Federal Court  Cour fédérale

CANADIAN MARITIME LAW ASSOCIATION
WILLIAM TETLEY MEMORIAL SYMPOSIUM
MCGILL UNIVERSITY, 3644 PEEL STREET
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FOND MEMORIES

THE HONOURABLE MR. JUSTICE SEAN HARRINGTON

INTRODUCTION

[1] Bill Tetley (he was never professor or Mr.) did more than anyone to put Canadian Maritime Law on the world map. He did so through his writings, his teaching at McGill, Tulane and elsewhere, and the strength of his personality.

[2] I first heard his name shortly after I began law school at McGill in 1965. He was already a senior partner at the firm of Martineau, Walker, Allison, Beaulieu and Tetley. I took the admiralty course which was an elective taught by Professor J.J. Gow. It was there that I came to learn of the first edition of Bill's *Marine Cargo Claims* which was published in 1965. However, when I articled at McMaster Meighen in 1968 his book was not in the library. Our senior admiralty partner, Stuart Hyndman, disagreed with many of Bill's interpretations of the case law and thought we would be led astray! However, those interested in maritime law all had their own copy. After my first year in practice, I was given the opportunity to join the admiralty group as John Hackett was shifted to labour law. He ceremoniously gave me his copy of *Marine Cargo Claims* which had cost $25.

[3] When I joined our Library Committee, I made sure all of Bill's works were on our shelves. One might agree with Bill, or not, but the cases were all there. I particularly appreciated his interest in private international law. He constantly compared Canadian, English, French and American case law. In *Marine Cargo Claims*, 4th edition, he provided summaries from 48 different jurisdictions. If our own law was silent on a subject, one might shop around and find a good argument that had been developed in another jurisdiction.

[4] Bill was first elected to the Quebec National Assembly in 1968 and later became the Minister of Financial Institutions, Companies, Cooperatives and Consumer Protection. He was responsible for Quebec's first *Consumer Protection Act*.

[5] I first met Bill in the early 1970s at a Canadian Bar Association annual meeting in Québec City. He was kind enough to invite us to one of the chambers of the Quebec National Assembly. After he left politics in 1976, I began to see him regularly at meetings of the Canadian Maritime Law Association and later the Association of Maritime Arbitrators of Canada. Bill held his points of view strongly, but was always ready to enter into friendly debate. I was an annual guest lecturer here at McGill. He would ask me to lecture on topics on which our opinions differed.

CARGO CLAIMS

[6] Bill's approach was that the cargo interests were the good guys and the carriers the bad guys. Whenever I think of Bill, I think of the dissenting opinion of Justice Hays of the United

States Court of Appeals, Second Circuit, in *Encyclopaedia Britannica Inc. v SS Hong Kong Producer and Universal Marine Corporation*, 422 F.2d 7, 1969 AMC 1741 where he said:

> From the majority opinion one might gather that devilishly clever Chinese carriers were dealing with the unworldly professors who write the articles for the encyclopaedia.

[7] Three of the many topics of interest to Bill were the burden of proof under the *Hague Visby Rules*; the Himalaya Clause, and the demise or identity of carrier clause.

[8] Bill was not happy with the approach of Canadian courts to the burden of proof. In his *Marine Cargo Claims*, 4th edition, 2008, at page 354, he said, among other things: "that it was incumbent upon the carrier to prove due diligence to make the ship seaworthy in order to escape liability." However, it had been held that if the loss or damage is *prima facie* attributable to one of the excepted perils set out in the *Rules*, cargo interests must establish the carrier's negligence or, both that the ship was unseaworthy and that the loss was caused by that unseaworthiness. It is only if unseaworthiness is established that the carrier must persuade the court that due diligence had been exercised (*Kruger Inc v Baltic Shipping Co* (1989), 57 DLR (4th) 498 (FCA), 1989 FCJ n^{o} 229 (QL)).

[9] The Himalaya Clause was developed as a result of Lord Denning's decision in *Adler v Dickson (The Himalaya)*, [1954] 3 All ER 397, [1954] 2 Lloyd's Rep 267. Mrs. Adler was injured while boarding a P&O passenger ship due to a poorly rigged gangway. The shipowner was contractually exonerated from liability, so she successfully sued Mr. Dickson, the bos'un. Lord Denning suggested ways around the common law principle that a stranger could not benefit from a contract. This was never a serious problem in the civil law.

