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Developments in Canadian Maritime Law

01/01/2011- 31/03/2012

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Synopsis of Important Developments

Canadian Maritime Law

The nature and scope of Canadian maritime law and the constitutional limits of Parliament's jurisdiction over navigation and shipping continues to generate a multiplicity of cases. Most recently, in *Ryan Estate v. Universal Marine*, 2009 NLTD 120, affd. [2011 NLCA 42](#), the Newfoundland Court of Appeal held that the litigation bar in the provincial *Workers Compensation Act* did not apply to dependents of crew members who lost their lives when their vessel sank. In *Jim Pattison Enterprises v. Workers' Compensation Board*, [2009 BCSC 88](#) affirmed [2011 BCCA 35](#), the British Columbia Court of Appeal dismissed an appeal from the B.C. Supreme Court and held that the *Occupational Health and Safety Regulation* under the provincial *Workers Compensation Act* was applicable to commercial fishing vessels. The intraprovincial nature of the fishing activities was an important factor in the decision. Other cases of interest include: *Chalets St-Adolphe inc. c. St-Adolphe d'Howard (Municipalité de)*, [2011 QCCA 1491](#), where a municipal by-law that restricted the persons who could use a lake was declared invalid by the Quebec Court of Appeal; *Alcan Primary Metal v. Groupe Maritime Verreault Inc.*, [2011 FCA 319](#), where it was held that a brokerage/commission contract in respect of tugs was governed by maritime law and within the jurisdiction of the Federal Court; and, *Toney v. Canada*, [2011 FC 1440](#), where it was held that the Federal Court had jurisdiction in an admiralty action against a provincial crown.

Marine Insurance

Marine insurance cases of interest include: *Feuiltault Solution Systems Inc. v. Zurich Canada*, [2011 FC 260](#), where a defence to a claim under an all risks cargo policy was upheld on the basis that the cause of the loss was inherent vice or insufficient packaging and that the assured had not proven a fortuity; and, *Société Telus Communications v. Peracomo Inc.*, [2011 FC 494](#), where the Court upheld a denial of coverage on the basis of the wilful misconduct of the assured in deliberately cutting a submarine cable.

Carriage of Goods

In *Cami Automotive, Inc. v. Westwood Shipping Lines Inc.*, [2009 FC 664](#), affd. [2012 FCA 16](#), the Federal Court of Appeal upheld a decision of the Federal Court holding that a rail carrier could choose the limitation that was the most beneficial to it. In *Orient Overseas Container Line Limited v. Sogelco International*, [2011 FC 1466](#) a foreign arbitration award involving a services contract was recognized and enforced. The Court refused to consider the merits of the award.

Jurisdiction Clauses

In *T. Co. Metals LLC v. Vessel "Federal EMS"*, [2011 FC 291](#) rvsd. [2011 FC 1067](#), the decision of a Prothonotary was reversed and it was held that a charter party was not a "contract of carriage" within the meaning of s. 46 of the *Marine Liability Act*. In *New World Expedition Yachts LLC v. P.R. Yacht Builders*, [2011 BCSC 78](#), the plaintiffs' attempts to avoid the results of arbitration award through allegations of fraud were unsuccessful.

Collisions/Limitation of Liability

There have been three significant collision/limitation cases. In *Buckley v. Buhlman*, [2011 FC 73](#) affd. [2012 FCA 9](#), the Federal Court of Appeal upheld a decision of the Federal Court where the differences between sections 28 and 29 of the *Marine Liability Act* were considered. It was determined that the limits applicable to “passengers” apply only to persons on board the ship seeking to limit liability. In *J.D. Irving, Limited v. Siemens Canada Limited*, [2011 FC 791](#), the Federal Court upheld the right of a carrier/ship owner to limit its liability and enjoined an action in a provincial superior court. In *Société Telus Communications v. Peracomo Inc.*, [2011 FC 494](#), the defendant intentionally cut a submarine cable that he had snagged believing it to be abandoned. The Federal Court held that his actions disentitled him from the benefit of limitation of liability. Other cases of interest are: *Hogan v. Buote*, [2012 PESC 10](#) where the court apportioned liability for a collision between fishing vessels; and, *Wolverine Motor Works Shipyard LLC v. Canadian Naval Memorial Trust*, [2011 NSSC 308](#) where a claim against a ship that came loose from her moorings during a hurricane was dismissed on the grounds of inevitable accident.

Mortgages, Liens and Priorities

In *World Fuel Services Corporation v. Nordems (Ship)*, [2010 FC 332](#), affd. [2011 FCA 73](#), the Federal Court of Appeal upheld the Federal Court decision holding that there was no American lien for bunkers supplied to a ship under time charter where the supply occurred outside of the United States or Canada and was pursuant to a contract between the supplier and the time charterer as opposed to the ship owner. In *TAM International Inc. v. Ship MCP Altona*, [2012 FC 128](#) an arresting party that later abandoned its claim to the proceeds of sale was ordered to pay costs of \$1,000.

Admiralty Practice

The supply of bunkers also gave rise to an interesting practice case in *Alpha Trading Monaco Sam v. The “Sarah Desgagnés”*, [2010 FC 695](#), affd. [2011 FCA 41](#). The Federal Court of Appeal affirmed the decision of the Federal Court wherein it granted an anti-suit injunction restraining a foreign bunker supplier from continuing proceedings in Belgium and Italy. The fact that the foreign bunker supplier initially commenced the Canadian proceeding was the determining factor that led to the granting of the injunction. Other practice cases of interest include: *Seanautic Marine Inc. v. Jofor Export Incorporated*, [2012 FC 328](#) where the court affirmed that dismissal of a prior proceeding without an adjudication on the merits is not a bar to later proceedings; *Secunda Marine Services Ltd. v. Caterpillar Inc.*, [2012 NSSC 53](#) where the plaintiff was allowed to amend its claim by adding a new plaintiff 10 years after the incident giving rise to the claim; *Olsen v. The Bank of Nova Scotia*, [2011 BCSC 111](#), where an injunction was sought, and denied, to restrain payment under a letter of credit that had been given to secure the release of a vessel from arrest; *Shell Canada Energy v. General MPP Carriers*, [2011 FC 217](#), where, in an action *in rem*, the plaintiff was refused leave to add an *in personam* claim against the owners after the expiry of the limitation period; and *FFS HK Ltd. v. P.T. 25 (Ship)*, [2011 BCSC 1418](#) where double costs were awarded in respect of a successful claim for contribution and indemnity in relation to an oil spill incident.

Pollution

In *R. v. Bolt*, [2011 NLTD 20](#) the accused was fined \$10,000 for a diesel fuel spill and \$5,000 for failing to report it.

