Canadian Maritime Law - 1998 Cases

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Marine Insurance

Marine Insurance - All Risks Policy

Russell v Canadian General Insurance Co.
(February 12, 1999) No. 94-CQ-56261 (Ont. Ct. Gen. Div.)

In this matter the Plaintiff claimed under an all risks marine policy for damage caused to a sailboat by the accumulation of water in the interior of the vessel. The damage to the sailboat occurred during the period from 1990 to 1993. The assured put the vessel into storage at the end of the summer in 1990 and left it in storage until October 1993 when it was discovered to be full of water. The accumulation of water had rendered the vessel a constructive total loss. The insurer denied coverage on the basis that there was wilful misconduct on the part of the assured, that the Plaintiff "courted the risk" and that the damage was caused by wear and tear, an excepted peril under the policy. There was conflicting evidence as to whether the assured periodically inspected the vessel while it was in storage. The assured testified that he did periodically inspect the vessel. The insurer led expert evidence to the effect that the assured could not have possibly inspected the vessel given the amount of water that had accumulated.

The Court, however, held that there was no requirement that the assured inspect the vessel. The Court also held that there was no "wilful misconduct" on the part of the assured as he did not intend to damage the vessel and there was no deliberate courting of the risk as the damage was not foreseen. Additionally, the Court found the damage was not caused by wear and tear as the damage was highly unusual and not the result of an occurrence ordinarily to be expected.

Unseaworthiness

Laing v Boreal Pacific
(February 17, 1999) No. T-1713-96 (F.C.T.D.)

This was a claim under a marine insurance policy for the loss of an excavator. The excavator was loaded on the self propelled barge, the "Palaquin", and was being carried across the Strait of Georgia. During the crossing the seas became rough and the excavator shifted and ultimately fell overboard. The Plaintiff settled an action brought by the owner of the excavator and brought this action for indemnity pursuant to the terms of his insurance policy. The Defendant insurer denied the claim on the basis that the vessel was unseaworthy at the commencement of the journey. The trial judge agreed with the insurer. She found that the barge was unseaworthy in that it was too heavily laden for the sea conditons that could reasonably be expected and the excavator was not properly secured. She further found that the Plaintiff had knowledge of the facts that made the vessel unseaworthy. In result, the Plaintiff's action was dismissed.

Breach of Warranty of Inspection

Shearwater Marine Ltd. v. Guardian Insurance Co. et.al.,
(October 1, 1998) No.CA022988 (B.C.C.A.)

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 trial judge 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 trial judge 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 trial judge 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 trial judge held that the normal charge-out rate should be used. The insurer appealed. The British Columbia Court of Appeal

stated that "the trial judge reached the right conclusions for the right reasons" and dismissed the appeal.

Extent of insurer's obligation to repair

Lockwood v Moreira
(April 24, 1998) No. C21444 (Ont. C.A.)

In this matter the insured's pleasure craft was broken into by vandals who used citronella candles in the interior of the vessel. As a consequence, a thick sooty substance covered the interior of the vessel. The assured made a claim under the insurance policy and the insurers responded by having the interior of the vessel cleaned. The assured was not satisfied with the first cleaning so the insurers authorized a second cleaning. The assured was still not satisfied and took the position that the only way the vessel could be restored to its original condition was by removing the deck and replacing the interior at a cost of $100,000. The trial judge held that the insurer's obligation under the policy was to restore the boat to substantially the same condition it was in before the vandalism, which had been done. The insurer was not required to restore the boat to the exact condition it was in before the vandalism. The trial judge further rejected a claim of bad faith against the insurer, holding the insurer had responded promptly to the claim and without malice. The insured appealed. The Ontario Court of Appeal in a brief endorsement noted that they agreed with the trial judge that the boat "was substantially repaired" and dismissed the appeal.

Discovery - Valued Policies

Hospitality of New York Inc. v. Norwich Union Fire Insurance Society Ltd. ,
(March 23, 1998), No. T-1904-95 (F.C.T.D.)

