordered that the Statement of Claim *in rem* be struck and the arrest set aside. The Court of Appeal held that it was bound by its decision in *Paramount Enterprises International Inc. v The "An Xin Jiang"*, [\[2001\] 2 F.C. 551](#), which was indistinguishable from the facts in the present case. However, and most interestingly, the Court of Appeal wrote that *Paramount Enterprises International Inc. v The "An Xin Jiang"* had been wrongly decided. The issue in both cases was the interpretation of s. 43(2) of the Federal Court Act which permits *in rem* jurisdiction against "the property that is the subject of the action". In the *Paramount* case it was held that the cargo was not "the subject of the action" because the Plaintiff never had physical possession, referred to as the "physical nexus" test. This was considered to be too

narrow an interpretation. The Court said it preferred a broader “identifiability” test, meaning the action *in rem* must relate to the specific property contemplated in the contract at issue. However, the Court of Appeal held that it could not overrule a prior decision of another panel of the court unless the decision was manifestly wrong in the sense that the other panel had overlooked a relevant statutory provision or a case that ought to have been followed. As this test had not been met, the Court of Appeal said it was bound by its prior decision.

The Appellant appealed to the Supreme Court of Canada. The Supreme Court in very short reasons said that they agreed that the words in s. 43(2) “subject of the action” should not be given a narrow interpretation. The “physical nexus” test of *Paramount Enterprises International Inc. v The “An Xin Jiang”* should be rejected in favour of an “identifiability” test that asks whether the cargo is the cargo designated in the contract of affreightment alleged to be breached. Applying this approach s.43(2) was satisfied.

*Admiralty Practice - Arrest of Cargo - Sufficiency of Affidavit to Lead Warrant - Pleadings*

**Kremikovtzi Trade v Phoenix Bulk Carriers Ltd., [2007 FCA 381](#)**

This was a claim *in rem* against the owners and all others interested in a particular cargo. This particular application was a re-hearing of various issues that had been referred back to the Court of Appeal after the Supreme Court of Canada overturned the Court of Appeal on the issue of *in rem* jurisdiction in *Phoenix Bulk Carriers Ltd. v. Kremikovtzi Trade*, [2007 SCC 13 \(CanLII\)](#). The issues now considered were first, whether the affidavit to lead warrant was sufficient and second whether the Statement of Claim should be struck on the grounds that it did not disclose a cause of action or was otherwise scandalous, frivolous or vexatious. Regarding the Affidavit to Lead Warrant, the Defendant argued that the affidavit did not disclose the basis for invoking the court’s *in rem* jurisdiction as required by the Rules. However, the affidavit specifically referred to the subsections of s.22 and 43 relied upon and the Court held that this was sufficient. With respect to the Statement of Claim, it was alleged the claim was deficient in that it did not contain an *in personam* claim to support the *in rem* claim. The Court agreed that there could be no *in rem* claim without an *in personam* claim however the Court noted the Statement of Claim contained an allegation that the owners of the cargo at the time of the breach of contract were the owners at the time of the commencement of the action and held that this supported an *in personam* claim. Finally the Court considered whether Kremikovtzi was the beneficial owner of the cargo at the time the cause of action arose and at the time of commencement of the action. The Court noted that the issue was a difficult one but ultimately concluded that it was at least arguable and hence the Statement of Claim was not frivolous and vexatious.

*Admiralty Practice - In Rem Actions – Stay*

**Maritima de Ecologia, S.A. de C.V. v. Maersk Defender (Ship), [2007 FCA 194](#)**

In this matter Secunda discussed with the Appellant an arrangement whereby Secunda, or a company controlled by it, would purchase the *Maersk Defender*, modify the vessel to meet the requirements of the Appellant and then charter the vessel to the Appellant. Subsequently Atlantic, a company controlled by Secunda, entered into an agreement with Maersk to purchase the vessel and entered into a charter party with the Appellant. However, before the purchase could take effect, Secunda and Atlantic learned that Mexican authorities would not issue the