Miscellaneous

Notable cases under this heading include: *Western Forest Products Inc. v. O'Brien*, [2011 FC 1528](#), where the owner of a foreshore lease obtained an injunction to remove a barge moored on the leasehold without its permission; *Shipping Fed. of Cda. v. Vancouver Fraser Port Authority*, [2012 FC 301](#), where the court dismissed a challenge by ship owners to a container fee imposed under the *Canada Marine Act*; *M.V. Stormont v. Canada*, [2011 FC 531](#) affd. [2012 FCA 93](#), where a challenge to an ice breaking services fee was dismissed; *Adventure Tours Inc. v. St. John's Port Authority*, [2012 FC 305](#), where an application challenging the power of the Port Authority was struck; and *Worldspan Marine Inc. (Re)*, [2011 BCSC 1758](#), and *Sargeant v. Worldspan Marine Inc.*, [2011 BCSC 767](#), where the court stayed proceedings involving an insolvent ship builder to allow restructuring efforts to be investigated.

Canadian Maritime Law/Admiralty Jurisdiction

Canadian Maritime Law - Application of Provincial Statutes - Workers Compensation

Ryan Estate v. Universal Marine, 2009 NLTD 120, affd. [2011 NLCA 42](#)

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

On appeal, the Newfoundland Court of Appeal upheld the judgement of the Trial Judge but with a dissenting Justice. The majority began its analysis by applying the pith and substance doctrine and had no difficulty finding that the *Workplace Health, Safety and Compensation Act* was valid provincial legislation. It then considered the interjurisdictional immunity doctrine noting that

this involved answering two questions: (i) does the provincial law trench on the core of a federal power? and (ii) is the provincial law's effect on federal power sufficiently serious? (i.e. does it impair and not merely affect the federal power?). Relying heavily upon the Supreme Court of Canada's decision in *Ordon v Grail*, the majority held that the doctrine of interjurisdictional immunity applied and the statute should be read down. The majority also considered and applied the paramountcy doctrine holding that "if a maritime claimant wishes to avail of the right to sue, he or she will be precluded from doing so. He or she cannot comply with the federal law without violating the provincial. The two provisions cannot, in an operative sense, co-exist."

The dissenting Justice would have held: that the *Workplace Health, Safety and Compensation Act* was in pith and substance a no fault insurance scheme and not maritime negligence law; that there was no operational conflict under the paramountcy doctrine as the federal law did not compel claimants to make claims; and the interjurisdictional immunity doctrine did not apply because the core of the federal power was not engaged.

(Note 1: A preliminary issue on the appeal was whether s. 57 of the *Judicature Act* of Newfoundland required that notice be given to the Attorney General of Newfoundland of the constitutional question and whether the prior proceedings were null and void by reason of failure to give such notice. The parties other than the Crown argued that notice was not required since only the applicability of the statute was being challenged and not its validity. The Court of Appeal disagreed and held that notice should have been given but, because there was no prejudice, the failure to give notice did not render the prior proceedings a nullity.

Note 2: This is a very controversial topic and the decision in this case is currently under appeal to the Supreme Court of Canada. The decision in this case is, arguably, inconsistent with that in *Laboucane v Brooks et al.* 2003 BCSC 1247.)

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

Jim Pattison Ent. v. Workers' Compensation Board, [2009 BCSC 88](#) *affd.* [2011 BCCA 35](#)

The central issue in this case was whether and to what extent the British Columbia *Occupational Health and Safety Regulation* ("OHSR") of the *Workers Compensation Act* applied to commercial fishing vessels. It was argued that the OHSR was 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 Trial Judge 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 Trial Judge 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 Trial Judge noted that the doctrine of interjurisdictional immunity goes against the dominant tide of

constitutional interpretation and should be applied with restraint. The Trial Judge 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 Trial Judge then dealt with the pith and substance analysis and concluded that the pith and substance of the OHSR were the health and safety of workers which are matters within the legislative competence of the province. The Trial Judge then turned to the doctrine of paramountcy as there are many federal laws relating to the safety of ship and crew. The Trial Judge 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 Trial Judge 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 Trial Judge further found that the OHSR did not undermine the purpose of the federal statutes and therefore concluded that the doctrine of paramountcy was not operative. The Trial Judge then turned to the interjurisdictional immunity doctrine. The Trial Judge 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 Trial Judge 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.

Upon appeal, the British Columbia Court of Appeal began its analysis noting that the modern approach to Canadian federalism is “cooperative federalism”. It then turned to the pith and substance analysis and found the purpose and effect of the provincial legislation to be the occupational health, safety and well-being of workers employed on fishing vessels, a matter of labour relations and, as such, coming within provincial jurisdiction over “property and civil rights”. The Court next considered whether the fishing operations at issue were a provincial or federal undertaking. The appellants argued that as the normal fishing activities of the concerned vessels were beyond the limits of the province their operations should be characterized as a federal undertaking. However, the Court found that the business of the appellants was exclusively intraprovincial and there was no operational connection to another jurisdiction. Accordingly, the Court held that the operational activities were a provincial and not a federal undertaking. Although not necessary, the Court did go on to consider the doctrines of interjurisdictional immunity and paramountcy but held that neither applied. The impugned provisions did not impair the core competence of federal jurisdiction over navigation and shipping and there was no evidence of operational conflict or frustration of the purpose of the federal legislation.

Constitutional Law - Validity of Municipal Bylaws

Chalets St-Adolphe inc. c. St-Adolphe d'Howard (Municipalité de), [2011 QCCA 1491](#)

This case concerned the validity of a municipal bylaw which restricted the use of a municipal boat ramp and a lake to residents. The bylaw was challenged by a local businessman who had a

small cottage rental business and used the municipal boat ramp to launch his customers' boats. At first instance the validity of the bylaw was upheld, on the basis of the double aspect doctrine with the Trial Judge holding that the dominant aspect of the impugned bylaw was protection of the environment. On appeal, the Quebec Court of Appeal held that the pith and substance of impugned provisions encroached upon the basic, minimum and unassailable core of the exclusive jurisdiction of Parliament over navigation and shipping. (Note: Regrettably, this decision appears to be reported only in French and the author has only a limited understanding of the French language.)

Constitutional Law - Application of Municipal Bylaws

Durham v. Todd, [2010 ONCJ 122](#) 2011 ONCJ 449

In this matter the defendant boat owner was charged with trespass under the Ontario *Trespass to Property Act* and with infractions of various municipal Bylaws. The charges all related to anchoring in Port Whitby Harbour which was a harbour designated under the *Fishing and Recreational Harbours Act*. The harbour was administered by the municipality pursuant to an agreement with the Department of Fisheries. The accused defended the charges on the grounds that the province and the municipality had no constitutional jurisdiction. At first instance the Justice of the Peace found that the agreement between the municipality and the Department of Fisheries gave the municipality the requisite authority and rendered nugatory any issue of interjurisdictional immunity. The accused appealed. On appeal, the Judge affirmed the decision of the Justice of the Peace. The Appeal Judge held that the *Fishing and Recreational Harbours Act* entitled the Minister to delegate authority to the municipality and that there was no conflict between federal and provincial or municipal law.

