Canadian Maritime Law - 1997 Cases

Prepared by Christopher J. Giaschi
Giaschi & Margolis
404-815 Hornby Street
Vancouver, British Columbia
Tel. (604)681-2866
Fax (604) 681-4260
email giaschi@admiraltylaw.com

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This Paper includes summaries of cases decided between January 1, 1997 and approximately February 28, 1998. The case summaries are taken from the authors internet site *Admiralty*Law.com which can be found at http://www.admiraltylaw.com.

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Marine Insurance

Waiver of Subrogation - Additional Insureds - Privity of Contract

Fraser River Pile & Dredge Ltd. v Can-Dive Services Ltd.
(October 27,1997) No. CA020806, (B.C.C.A.)

This case was an action by owners and underwriters of the derrick barge "Sceptre Squamish" against the charterer of the barge. The "Sceptre Squamish" was lost in a storm off Little River when it was left by the charterer unattended in heavy weather. A main issue in the case was whether the charterer could rely on terms and conditions in the owner's hull policy in defence of the action. The policy contained a waiver of subrogation clause that waived subrogation against charterers. It also contained an "additional insureds" clause that gave the owner permission to charter and made the charterer an additional insured under the policy. Owners and underwriters argued that the charterer was not entitled to rely on these terms because it was not a party to the policy. They invoked the doctrine of privity that states third parties cannot take advantage of a contract to which they are not a party even though that contract may expressly confer benefits upon them. At trial, the Court agreed with owners and underwriters that the doctrine of privity applied and concluded that the charterer could not take advantage of the waiver of subrogation or additional insureds clause. On appeal, the

Court of Appeal embarked on a lengthy analysis of the doctrine of privity and concluded that the doctrine of privity no longer applied to prevent a third party from taking the benefit of an insurance policy pursuant to an additional insureds clause or waiver of subrogation clause.

Liability of Brokers

Percy v West Bay Boat Builders and Shipyards Ltd. et.al.,
(October 28, 1997) No. CA021807 Vancouver Registry (B.C.C.A.).

This was an appeal of a decision in which an insurance broker was found liable for not obtaining the proper coverage for its client, a yacht builder. The issue arose when the builder was sued by a customer after the customer's yacht caught fire. The customer alleged that the boat was negligently manufactured by the builder. The action by the customer was settled out of court for a substantial sum. The builder sought reimbursement of the settlement funds and of its full legal costs from the broker. The builder alleged that the broker had enticed it away from another broker/insurer by promising "full coverage" at better rates. As it turned out, the policy obtained for the builder by the broker did not provide the same coverage as was provided by the prior policy. Specifically, it did not cover the product liability claim of the builder's customer. If the prior policy had been in place, the builder would have been covered for this claim. The broker was found liable both at trial and on appeal for failing to properly review its client's prior policies and for failing to properly advise the client of the exclusions to coverage. For the full text of the Reasons on Appeal, click here.

Third Party Action Against Insurers

Demitri v. General Accident Indemnity Co.,
(November 26, 1996) No. S031296 New Westminster Registry (B.C.S.C.).

This is not a recent case but is one which we only recently came to our attention. The Plaintiff was injured and his vessel was damaged when it was hit by a vessel insured by the Defendant. The Plaintiff obtained judgement against the assured but was unable to recover from the assured and was therefore attempting to recover directly from the insurer pursuant to statute. The insurer denied liability on the grounds that its assured had failed to give it prompt notice of the claim as required by the terms of the policy. The accident occurred in September 1991 but the assured did not give notice until November 1992. The Court held that the assured had failed to give prompt notice and declined to give relief from forfeiture. In the result, the Plaintiff was not able to recover from the insurer.

Liability Insurance - Coverage

Strangemore's Electrical Limited v Insurance Corporation of Newfoundland Limited
[1997] I.L.R. I-3475 (Nfld. S.C.)

This was an action under a policy of commercial insurance. The Plaintiff was in the business of servicing and repairing vessels. One such vessel (which incidentally was owned by the President of the Plaintiff company) was destroyed by fire while in the possession of the

Plaintiff for servicing. The boat owner brought action against the Plaintiff who, in turn, requested coverage under the liability provisions of the insurance policy. The Defendant insurer denied coverage relying on an exclusion in the policy that excluded coverage for "personal property in your care custody or control". However the policy also contained a specific exclusion for watercraft which provided that the exclusion did not apply to "watercraft while ashore on premises you own or rent". The Court held that clearly the boat in issue was on the premises of the assured and therefore the policy applied.

Breach of Warranty of Inspection

Shearwater Marine Ltd. v. Guardian Insurance Co. et.al.,
(February 28, 1997) No.C935887 (B.C.S.C.)

In this matter the Plaintiff claimed under a marine insurance policy for the constructive total loss of a 93 year old converted wooden fish packer. The vessel sank while moored to a log boom breakwater. The Defendant insurers denied coverage arguing that the assured had breached a warranty that provided: "Vessel inspected daily basis and pumped as necessary." The vessel was not boarded on a daily basis for the purpose of "inspection". It was, however, observed from a distance (often of 300 yards) and pumped as necessary. The Court held that compliance with the warranty did not require daily boarding of the vessel but, rather, that daily observation by a knowledgeable observer was sufficient. The Court further went on to consider whether the warranty was a "true warranty", the breach of which would void the policy, or merely a suspensive condition, the breach of which merely suspends the policy while the breach continues. The Court held that the warranty was a suspensive condition. This was relevant as the vessel had been boarded and pumped the day before the sinking. A final issue concerned whether the vessel was truly a constructive total loss, ie. whether the cost of repair exceeded the insured value. This, in turn, depended on whether the assured's normal labour charge-out rate was used to calculate the repair cost or whether the actual cost to the assured (ie.without a profit element) was used. The Court held that the normal charge-out rate should be used.

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Carriage of Goods

Right to Sue - Identity of Carrier - Quantum

Union Carbide Corporation v. Fednav Limited
(May 20, 1997) No. T-2403-81(F.C.T.D.)

This was a claim for damage to a cargo of synthetic resin shipped from Montreal to Bangkok and Manila on board the ship "Hudson Bay". The Plaintiffs were the shipper of the cargo and the consignees. The consignees purchased the cargo on cif Bangkok and cif Manila terms. The "Hudson Bay" was under time charter pursuant to a New York Produce Exchange Form time charter agreement. The bills of lading were signed by the charterer "by authority of

master as agents only". The issues in the case were: whether the shipper was a proper Plaintiff; whether the charterer was liable in contract as a "carrier"; whether the charterer was liable in tort for negligent stowage; and whether the Plaintiffs had properly proven their damages. On the first issue the Court held that the shipper was not a proper plaintiff. The Court held that under the cif terms the risk of loss passed to the buyer upon shipment and further that pursuant to the *Bills of Lading Act* all rights of action in respect of the cargo were vested in the consignees. The Court also held that the rule in *Dunlop v Lambert* (1839) 7 ER 824, (which allows the shipper to recover substantial damages as trustee for the true owner of the goods) had no application because the claims were covered by the *Bills of Lading Act*.

On the second issue, the Court held that there could be only one carrier and that, where the bills of lading are signed for or on behalf of the Master, the carrier is the shipowner unless there is an express undertaking on the part of the charterer to carry the goods. The Court found that there was no such express undertaking notwithstanding that the charterer had described itself as the carrier in the booking note. In reaching this conclusion the Court refused to follow *Canastrand Industries Ltd. v. The "Lara S"*, [1993] 2 FC 553, (affirmed by the Court of Appeal 176 N.R. 31), wherein Reed, J. held that both shipowner and charterer should be jointly liable.

The Plaintiffs further argued that the charterer was liable in tort for negligently stowing the pallets more than three tiers in height. The Court found that the charterer was not aware of any restrictions in the height to which the pallets could be stowed and that it was not obvious they should be restricted to three levels. The Court further held that the charterer could not be liable for the negligence of the stevedores.

Finally, on the question of quantum, the Court held that evidence of the settlement of the Plaintiffs' cargo insurance claim was neither relevant to the question of, nor admissible to prove, the Plaintiffs' damages. The Court held that the Plaintiffs must testify as to the actual losses suffered by them and that it was not sufficient to simply rely on generic evidence of arrived sound market value and arrived damaged market value.