required permits for longer than two years. As a result, Atlantic advised the Appellant that the charter party had been frustrated and in response the Appellant commenced arbitration proceedings. On 4 December 2006 the Appellant commenced an action in the Federal Court against the *Maersk Defender in rem* and against Secunda and Atlantic *in personam*. On 12 December the *Maersk Defender* was sold by Maersk to a company called Pacific. Also, on 12 December 2006 a second action was commenced in the Federal Court against the *Maersk Defender in rem* and against Secunda, Atlantic and Pacific *in personam*. Both actions were said to be “for the sole purpose of obtaining interim protective orders”. The *Maersk Defender* was arrested in the second action; however title had already been transferred to Pacific by the time of the arrest. The Respondents brought an application to strike the *in rem* and the *in personam* proceedings against Secunda and Pacific. At first instance, the motions Judge struck the *in rem* proceeding and stayed the *in personam* proceedings. On appeal, the Court of Appeal held that the *in rem* proceedings should be struck on two grounds. First, at the time of the commencement of the second action the vessel had been sold and therefore the requirement of s.43(2) that there be the same beneficial owner at the time of commencement of the action as at the time the cause of action arose had not been met. Second, and in any event, there was no personal liability on the part of the owner of the vessel to support the *in rem* jurisdiction. The Appellants claim in the arbitration was only against Atlantic and Atlantic was never the owner of the vessel. With respect to the *in personam* claims, the Court of Appeal held that because the actions were commenced solely for the purpose of obtaining security for the arbitration proceeding against Atlantic, there was no remedy sought against Secunda and Atlantic and the *in personam* claims against them must be struck.

#### *In Rem Proceedings - Arrest – Sistership*

##### **F.C. Yachts Ltd. v. Vessel Bearing Hull No. QFY10703E709 (Yacht), [2007 FC 1257](#)**

The Plaintiff builder was building two yachts for the Defendant. The first yacht was substantially completed and payments were up to date. The Defendant was, however, alleged to be in arrears on the payments in respect of the second yacht. The builder commenced proceedings in respect of the second yacht but arrested the first yacht as a sistership to the second yacht. The Defendant brought this application to set aside the *in rem* action and the arrest. The Defendant argued that it was not the “beneficial owner” of the first yacht or the owner of the second yacht. The recorded owner of both yachts was the Plaintiff but the construction contracts provided that title was to be transferred to the Defendant upon completion. Moreover, the Defendant was the mortgagee in respect of both yachts. On these facts, the Court held that the Defendant’s interest in the first yacht was exactly what the contract documents said; it was the mortgagee and not the beneficial owner. In result, the *in rem* actions were struck and the arrest was set aside.

#### *Arrest - Full Disclosure*

##### **Hansen v. The Trinity (Ship), [2007 BCSC 225](#)**

This was an application to set aside a warrant of arrest on the grounds of material non-disclosure by the Plaintiffs. The material non-disclosure was an earlier action for the same damages in which the Plaintiffs had applied for and been refused a *mareva* injunction. The Court held, for the first time, that full and frank disclosure is required when an application for arrest is made under the Rules of the British Columbia Supreme Court and further held that the Plaintiffs had



failed to make such disclosure. In result, the arrest was set aside. (Note: This decision stands on its own, and is arguably incorrect, in requiring full disclosure to support an arrest. The Federal Court decisions on this issue suggest that such disclosure is not required. [See for example: *Streibel v The "Chairman"* [2002 FC 545](#), *Magnolia Ocean Shipping v The "Soledad Maria"*, [1982] 1 FC 205, and *Kiku Fisheries Ltd. v. Canadian North Pacific Ocean Corporation*, (1998) 137 F.T.R. 192.] )

### *Pleadings - Amendment - Limitation Period*

#### **Bank of the West v. The 26' Well Craft Scarab (Ship), [2007 FC 1112](#)**

The Defendant marine insurer sought leave to amend its pleading to plead a limitation period contained in its policy. At first instance the Prothonotary denied the application without giving reasons. On appeal, the motions Judge noted the general rule is to allow amendments at any stage of an action provided there is no prejudice or injustice to the other party that cannot be compensated for in costs. Given that the proceeding had not advanced significantly and the Plaintiff was unable to identify any particular prejudice, the Judge allowed the appeal and gave leave to the Defendant to plead the limitation period defence.