This was an interlocutory motion in a case involving a valued cargo insurance policy. The cargo was damaged during transit by an explosion and the insurer denied coverage. At issue was whether a party on an examination for discovery could be compelled to answer questions relating to the purchase price of the insured goods. The evidence was that the cargo was insured for its resale price and that this was three to four times the purchase price. The insured relied on section 30(4) of the Marine Insurance Act which provides that, absent fraud, the value specified in a valued policy is conclusive evidence of insurable value. As the Defendant insurer had not pleaded fraud, the insured argued that it was not required to disclose the purchase price. The Prothonotary held that the insured was obliged to answer questions relating to the purchase price of the cargo.

Cargo Insurance - Exclusions - Institute Frozen Meat Clauses

Queen Charlotte Lodge Ltd. v Hiway Refrigeration Ltd. and Royal Insurance

(January 7, 1998) Vancouver Registry No. C946385 (B.C.S.C.)

In this matter the Plaintiff had purchased a used refrigeration unit from one of the defendants

for use in transporting meat and vegetables to the Plaintiff's fishing lodge in the Queen Charlotte islands. The goods were insured under a policy of insurance that included the Institute Frozen Meat Clauses A-24. These clauses contained an exclusion excluding any loss arising from "unfitness of container... where loading therein is carried out prior to attachment of this insurance or by the assured or their servants". While in transit the refrigeration unit ceased functioning and the goods within were spoiled. The Plaintiff sued both the vendor of the refrigeration unit and the insurer. The Court found that the cause of the failure of the refrigeration unit was a defective part. With respect to the liability of the vendor of the refrigeration unit, the Plaintiff argued the vendor was liable for breach of the implied warranties of fitness and merchantability in the Sale of Goods Act. The vendor argued that it had contracted out of the implied terms by the use of the words "No Warranty" in a quotation given to the Plaintiff. The Court held, however, that these words were not sufficiently clear to exclude the implied terms. With respect to the liability of the insurer, the Court held that the loss was excluded by the terms of the policy and the insurer was not liable. In reaching this conclusion the Court noted that the insurer did stipulate for the inclusion of the Institute Frozen Meat clauses in its negotiations with the broker and that the broker was, as a matter of law, the agent for the assured.

Carriage of Goods

Claim for Freight - Set Off

Mediterranean Shipping Co. v Canada Textile,
(May 27, 1998) No.T-245-98 (F.C.A.)

This was an application to strike portions of a Statement of Defence and Counterclaim. The main action was a claim for freight. The defence and counterclaim alleged that there had been inordinate delay in delivery that constituted a fundamental breach of the contract between the parties. The Prothonotary refused to strike the Statement of Defence and Counterclaim noting that the allegation might be an exception to the rule in Canadian Maritime Law that there could be no defence of set-off against a claim for freight.

Mis-delivery Conversion

Westwood Shipping Lines v Geo International et.al
(June 24, 1998) No. T-359-98 (F.C.T.D.)

This was an application for summary judgement by the Plaintiff carrier against the Defendant for conversion. The Defendant was the "Notify Party" on order bills of lading. The Defendant obtained delivery of the cargo without surrendering the original endorsed bills of lading and without paying the purchase price to the shipper/vendor. The Plaintiff maintained that the cargo was delivered only after the Defendant fraudulently misrepresented that the original bills of lading had been surrendered by the shipper. The Defendant denied any such representation had been made. The Court found it unnecessary to determine whether a fraudulent misrepresentation had been made. The Court held that the Defendant's actions in

taking the goods without having paid for them amounted to conversion.

Liability of Terminal Operator - Limitation Clause - Himalaya Clause

Braber Equipment Ltd. v Fraser Surrey Docks Ltd.
(October 10, 1998) Vancouver Registry No. C961205 (B.C.S.C.)