Summary Trial- Liability of Freight Forwarder

Canusa Systems Ltd. v The "Canmar Ambassador"
(February 16, 1998) No. T-459-95 (F.C.T.D.)

This was a motion by the Plaintiff for summary judgment against the Defendant freight forwarder for damage caused to a cargo of heat shrunk tubing. The Defendant admitted that it had arranged the shipment of the goods and that the goods were damaged but argued that as freight forwarder it was not responsible for the damage. However, it had issued a "Combined Transport Bill of Lading" which provided it "shall be liable for loss of or damage to the goods occurring between the time when he takes the goods into his charge and the time of delivery". The "Combined Transport Bill of Lading" further provided for exceptions from this liability but the onus of proving such exceptions was on the freight forwarder. The forwarder had not proven any such exceptions. The Court granted summary judgment with a reference to determine the damages.

Liability of Forwarding Agents

Brereton v. KLC Freight Services Ltd.
(November 26, 1997) No. 485/95 (Ont. Ct. Gen. Div.)

This was an appeal of a judgement rendered by the Ontario Small Claims Court. The action involved a shipment of personal effects from Toronto to Trinidad. Sixteen pieces were delivered by the Plaintiff to the Defendant for carriage but only fifteen pieces were ultimately delivered. The contract between the Plaintiff and Defendant specified that the Defendant was not a carrier but was only a forwarding agent responsible for the selection of third party carriers. At trial, the Small Claims Court held that the Defendant was liable for the non-delivery on the basis of *res ipsa loquitur*. On appeal, the Ontario Court General Division held that the Defendant was not a carrier but was merely a forwarding agent and, as such, was not liable absent proof of negligence. As there was no evidence of negligence on the part of the Defendant, the appeal was allowed and the action dismissed.

Freight Charges

American President Lines Ltd. v Pannill Veneer Co. Ltd.
(September 17,1997) No.T-1706-94 (F.C.T.D.)

This was an action by an ocean carrier to recover freight charges. The Defendant shipper had retained a freight forwarder who made the carriage arrangements with the Plaintiff. The Plaintiff invoiced the freight forwarder who in turn invoiced the Defendant. The Defendant paid the freight forwarder but the forwarder became insolvent and did not pay the Plaintiff. The Court held that it was never intended that the Defendant would pay the Plaintiff and accordingly dismissed the action.

Suit Time Extensions

Riva Stahl GmbH v The "Bergen Sea" et.al.
(May 21, 1997) No. T-1389-95(F.C.T.D.)

This case illustrates the dangers to Plaintiffs of suit time extensions. The Plaintiffs in the case obtained a suit time extension from the shipowner to June 13, 1995. This extension was conditional on the Plaintiffs obtaining a similar extension from charterers. The Plaintiffs did obtain a suit time extension from charterers but it was to a date of June 30, 1995. This extension was also conditional on the Plaintiffs obtaining a similar extension from owners. The Plaintiffs were unaware of, or failed to appreciate that, the extensions were not similar in that they expired on different days. The Plaintiffs issued a Statement of Claim on June 28, 1995, two days before the charterer's extension expired but after the owner's extension had expired. Both Defendants brought a summary judgment application to dismiss the action as being out of time. The Court granted the application holding that there was no binding agreement to extend suit time to either June 13, 1995 or June 30, 1995. A secondary issue in the case was whether the Defendants had waived the time bar defence or were estopped from raising it by reason of their continued negotiations with the Plaintiffs. The Court held there

had been no such waiver or estoppel.

Booking Note Contracts

Domtar Inc. v. Lineas De Navigation Gema S.A. et.al.
(April 11, 1997), No. T-2873-96 (F.C.T.D.)

This was a summary judgment application that concerned the identity of the parties to a booking note contract. See a more complete summary below under Admiralty Practice.

Road Carriage - Through Bills of Lading - Federal Court Jurisdiction

Matsuura Machiner Corporation et.al. v Melburn Truck Lines
(March 12, 1997), Nos. A-213-96, A-220-96, A-221-96 (F.C.A.)

In these matters the Federal Court of Appeal held that the Court had no jurisdiction in a claim against a road carrier under a through bill of lading. See a more complete summary below under Canadian Maritime Law.

Costs of Discharge and Restowage

Canadian Forest Products Inc. v Termar Navigatin Co. Inc.
(December 3, 1997) No. T-1719-91 (F.C.T.D.)

This was a counterclaim to recover the costs of discharging and restowing the Plaintiff's cargo after it shifted when the vessel encountered a large wave in rough seas. The Court held that the Plaintiff was not obliged to pay the discharge and restowing costs either under the terms of the bill of lading or on the basis of bailment, agency of necessity, quantum meruit or unjust enrichment.

Excessive Freight Charges

Me Thierry Van Dooselaere v Unispeed Group Inc. and SGS Supervision Services,
(January 27, 1997) No. T-1452-92 (F.C.T.D.)

This was an action by the Plaintiff shipper against the carrier and surveyors for excessive freight charges. The Plaintiff negotiated a freight rate for 1486 metric tonnes of creosoted poles. During the course of loading the poles it was discovered that the cargo occupied more space than anticipated and the carrier demanded additional freight which the Plaintiff was forced to pay. The Plaintiff subsequently retained a surveyor to measure the cargo. The surveyor did so and the Plaintiff paid on the basis of the survey. Upon delivery the cargo was again surveyed by two independent surveyors both of whom agreed that the original survey significantly overstated the amount of cargo. The Court held that the carrier and the surveyor were jointly and severally liable for the excessive freight charges the Plaintiff was forced to pay.

Liability of Terminal Operator

Bethlehem Resources Corporation v Vancouver Wharves,
(January 9, 1997), No. C943469, (S.C.B.C.)

This was a motion for summary judgment brought by the Plaintiff against the Defendant, a terminal operator, for shortages to ore concentrate shipped through the Defendant's facility. The relationship between the parties was governed by an agreement which specifically provided that the terminal would only be liable for "proven negligence". The Court held that normal shrinkage might have accounted for the shortages and further held that the Plaintiff had not proven an act of negligence to support the claim.

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Collisions

Apportionment of Liability - Liability of Crown

Kajat v. The "Arctic Taglu" et.al.,
(August 26, 1997) No. T-1724-94 (F.C.T.D.)

This case concerned liability for a collision that took place on July 21, 1993, between the fishing vessel "Bona Vista" and the tug-barge combination "Arctic Taglu"/"Link 100". At all material times the "Arctic Taglu" was pushing the barge "Link 100". The collision took place at night near Active Pass in the Strait of Georgia. The two vessels were approaching each other on reciprocal courses when the "Bona Vista" made an abrupt turn to port across the bow of the barge "Link 100". The "Bona Vista" was struck amidship by the bow of the "Link 100" and rolled underneath the barge. All six people aboard the "Bona Vista" perished. The action was brought by the wife and mother of two of the deceased. The Defendants were the owners and operators of the tug and barge and the Federal Crown. The action against the Crown was based on allegations that the Department of Transport had been negligent in its approval of the lighting arrangements used by the tug-barge combination. The Court apportioned liability for the collision 85% to the Defendants (including the Crown) and 15% to the "Bona Vista". The Court found that the lighting arrangement on the tug-barge combination was confusing to mariners and that this confusion could have been avoided if the the tug-barge combination had been lit as a composite vessel. The Court further found that the practice of the tug-barge combination of shining a searchlight along the side of the barge was also confusing to mariners in that it could be interpreted as signalling a danger. The Court found that this use of the searchlight caused the "Bona Vista" to make its abrupt turn to port across the bow of the "Link 100". The Court further criticized the Defendants for allowing a close quarters situation to develop and for having only one person on watch contrary to the regulations. The Court also criticized the operator of the "Bona Vista" for allowing the close quarters situation to develop and found that the operator of the "Bona Vista" was likely somewhat fatigued by the time of the accident.

(Note: In a subsequent decision rendered December 4, 1997, the Court apportioned liability as between the Defendants; 70% to the owners/operators and 30% to the Crown. The Court

also considered whether the negligence of the Plaintiff's husband disentitled the Plaintiff to damages. The Court adopted the decision of the Newfoundland Court of Appeal in *Bow Valley Husky v St. John Shipbuilding* (since affirmed by the Supreme Court of Canada. See Summary under Canadian Maritime Law). In the result, the Court held that contributory negligence was not a bar to recovery.)