### *Mareva Injunction – Charters*

#### **Aosta Shipping Co. v. Gulf Overseas General Trading LLC, [2007 BCSC 354](#)**

This was an application to set aside a mareva injunction that had been granted *ex parte*. The injunction seized bunker fuel on board a ship that was chartered by the Defendant. The Plaintiff's claim against the Defendant was in relation to a freight dispute in an earlier unrelated charter and which had been submitted to arbitration in England. The Court noted that mareva injunctions are "extraordinary orders" and their granting is discretionary. In particular, it noted that in British Columbia the authorities indicated a more relaxed approach to mareva injunctions with a movement "to a somewhat unfettered exercise of discretion". Nevertheless, the two necessary conditions for the granting of an injunction are that the Plaintiff must show a strong prima facie or good arguable case and that the balance of justice and convenience favours the granting of the injunction. Although it was apparently clear that the Defendant owed the Plaintiff the money, the Court set aside the injunction on the grounds that neither party had a substantial connection to the jurisdiction and the seizure had negative consequences for the ship, which was owned by a third party, and her crew.

### *Arrest – Contempt*

#### **Labrador Sea Products Incorporated v. Northern Auk (Ship), [2007 FC 679](#)**

In this matter the Defendants had apparently removed fishing gear and other equipment from a vessel that was under arrest. The Court found the Defendants guilty of contempt, fined them \$5,000 each and ordered that they pay costs fixed at \$15,000. The Court noted that the requirements for contempt are: 1. the party alleging contempt has the burden of proving it; 2. the elements must be proved beyond a reasonable doubt; 3. what must be established is knowledge of the existence of the Order and knowing disobedience; and 4. *mens rea* or good faith is relevant only as to mitigation.

*Practice - Collisions - Expert Reports – Admissibility***Laudon v. Roberts, [2007 CanLII 12208](#)**

The issue in this application was the admissibility of an expert report. The reports were challenged, inter alia, on the grounds that they were not necessary, that they usurped the function of the judge or jury, and that they contained opinions on matters of law. The Court reviewed both reports which contained assessments of negligence, interpreted and applied the *Collision Regulations* to the facts of the case, and rendered opinions on contributory negligence. The Court concluded that these reports went beyond the function of an expert and intruded into the exclusive roles of the judge and jury.

**Pollution***Pollution - Ship Source Oil Pollution Fund***Canada v. Administrator of the Ship Source Oil Pollution Fund, [2007 FC 548](#)**

This was an action by the Crown challenging the adequacy of an offer of compensation made by the Administrator of the Ship Source Oil Pollution Fund pursuant to the provisions of the *Marine Liability Act*. The issue in this application was whether the named Respondent should be the Administrator or the Attorney General of Canada. The Court held that the Administrator was properly named as the Respondent.

*Adequacy of Compensation - Ship Source Oil Pollution Fund- Standard of Review***Canada v. Ship Source Oil Pollution Fund, [2008 FC 1094](#)**

This was an action by the Crown challenging the adequacy of an offer of compensation made by the Administrator of the Ship Source Oil Pollution Fund pursuant to the provisions of the *Marine Liability Act*. The Crown incurred costs in excess of \$220,000 to clean and destroy an abandoned tugboat and applied to the Administrator of the Ship Source Oil Pollution Fund for reimbursement of this amount. The Administrator offered the Crown only \$20,000, arguing that if the Crown had acted reasonably it would have and could have pumped the contaminants from the vessel years earlier. As a preliminary issue, the Court had to consider the appropriate standard of review of a decision of the Administrator and the scope of the appeal. The Court held that the standard was one of reasonableness rather than correctness and that the Court must not substitute its decision for that of the Administrator unless an unreasonable conclusion has been demonstrated. The Court next considered whether the Crown had been negligent and concluded that it had been negligent in waiting five years before exercising its statutory powers to clean and destroy the vessel. This delay increased the claim unnecessarily. The Court next considered whether the Administrator had breached the rules of procedural fairness by failing to provide the Crown with an expert report which apparently quantified the loss at \$20,000. The Court held that the expert's report should have been provided to the Crown. In result, the Court ordered the Administrator to provide the report to the Crown and ordered the Administrator to make a second offer of compensation after receiving and considering any comments by the Crown.

*Pollution - Discharge from Vessel – Offence***Newfoundland Recycling v. Her Majesty the Queen (Attorney General for Canada), [2008 NLTD 38](#)**

This was an appeal from a judgment finding the Appellant guilty of depositing a deleterious substance (oil) in water frequented by fish contrary to the *Fisheries Act*. The offence occurred when a vessel that the Appellant had been dismantling for salvage sank at the wharf. The Appellant argued, inter alia, that it was not the owner of the vessel. The Court held, however, that ownership was not determinative. Rather, it was control that mattered and the Court held the trial Judge correctly found the Appellant had control.