Brokerage contract – Jurisdiction – Canadian Maritime Law

Alcan Primary Metal v. Groupe Maritime Verreault Inc., [2011 FCA 319](#)

This case concerned whether the Federal Court had the jurisdiction to determine a dispute between the parties involving alleged breaches of a brokerage contract relating to tugs. The parties had entered into a contract whereby the plaintiff was to be paid a commission in the event that it found a tug or tugs that met the needs of the defendant. The plaintiff claimed it was owed commission under the contract and brought this action to recover the commission. The defendant responded by challenging the jurisdiction of the Federal Court. At first instance, the Motions Judge dismissed the motion finding that the contract was maritime in nature and fell within Canadian maritime law. The Federal Court of Appeal affirmed the Motions Judge. The Court did not accept that there was any distinction to be drawn between the purchase of a tug and brokerage services that enable the purchase. The Court held the two were inseparable.

Federal Court Jurisdiction - Action vs Provincial Crown - In Rem Proceedings

Toney v. Canada, [2011 FC 1440](#)

This case arose out of a fatal accident that occurred on an Alberta lake. The defendants

included both the federal and provincial crowns and a vessel owned by the Alberta government. It was alleged that the defendants owed search and rescue duties and were negligent in the performance of those duties. The Alberta defendants moved to have both the *in rem* and *in personam* actions struck on the basis that the vessel had been sold prior to the commencement of the action and on the basis that actions against the provincial crown should be commenced in the provincial courts. The federal defendants also moved to stay the action or to have it struck as an abuse of process. The Court allowed the motions only with respect to the action *in rem*. The Court held that the sale of the vessel prior to the commencement of the action did defeat the action *in rem* but it did not affect the action *in personam*. The Court held that the fact one of the defendants was a provincial crown was irrelevant as the action (and the court's jurisdiction) was not grounded in s. 17 of the *Federal Courts Act* but in s.6 and following of the *Marine Liability Act*.

Marine Insurance

Marine Insurance – Cargo All Risks - Burden of Proof – Sufficiency of Packing

Feultault Solution Systems Inc. v. Zurich Canada, [2011 FC 260](#)

The plaintiff was the owner of a cargo of machines stowed in three containers and shipped by sea from Montreal to Europe. Two containers were stowed under deck and the third was stowed on deck. Upon delivery of the containers it was discovered that all of the units were damaged by rust. A claim by the plaintiff under its cargo policy with the defendant was denied on the grounds of inherent vice or insufficiency of packaging. Specifically, the defendant alleged that the damage occurred because the timbers used to brace the cargo had excessive water content which condensed during the voyage. The evidence established that the three containers were in good condition and that there was no ingress of water into the containers. The plaintiff relied on the fact that it had previously sent several similar shipments packed in the same way without incident. However, the Court found as a fact that the packing was insufficient in that the wood used to brace the cargo was unsuitable and the individual units should have been wrapped in some manner. The Court accepted that an all risks policy requires that there be a “fortuity” and that the burden was on the plaintiff to prove such fortuity.

Marine Insurance – Wilful Misconduct

Soci  t   Telus Communications v. Peracomo Inc., [2011 FC 494](#)

In this case the Court held that the intentional cutting of a submarine cable was “wilful misconduct” on the part of the assured that rendered the insurance void. See the full summary below under Collisions/Limitation of Liability.

Carriage of Goods

Carriage of Goods - Intermodal - Rail Carriage - Himalaya Clause - Applicable Limitation - Double Costs

Cami Automotive, Inc. v. Westwood Shipping Lines Inc., [2009 FC 664](#), *affd.* [2012 FCA 16](#)

Cami Automotive, Inc. v. Westwood Shipping Lines Inc., [2010 FC 26](#)

In this action the plaintiffs sued the defendants for damage to cargo carried under a through bill of lading. The cargo was damaged as a result of a train derailment. The defendants were the charterer of the carrying vessel, the owner of the carrying vessel and the rail carrier. The plaintiff and the charterer conducted business under annual service contracts for the carriage of containers from Japan to Toronto pursuant to which a "Shipping Document" was issued when containers were loaded for carriage. The charterer and the rail carrier conducted business under a "Confidential Contract". The issues for determination were the entitlement of the charterer and rail carrier to limit their liability under the terms of the various contracts. The Trial Judge dealt first with the limitation of the charterer and considered whether the "Shipping Document" was a bill of lading or a waybill. The Trial Judge held that it was a waybill noting that it was titled "Waybill", it contained a stamp indicating delivery would be made to the named consignee (without production of the original) and only one copy was issued (bills of lading are usually issued in triplicate). As the "Shipping Document" was determined to be a Waybill and not a Bill of Lading, the Trial Judge further held that the Hague-Visby Rules were not compulsorily applicable. However, the Waybill incorporated the terms of COGSA which contains a US\$500 per package limitation and this limitation was held to be applicable to the charterer. A secondary issue relevant to the charterer's limitation was the definition of a "package". The Trial Judge held in the circumstances that each pallet was a package and that the total limitation amount was US\$50,000. The Trial Judge then turned to the limitation of the rail carrier and considered first whether the rail carrier could limit its liability under the "Confidential Contract" even though the plaintiff was not a party to that contract. The Trial Judge applied the doctrine of sub-bailment and held that the plaintiff was bound by the terms of the "Confidential Contract". There was, however, an issue as to the proper interpretation of the "Confidential Contract" and, specifically, whether the rail carrier's limitation was contained in a tariff or in the Railway Traffic Liability Regulations. The Trial Judge found that the tariff had not been properly incorporated into the "Confidential Contract" and, accordingly held that liability was to be determined in accordance with the Regulations. The Trial Judge next considered whether the rail carrier could rely upon the limitation provisions in the "Shipping Document" and, applying the Himalaya clause in the "Shipping Document", held that it was entitled to do so. The Trial Judge further noted that the rail carrier was free to choose the limitation most beneficial to it.

The decision was appealed to the Federal court of Appeal. In very short reasons (2012 FCA 16) the Court of Appeal dismissed the appeal saying merely that they had not been persuaded that the Trial Judge had made any errors warranting their intervention.

In a related decision on costs reported at 2010 FC 26 the Trial Judge addressed the liability of the parties for costs. The vessel and rail carrier each claimed entitlement to double costs on the basis that the rail carrier had paid the plaintiff Cdn\$50,000 and the vessel had made an offer to settle in the amount of Cdn\$50,001. The Trial Judge held that the payment by the rail carrier was not a clear and unequivocal offer within the meaning the rules and that the rail carrier was not entitled to double costs. With respect to the vessel, the Trial Judge held that as there was not yet a final judgment, there was no basis for application of the rules relating to double costs. Moreover, the Trial Judge questioned whether the offer made by the vessel would be as favourable as the minimum amount of the eventual judgment (this was presumably because the Cdn\$ was worth less than the US\$ at the time). In result, the defendants were awarded only normal costs. Two interesting points were considered during the course of the reasons on costs. First, the Trial Judge considered whether the salvage obtained from the sale of the damaged cargo should be deducted from the limitation amount and held it was not appropriate to do so. Second, it was urged on the Trial Judge that the plaintiff's total claim was limited to US\$50,000 rather than US\$50,000 for each defendant. The Trial Judge declined to address this issue which was first raised at the hearing on costs.