[10] At page 1854 of *Marine Cargo Claims*, Bill dislikes the principle of someone who is not a party to a contract benefitting from that contract as: "the door is left open to incongruity, abuse and, at times, injustice to persons who have contracted in good faith".

[11] However, the clauses which developed as a result of the *Himalaya* have been upheld by our Supreme Court in *ITO Terminal Operators Ltd v Miida Electronics Inc.* (Buenos Aires Maru), [1986] 1 SCR 752 and *London Drugs Ltd v Kuehne & Nagel International Ltd*, [1992] 3 SCR 299.

[12] Bill did not like the various versions of the identity of carrier or demise clause. In brief, these clauses provide that notwithstanding what appears to the contrary, such as the charterer's letterhead on a bill of lading, the contract of carriage is really with the shipowner or, if the ship is under demise, with the demise charterer. At page 603 of *Marine Cargo Claims*, he pointed out that: "Regrettably" our courts "seem to have unambiguously resurrected the validity of demise and identity of carrier clauses".

[13] I must say I was never particularly fond of the demise clause. In my early days, most of the liner services to and from Montréal were operated by time charterers. As a result, the shipowner was left holding the bag in first instance and had to claim indemnity under a charter party arbitration clause.

[14] I had occasion to draft a number of bills of lading. If the carrier was, in reality, the time charterer I would identify that party as the carrier, but then attempt to protect the shipowner by way of Himalaya and Circular Indemnity clauses.

ARBITRATION CLAUSES

[15] Quebec always had a love/hate relationship with arbitration clauses. When I began practice, the "clause compromissoire" was contrary to public policy. That was a clause by which parties agreed to refer future disputes, if any, to arbitration. It was quite alright to agree to arbitrate once a dispute occurred.

[16] Then, there was a change of heart and the jurisdiction of the court was completely ousted. That approach too was subsequently abandoned.

[17] The federal Parliament enacted the *Commercial Arbitration Act*, RSC 1985, c-17 (2nd Supp.) based on the UN Model Code. The provinces followed suit. It is a very good Act. A party has recourse to the courts to grant interim security, which does not constitute a waiver of the right to arbitrate. Article 34 gives limited recourse to the courts once an arbitral award has been made, but an error in law on the part of the arbitrators is not one of them.

[18] When this matter was under discussion at the Association of Maritime Arbitrators of Canada, I was very much of the view that such as in England, there should be provision for the arbitrators to refer points of law to the courts. However, Bill persuaded me I was wrong. He was of the view that if parties wanted commercial people to resolve their disputes, it followed that these arbitrators may well err in law. The parties should bear the consequences thereof. I came around to his point of view.

[19] However, I am now somewhat ambivalent. Decisions of the Immigration and Refugee Board under the *Immigration and Refugee Protection Act* and that of Citizenship Judges under the *Citizenship Act* are subject to judicial review in the Federal Court. The Court's decision is final and is not subject to appeal unless a serious question of general importance is certified.

GENERAL AVERAGE

[20] Bill was not fond of general average. Indeed, at page 1751 of *Marine Cargo Claims*, he says it should be abolished. He particularly disliked what he termed "artificial" general average. In *Ellerman Lines Ltd v Gibbs, Nathaniel (City of Colombo)*, [1986] 2 FC 463, [1986] AMC 2217, the shipowner claimed general average while the ship was safety moored at Montréal. However, if she were to continue on to her final destination, Toronto, inevitably there would be engine failure. Thus, the costs of repair was claimed in general average and cargo would only be released against a non-separation agreement, meaning that even if cargo interests wanted delivery at Montréal they would have to contribute as if the cargo had remained on board to final destination.

[21] Speaking for the Court of Appeal, Mr. Justice Stone, who was a past-president of the Canadian Maritime Law Association, as, of course, was Bill Tetley, held that the declaration of general average was valid. He also held, however, that cargo interests could avoid contributing to expenses not yet incurred by taking delivery at an intermediate port. I represented Ellerman Lines and was accused (nicely) by Bill of contributing to the perversion of the law!

[22] As for the future of general average…? The *Comité Maritime International* is looking at the York Antwerp Rules still again.

THE ACTION *IN REM* AND THE *MAREVA INJUNCTION*

[23] The action *in rem* is a unique process directed against a ship or other maritime property which, if it runs its course, results in a sale by the admiralty marshal which gives the purchaser a title free and clear of all liens and encumbrances (*The Henrich Björn* (1886), 11 App Cas 270, 6 Asp MLC 1 (HL).