**Miscellaneous***Wrecks - Right to Salvage Sovereign Warship - Provincial Statutes***Chameau Exploration Ltd. v. Nova Scotia (Attorney General), [2007 NSSC 386](#)**

This interesting case concerned attempts to explore what was believed to be the 1812 wreck of a Royal Navy sloop. The case came before the court as an application for judicial review of a decision of the Executive Director of the Nova Scotia Museum. The Director had declined to issue a research permit to explore the wreck under the Nova Scotia *Special Places Protection Act*. Such a permit was required to carry out any exploration or excavation. The decision to decline the permit was because of a letter received from the British High Commission claiming ownership and sovereign immunity over the wreck as a warship but the applicant was not given the opportunity to make submissions on the British claim. The Court held that this was a breach of procedural fairness and quashed the decision of the Director. The Court did not, however, order that the permit be granted or decide the merits of the British claim. (Note: It is interesting that no challenge seems to have been made to the constitutional validity or applicability of the *Special Places Protection Act*, a provincial statute. One would think it at least arguable that the provinces have no jurisdiction over wrecks and the exploration and salvage thereof.)

*Ship building - Extras***D'Eon Boatbuilding Limited v. Thankful Too Family Fisheries Inc., [2008 FC 923](#)**

This was an action to recover the unpaid balance of construction costs incurred in building a fish boat. There were two factual issues in the case; one involved which of two quotes was the contract between the parties and whose accounting of extras was to be accepted. The Judge reviewed the evidence and granted judgment to the builder for approximately \$28,000.

*Ship Building - Fundamental Breach - Rescission - Repudiation - Forfeiture - Relief from Forfeiture***Hansen v. "Trinity" (The), [2007 BCSC 821](#) additional reasons [2007 BCSC 1489](#)**

The Plaintiffs in this case sought the return of in excess of \$300,000 they had paid towards the purchase of a sailing vessel being built for them by the Defendants. The Plaintiffs alleged that there was a fundamental breach of the building contract entitling them to rescission of the



contract. The breaches related to alleged welding defects in the hull. The Defendants counterclaimed for damages and alleged the Plaintiffs had forfeited their part payments. The Court reviewed the evidence and found that the Plaintiffs had failed to prove the welds were defective. Accordingly the claim of fundamental breach was dismissed and the Court found that the Plaintiffs had repudiated the contract by refusing to complete the purchase. The Court noted that the Plaintiffs had thereby forfeited their part payment of the purchase price but considered whether relief from forfeiture should be granted. The Court calculated the total loss suffered by the defendants at \$234,000 and compared this to the sum forfeited of \$317,000. The Court concluded that the sum forfeited was not out of all proportion to the loss suffered and declined to grant relief from forfeiture.

*Ship building - Government Procurement – Standing*

**Irving Shipbuilding Inc. v. Canada (Attorney General), [2008 FC 1102](#)**

This was an application for judicial review challenging the awarding of a contract by the Government of Canada to provide service support for its Victoria Class submarines. The Applicants were two sub-contractors of an unsuccessful bidder. Surprisingly, and fatally for the Applicants, the unsuccessful bidder was not part of the proceedings. The Applicants argued that there was a conflict of interest in that some employees of the successful bidder had been involved in an earlier test program that gave it inside knowledge and an unfair advantage. The application was dismissed on the grounds, first, that the Applicants had no standing since they were not “directly affected” by the decision, and second, on the grounds that there was no conflict of interest. (See 2009 Addendum for Appellate Decision)

*Ship Repair - Unconscionable Transaction - Quantum Meruit - Interference with Contractual Relations*