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Limitation of Liability

Bill S-4, An Act to Amend the Canada Shipping Act, was passed by the Senate on December 16, 1997 and is currently before the House of Commons. The amendments will permit Canada's accession to the 1976 Convention on Limitation of Liability for Maritime Claims and its 1996 Protocol. These amendments make it easier for shipowners to avail themselves of limitation but the limitation amount is substantially increased. The amendments also implement the 1992 Protocols to the 1969 Convention on Civil Liability for Oil Pollution Damage and the 1971 Convention on the International Fund for Compensation for Oil Pollution Damage. The compensation available to claimants for oil pollution damage will increase to $270 million. A thorough analysis of the changes implemented by Bill S-4 (which is equivalent to Bill C-58 that died on the order paper when an election was called earlier this year) was prepared by Thomas Hawkins for the Canadian Maritime Law Association and can be found HERE.

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Tug and Tow

Exclusion/Limitation Clauses

Primex Forest Products Ltd. v Harken Towing Co.,
(July 9, 1997) Vancouver Registry No. A976013 (B.C.S.C.)

This case arose out of a collision involving a log tow and a bridge. As a consequence of the collision the log tow broke apart and the Plaintiff, owner of the logs, was required to pay for salvage. The Plaintiff claimed these expenses from the Defendant tug owner who alleged that it was not liable by reason of a set of standard towing conditions or, alternatively, that it was entitled to rely upon a limitation provision in the conditions. The issue in the case was whether these conditions were valid. The Plaintiff argued that the various clauses within the conditions were inconsistent and ambiguous and therefore of no force and effect. The Court agreed with the Plaintiff that the exclusion clauses within the conditions were inconsistent and of no effect, however, the Court gave effect to the limitation provision. In the result, the Defendant was entitled to limit its liability to $500.

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Pollution

no significant cases

Admiralty Practice

Assessors and Expert Evidence - Content of Canadian Maritime Law

Porto Seguro Companhia De Seguros Gerais v Belcan S.A. et.al.
(December 18, 1997) No. 25340 (S.C.C.)

This was an appeal from the Federal Court of Appeal. The issue was whether a party may call expert evidence when the Court has appointed assessors. At trial, the trial Judge applied a well established rule of admiralty and, pursuant to that rule, she refused to disclose to the parties the questions put to assessors and refused the parties the right to call their own expert evidence. On appeal, the Court of Appeal held that the admiralty rule prohibiting expert evidence was restricted to situations where the issues the assessors were appointed to deal with were issues of navigation and seamanship. The Court of Appeal nevertheless refused the appeal as there had been no prejudice to the Appellant. On further appeal to the Supreme Court of Canada, the Supreme Court allowed the appeal and ordered that there be a new trial. The Supreme Court of Canada held that there was a strong argument that procedural matters, such as the admiralty rule prohibiting expert evidence, were not incorporated into Canadian Maritime Law by s. 42 of the Federal Court Act. Section 42 of the Federal Court Act, and its predecessor provisions, incorporate only the substantive aspects of admiralty law as administered by the High Court of England on its Admiralty side. Further, the Court held that even if the rule against expert evidence was incorporated as part of Canadian Maritime Law it was not immutable. "The Courts may change common law rules where this is necessary to achieve justice and fairness by bringing the law into harmony with social, moral and economic changes in society, and where the change will not have complex and unforeseeable consequences." Such changes are more readily made where the rules are procedural rather than substantive. Applying this test the Court found that the rule against expert evidence required modification as it violated the parties' right to be heard and was out of step with modern trial practice. The Court therefore modified the rule to permit assessors to give the Judge assistance on technical matters and even to give advice on matters of fact but such advice is to be disclosed to the parties, who are to have a right of response. Further, in all cases, the parties are at liberty to call their own expert evidence.

Wrongful Arrest

Armada Lines Ltd. v. Chaleur Fertilizers Ltd.,
(June 26, 1997) No. 24351 (S.C.C.).

This important case concerns the question of when an arresting party is liable for wrongful arrest. In a ground breaking decision reported at [1995] 1 F.C. 3, the Federal Court of Appeal held that an arresting party could be liable for wrongful arrest merely upon a finding that the

arrest was "illegal" or "without legal justification". The Supreme Court of Canada, however, reversed this ruling and re-established the rule from *The "Evangelismos"*(1858) 14 E.R. 945, that damages for wrongful arrest may only be awarded where the arresting party acts with either bad faith or gross negligence. The Supreme Court noted that a change in such a long standing rule should only be made by the legislature.Click here for the full text of this decision.

Arrest of Chartered Ship

Margem Chartering Co. Inc. v Cosena SRL and The "Bocsa",
(March 5, 1997) T-2418-96 (F.C.T.D.)

This was a motion by the shipowner to strike out the *In Rem* Statement of Claim and set aside the arrest. The Plaintiff had entered into a charter party agreement with the "disponent owner" of the ship for the carriage of coal. Upon arrival at the port of loading the vessel was detained by Coast Guard and was unable to load her cargo. The Plaintiff then commenced the action against the owners and arrested the ship for the breach of the charter party. The main issue in the case was whether the charter party was with the shipowner or with the "disponent owner". Upon reviewing the evidence the Prothonotary held that the charter party was with the "disponent owner" and struck out those portions of the Statement of Claim alleging breach of contract by the shipowner. The Prothonotary, however, did not set aside the warrant for arrest as the Plaintiff had a possible cause of action against the shipowner in tort and such a claim was enforceable *In Rem* pursuant to section 22(2)(i) of the Federal Court Act.

Arrest - Affidavit to Lead Warrant - Level of Disclosure Required

Kiku Fisheries Ltd. v. Canadian North Pacific Ocean Corporation et.al.,
(September 15, 1997) No. T-1666-97 (F.C.T.D.)

This unusual case was an application to set aside a warrant of arrest. The case involved a shipment of roe herring from Russia to Vancouver. The carrier, on instructions from the importer of the cargo, issued two sets of bills of lading for the cargo. When the vessel arrived two different parties claimed entitlement to the cargo. One of these parties arrested the ship and cargo. The carrier moved to set aside the arrest on various grounds including; that the claim should be struck out; that there was no valid *In Rem* cause of action because the ship was under demise charter and hence the master who signed the bills of lading did not thereby invoke the *in personam* liability of the owner, a necessary requirement to an *In Rem* action; and, that there had not been proper disclosure in the affidavit to lead warrant. On the first issue the Court found that any deficiencies in the Statement of Claim could be cured by amendment. On the second issue the Court found that it was not clear that there was a demise charter of the vessel. The Court thought the agreements for the use of the ship were more consistent with ship management or joint venture agreements and, as such, the Master's signature on the bills of lading would bind the owner and the action would accordingly sound *In Rem*. On the final issue, the Court noted the dicta of the Federal Court of Appeal in *Armada Lines v Chaleur Fertilizers* wherein the arrest procedure was compared with the procedure to invoke a Mareva injunction but held that on a plain reading of rule 1003(2) there

was no requirement of full and frank disclosure of all material matters in an affidavit to lead warrant. In reaching this conclusion the Court noted that the portion of the decision of the Federal Court of Appeal dealing with wrongful arrest had been overturned by the Supreme Court of Canada.

Injunctions - fishing Quota - Sufficiency of Affidavit to Lead Warrant

Bornstein Seafoods Canada Ltd. v The "steadfast" et.al.
(December 30, 1997) No. T-2059-97 (F.C.T.D.)

This was an application to set aside an interim injunction that had been granted by the Court restraining the Defendants from dealing with a groundfish quota and to set aside a Warrant of Arrest against the Defendant vessel. The Plaintiff alleged that the quota had been assigned to it. The Court considered the three pronged test for an injunction: whether there is a serious question to be tried; whether the Plaintiff will suffer irreparable harm if the injunction is not granted; and, whether the Plaintiff or Defendant would suffer greater harm. The Court considered the evidence and concluded that the Plaintiff would not suffer irreparable harm and that the Defendant would suffer greater harm if the injunction was granted than would the Plaintiff if the injunction was refused. With respect to the arrest issue, the Court held that a dispute concerning quota was not something that came within Canadian Maritime Law and therefore set aside the arrest. The Court also noted that the Affidavit to Lead Warrant was defective in that it did not describe the nature of the claim but merely referred to the Statement of Claim.