Freight – Demurrage - Arbitration Awards – Enforcement – Appeals for Arbitrators

Orient Overseas Container Line Limited v. Sogelco International, [2011 FC 1466](#)

This was an appeal from a decision of a Prothonotary granting recognition and enforcement of a New York arbitration award. The appellant argued that the Prothonotary had erred in finding that there was a written arbitration agreement, a requirement of recognition and enforcement. The Appeal Judge, however, agreed with the Prothonotary. He found the undisputed evidence was that a services contract containing an arbitration provision had been signed. The appellant's argument that it had only been given one page of the agreement was not considered germane as that one page referred to the other pages and the appellant never asked for the other pages. The Appeal Judge did not agree with the Prothonotary that the appellant's participation at the arbitration was relevant since that participation was done under protest. The Appeal Judge also did not agree that there was a three month time period within which to appeal the award as the three month time period under the *Commercial Arbitration Code* applies only to Canadian arbitrations not foreign arbitrations. Having found that there was an agreement to arbitrate, the Appeal Judge refused to consider the appellant's arguments that the arbitrator erred on the merits. The Judge said: "If one agrees to arbitrate, one accepts the possibility that the arbitrator may get it wrong. This is not a jurisdiction in which one may go to court on a point of law, but only on whether there was an agreement to arbitrate and what I would broadly call principles of natural justice".

Arbitration/Jurisdiction Clauses and Stays of Proceedings

Stay of Proceedings - Arbitration Clause - Fraud - Res Judicata

New World Expedition Yachts LLC v. P.R. Yacht Builders, [2011 BCSC 78](#)

In this action the plaintiff alleged that the defendant shipbuilders had engaged in a fraudulent scheme in relation to a ship building contract. The vessel was being built under a contract between the plaintiff/purchaser, NWEY, and the defendant/builder, PRYB. PRYB sub-contracted the labour part of the build to a related company, FCY, also a defendant. Disputes arose during the course of the construction which were referred to arbitration and decided against the plaintiff in two arbitrations. The plaintiff first sought unsuccessfully to set aside the award on the basis of bias of the arbitrator. When that was unsuccessful, the plaintiff brought this action for damages alleging fraud. The defendants moved to stay the action on the basis of the arbitration clause in the building contract and on the grounds that the issues were *res judicata* having already been decided in the arbitrations. The Court agreed with the defendants on both counts holding that the plaintiff was seeking to re-litigate matters that were or could have been decided in the arbitrations.

Carriage of Goods - Arbitration Clause - Stay of Proceedings - Application of s.46 MLA to Charterparties

T. Co. Metals LLC v. Vessel "Federal EMS", [2011 FC 291](#) *rvsd.* [2011 FC 1067](#)

This case concerned carriage of a cargo of cold-rolled steel coils carried from Brazil to Toronto. The bills of lading incorporated the terms and conditions of a charterparty between the ship owner and the exporter of the cargo. Pursuant to the terms of the charterparty, the charterer/exporter was to be responsible for the loading, stowing and discharging of the cargo. The charterparty also contained an arbitration clause in favour of New York arbitration. At about the time of the loading of the cargo there was a disagreement between the owner and the charterer/exporter as to whether the cargo should be covered with plastic sheeting. To resolve this disagreement, the charterer/exporter provided the owner with a letter of indemnity holding the owner harmless for any damage due to the use of the plastic sheets. Upon arrival of the cargo at Toronto, there was damage to the cargo and the plaintiff commenced this action against the ship owner. The ship owner, in turn, commenced third party proceedings against the charterer/exporter. The charterer/exporter then brought an application to stay the third party proceedings relying upon the arbitration clause in the charterparty. The primary issue was whether a charterparty was a "contract for the carriage of goods by water" within the meaning of s.46 of the *Marine Liability Act*. If it was then the arbitration clause would not oust the jurisdiction of the court.

At first instance, the Prothonotary dismissed the motion holding that s. 46 of the *Marine Liability Act* applied and proceedings were entitled to be brought in Canada. However, on appeal, the Appeal Judge allowed the appeal and stayed the proceedings. The main issue in this case was whether s. 46 of the *Marine Liability Act* applies to charterparties. The Appeal Judge

noted that the ordinary meaning of the expression “contract for the carriage of goods by water” in s. 46 could support the inclusion of charterparties. However, relying heavily on the fact that the Hague-Visby and Hamburg Rules excluded charterparties, the Appeal Judge concluded that s. 46 did not apply to charterparties. In reaching this conclusion the Appeal Judge reasoned that s. 46 was a transitional provision which was eventually to be replaced by the Hamburg Rules and, as a transitional provision, it should not be given a wider scope than the Hamburg Rules. (A subsidiary issue in the case was whether the contract was to be found in the bills of lading or the charterparty. The Court held that the bills of lading functioned only as receipts as they remained in the hands of the charterer and never passed to a third party. A second subsidiary issue was whether the LOI was a separate contract unaffected by the arbitration clause in the charter party. The Court held that it was an amendment of the charterparty and therefore any claim under the LOI was caught by the arbitration clause in the charterparty.)

Collisions/Limitation of Liability

Limitation of Liability - Pleasure Craft - Collisions - Interest - Passengers

Buckley v. Buhlman, [2011 FC 73](#) *affd.* [2012 FCA 9](#)

(Note: This case concerns sections 28 and 29 of the *Marine Liability Act* but the Reasons for Judgment refer to the section numbers as they existed in 2006. This can be confusing for anyone familiar with the current numbering because the section numbers have since been transposed. What was s. 28 is now s. 29 and vice versa. To be consistent with the Reasons and to avoid adding to the confusion, I have decided to use the 2006 section numbers in this summary.)

The plaintiffs brought this action for limitation of liability under Part 3 of the *Marine Liability Act*. The plaintiffs were the owners of a fishing lodge that offered their guests the use of boats and motors. The defendants were a family of four who were guests at the lodge. During the defendants’ stay at the lodge they were involved in a collision between two of the plaintiffs’ boats. The first boat was operated by one of the plaintiffs and had two of the defendants as passengers. The second boat was operated by one of the defendants with the fourth defendant as a passenger. The two defendants in the second boat were injured. The main issue in the case was whether the applicable limitation was under s. 28 or s. 29 of the MLA. At the time s. 29 applied to “passengers” of ships of less than 300 gross tons and provided a limit of liability of at least 2 million SDRs (approximately CDN\$3 million). Section 28 applied to all ships of less than 300 gross tons except passenger claims under s. 29 and provided for a limit of liability of \$1 million. (The limitations of Part 4 of the MLA, which implements the Athens Convention, were not applicable as the defendants were not passengers “under a contract of carriage”.) The term “passenger” is a defined term in Part 3 of the MLA and includes a person carried on board a vessel “operated for a commercial or public purpose”. The parties apparently presented arguments relating to whether the vessels were used for commercial purposes. However, at trial, the Judge pointed out that this argument was misplaced. The Trial Judge noted that the

two defendants who were injured were not aboard the vessel operated by one of the plaintiffs. Therefore, regardless of whether the vessels were used for a commercial purpose, the injured defendants were not passengers *vis a vis* the plaintiffs and the s. 29 limitation did not apply. Accordingly, the limitation applicable was \$1 million under s. 28. The Trial Judge further dealt with a subsidiary issue of whether the limitation amount included interest and costs and held that it did not.