**Nanaimo Shipyard Ltd. v. Keith, [2008 BCSC 1150](#)**

The Defendant’s vessel ran aground and was severely damaged near Nanaimo, B.C. The grounding occurred a mere 100 yards from the Plaintiff’s shipyard. The Plaintiff’s employees secured the vessel, brought it to the shipyard and hauled it out of the water. The next day the Defendant was presented with a work order for the work done the previous day. The Defendant signed the work order. The work order included a “residency fee” of \$350 per day and a “lay day fee” of \$4,500 per day. The Defendant’s insurance company advertised for bids to repair the vessel. The Plaintiff bid but was not successful and the repair contract was given to another company. The main issue in the case was whether the Plaintiff was entitled to charge the “lay day fee” and “residency fee”. On this issue the Court found as a fact that the Plaintiff had advised the Defendant that the residency fee would be negotiable. The Court also found that the terms were vague with no clear meaning. Accordingly, the Court held that there was no agreement to pay the lay day or the residency fees. The Court also considered whether the agreement was unconscionable. The Court noted that unconscionability required, first, proof of inequality in the positions of the parties arising out of ignorance, need or distress and second, proof of substantial unfairness of the bargain obtained by the stronger. Once these factors are shown, the burden of proof shifts to the stronger party who must prove that the bargain is fair, just and reasonable. Applying this test, the Court held that there was unconscionability. The Court also found that there was unconscionability under the *Business Practices and Consumer*

*Protection Act* of British Columbia. Although the unconscionability invalidated the signed work order, the Court held that the Plaintiff was entitled to be paid for its work and the use of its facility on a quantum meruit basis. Claims by the Plaintiff against the underwriters of the Defendant for interference with contractual relations and breach of warranty of authority were dismissed.

### *Judgement - Collection - Garnishment*

#### **Morgan v. Guimond Boats Limited, [2008 FC 1004](#)**

In a judgment rendered December 2006 the Federal Court of Appeal upheld an award recognizing a foreign judgement against the Defendant. At a judgment debtor examination it was learned that the Defendant owned real property which was leased and generated a monthly rent. In fact, there was both a head lease and a sub-lease. An order was sought garnishing the amounts owed under the leases. The lessees put forward three arguments as to why the rent payment could not be subject to garnishment. First, they said that rent was never paid. Instead the lessees simply paid the debts of the lessor. Not surprisingly, the Court did not accept this argument. Second, it was argued that the rent payments were subject to a trust in favour of a mortgagee. The Court held, however, that a trust was only created if the mortgagee made such a request which had not occurred. Finally, it was argued that there was an outstanding debenture in favour of one of the lessees. However, the Court held that the debenture had not crystallized and so did not impede the garnishment of the rent payments.

### *Capsize - Fatal Injury - Criminal Negligence*

#### **R. v. Broadwith, [2007 BCSC 1910](#)**

The accused was the Captain of a houseboat that capsized resulting in the death of a passenger. He was charged with criminal negligence causing death. Although the Court accepted the evidence of the Crown's expert that the house boat was overloaded and was destined to capsize because of this, the Court held that the Crown had failed to prove the Captain's conduct amounted to criminal negligence. One of the critical findings leading to the acquittal was that the Captain was not aware there were an excessive number of passengers on board. The sinking occurred because two passengers pushed the boat away from the dock before the Captain had given his safety speech and before he could count the number of passengers onboard.

### *Capsize - Fatal Injury - Dependents Claims - Damage Assessment*

#### **Wilcox v The Miss Megan, [2008 FC 506](#), affirming [2007 FC 1004](#)**

This was a case in which the Defendant admitted liability for a fatal injury when a fishing vessel capsized. The deceased drowned. Claims were made under the provisions of the *Marine Liability Act* by the deceased's widow, three adult children and brothers and sisters. The first issue was whether the brothers and sisters could make a claim under the MLA. The Prothonotary held that they were clearly entitled by s. 4(c) of the Act. The Prothonotary next considered the pecuniary damages. The Prothonotary rejected the Defendant's argument that a deduction should be made for successful mitigation by the widow holding that a widow had no obligation to mitigate. The Prothonotary also said that the appropriate means of accounting for personal expenditures by the deceased in a two income household was to use the "cross-dependency method" (which applies a

dependency rate to family income as opposed to personal income). The Prothonotary next considered whether two of the dependents were entitled to damages for loss of valuable services provided by the deceased and held that they were. Finally, the Prothonotary considered damages for loss of care, guidance and companionship. The Prothonotary noted that the MLA provided no guidance as to how these damages should be calculated and further noted that the provinces seemed to have taken two distinct approaches; a conventional award or an award based on assessment of the evidence on a case by cases basis. The Prothonotary held that legislation in Ontario bore the closest resemblance to the MLA and adopted the Ontario case by case approach. In assessing actual damages the Prothonotary consulted the Ontario cases for guidance. The Prothonotary awarded the widow and a disabled daughter \$75,000 each for loss of care, guidance and companionship. The other two children were awarded \$25,000 each. The siblings were each awarded \$15,000. The Defendant appealed the order of the Prothonotary but the Appeal Judge upheld the decision in its entirety.