Sistership Arrest

Hollandsche Aannaming Maatschappij b.v. v The "Ryan Leet" et.al.,
(August 21, 1997) No. T-1661-97 (F.C.T.D.).

This was an application to set aside a sister ship arrest. The case concerned the interpretation of s. 43(8) of the Federal Court Act . Section 43(8) states the *In Rem* jurisdiction of the Court may be exercised against any ship that "at the time the action is brought, is beneficially owned by the person who is the owner of the ship that is the subject of the action". The issue was whether "owner" as used in s. 43(8) means registered owner only or whether it should be interpreted broadly to include beneficial owner. The issue arose because the ship that was arrested was owned by the parent company of the subsidiary that owned the ship that was the subject of the action. The Defendant argued that the arrest should be set aside since the "owner" of the ship that was the subject of the action, the subsidiary, did not own or beneficially own the arrested ship. The Court agreed and held that "owner" as used in s. 43(8) meant registered owner only and did not include beneficial owner. Hence, the arrest was set aside. (Note: If the ship that was the subject of the action had been owned by the parent company and the arrested ship had been owned by the subsidiary then, subject to considerations of piercing the corporate veil, the arrest would likely have been valid.)

In Rem Proceedings - Arrest - Breach of Agency Contract

Scandia Shipping Agencies Inc. v. The "Alam Veracruz"
(December 23, 1997) No. T-2472-97 (F.C.T.D.)

The issue in this case was whether an action *In Rem* is available against all property of a Defendant or only against the property that is the subject of the action. The underlying action involved a claim by the Plaintiff agent alleging that the Defendant shipping line had wrongfully terminated the brokerage agreement between them. The agent commenced *In Rem* proceedings and arrested the bunkers and freight of the "Alam Veracruz". Before the Prothonotary and on appeal, the Court struck out the *In Rem* action and set aside the arrest. The Court held that an *In Rem* action was available only against property that is the subject of the action. The Court further held that since the action was merely for breach of a brokerage contract there was no *In Rem* action and no right of arrest.

Arrest - Application to Set Aside

Viktor Overseas Ltd. v The "Filomena Lembo" et.al.
(November 7, 1997) No. T-2241-97 (F.C.T.D.)

This was an application to set aside a Warrant of arrest in support of a claim for unpaid repairs to the vessel. The shipowner argued that the Plaintiff had no right to arrest because the repairs were ordered by the bareboat charterer who had no authority to contract on behalf of the owner. However, the Court noted that the Statement of Claim alleged that the repairs were ordered on behalf of the owner and that the repair contract itself stated that the repairs were ordered on behalf of the owner. In the result, the Court dismissed the application.

Bail

Amican Navigation Inc. v The "Necat A" at.al.
(October 21, 1997) No. T-1357-97 (F.C.T.D.).

This was an appeal from the Prothonotary. The original motion was by the shipowner to reduce the amount of bail that had been posted to secure the release of the ship from arrest. The underlying action was for breach of a charterparty. The Plaintiff alleged the Defendant failed to provide a ship to load a cargo the Plaintiff had undertaken to transport. The Plaintiff claimed damages of $337,000.00 for loss of profit, $130,000.00 for Suez Canal fees and $114,000.00 for the balance owing on the hire statement. Bail was initially given in the amount of $605,000.00. The Prothonotary reduced this bail to $124,000.00, holding that the Plaintiff was not entitled to bail in respect of the loss of profits claim or in respect of the canal fees. On appeal, the Court reinstated bail for the loss of profits claim holding that the Plaintiff was entitled to bail based on its best arguable case and that speculative calculations should not be used to determine this. The Court did, however, find that the best arguable case on the loss of profits claim was 30% of revenues rather than the 60% the Plaintiff claimed. With respect to the canal fees, the Court held that the fact that the Plaintiff had not paid these fees was not relevant as the Plaintiff was obliged to pay them and, in fact, was being sued for them. The Plaintiff was thus held to be entitled to bail in respect of these fees.

Practice - Increased Costs

CSL Group Inc. v. Canada
(October 17, 1997) No.T-1307-90 (F.C.T.D.)

This was an application by the Defendant for increased costs. The Defendant had been successful in its defence of an action brought by the Plaintiff. The action had been a test case in which the Plaintiff sought to recover substantial damages for delays experienced by its ships in the transit of the St. Lawrence Seaway during November and December, 1989. The delays were caused by a public service strike. The Court agreed with the Defendant that the case was unusual in that the issues of both liability and quantum were complex. The Court ordered that the Defendant's costs should be taxed under Column V of Tariff B.

Increased Costs

Kajat v. The "Arctic Taglu" et.al.,
(December 4, 1997) No. T-1724-94 (F.C.T.D.)

This case concerned a collision between a fishing vessel and a tug and tow combination. The full facts of the case are summarized above under Collisions. This aspect of the case was to determine costs, amongst other issues. The Plaintiff applied for increased costs on the grounds that the Defendant had taken extreme positions and that some of the Defendants had been less than candid. The Court agreed that the conduct of the Defendants, other than the Crown, merited an award of increased costs. The Defendants also applied for an order that since the Plaintiff's husband was found 15% at fault for the accident that the Plaintiff's costs should likewise be reduced by this amount. The Defendants relied on the British Columbia Negligence Act for this proposition. The Court, however, held that costs was a matter within the court's discretion pursuant to the Federal Court Rules and that, accordingly, the Negligence Act did not apply. The Court refused to exercise the discretion as requested by the Defendants and gave the Plaintiff her full costs.

Service - Default Proceedings - Wages

Reano v The "Jennie W"
(December 11, 1997) No. 1719 (F.C.A.)

This was an appeal from the dismissal of a motion to set aside a default judgement. The action was for wages and expenses.The action was commenced in May 1996. The Statement of Claim did not contain the required endorsement in Form 4. The Statement of Claim and Warrant of arrest were served on the ship on May 28, 1996. In August 1996 an Amended Statement of Claim including Form 4 was filed and served. Default judgment was obtained against the ship in October 1996. A motion to set aside the default judgment was brought in March 1997. The shipowner argued that the default judgment should be set aside because the original Statement of Claim did not include the endorsement in Form 4. The Court of Appeal held that service of the defective Statement of Claim did not render the action a nullity or the arrest invalid since the defect had been remedied by the subsequent filing and serving of the

Amended Statement of Claim. Further, the Court of Appeal held that there had been an unreasonable delay in filing the motion to set aside the default judgement. The Court of Appeal agreed with the Defendant, however, that in the particular circumstances of the case the claims for wages and expenses were claims for unliquidated damages rather than liquidated damages and the Court ordered that there be a reference to determine the amounts owing.

Service - Indorsement Form 4

Marystown Shipyard Limited v The "Icelandic Harvester
(November 20, 1997) No. T-543-96 (F.C.T.D.)

In this case the Court noted that objections concerning an indorsement (Form 4) are mere irregularities and not fatal defects.

Examination For Discovery

Shinwa Kaiun K.K.. v "The Queen of Alberni" et.al.
(August 27, 1997) No. T-659-92 (F.C.T.D.)

The issue in this motion was whether the representative of a party on examination for discovery could be required to locate and inform himself from former employees. The Court ordered the party to use best efforts to locate the former employees and obtain the requested information.

Addition of Parties

State of Alaska v. John Doe et.al.,
(September 25, 1997) No. T-1552-97 (F.C.T.D.)

This was the first volley in the litigation surrounding the blockade of the Alaskan ferry "Malaspina" by B.C. fishermen in July of 1997. The motion was brought by various fishermen to file conditional appearances to challenge the way which they were added as Defendants and to challenge the *In Rem* jurisdiction of the Court. The Statement of Claim initially named 14 vessels, John Doe, Jane Doe, and other persons and ships unknown. In a subsequent amendment pursuant to Rule 421 the Plaintiff purported to add 180 vessels and 227 individuals and companies. The added Defendants objected to this method of adding parties without a Court order. The Court did not decide the question of whether the Defendants had been properly added but did grant leave to file conditional appearances to argue the matter more fully later. The Defendants also argued that the claims of the Plaintiffs, which alleged conspiracy, nuisance, trespass, interference with contractual rights and interference with navigation, were not valid *In Rem* claims. The Court, however, held that the Plaintiffs claims did come within section 22(2)(d) which gives *In Rem* jurisdiction over any claim for damage caused by a ship. The Court noted that this provision has been very broadly interpreted.