[24] The Mareva injunction (*Nippon Yusen Kaisha v Karageorgis*¸ [1975] 3 All ER 282 (CA), [1975] 2 Lloyd's Rep 137 and *Mareva Compania Naviera SA v International Bulkcarriers SA,* [1980] 1 All ER 213 (CA), [1975] 2 Lloyd's Rep 509 is an equitable remedy *in personam*. Lord Denning adapted the civilian seizure before judgment, which is an *in rem* remedy, and fit it into equity, an *in personam* remedy. The asset is not seized, but it is frozen. It cannot be moved. Unlike an arrest in an action *in rem*, it is necessary to establish some skulduggery on the part of the defendant, and an undertaking in damages is usually required.

[25] By the time *Armada Lines Ltd v Chaleur Fertilizers Ltd*, [1995] 1 FC 3, [1994] FCJ n^{o} 1074, reached the Federal Court of Appeal, the Court was dealing with the wrongful arrest of cargo. The jurisprudence up to that time was to the effect that damages did not lie for wrongful arrest unless the plaintiff was in bad faith or grossly negligent, neither of which was established. However, the Court of Appeal equated an arrest in an action *in rem* with the Mareva injunction and expanded the notion of damages.

[26] My partner, the late Jon Scott, sought leave to appeal to the Supreme Court. In an effort to persuade the Court that this was truly a matter of national and international importance, he enlisted Bill's aid. Bill gave an affidavit in support of the application for leave. He cited 9 English cases, 12 American, 2 Belgian, 2 French and 5 Canadian, as well as doctrine to support his position that the Federal Court of Appeal got it wrong.

[27] We were aware that this tactic was somewhat suspect because the Court was loath to look at affidavits as to the content of Canadian admiralty law, which should form part of legal argument. However, Bill's work had already been favourably cited by the Court five times (*ITO-International Terminal Operators v Miida Electronics*, [1986] 1 SCR 752; *Q.N.S. Paper Co. v Chartwell Shipping Ltd.*, [1989] 2 SCR 683; *Monk Corp v Island Fertilizers Ltd.*, [1991] 1 SCR 779; *Canadian National Railway Co. v Norsk Pacific Steamship Co.*, [1992] 1 SCR 1021; and *London Drugs Ltd v Kuehne & Nagel International Ltd*, [1992] 3 SCR 299). Sure enough, the other side successfully moved to have Bill's affidavit struck (*Armada Lines Ltd v Chaleur Fertilizers Ltd*, [1994] SCCA No 425 (QL)), but in the same decision we were granted leave.

[28] In its decision reported at [1997] 2 SCR 617, the Court reaffirmed that damages only lay for wrongful arrest if the arrested party acted either in bad faith or was grossly negligent. Any change to extend the common law liability rule for wrongful arrests should be made by Parliament. The Court confirmed that an arrest in an action *in rem* and the Mareva injunction are quite distinct. In other words, it agreed with Bill.

[29] The Supreme Court continues to refer to Bill's writings in maritime law and in other contexts (*Bow Valley Husky (Bermuda) Ltd. v Saint John Shipbuilding Ltd.*, [1997] 3 SCR 1210;

Holt Cargo Systems Inc v ABC Containerline N.V. (Trustees of), 2001 SCC 90, [2001] 3 SCR 907; *Spar Aerospace Ltd v American Mobile Satellite Corp.*, 2002 SCC 78, [2002] 4 SCR 205; *Z.I. Pompey Industrie v ECU-Line N.V.*, 2003 SCC 27, [2003] 1 SCR 450; and *Dell Computer Corp. v Union des consommateurs*, 2007 SCC 34, [2007] 2 SCR 801).

PERSONAL REMINISENCES

[30] From time to time, Bill asked me to act as outside examiner on a defense of a doctoral thesis. Apparently, I was a little tough. However, one candidate who sailed through without any difficulty whatsoever was one of our speakers here today, Marko Pavliha.

[31] A judge who encouraged me to apply to the bench was Mr. Justice Arthur Stone. As I was applying to the Federal Court, which is a national court, I gave his name as a reference as well as that of David Brander Smith, of Vancouver, who at the time was president of the Canadian Maritime Law Association. Neither was consulted. When it came time to renew my application, I called Raynold Langlois. He told me I had gone about it all the wrong way. Notwithstanding that the Federal Court is a national court, the process is the same as if I were applying to the Quebec Superior Court, *i.e.* give Quebec references only. He suggested that I might give Bill as a reference. Bill agreed. He was consulted. Who knows!