*Personal Injury - Duty of Care of Boat Rental Company – Damages*

**Wozniak v Alexander, [2008 ABQB 430](#)**

The Plaintiff was seriously injured while tubing when her foot was nearly severed by the propeller of the towing boat operated by one Defendant. The operator admitted liability but alleged liability should be shared with the company from whom the boat was rented. The Court held, first, that a duty of care was owed by the rental company. In fact, this seems to not have been seriously contested. The Court then found that the rental company had breached this duty by not taking adequate steps to determine the experience level of those who would be operating the vessel and by not giving adequate instruction. In particular, none of the vessel's occupants were instructed on towing procedures or how to "kill" the engine and when that should be done. With respect to causation, the Court recognized the "but for" test was the appropriate test and held that "but for" the inexperience of the operator and the lack of proper instruction, this accident would have been avoided. The Court then apportioned liability equally between the operator and boat rental company. The Court awarded: general damages for loss of pleasure and enjoyment of life at \$120,000; cost of future care and housekeeping at \$40,000; and loss of earning capacity at \$50,000.



## Addendum 2009 Cases

### *Carriage of Goods - Deck Carriage - Marine Insurance - Waiver of Subrogation - 3rd parties*

**Timberwest Forest Corp. v. Pacific Link Ocean Services Corporation, [2009 FCA 119](#) affirming [2008 FC 801](#)**

This was a subrogated claim for the loss of approximately C\$1 million worth of logs. The logs were lost from the deck of a barge while en route from Vancouver to California. The issues in the case were: first, whether the cargo was sufficiently described as deck cargo to remove it from the application of the Hague-Visby Rules (thus denying the Defendants the right to rely upon exclusion or benefit of insurance clauses in the contract); and second, whether the waiver of subrogation clause in the Plaintiff's insurance policy protected all of the Defendants or just the specifically named contracting carrier. The contract of carriage was contained in a letter of understanding and set of standard terms and conditions which incorporated a bill of lading that was "contemplated" to be issued. The bill of lading, which was never in fact issued, included on its face a statement that "all cargo was carried on deck unless otherwise stated". The Plaintiff argued that a printed statement of deck carriage in a standard bill of lading that was not actually issued was not sufficient compliance with Art 1(c) of the Hague-Visby Rules to oust the application of the Rules. The motions Judge held, however, that the Plaintiff was bound by the terms of the contract including the bill of lading terms and these contained a clear statement as to deck carriage. In result, the Rules did not apply. The second major issue in the case concerned a clause in the Plaintiff's policy of insurance which specifically waived subrogation against the contracting carrier. The contracting carrier had entered into time charters for the tug and barge with two affiliated companies who actually carried out the contract through their employees. The issue was whether these other companies and their employees could take the benefit of the waiver of subrogation clause which did not name them specifically or by class. The motions Judge reviewed the complicated history of the waiver of subrogation clause and concluded that it was intended to waive subrogation against the "carrier" or "tower", terms that were used indiscriminately. As the other parties fell within the definition of "carrier" in the bill of lading, they were entitled to the benefit of the waiver of subrogation clause. He further held that extending the benefits of the waiver of subrogation to these other entities would be a permissible incremental change in the law. On appeal, the Court of Appeal upheld the decision of the motions Judge but for different reasons. The Court of Appeal enforced the waiver of subrogation clause not on the basis of the intention of the parties but referred to a separate clause in the policy whereby underwriters waived rights of subrogation whenever the assured had waived rights of recovery. The Court of Appeal held that pursuant to the terms of the bill of lading recovery had been waived against all of the defendants and therefore rights of subrogation were also waived.