Addition of Parties

State of Alaska v. John Doe et.al.,
(November 3, 1997) No. T-1552-97 (F.C.T.D.)

This was the second volley in the litigation surrounding the blockade of the Alaskan ferry "Malaspina" by B.C. fishermen in July 1997. The motion was brought by various fishermen for an order that the action was not properly commenced as against them. The Statement of Claim initially named 17 vessels, John Doe, Jane Doe, and other persons and ships unknown. In a subsequent amendment pursuant to Rule 421 and without a Court order, the Plaintiff purported to add 94 ships and their owners. The added Defendants argued that this was the addition of parties and could only be done with a Court order pursuant to rule 1716. The Plaintiff argued that they were not adding new parties but were merely correcting a misnomer. The Court held that for the Plaintiff to prevail the burden was on it to lead evidence showing the new ships were in the path of the "Malaspina". As the Plaintiff led no such evidence, the application was allowed and the Court ordered the action against these additional Defendants had not been properly commenced.

Addition of Parties

State of Alaska v. John Doe et.al.,
(December 3, 1997) No. T-1552-97 (F.C.T.D.)

This was yet another volley in the litigation surrounding the blockade of the Alaskan ferry "Malaspina". This was an appeal from an order of the Prothonotary in which the Prothonotary permitted the Plaintiff to add 473 Defendants. The Defendants objected to the admissability of the evidence submitted in support of the Plaintiff's original application. The Court held that the evidence was admissable on an interlocutory application and, if it contained hearsay evidence, such evidence is admissable under Rule 332(1). (Editors Note: This case settled in ealry 1998.)

Injunctions

Navi Mont Inc. v Rigel Shipping Canada Inc.,
(May 28, 1997) No. T-966-97 & T-961-97(F.C.T.D.)

This was an application for an interlocutory injunction directing the Defendant to continue to operate various ships in accordance with a contract of affreightment. The underlying issue in the action was whether one of the Plaintiffs was entitled to assign its interest in the contract of affreightment to the other Plaintiff that was specifically created for that purpose. The Court referred to the three stage test for granting an injunction: that there be a serious question to be tried; that the applicant would suffer irreparable harm if the injunction is refused; and, that the balance of convenience favours granting the injunction. Although the Court held that there was a serious question to be tried concerning the assignment, it was not satisfied that any harm suffered by the Plaintiffs could not be adequately compensated by an award of damages. In the result, therefore , the injunction was refused.

Failure to Comply With Peremptory Order

Margem Chartering Co. Inc. v Cosena SRL and The "Bocsa",
(June 30, 1997) No. T-2418-96 (F.C.T.D.).

This was an application by the Defendant to have the Plaintiff's action dismissed for failing to provide security for costs as required by a previous peremptory order. The Court considered the test to be applied when a party fails to comply with a peremptory order (also referred to as an "unless" order). The Court noted that there were two different principles of law at issue. First, a litigant ought not to be deprived of a right to have its case heard, so long as any damage to other parties is compensable. Second, a litigant who fails to comply with a peremptory order will not normally be permitted to continue the action. The Court noted that to overcome the presumption the party who failed to comply with the order must demonstrate that the failure to comply was not intentional or contumelious. In the case before it the Court found that the Plaintiff's failure to post security was due to circumstances beyond its control and therefore refused to dismiss the action.

Sisterships - Renewal of Statement of Claim

Belgo Nineira Comercial Exportadora S.A. et. al. v. Hadley Shipping Co. Ltd. et.al.,
(May 12, 1997), No. T-2161-94 (F.C.T.D.).

In this case the Plaintiff had commenced an action against the wrong-doing vessel and three sister ships. One of the sister ships had been in the jurisdiction but it had not been served by the Plaintiff who subsequently obtained an order extending the time for service of the Statement of Claim. The same sister ship later returned to the jurisdiction. The Defendant brought a motion to set aside the time extension and strike the Statement of Claim as against that sister ship. Counsel agreed that the time extension should be set aside but could not agree on whether the Statement of Claim should be struck as against that sister ship. The Prothonotary noted that a Plaintiff could renew a Statement of Claim as against only those ships that had not come in the jurisdiction. The Prothonotary ordered that the Plaintiff file an amended Statement of Claim deleting the sister ship from the style of cause.

Booking Notes

Domtar Inc. v. Lineas De Navigation Gema S.A. et.al.,
(April 11, 1997), No. T-2873-96 (F.C.T.D.).

This was a motion by the Defendant shipowner to set aside an arrest and strike the *In Rem* portions of the claim. The Plaintiff's action was for breach of a booking note contract. The Defendant shipowner argued that the vessel could not be arrested as it was not a party to the booking note contract. The shipowner argued the booking note was between the Plaintiff and the other Defendant. The Court, however, noted that there was some evidence suggesting a close relationship between the shipowner and the other Defendant. The Court held that it was not obvious on the evidence that the shipowner was not liable in contract to the Plaintiff and refused to set aside the warrant or dismiss the *In Rem* claim.

Dismissal for Delay

Baldwin v The "Jennifer Martha",
(March 19, 1997) No. T-1327-90 (F.C.T.D.).

This was an application to dismiss the underlying action for want of prosecution. The action involved a collision which had occurred on May 15, 1989, and the action was commenced on May 11, 1990. The Court cited the applicable test as being threefold: whether there has been inordinate delay, whether the delay is inexcusable, and whether the defendants are likely to be seriously prejudiced by the delay. The Court easily found that the first two parts of the test had been established but did not dismiss the action as there was no evidence of prejudice.

Conditional Extensions of Suit Time

Sidmar N.V. v Fednav Limited,
(February 25, 1997) Nos. A-807-96, A-808-96 & A-809-96 (F.C.A.).

This matter concerned the interpretation of various agreements to extend suit time in a carriage of goods case. The cargo was carried by sea from Belgium to Detroit and Chicago under bills of lading which provided that suit should be brought in Canada. The carrier granted suit time extensions which were conditional on any subsequent actions being filed in Detroit. The Shipper, however, commenced the actions in the Federal Court of Canada pursuant to the jurisdiction clauses in the bills of lading. The Federal Court of Appeal held that the provision in the suit time extension agreement requiring suit to be filed in Detroit was invalid as contrary to the Hague-Visby Rules.

Court Ordered Extension of Limitation Period - Canada Shipping Act s. 572(3)

Smallwood v Hill,
(January 8, 1997) Nos. C24305 & C24306 (Ont. C.A.)

This was an appeal from an order under s. 572 (3) of the Canada Shipping Act extending the time in which to issue a Statement of Claim. The facts of the matter were that a boating accident occurred on August 4, 1990, but action was not commenced by the injured Plaintiff until January 26, 1995, ie. 30 months after the two year limitation period in s. 572(1) of the Canada Shipping Act had expired. The cause of the missed limitation period was solicitor's negligence which was then compounded by the solicitor's failure to do anything about the mistake when it was drawn to his attention. The Court of Appeal noted that this was a marginal case but nevertheless held that the motions judge had not erred in exercising his discretion in favour of an extension of time.

Offers to Settle - Costs

Shorworld International Inc. et.al. v. Fednav Ltd. et.al.,
January 13, 1997), No. T-989-92 (F.C.T.D.).

In this carriage of goods case the Defendant delivered a formal offer to settle pursuant to Rule

344.1. The offer did not provide for costs but the Plaintiff accepted it and demanded costs up to the date of the offer based on column III of Part I of Tariff B. The Court held that the Plaintiff was entitled to the costs demanded.

In Rem Jurisdiction - Sufficiency of Service

Elders Grain Company Limited v. The "Ralph Misener" et.al.,
(January 17, 1997), No. T-1836-90 (F.C.T.D.).

In this matter an *In Rem* Statement of Claim was served upon a ship by delivering a copy of the Statement of Claim to the Master on board the ship. The issue was whether such service was valid service under Rule 1002, which specifically provides that service on a ship is to be effected by attaching a copy of the Statement of Claim to the mast or some other conspicuous part of the ship. The Court reasoned that the Rules should be given a flexible, liberal interpretation and held that service on the Master was sufficient.

Sale Pendente Lite

Mario Neves et.al. v. The "Kristina Logos" et.al.,
(January 16, 1997) No.T-1041-95 (F.C.T.D.).