The defendants appealed to the Federal Court of Appeal arguing that the limitation should have been under s. 29. The appeal was dismissed. The Appellate Court agreed that s. 29 of the MLA had no application as the injured parties were not on board the first boat. The Court noted that Art. 7 of the Convention on Limitation of Liability for Maritime Claims, from which s. 29 of the MLA is derived, favoured the interpretation that s. 29 applies only to persons on board the ship seeking to limit liability. A cross-appeal from the Trial Judge's decision that the limitation amount was exclusive of interest and costs was abandoned. The Court said this was a question to be left for another day.

Limitation of Liability - Jurisdiction - Concurrent Cases - Stay of Limitation Proceedings - Establishment of Limitation Fund - Enjoining Superior Court Proceedings

J.D. Irving, Limited v. Siemens Canada Limited, 2011 FC 791

This case concerned two steam turbine rotors that were dropped into the waters of the harbour of St. John, New Brunswick in the course of being loaded onto a barge for transport. Siemens, the owner of the turbines, commenced proceedings in the Ontario courts for approximately \$45 million against the carrier and a naval architect who provided consulting services to the carrier. The carrier and naval architect brought this action in the Federal Court for a declaration that their liability was limited to \$500,000. These reasons relate to a series of motions and counter-motions concerning the entitlement of the defendants to limit their liability. Siemens sought an order staying the limitation proceedings. It argued, first, that its claims were not governed by Canadian maritime law and the Federal Court was without jurisdiction. The Court easily rejected this argument noting the many factual connections with shipping and navigation and finding it "clear" that "the nature of Siemens' claim is essentially maritime law". The Court held that it had concurrent jurisdiction with the Ontario Superior Court. The Court next considered Siemens' request for an interlocutory stay pursuant to s. 50 of the *Federal Courts Act*. Siemens argued that the Ontario proceedings were broader in scope than the Federal proceedings and that there was a risk of inconsistent findings if both proceedings were allowed to continue. The Court noted that a stay order was discretionary and that the appropriate test was whether the continuation of the action would cause prejudice to Siemens and would a stay cause an injustice to the carrier and naval architect. The Court declined to order the stay holding that Siemens had not demonstrated that it would be prejudiced if the stay was not granted. On the other hand, the Court expressly found that a stay would work an injustice to the carrier and the architect who had "a presumptive right to limit liability". The Court then considered Siemens' request for a final stay which was based upon an argument that the carrier and naval architect were not entitled to limit their liability pursuant to Art. 4 of the Convention on Limitation of Liability for Maritime Claims. (Article 4 provides that

a defendant is not entitled to limit liability if the loss resulted from the personal act or omission of the defendant “committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result”.) Siemens relied upon an expert report for evidence that the carrier was reckless. However, the Court held it was premature to determine such an issue and that a full trial would be required before a party could be denied the right to limit liability. The second application before the Court was a motion by the carrier to enjoin the Ontario action pursuant to s. 33(1)(c) of the *Marine Liability Act*. The Judge noted that the language of s. 33 was very broad and that the availability of the enjoining remedy illustrated “the value attached to the importance of adjudicating all issues relevant to the constitution and distribution of a limitation fund in one forum”. She noted that the large discrepancy between Siemens’ damage claim and the limitation amount was a significant factor in favour of enjoining the Ontario action. She noted that there would be significant cost savings for all parties if the Ontario action was enjoined. Ultimately, having regard to all the facts, she concluded that it was appropriate to enjoin the Ontario proceedings and have all issues determined in the Federal Court.

Collisions – Apportionment – Vessel Engaged in Fishing

Hogan v. Buote, [2012 PESC 10](#)

The issue in this case was the apportionment of liability for a collision involving two fishing vessels. One vessel, under the command of Hogan, was in the process of laying lobster traps in a northerly direction while the other vessel, under the command of Buote, was proceeding westerly. Buote argued the collision was Hogan’s fault as Buote had the right of way pursuant to Rule 15 of the Collision Regulations. Hogan, on the other hand, said he had the right of way as he was a vessel engaged in fishing pursuant to Rule 3. The Court held that Hogan, although laying traps, was not restricted in his ability to manoeuvre and therefore Rule 3 did not apply. The Court ultimately found Hogan was 75% at fault and Buote 25% at fault.

Collisions - Inevitable Accident - Hurricane

Wolverine Motor Works Shipyard LLC v. Canadian Naval Memorial Trust, [2011 NSSC 308](#)

In this case the defendant’s steel hulled vessel broke loose from its moorings and struck and sank the plaintiff’s sail boat which was moored alongside. The incident occurred as Hurricane Juan was pounding the Nova Scotia coast. The plaintiff alleged the defendant was negligent. The court, however, found that the defendant was aware of the approaching hurricane and prepared for it but could not have anticipated the severity of the weather. The plaintiff’s case was therefore dismissed. The Court had been particularly troubled that the defendant had led expert evidence but the plaintiff had not.

Collisions - Cutting of Submarine Cable - Liability - Limitation - Insurance - Wilful Misconduct

Société Telus Communications v. Peracomo Inc., [2011 FC 494](#)

The plaintiff was the owner of two submarine cables on the bottom of the St. Lawrence River. The defendants were the owner of a fishing vessel and the operator of the vessel who was also the principal of the owner. The operator snagged one of the submarine cables belonging to the plaintiff while fishing. The operator cut the cables with a saw believing that it was not in use. A few days later he snagged the cable a second time and did the same thing. The plaintiff commenced these proceedings alleging negligence and damages of approximately \$1 million to repair the cable. The defendants denied liability saying insufficient notice had been given of the location of the cables and that, in any event, the cables should have been buried. The defendants further disputed the damages and claimed the right to limit liability. A further issue was whether the defendants' insurance coverage was jeopardized by reason of "wilful misconduct" on the part of the insured/defendants. On liability the Court found that the cables were included in notices to mariners and were shown on navigation charts and that it was the duty of the defendants to be aware of them. The Court further found that it was not practical to bury the cables and held that the sole cause of the loss was the intentional and deliberate act of the defendant operator. With respect to damages, the Court held that the plaintiff was entitled to damages in the nature of superintendence and overhead and allowed 10% for this. The Court then turned to limitation of liability and noted that to avoid limitation the plaintiff had to prove a personal act or omission of the defendant committed either "with intent to cause such loss" or "recklessly and with knowledge that such loss would probably result". The Court held, for the first time in Canada, that this test had been met and the defendants were not entitled to limit liability. The Court said that the defendant operator had intentionally cut the cable and that the loss was the diminution in value of the cable, not the cost of repair. The Court said the defendant operator intended the very damage but just did not think the cable would be repaired. The Court further held that the defendant operator was "reckless in the extreme" and that the loss was a certainty. Turning to the insurance issue, the Court referred to authorities that established wilful misconduct "implies either a deliberate act intended to cause the harm, or such blind and uncaring conduct that one could say that the person was heedless of the consequences". The Court had little difficulty in concluding this test had been met and the insurance coverage void.