### *Carriage of Goods - Limitation Period - Counterclaim*

**Hapag-Lloyd Container Linie GmbH v. Moo Transport & Commodities Inc., [2009 FC 201](#)**

The issue in this case was whether a counterclaim for damage to cargo and non-delivery should be dismissed on the grounds that the counterclaim was made out of time. The moving party relied upon a clause in the bill of lading that stipulated the carrier would be discharged from all liability unless suit was brought within one year (almost identical wording to the limitation

period in the Hague/Hague-Visby Rules). The Court gave effect to the clause noting that this wording had the effect of completely excluding any cause of action rather than merely barring a remedy. In result, the counterclaim was dismissed.

*Collisions - Ship at Moorage - Liability - Damages - Betterment - Expert's Reports - Representative Proceedings*

**Laichkwiltach Enterprises Ltd. v. F/V Pacific Faith (Ship)**, [2009 BCCA 157](#), aff'g in part [2007 BCSC 1852](#), additional reasons [2008 BCSC 282](#)

This was an action for damages arising out of a collision. The Plaintiff's ship was moored at a wharf when the Defendant's vessel struck it while attempting to dock. The trial Judge held that the Defendants were prima facie negligent as there is a presumption of fault when a moored vessel is struck by a moving vessel. The trial Judge accepted that there was a clutch failure on the Defendant's vessel but, in the absence of evidence of the history or maintenance of the clutch, this did not absolve the Defendant of liability. The Plaintiff sought a total of \$105,000 in damages including approximately \$14,000 for lost fishing income. The trial Judge, however, found that the Plaintiff had failed to prove much of the damages it claimed and those damages it had proved were reduced by 67% to reflect "new for old" or betterment. Part of the reason for the lack of proof was the trial Judge gave no weight to the opinions of the Plaintiff's expert because the expert's report had apparently been drafted by a lawyer and the trial Judge was uncertain as to whose opinions were expressed in the report. The claim for lost income was denied on the grounds that the Plaintiff had unreasonably delayed in effecting the repairs. The Plaintiff appealed the damages issues. The Court of Appeal refused to intervene with respect to the findings of what had been damaged. These were findings of fact that were supported by the evidence. With respect to "betterment" the Plaintiff/Appellant argued that this concept of reducing damages for "betterment" did not apply to admiralty cases. The Court of Appeal disagreed holding that betterment was commercially realistic. The Court of Appeal did, however, find that the Trial Judge had not properly calculated the betterment. The court noted that betterment calculation must be reasonable and fair to both parties and that it must be remembered that the cause of immediate repairs was the tortious act of the Defendant/Respondent. In result, the Court of Appeal adjusted the betterment reduction from 67% to 33%.

*Ship building - Government Procurement - Standing*

**Irving Shipbuilding Inc. v. Canada (Attorney General)**, [2009 FCA 116](#) affirming [2008 FC 1102](#)

This was an application for judicial review under s. 18.1 of the *Federal Courts Act* challenging the awarding of a contract by the Government of Canada to provide service support for its Victoria Class submarines. The Applicants were two sub-contractors of an unsuccessful bidder. Surprisingly, and fatally for the Applicants, the unsuccessful bidder was not part of the proceedings. The Applicants argued that there was a conflict of interest in that some employees of the successful bidder had been involved in an earlier test program that gave it inside knowledge and an unfair advantage. The application was dismissed on the grounds, first, that the Applicants had no standing since they were not "directly affected" by the decision, and second, on the grounds that there was no conflict of interest. On appeal, the Court of Appeal upheld the

Judge at first instance but for slightly different reasons. The Court of Appeal held that the Applicants were not owed a duty of fairness either at contract, since they were not the unsuccessful bidder, or at common law. Further, since they were not owed a duty of fairness they were not "directly affected" by the decision awarding the service contract and, therefore, had no status under s. 18.1 of the *Federal Courts Act*.

*Marine Insurance - Subrogation - Control of Action - Admiralty Practice - Striking Pleadings*  
**Hodder Tugboat Co. Ltd. v JJM Construction Ltd. et al., [2009 FC 161](#)**

This case involved damage to two barges that were under charter. Following the incidents giving rise to the damage an action was commenced in the name of the owner and the charterer against Texada and Pacific. This action was essentially a subrogated action brought by the underwriters of the barges. Subsequently a second action was commenced by the owner against the charterer as well as Texada and Pacific. Texada and Pacific then brought this motion to strike the second action on the grounds that it was frivolous and vexatious. The court declined to completely strike the second action as there were aspects of the second action, including uninsured losses, that were not included in the first. Instead the court ordered that the actions be restructured such that the owner was the plaintiff in one action and the charterer the sole plaintiff in the other and that the actions be specially managed and heard together. During the course of its reasons the court also had to consider whether the underwriter or the insured had the right to control the subrogated action. The court held that even though the underwriter may have paid the full amount under the policy the insured retains the right to control the proceeding until it is fully indemnified. A subrogation receipt did not alter the common law on this point.