This was an application by the Crown for leave to sell the Defendant vessel *pendente lite*. The application was granted on the grounds that the costs of maintaining the vessel amounted to over $500,000 and the ongoing cost was $60,000 per year. Further, there was evidence the vessel was deteriorating in value and its classification certificate would soon expire.

Sale Pendent Lite

The Governor and Company of the Bank of Scotland v The "Nel"
(December 9, 1997) No. T-2416-97 (F.C.T.D.)

This was an application by the mortgagee of the Defendant vessel for Court approval of a private sale. The mortgage covered four vessels and was outstanding in the amount of US$12 million. All of the vessels were in various stages of sale proceedings and it appeared likely that there would be a deficiency under the mortgage even after all the vessels were sold. The Court noted that a sale pendente lite could be ordered "for good reason". The Court found good reason in the fact that the "Nel" was loaded with sulfur, a cargo that is notorious for causing corrosion damage. The Court therefore approved the sale.

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Canadian Maritime Law and Federal Court Jurisdiction

Contributory Negligence - Application of Provincial Statutes to Maritime Matters

Bow Valley Husky Ltd. v. St. John Shipbuilding Ltd.

(December 18, 1997) No. 24855 (S.C.C.)

This is an extremely important case that all maritime law practitioners should read carefully. The case involved a breach of contract and negligence claim relating to the building of an off shore oil platform owned by the Plaintiff. The significant maritime law issue was whether the Plaintiff's claim was barred by reason of contributory negligence. The Defendant argued that because the matter was governed by Canadian Maritime Law the Newfoundland Contributory Negligence Act, which would have apportioned liability, did not apply and the Plaintiff's claim was barred. The Supreme Court of Canada agreed that the Newfoundland Contributory Negligence Act did not apply to maritime torts. The Court noted that the "(a)pplication of provincial laws to maritime torts would undercut the uniformity of maritime law". Nevertheless, the Court said that this was "an appropriate case for ... an incremental change to the common law in compliance with the requirements of justice and fairness". The Court held that the contributory negligence bar did not apply to maritime torts. This case is of significance not only because of the ruling on contributory negligence but also because the court dealt specifically with the so-called "gap rule" (which holds that, for matters within the constitutional jurisdiction of both the provinces and the federal government, the provinces may legislate where the federal government has not done so). The Court held that the absence of federal legislation did not mean there was a "gap" which the provinces could fill because the common law applied to fill any such gap. (Although not specifically enunciated in the judgement, presumably this is because the Federal Court Act enacts the common law as Canadian Maritime Law.) The significance of this may be that no provincial statute can ever apply to a matter governed by Canadian Maritime Law. The full text of the decision can be found here.

Fatal Diving accident - Application of Canadian Maritime Law - Limitation Periods

Dreifelds v Burton
(March 6, 1998) No. C 2456 &: C24580 (Ont. C.A.)

This was an appeal from a decision of the Ontario Court General Division. The case concerned a fatal scuba diving accident in Lake Ontario. A chartered vessel was used to take the divers to the dive site but the vessel was otherwise not involved in the accident. The deceased died from a gas embolism. The issue in the case was whether the accident was governed by Canadian Maritime Law and the one year limitation period in the Canada Shipping Act or by the two year period in the Ontario Family Law Act. Both at the trial level and on appeal it was held that the case was not governed by Canadian Maritime Law and that the two year period in the Family Law Act applied. The Court of Appeal noted that "not every tortious activity engaged in on Canada's waterways is subject to Canadian maritime law. Only if the activity sued about is sufficiently connected with navigation or shipping... will it fall to be resolved under Canadian maritime law."

It is noteworthy that the Court of Appeal said, in obiter dicta, that if the case was governed by the one year limitation period in the Canada Shipping Act, the Court would nevertheless have the inherent jurisdiction to extend the one year limitation period and would have done so in the absence of any prejudice to the Defendants. (Editor's Note: Compare this to the decision

of the British Columbia Supreme Court in ***Vogel v Sawbridge et.al.*** (April 3, 1996) No. 24638 Kelowna Registry (B.C.S.C.) where that Court refused to recognize any such inherent jurisdiction.)

Jurisdiction of the Federal Court

Corcovado Yacht Charters Ltd. v Forshore Projects Ltd.
(February 9, 1998) No. T-153-98 (F.C.T.D.)

The issue in this case was whether the Federal Court had jurisdiction to determine a dispute relating to the refusal of a landlord to renew a lease on a building that was, in part, built on pilings at Granville Island in False Creek, Vancouver. The Court held that the lease and its cancellation or non-renewal were in pith and substance matters within the property and civil rights jurisdiction of the provinces and not governed by Canadian maritime law. In the result, the Court declined jurisdiction.

Contribution and Indemnity

Canada v Mallett and Associates Engineering Ltd.,
(January 24, 1997) No. 127434 (N.S.S.C.).

This was an action against the Defendant for breach of contract and negligence in relation to dredging of the Liverpool Harbour and construction of a containment facility. The Defendant in turn brought Third Party proceedings against subcontractors. The Third Parties brought this application to strike out the Third Party proceedings on the grounds that they were governed by Canadian Maritime Law which did not recognize a claim for contribution and indemnity. The Court refused to strike out the proceedings holding, first, that it was not clear the matter was entirely governed by Canadian Maritime Law and, secondly, that it was arguable whether there was a right to contribution and indemnity under Canadian Maritime Law.

Contribution & Indemnity

Ferguson v Arctic Transportation Ltd. et.al.,
(July 29, 1997) No. T-1941-93 (F.C.T.D.).

The issue in this matter was whether the Federal Court had jurisdiction to determine issues of contribution and indemnity raised in a Third Party action. The facts were that the Plaintiff, a pilot with the Panama Canal Commission, was injured on board a ship owned and operated by the Defendants while it was transiting the Panama Canal. The Defendant commenced Third Party proceedings against the Panama Canal Commission alleging that the Plaintiff's injuries were caused by the negligence of employees of the Commission. The Commission argued that the claim for contribution and indemnity was not a claim recognized by Canadian Maritime Law and was therefore not within the jurisdiction of the Federal Court. The Court, however, held that it did have jurisdiction as the claim related to pilotage. The Court further noted that Canadian Maritime Law includes the law of torts.

Road Carriage

Matsuura Machiner Corporation et.al. v. Melburn Truck Lines Ltd,
(March 12, 1997), Nos. A-213-96, A-220-96, A-221-96 (F.C.A.).

These three appeals concerned the jurisdiction of the Court over a road carrier in a through transit situation. Specifically, the Court considered whether s. 22(2)(f) (which grants the Court jurisdiction over claims "arising out of an agreement relating to the carriage of goods on a ship under a through bill of lading") supported jurisdiction against the road carrier. The Court of Appeal held that this section did not allow an action against a road carrier who was not a party to the through bill of lading.

Negligent Misrepresentation

Pakistan National Shipping Corp. v Canada (The Queen v. Grief Containers Ltd.),
(April 30, 1997), No. A-343-96 (F.C.A.).

This was an interlocutory application to strike a third party action on the grounds that the Federal Court had no jurisdiction over the subject matter. The main action was brought by the Plaintiff carrier against the Defendant shipper to recover expenses incurred when plastic drums containing the Defendant's cargo of canola oil began to leak and caused a collapse of stow. The Defendant, in turn, commenced third party proceedings alleging that the third party had negligently represented the quality and capacities of the plastic drums. The motions Judge allowed the third party's application to strike the third party claim. On appeal, the Court of Appeal noted that the claim was not simply for supplying defective drums but was for negligent misrepresentation and that the third party was well aware that the intended use of the drums was to transport oil by ships. The Court of Appeal held that the Court did have jurisdiction as the claim was integrally connected to the Court's admiralty and maritime jurisdiction.

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Miscellaneous - **Salvage and Wrecks, Priorities, Arbitration/Jurisdiction Clause, Personal Injury, Charterparties, Necessaries, Other**

Salvage and Wrecks

Salvage - Priority as Between Salvor and Mortgagee

General Accident Indemnity Company v. The "Panache IV"
(October 31, 1997) No. T-1497-95 (F.C.T.D.).