Mortgages, Liens and Priorities

Costs – Abandonment of Claim – Liability of Claimant

TAM International Inc. v. Ship MCP Altona, [2012 FC 128](#)

This case concerned a vessel that was forced to return to Vancouver after a cargo of yellow cake uranium spilled in the hold of the vessel. The vessel was arrested upon its arrival by the plaintiff TAM as well as by another claimant. Other parties filed caveats against release

including the mortgagee. Eventually the ship was sold by court order. Subsequent to the sale but after some additional steps had been taken by competing claimants to investigate Tam's claims, TAM withdrew its claim to the proceeds of sale. In this motion the mortgagee sought costs against TAM in the amount of \$2,000. The application was allowed, in part, in that the Judge ordered TAM to pay \$1,000 in costs.

In Rem Actions – Time Charters – Presumption

Liens - Availability of U.S. Maritime Lien where Vessel under Time Charter - Applicable Law

World Fuel Services Corporation v. Nordems (Ship), [2010 FC 332](#), *affd.* [2011 FCA 73](#)

This case probes the extent to which American maritime liens will be recognized by Canadian courts. Essentially, the issue was whether an American maritime lien would be recognized where bunkers were supplied to a ship under time charter outside of the United States or Canada and pursuant to a contract between the supplier and the time charterer. The bunker supply contract contained terms to the effect that: the bunkers were supplied on the faith and credit of the ship and her owners; the supplier was to have a lien over the vessel; and the supply contract was subject to U.S. law. The time charter party contract, on the other hand, contained the usual terms that the charterer was responsible for fuel and was prohibited from incurring liens. At first instance the Judge held the charterer had no authority, express or implied, to bind the owners to the supply contract and that therefore there was no *in personam* liability on the part of the owners to support a claim *in rem*. In reaching this conclusion, the Judge noted that the presumption as to the authority of a time charterer under Canadian law is much weaker than under U.S. law. Under U.S. law the presumption can only be rebutted by showing the supplier had actual knowledge of lack of authority whereas under Canadian law less than actual knowledge is necessary. The Judge found that the supplier's own terms and conditions referred to commercial ship registries such as Lloyds which identified the vessel's owner and held that the supplier was therefore on notice and should have verified whether the charterer had authority. The Judge next considered whether American law applied to the transaction and looked at the various connecting factors. In doing so he noted that because the owners were not a party to the supply contract the U.S. choice of law clause in the contract was of less significance than otherwise. He ultimately found that the applicable law was the place of the supply of the bunkers, which was South Africa, and as South African law had not been pleaded or proven, he applied Canadian law. Although the Judge had held that U.S. law was not applicable to the transaction, he nevertheless continued to decide whether U.S. law would recognize a maritime lien under circumstances where bunkers were supplied to a time charterer of a non-American ship outside of a U.S. port. He reviewed the affidavits of American attorneys that had been put before him and the various U.S. authorities and ultimately concluded that U.S. law would not recognize a lien under the circumstances.

On appeal, the Federal Court of Appeal dealt first with the presumption and then with the applicable law. On the presumption issue the Appellate Court agreed with the Trial Judge that the presumption was weaker under Canadian law than under American law. The Court said that

the relevant question under Canadian law is whether there was behaviour or conduct on the part of the shipowner that would lead a supplier to believe the charterer was authorized to contract on the owner's behalf or on the credit of the ship. In the absence of any "holding out", the owner is not liable. The Court further noted that there is a duty on the supplier to make inquiries. Applying these principles to the facts of the case the Court held that the supplier knew or ought to have known that the charterer was not the owner and ought to have made inquiries. The Court further found that there was no "holding out" by the owner. The Court then turned to the question of applicable law and specifically to the question of what weight should be given to the choice of law clause in the supply contract. The Court held that where the owner was not a party to the supply contract the choice of law clause should be given no weight. The Court further refused to interfere with the Trial Judge's balancing of the various factors and dismissed the appeal. The Court of Appeal did not address the Trial Judge's finding as to whether U.S. law would recognize a lien in the circumstances.

Admiralty Practice

Anti-Suit Injunction - Bunker Supplies

Alpha Trading Monaco Sam v. Sarah Desgagnés (Ship), [2010 FC 695](#), *affd.* [2011 FCA 41](#)

This was an application by the defendant owner of the subject ship for an anti-suit injunction restraining the plaintiff from continuing proceedings commenced in Belgium. The plaintiff was a bunker supplier who had supplied the defendant ship with bunkers at various ports including ports in Canada. The ship was under time charter at the time of the supplies and the time charter contained a prohibition of lien clause and a clause that charterers were responsible for bunkers. The ship was arrested by the plaintiff in this action in Montreal and was later released on the undertaking of the owner to provide bail. Before bail was actually provided, the plaintiff advised that it would amend its statement of claim and proceed with only one supply claim. The plaintiff later commenced proceedings in Italy and Belgium and had the vessel seized in Belgium. The Court noted that the reason the plaintiff was "slicing and dicing" its recovery efforts was because Canadian law required personal liability on the part of the ship owner to support an action *in rem* whereas under Belgium law a ship may be arrested to secure a claim by a bunker supplier without personal liability of the owner. The Court further noted that the discretion to order an anti-suit injunction should be exercised most carefully. However, the Court did exercise its discretion and granted the injunction on the basis that the plaintiff had commenced these proceedings and accepted the defendant's undertaking to post bail. Importantly, the Court said that if the plaintiff had not commenced this proceeding in the first instance the defendant would have no standing whatsoever to bring this motion. The Court noted that the plaintiff could properly have made its claims in a number of jurisdictions but that having made its choice it would be held to it. Accordingly, the Court granted the anti-suit injunction and ordered the plaintiff to release the ship from arrest in Belgium. On appeal to the Federal Court of Appeal, the Court of Appeal in brief reasons merely said that the re-arrest of the ship was, in the circumstances, an attempt to take unfair advantage by forcing the owners to provide security to guarantee a judgment against a third party.

Practice - Other Proceedings - Abuse of Process

Seanautic Marine Inc. v. Jofor Export Incorporated, [2012 FC 328](#)

An issue in this case was whether an action in the Federal Court ought to be struck by reason that an earlier action in a Small Claims Court had been struck for delay/abandonment. Both the Prothonotary and the Appeal Judge held that the dismissal of the small claims action without a decision on the merits did not prevent the party from bringing the action in Federal Court.

Injunctions – Security for Release from Arrest – Letters of Credit – Fraud

Olsen v. The Bank of Nova Scotia, [2011 BCSC 111](#)

This was an application for an injunction restraining payment under a letter of credit. The letter of credit had been issued to obtain the release of a vessel from arrest and to secure claims that were the subject of arbitrations. The arbitrations were decided in favour of the defendant ship builders and applications to review the arbitration awards were later dismissed. In this action the plaintiff alleged that the letter of credit was obtained by fraud. The plaintiff was not a party to the ship building contract but was to be the ultimate purchaser and had supplied the letter of credit as well as the funds to finance the construction. The Court dismissed the application holding that the plaintiff had failed to make out a strong *prima facie* case of fraud. The Court also disagreed with the plaintiff that an injunction was necessary to preserve the *status quo*. The Court noted that the defendants had the security of the vessel and agreed to release the vessel in substitution for the security of the letter of credit. The Court said that by seeking to invalidate the letter of credit and not returning the vessel the plaintiff “will have significantly altered the position of” the defendants. The Court was finally concerned that the action was simply a collateral attack on the arbitration awards.