*Admiralty Practice - In Rem Actions - Arrest*

**Dragage Verreault Inc. v The M/V "Atchafalaya", [2009 FC 273](#)**

This matter arose out of a contract for the dredging of a channel. The Plaintiff was the head contractor under the dredging contract. The Plaintiff subcontracted the job to a company known as B+B Dredging. The contract specified the work was to be done by the "Atchafalaya" which was owned by a company called Proteus and under bareboat charter to B+B. The Plaintiff alleged there was delay on the part of the Defendants in bringing the "Atchafalaya" on site as a consequence of which the Plaintiff incurred liabilities under the head contract. The Plaintiff commenced this in rem action and arrested the "Atchafalaya". The owner of the "Atchafalaya" brought this motion to set aside the arrest and strike the in rem action on the grounds that there was no in personam liability of the owner to support the action in rem. The Motions Judge however found that there were some representations during the course of the contract negotiations that indicated the principal of B+B (who was also the principal of Proteus) had the authority to contract on the credit of the ship. Accordingly, the motion was refused.

*Canadian Maritime Law - Application of Provincial Statutes - Occupational Health and Safety*

**Jim Pattison Enterprises v. Workers' Compensation Board, [2009 BCSC 88](#)**

The central issue in this case was whether and to what extent the British Columbia *Occupational Health and Safety Act* ("OHSA") applied to commercial fishing vessels. It was argued that the



OHSA and regulations passed pursuant thereto were constitutionally invalid or inapplicable on the grounds that the safety of ships and crew is a matter within the sole jurisdiction of Parliament under its navigation and shipping power or, alternatively, that fishing is a federal work or undertaking. The Court began by reviewing the history of occupational health and safety in British Columbia in relation to fishing and reviewed various federal-provincial agreements that had been entered into. The Court then turned to the constitutional issue beginning, predictably, with the recent Supreme Court of Canada decisions in *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, [2007 SCC 22](#) and *British Columbia (Attorney General) v. Lafarge Canada Inc.*, [2007] 2 S.C.R. 86, [2007 SCC 23](#). The Court noted that the doctrine of interjurisdictional immunity goes against the dominant tide of constitutional interpretation and should be applied with restraint. The Court further noted that the doctrine of interjurisdictional immunity does not apply except where the adverse impact of a law adopted by one level of government is such that the core competence of the other level of government (or the vital or essential part of an undertaking it duly constitutes) is placed in jeopardy. The Court then dealt with the pith and substance analysis and concluded that the pith and substance of the OHSA and its regulations were the health and safety of workers which are matters within the legislative competence of the province. The Court then turned to the doctrine of paramountcy as there are many federal laws relating to the safety of ship and crew. The Court summarized the test as requiring the petitioners to establish either that: (a) it is impossible to comply with both laws; or (b) that to apply the provincial law would frustrate the purpose of the federal law. After reviewing the legislation, the Court concluded that there was considerable overlap and potential for confusion and that compliance with both regimes could be difficult and expensive, however, as it was not "impossible" to comply with both there was not operational incompatibility. The Court further found that the OHSA did not undermine the purpose of the federal statutes and therefore concluded that the doctrine of paramountcy was not operative. The Court then turned to the interjurisdictional immunity doctrine. The Court first considered whether fishing was a federal undertaking and held that it was not because the undertaking did not play any role in "connecting" British Columbia with any other province or country. The Court then considered whether the provincial law impaired or placed in jeopardy the core of federal competence over navigation and shipping and concluded that it did not.

### *Supply of Goods and Services*

#### **Sealand Marine Electronics Sales & Services Ltd. v. Lukey's Boat (Ship), [2009 FC 32](#)**

This was a simplified action for recovery of a balance owing on an invoice relating to the supply of electrical equipment to a vessel. The main factual issue in the case was whether, when the order for the equipment was placed, the price was to include a transducer. The Court found as a fact that there was no agreement to include a transducer and the Plaintiff was awarded judgment.

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