This case has a good discussion of salvage. The case involved a claim for a salvage award by the underwriter of the "Panache IV". The "Panache IV" had an insured value of $275,000.00 and sank in deep waters under suspicious circumstances. The underwriter, suspecting the

vessel had been scuttled, undertook salvage efforts. After two failed attempts the underwriter was finally able to raise the vessel. The raising of the vessel provided crucial evidence that the vessel had, in fact, been scuttled. The salvage of the vessel cost the underwriter in excess of $307,000.00. The salved vessel was sold for slightly in excess of $30,000.00. The underwriters sought a salvage award out of the sale proceeds to defray some of the costs of the salvage. The mortgagee of the vessel, who was owed approximately $240,000.00, opposed the salvage award arguing that the underwriter was a party interested in the vessel and its services were not therefore rendered voluntarily such as to attract a salvage award. The Court, however, held that the underwriter was entitled to a salvage award and awarded the underwriter $12,000.00 plus additional expenses of $2,600.00.

Priorities

Validity of Seizure Under Mortgage

Greeley v The "Tami Joan"
(August 29, 1997) No. T-2778-92 (F.C.T.D.).

This was a contest between the mortgagee and lessee of the fishing vessel "Tami Joan". The Plaintiff had leased the vessel from its owner and had effected improvements to it. Unknown to the Plaintiff the vessel was mortgaged and the mortgage was in arrears. The mortgagee seized the vessel pursuant to the mortgage and it was eventually sold. The Plaintiff alleged that the mortgagee had wrongly deprived him of possession of the vessel and that he was entitled to a possessory maritime lien for the materials and services he had supplied to the vessel. The Court held that the mortgagee was entitled to seize the vessel because the mortgage was in arrears and its security was impaired by reason that the vessel was uninsured. The Court further held that the Plaintiff was not entitled to a possessory lien because he had lost possession of the vessel to the mortgagee. The Plaintiff was, at most, entitled to a statutory right of action *In Rem* which gave him no priority.

Container Storage Charges as Marshall's Expenses

Holt Cargo Systems Inc. v. The "Brussel" et.al.,
(May 15, 1997), No. T-2161-94 (F.C.T.D.).

This was an application by a terminal operator to recover movement and storage charges for abandoned containers from the proceeds of sale of the Defendant ship as if those charges had been a marshall's expense of arrest. The containers had been off-loaded from the Defendant ship pursuant to a Court order. The Court granted the application, reasoning that the charges were incurred for the benefit of all cargo owners to facilitate the sale of the vessel and that, if the ship had not been unloaded when it was, the marshall would have had to make those arrangements.

Usual Order of Priorities

Scott Steel Ltd. v. The "Edmonton Queen" et.al.

(January 30, 1997) No. T-1457-93 (F.C.T.D.)

This was an appeal from the order of the Prothonotary setting the priorities among various claimants to the proceeds of the Court ordered sale of the stern wheeler *"Edmonton Queen"*. The contest was between the builder who had a possessory lien over the vessel, the mortgagee who held a builder's mortgage which matured into a registered mortgage and a supplier of goods and services. The usual ranking of priorities in such a case would be that the possessory lien holder would rank first (after the Marshall's fees), the mortgagee would rank second and the supplier of goods and services last. The mortgagee argued that the Court had the jurisdiction to depart from the usual order of priorities. The Court upheld the decision of the Prothonotary not to depart from the usual order of priorities unless very special circumstances were shown or it was necessary to prevent an obvious injustice. The Court found no such obvious injustice and declined to interfere with the usual order of priorities. The decision also contains a useful discussion of the standard of review upon an appeal from a Prothonotary's order.

Arbitration/Jurisdiction Clause

Stay of Proceedings - In Rem Proceedings - Change of Ownership

Fibreco Pulp Inc. et.al v Star Shipping A/S et.al.
(February 9, 1998) No. T-153-98 (F.C.T.D.)

The significant issue in this case was whether the action should be stayed not only against parties to an arbitration agreement but also against Defendants not parties to the agreement. The Court held that the action could be stayed against all Defendants.

This case involved two shipments of pulp from Squamish, British Columbia to Finland via Rotterdam. The Plaintiffs were the vendor of the pulp, the buyer of the pulp for resale, and the ultimate buyer/consignee of the pulp. The Defendants were the Squamish terminal, the charterers, Star Shipping A/S, and the owners of the various ships that carried the pulp. The buyer of the pulp and Star Shipping had entered into a contract of affreightment that contained an arbitration agreement in favour of London arbitration. The Court held that pursuant to the Commercial Arbitration Act it had no alternative but to grant a stay of proceedings against Star Shipping. The Court further noted, however, that the more interesting question was whether the action ought to be stayed against the other Defendants who were not parties to the agreement. The Court referred to Nanisivik Mines Ltd. v Canarctic Shipping Co. Ltd. (1994), 113 D.L.R. (4th) 536, where the Court of Appeal ordered a stay against persons not parties to an arbitration agreement on the grounds that "disposing of the issues between the two parties to the arbitration agreement might, more likely than not, resolve the entire litigation". In reliance on this decision, the Court noted that London arbitration "may well resolve the whole claim" and consequently ordered that the entire action be stayed.

A secondary issue in this case was whether the *In Rem* action against one of the Defendant

ships ought to be set aside and the security given by the shipowner returned. The grounds were that there had been a change in the beneficial ownership of the ship after the voyage in question but before the action was commenced. (For certain specified claims, including cargo claims, section 43(3) of the Federal Court Act requires that the ship's beneficial ownership be the same at the time of commencement of the action as it was when the cause of action arose.) The Court granted the motion and ordered that the *In Rem* proceeding be struck and that the security be returned.

Interpretation of Arbitration Clause - Contra Proferentem

Ocean Fisheries Ltd. v Pacific Coast Mutual Marine Insurance Company,
(October 30, 1997), No. A-286-97 (F.C.A.).

This was an appeal from an order of Mr. Justice Teitelbaum of the Trial Division. A motion for a stay was initially brought before the Prothonotary who ordered a stay on the basis of an arbitration provision contained in the by-laws of the Defendant, a mutual insurance company, and incorporated by reference into the terms of an insurance policy. The Plaintiff argued that the arbitration provisions should be read contra proferentem against the Defendant and that, when so read, they did not apply. The Prothonotary held that there was no ambiguity in the provisions and that they did apply. Further, the Prothonotary disagreed that the doctrine of contra proferentem should apply to an insurance policy issued by a mutual insurance company such as the Defendant. On appeal, Mr. Justice Teitelbaum held that the Prothonotary erred in failing to read the insurance policy contra proferentem. Further, he held that when the policy was so read the arbitration provision applied only if the Defendant had made an offer of settlement. As the Defendant had not made an offer of settlement, the Plaintiff was not obliged to arbitrate. On further appeal to the Court of Appeal the Court affirmed the decision of Mr. Justice Teitelbaum. The Court held that a contract of insurance was to be interpreted like any other contract, ie. to discover and give effect to the intention of the parties as disclosed by the words used, the context and the purpose. The Court held that when the bylaws of the Defendant were so interpreted the dispute did not come within the arbitration clause.

Jurisdiction Clause - Past Practice of Parties

Transcontinental Sales Inc. v Zim Container Service,
(June 26, 1997) No. T-462-97 (F.C.T.D.).

This was a motion for a stay of proceedings on the grounds that a jurisdiction clause in the bills of lading required any disputes to be brought in Israel. The Plaintiff argued that countless claims between the parties in the past had been resolved in Canada and that the Defendant was only seeking procedural advantages. The Court, nevertheless, ordered that the action be stayed.

Jurisdiction Clause - Void For Uncertainty - Identity of Carrier

Jian Sheng Co. Ltd. v The "Trans Aspiration",

(June 4, 1997) No. T-2219-96 (F.C.T.D.)

This was a successful appeal from the order of Prothonotary Hargrave in which the Prothonotary held that a jurisdiction clause selecting "the country where the carrier has his principal place of business" was void for uncertainty. In essence the Prothonotary held that the clause was void for uncertainty because it was unclear who the "carrier" was. The possibilities were the owner, a Panamanian company, the charterer, a Bermuda company, or the Canadian company that signed the bill of lading "as agent" without disclosing their principal. On appeal, however, the appeal Judge held that where a vessel is under time charter only the owner is the carrier unless the charterer gives an express undertaking, which had not been given in this case. Consequently, there was no uncertainty as to the identity of the carrier and therefore no ambiguity in the jurisdiction clause. This decision is under appeal.

Personal Injury

Personal Injury - Liability of Wharf Owner

Hawkins v The "Margaret Elizabeth No.1" et.al.
(June 10, 1997) No.T-2515-94 (F.C.T.D.)