Practice – Addition of Party

Secunda Marine Services Ltd. v. Caterpillar Inc., [2012 NSSC 53](#)

In this case the plaintiff was permitted to amend its pleading by adding a new plaintiff more than 10 years after the date of the fire that gave rise to the claim. The case turns largely on the rules of the Nova Scotia Supreme Court.

Practice – Motion to Strike Statement of Claim

Freightlift Private Limited v. Entrepot DMS Warehouse Inc., [2011 FC 280](#)

The plaintiff in this action was an Indian freight forwarder who had been retained to arrange shipment of four containers of clothing to Montreal. The bills of lading for the containers named the plaintiff as consignee because the purchaser had not paid for the cargo. The purchaser was in fact unable to pay for the cargo when it arrived and, as a consequence, arrangements were made by the purchaser and its freight forwarder for the containers to be stored while another buyer could be found. The cargo, however, mysteriously disappeared from the warehouse. The plaintiff brought this action alleging the defendants had conspired to

release the goods to the purchaser. The defendants brought this motion to strike the Statement of Claim on the grounds that it was premature in that the plaintiff was not the owner of the goods and had not suffered a loss. The plaintiff was, in fact, being sued by its customer in India and was defending that suit. At first instance and on appeal the motion was dismissed.

Practice - Service In Rem - Addition of Parties - Limitation Periods

Shell Canada Energy v. General MPP Carriers, [2011 FC 217](#)

This was an application by the owner of one of the defendant ships to set aside service and a corollary application to amend the statement of claim. The plaintiff had filed a statement of claim for damage to cargo on the last day of the one year limitation period. The statement of claim included the ship as a defendant but not the owner *in personam*. The statement of claim was sent by courier and fax to the owner but as service had to be effected in accordance with the Hague Convention the plaintiff obtained an *ex parte* order extending the time for service “on the owners” and ultimately effected service on the owner in Germany. The Court predictably held that service of the statement of claim on the owner was not service on the ship. The Court further held that the *ex parte* order extending the time for service did not indirectly create a right of action “*in personam*”. With respect to the plaintiff’s motion to amend the statement of claim by adding the owner as an *in personam* defendant, the Court refused the application on the basis that it was not the correction of a misnomer and the limitation period had passed.

Practice - Default Judgment - Discovery - Failure to Answer

CF Boatworks Inc. v. James, [2011 FC 1101](#)

In this matter the defendant’s statement of defence had been struck for failure to provide a list of documents or written answers to interrogatories. The plaintiff now brought this motion for default judgment. The Prothonotary noted that on a motion for default judgement there are two questions: is the defendant in default and is there evidence to support the plaintiff’s claim. On the first question the Prothonotary held that the effect of having a defence struck is tantamount to not filing a defence at all and, therefore, default judgment is available. On the second question the Prothonotary noted that a plaintiff may not rely on deemed denials and therefore a plaintiff must prove its case by affidavit evidence. The plaintiff had done so and was granted judgment.

Practice – Costs – Double Costs

FFS HK Ltd. v. P.T. 25 (Ship), [2011 BCSC 1418](#)

In this matter the plaintiff was successful at trial in that it obtained an order that the defendant was 50% at fault for a pollution incident. The plaintiff now sought to recover its costs. The plaintiff was awarded special costs and 100% of its costs and disbursements. Special costs were awarded primarily because the defendant advanced evidence of a witness which the Court found it should have known was manifestly unreliable. This conduct was compounded by a

baseless claim for privilege. Regarding the percentage of costs that should be paid, the defendant argued that pursuant to s. 3(1) of the *Negligence Act* of British Columbia the plaintiff was only entitled to 50% of its costs since liability was apportioned 50-50. But, the Court held the claim was governed by maritime law and not the *Negligence Act*. The Court further noted that it had broad discretion with respect to costs, that the plaintiff had acted reasonably in accepting partial responsibility for the spill and that the defendant had acted unreasonably. Accordingly, in the exercise of her discretion, the Judge ordered the defendant to pay 100% of the plaintiff's costs.

Pollution

Pollution - Fisheries Act - Deleterious Substance - Fine

R. v. Bolt, [2011 NLTD 20](#)

In this matter the defendant pled guilty to two charges of depositing a deleterious substance into waters frequented by fish and failing to report a spill contrary to the *Fisheries Act*. The facts were that a quantity of diesel fuel was spilled into the harbour while the defendant was refuelling his vessel. He was fined \$10,000 for the depositing charge and \$5,000 for the failure to report. The defendant appealed the fines. The Appellate Court dismissed the appeal noting that it would only interfere with the sentence if it was clearly unreasonable or demonstrably unfit, neither of which had been shown.

Miscellaneous

Application to remove barge from Foreshore

Western Forest Products Inc. v. O'Brien, [2011 FC 1528](#)

The plaintiff in this matter held a foreshore lease granted by the province of British Columbia over certain foreshore lands. The defendant was the owner of a barge anchored within the foreshore lease without the permission of the plaintiff. The plaintiff brought this action and application for an interlocutory injunction compelling the defendant to remove the barge. The Court granted the injunction. The Court held that there was a *prima facie* case of trespass, and that any right of riparian passage the defendant had did not include long term fixed moorage. The Court further said that injunctions are the presumed remedy in situations of trespass.

Canada Marine Act – Container Fee – Fair and Reasonable

Shipping Fed. of Cda. v. Vancouver Fraser Port Authority, [2012 FC 301](#)

This was an application for judicial review challenging the ability of the Vancouver Fraser Port Authority to impose a fee on ship owners for container cargo. Section 49 of the *Canada Marine Act* specifically requires that any fees charged be "fair and reasonable". The applicants alleged the fee charged was not fair and reasonable as ship owners receive no benefit for the

infrastructure improvements for which the fee was assessed. The Court held, however, that there was no requirement to link the fee with a service or benefit. The applicants further argued that the fee was an illegal tax as it was unconnected with any service. The Court again disagreed finding it was a charge connected with a regulatory scheme and therefore a regulatory charge and not a tax.

Ice Breaking Services Fee

M.V. Stormont v. Canada, [2011 FC 531](#) *affd.* [2012 FCA 93](#)

The issue in this case was whether the ice breaking services fee in the *Oceans Act* applied to the defendants who operated a truck ferry service utilizing tug and barge between Windsor, Ontario and Detroit, Michigan. The defendants argued, *inter alia*, that they did not have to pay the fee as it was not applicable to international voyages and that the Minister did not have the power to impose such fees. The defendants' argument turned upon the interpretation of the *Oceans Act*. The Trial Judge rejected these and other arguments on the basis of simple statutory interpretation.

The defendants' appeal was dismissed at 2012 FCA 93. The Appeal Court held that the applicable sections of the *Oceans Act* and Fee Schedule authorized an ice breaking fee on each transit to or from a Canadian port. The Appeal Court further held that the Minister was both authorized and required to provide icebreaking services and was entitled to charge a fee for such services.

Judicial Review – Application to Strike – Port Authority Powers

Adventure Tours Inc. v. St. John's Port Authority, [2012 FC 305](#)

This was a motion to strike an application for judicial review. The underlying facts were the applicant wrote to the St. John's Port Authority advising he wished to resume providing a tour boat service and inquiring whether a licence was required. The Authority wrote back advising that they had agreements in place with tour boat operators and were not accepting any further applications. The applicant brought an application for judicial review arguing that the Authority had no right to require him to obtain a licence and the Authority brought this motion to strike the application. The motion to strike was allowed. The Court held that the letter from the Authority did not attract rights of judicial review. A second issue in the case was whether the Authority was a federal body exercising a public function and therefore subject to judicial review. Although the Court did not need to address this issue, it held that the Authority was a federal body exercising a public function.

Ship Building - Default Judgement

Offshore Interiors Inc. v. Worldspan Marine Inc., [2011 FC 904](#)

This was an appeal from an order of a Prothonotary in which the Prothonotary refused to allow the defendant to file a defence out of time and gave default judgement. The underlying action

was a claim by a cabinet maker for the costs of cabinets installed on a yacht. The Appeal Judge considered the issues anew and found that there was a contract between the parties the important terms of which were clear. The work was done, invoices were sent but the invoices were not paid. The Appeal Judge found that the defendants offered no evidence to contradict the existence of a contract. In result, the Prothonotary's order was affirmed.

Ship Building – Bankruptcy – Stays of Proceedings

Sargeant v. Worldspan Marine Inc., [2011 BCSC 767](#)

This matter concerned a partially constructed yacht, an insolvent builder and many unhappy creditors. Some of the creditors had commenced proceedings in the Federal Court and obtained either arrest warrants against the vessel or caveats. The builder brought this application in the British Columbia Supreme Court under the *Companies Creditors Arrangement Act* seeking, *inter alia*, a stay of the Federal Court proceedings so that it could develop a viable restructuring plan that would allow it to complete the construction of the yacht. Although the Court granted much of the relief requested, including a general stay of all proceedings, the Court refused to specifically stay the Federal Court proceedings “as a matter of comity”. Instead, the Order of the Court included a specific request to the Federal Court for its assistance to recognize the stay. The Court noted that the British Columbia Supreme Court and the Federal Court “working cooperatively and each exercising its own jurisdiction should be able to avoid any insuperable conflicts between their respective jurisdictions”.

Ship Building - Insolvency - Stay of Proceedings

Worldspan Marine Inc. (Re), [2011 BCSC 1758](#)

The issue in this case was whether a stay of proceedings previously granted under the *Companies Creditors Arrangement Act* to allow an insolvent ship builder to refinance should be continued. The intended buyer of the partially constructed yacht opposed the builder's application to continue the stay. The buyer wanted to lift the stay so that he could appoint a receiver for the vessel and exercise his remedies. The Court noted that a stay should only be granted or continued when it would further the objective of facilitating a plan of arrangement between the debtor and its creditors. Other factors included the debtor's progress towards a restructuring and the relative prejudice. The Court reviewed the various steps that had been taken and ultimately granted the continuation of the stay noting that “at this stage, a CCAA restructuring still offers the best option for all of the stakeholders”.

Ship Supplier – Unpaid Invoices – Interest – Legal Fees – Costs – Offer to Settle – Set-off

Calogeras & Master Supplies Inc. v. Ceres Hellenic Shipping Enterprises Ltd., [2010 FC 1318](#), [2011 FCA 334](#)

Calogeras & Master Supplies Inc. v. Ceres Hellenic Shipping Enterprises Ltd., [2011 FC 1276](#) [2012 FCA 79](#)

The plaintiff in this matter was a ship chandler who had supplied various ships managed by the defendant over a number of years. This action was for payment of invoices in respect of those supplies as well as interest and legal fees, which fees were recoverable pursuant to the terms of the contract. The case primarily turned on its particular facts and the plaintiff was ultimately awarded approximately \$100,000, which was significantly less than it had claimed. Simple interest at 5% was awarded from a specified date. With respect to the claim for legal fees, the Court said that notwithstanding the contract it always retains discretion to reduce the amount awarded for such fees when there are special circumstances. The plaintiff appealed the Trial Judge's order on interest. The Court of Appeal, at 2011 FCA 334, allowed the appeal in part ordering that interest be calculated from 60 days after the issuance of the invoices.

In the later judgment reported at 2011 FC 1276, the Court reviewed and assessed the legal fees and rendered its reasons for costs. Although the plaintiff claimed to have spent over \$200,000 in legal fees, the Court said it would have granted no more than \$60,000. However, the Court did not have to make this final assessment as the amount awarded to the plaintiff plus its assessed legal fees to the date of an offer made by the defendant did not exceed the amount of the defendant's offer. The defendant was therefore entitled to costs from the date of the offer. Although Rule 420(2)(a) entitled the defendant to double costs from the date of the offer, the Court only awarded costs at 1.5 times the tariff rate. The defendant was also given the right to set-off the costs owing to it against the judgement amount owing to the plaintiff.

In yet a later judgment (at 2012 FCA 79) the defendant sought a stay of execution from the Court of Appeal so as to protect its right of set-off. This application was refused on the grounds that the defendant could have exercised its right of set-off earlier but chose not to do so.

Offences – Sentencing Principles

R. v. Atlantic Towing Ltd., [2011 NSPC 10](#)

The defendant was charged under s. 118 of the *Canada Shipping Act* with having taken actions "that might jeopardize the safety of a vessel or of persons on board". The charges stemmed from a sinking of one of the defendant's vessel in adverse weather. All crew members were saved. At the time of the sinking the vessel did not have a valid inspection certificate and was sailing 20 miles offshore whereas its documents restricted it to 15 miles. The defendant pleaded guilty to the charge but contested sentencing. The Court reviewed the principles of sentencing in safety legislation as being denunciation, deterrence, proportionality (the

sentence is to be proportional to the gravity of the offence), parity (the sentence should be similar to that imposed in other cases) and restraint (the sentence should be a measured response). When dealing with corporations the Court noted that regard should be had to the conduct, circumstances and consequences of the offence, the terms and aims of the legislation and the participation, character and attitude of the corporation. In applying these principles, the Court said that a deliberate decision had been made to undertake a voyage in the face of gale warnings and farther from shore than it was supposed to be. Although there was no intention to jeopardize the safety of the crew, the risk assessment was seriously flawed. The fact that the defendant pleaded guilty was a mitigating factor as was the company's clean safety record. Ultimately, the Court held a fine of \$75,000 was appropriate.

Offences – Canada Shipping Act

R. v. Ralph, [2011 NLTD 10](#)

The accused was charged with various offences under the *Canada Shipping Act* stemming from the sinking of its vessel at sea. The charges included having an insufficient number of crew, failing to maintain a proper deck watch or look-out and failing to ensure the crew understood the use of lifesaving and firefighting equipment. The accused was found guilty and an appeal from the conviction was dismissed.

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