This case concerned a 17 year old plaintiff who was injured when the rigging of a fishing vessel struck a light pole on a wharf causing it to fall and strike the Plaintiff. The Plaintiff brought this action against the fishing vessel. The fishing vessel in turn brought a third party action against the Crown as owner of the wharf. The fishing vessel was held 100% liable for the accident. The Court rejected the third party claim finding that the Crown was not aware of any defects in the light poles and that any defects were hidden and would not have been discoverable on a reasonable inspection. The Plaintiff was awarded in excess of $438,000.00.

Water Skiing

Martin v Derrach,
(January 2, 1997) No. GSS 2303 (P.E.I.S.C.).

This was a claim for personal injury damages arising out of a water skiing accident. The Plaintiff was being towed behind the Defendant's jet ski when she collided with an anchored boat and severely injured her right leg. Although there was no spotter aboard the jet ski, the parties agreed that the absence of a spotter was not causative. The Court held that the jet ski driver clearly had a duty to take reasonable care for the safety of his skier and that this duty required he drive safely and on a course in which the skier would be safe from collision. The Court, however, found that the driver had done so and that the collision was caused by the skier deliberately choosing to ski a path in close proximity to the anchored power boat. In the result, the action was dismissed.

Charterparties

Charter Hire - Demurrage - Set Off

Halla Merchant Marine Co. Ltd. v. The "Lok Maheshwari" et. al.,
(February 26, 1997) No. T-279-96 (F.C.T.D.).

This was an application for summary judgment by the disponent owner of the Defendant ship against the charterer for charter hire. The charterer defended the application on the grounds that it had a right of set off in respect of a claim for demurrage. The Court held that there was no valid right of set off because the hire claim was for a different time period than the demurrage claim. The disponent owner was not, however, completely successful. The Court held that there was a genuine issue for trial in respect of some of the periods for which hire was claimed.

Option to Purchase

The "Challenge One" v. Sail Labrador Limited,
(April 15, 1997), No. A-533-96 (F.C.A.).

In this matter the Plaintiff sought to exercise an option to purchase under a charter party which was "subject to full performance of all its obligations under this Charter Party". The Defendant refused to execute a bill of sale on the grounds that the Plaintiff was in breach of various clauses in the agreement. At trial, the Judge allowed the Plaintiff's action holding that the breaches by the Plaintiff were either *de minimis* or were cured by the time the option was exercised. On appeal, the Court of Appeal noted that the *de minimis* rule is a rule of interpretation used to determine whether a breach has been committed, not to qualify a breach as being minimal. The Court held that having found a breach the Trial Judge could not rely on the *de minimis* rule to conclude there was no breach. Further, the Court of Appeal held that the doctrine of "spent breach" does not derogate from the proposition that the holder of an option to purchase must strictly comply with the conditions of the option. The only exception is if the option holder's failure to comply with the conditions are related to the conduct of the other party.

Breach of Charterparty - Right to Damages

Melsa International Inc. v. Adecon Shipping Lines Inc. et.al.,
(April 11, 1997), No. T-2185-96 (F.C.T.D.).

This was an application by the Defendant for summary judgment dismissing the Plaintiff's action. The Plaintiff's action was for breach of a charter-party agreement. The Plaintiff and Defendant had entered into a charter party agreement in the Gencon form. The Defendant was not able to meet the agreed upon loading date and, as a consequence, the Plaintiff exercised its right to cancel the charter party and found another vessel to carry the cargo. The Plaintiff claimed the difference in the freight payable under the two charter parties. The Defendant argued that pursuant to the charter-party the Plaintiff's remedy was to cancel the charter and

that it had no right to claim damages. The Court reviewed the authorities and noted that a charterer who cancels a charter-party has a claim in damages if the failure of the ship to arrive by the cancelling date was a result of a breach on the part of the shipowner of his obligation to load by a particular date. In result, the Court found that there was a genuine issue for trial and dismissed the motion for summary judgment.

Necessaries

Other

Measurement of Tonnage

Pacific Shipyards Ltd. v Canada (Board of Steamship Inspection),
(May 23, 1997) No. T-A-58-96(F.C.A.).

The issue in this appeal concerned whether the trial Judge had correctly determined the proper regime for measuring the tonnage of ships under construction during the period from 1993-1994. The issue arose because of significant amendments to the Tonnage Regulations effective October 17, 1994. The Court of Appeal upheld the trial Judge who held that the new guidelines applied to ships under construction as of October 17, 1994, if they had not reached a sufficient stage of construction by October 17, 1994, so as to permit one to determine their tonnage under the previous regime with some certainty.

Breach of Contract of Sale - Liability of Solicitor

McPhail's Equipment Co. v Prairie Warehouse Leasing Corp.,
(June 3, 1997) Vancouver Registry No. C933446 (B.C.S.C.).

This was an action by the buyer of a yacht against the vendor for damages for conveying the yacht to a third party and against the buyer's solicitor for negligence in the handling of the transaction. The Court found that the Defendant vendor deliberately attempted to avoid the sale to the Plaintiff because it had found a buyer who was willing to pay a higher price than the Plaintiff. The Court held that the Plaintiff was ready, willing and able to complete the sale except to the extent made impossible by the vendor's own failure to perform its obligations. The Plaintiff was awarded damages of $50,000 for the return of a deposit and $30,000 for lost profit on the resale of the yacht. With respect to the action against the Plaintiff's solicitor, the Court found that the solicitor had acted reasonably and did everything he possibly could have.

Breach of Contract of Sale - Specific Performance

Gleason v. The "Dawn Light" et.al.,
(May 9, 1997), No. T-21903-96 (F.C.T.D.).

This was a summary judgment application to dismiss the Plaintiff's claim for specific performance of an agreement of purchase and sale of the Defendant vessel and an application

to set aside the arrest of the vessel. The Plaintiff alleged that the Defendant had agreed to sell the Defendant vessel to him but then sold it to the intervenor. For the purpose of the summary judgment application the Court was prepared to assume there was a binding agreement but nevertheless held that the evidence did not support an order of specific performance. The Court held the evidence did not show the vessel was unique or irreplaceable. The Court also noted that the fact the vessel had been sold to a bona fide purchaser for value without notice was a further strong discretionary reason not to grant specific performance. With respect to the application to set aside the arrest of the vessel, the Court held that it could not set aside the arrest as the Plaintiff still had a claim in damages for breach of contract.

Extradition

Romania v Cheng,
(March 6, 1997) No. 128423 (N.S.S.C.).

This is the decision of the Nova Scotia Supreme Court in the extradition hearing relating to the "Maersk Dubai", a case involving allegations of murder on the high seas. Seven officers of the Taiwanese registered "Maersk Dubai" were accused of throwing Romanian stowaways overboard while en route to Canada. Canadian authorities arrested the seven officers in Halifax. The State of Romania charged all seven officers and brought proceedings to have them extradited. The issue was whether the Court had jurisdiction to extradite the officers. The Court held that it did not have jurisdiction to extradite because the Extradition Act requires that the offence occur in the jurisdiction of the requesting state. The alleged murders occurred at Sea, not within the jurisdiction of Romania, and the officers were therefore discharged. The Court noted that but for the lack of jurisdiction it would have committed all of the officers.

Liability of ship Owners for Repatriation Costs of "Deserters"

Flota Cubana De Pesca v Minsiter of Citizenship and Immigration
(December 11, 1997) No. A-569-95 (F.C.A.)

The issue in this case was whether the Applicants, owners/operators of a fleet of fishing vessels, was liable under the provisions of the Immigration Act and Regulations for payment of fees and deposits relating to the repatriation of crew members who deserted their fishing vessels in Canada. The Applicants argued that the Act applied only to a "transportation company" and that a fishing vessel operator was not such a company. The Court noted that "transportation company" was not be given a restrictive definition and held that the provisions of the Act applied to the Applicant.

Arbitration Awards

Killam v Brander-Smith,
(February 28, 1997) No.A964074 (B.C.S.C.).

This was an application to set aside an arbitration award. The arbitration concerned the sale

of a 22 foot fibre glass boat. The purchaser alleged that the vendor had misrepresented the condition of the engine. The arbitrator held that the doctrine "buyer beware" applied and found in favour of the vendor. The Court upheld the arbitrator's decision.

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