This case involved damage to a container of equipment admittedly caused by the negligence of the terminal operator. The terminal operator sought to limit its liability to $100.00 per package pursuant to a limitation clause contained in its tariff. The Court found, however, that the Plaintiff had no knowledge of the tariff and was not bound by it. The Plaintiff's freight forwarder was aware of the tariff but as the decision to unload the container at the Defendant's terminal was made by the carrier and not the freight forwarder this did not assist the Defendant. The terminal operator further sought to rely upon the Himalaya clause in the carrier's bill of lading. The Court noted that the appropriate test to be met is the four point test enunciated in Scruttons Ltd. v Midland Silicones Ltd., [1962] A.C. 446 (ie. 1. that the bill of lading makes it clear that the stevedore is intended to be protected; 2. that the bill of lading makes it clear the carrier is contracting as agent for the stevedore; 3. that the carrier has authority from the stevedore to do that; and, 4. that any difficulties about consideration are overcome). The Court held that the terminal had failed to satisfy the third requirement. In obiter, the Court noted that if the Defendant was entitled to rely upon the Himalaya clause in the bill of lading there would be two inconsistent limitation provisions; the per package limitation under the bill of lading of 666.67 SDR per package and the $100 per package limitation under the Defendant's tariff. Following the decision in Meeker Log and Timber v The "Sea Imp VIII" (1996) 21 B.C.L.R. (3d) 101, the Court noted that two inconsistent exclusion/limitation clauses rendered both clauses null and void.

Stay of Proceedings - Jurisdiction Clauses - Carriage of Goods - Identity of Carrier

***Jian Sheng Co. Ltd. v The "Trans Aspiration*,**
(April 14, 1998), No.A-442-97 (F.C.A.).

This is an important case on the issue of the identity of the carrier under a bill of lading although the case arose in the context of a motion for a stay of proceedings under a jurisdiction clause. The Federal Court of Appeal held that where the bill of lading is signed for or on behalf of the Master it is a shipowner's bill and the shipowner is prima facie the carrier. The Court expressly rejected the notion that both the charterer and owner could be a carrier. See the full summary below under Arbitration/Jurisdiction Clauses.

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 judgement 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 judgement with a reference to determine the damages.

Road Carriage - Limitation

North American Van Lines v Rosenau Transport Ltd.
(September 4, 1998) No. P9790106477 (Alta. Prov. Ct.)

This was an action for damage to a cargo of photocopiers. The Court held that the damage was caused by the negligence of the Defendant in failing to properly secure the photocopiers for transit. The defence was that there was an agreement between the parties that the Defendant would not be liable for any damage. The evidence was that the Defendant had verbally advised the Plaintiff prior to the shipment that the Defendant would accept no liability for the shipment. This agreement was evidence by a term in the bill of lading stating "Uncrated - no claim to carrier". Notwithstanding this, the Court found that the Plaintiff had not signed or initialled the term "no claim to carrier" and that the clause was in conflict with the maximum liability provision of the bill of lading. The Court further held that even if the exclusion applied it would cover only the risks incidental to transportation and would not relieve the Defendant from liability for its negligence. In result, the Plaintiff was given judgement for limitation amount of $2.00 per pound.

Rail Carriage - Contribution

Canadian National Railway v Southern Railway of British Columbia
(May 11, 1998) Vancouver Reg. No.C972706 (B.C.S.C.)

Both the Plaintiff and Defendant in this matter were rail carriers. They had entered into an agreement with Johnson & Johnson for the carriage of goods from Quebec to British Columbia. Some of the goods were destroyed by fire. The Plaintiff paid Johnson & Johnson the full amount of its loss. Subsequently, pursuant to an agreement the matter was referred to arbitration. In the arbitration it was held that the Defendant was fully responsible for the loss. The Plaintiff then brought this action for reimbursement. The Defendant argued, *inter alia* that the claim of the Plaintiff was time barred and that the Plaintiff had paid Johnson & Johnson more than the limitation amount to which Johnson & Johnson was entitled. With respect to the time bar issue, the Defendant argued that the claim was for property damage and that the applicable limitation under the Limitation Act of British Columbia was two years. The Court held that, although a claim by Johnson & Johnson might be for property damage, the claim by the Plaintiff was for breach of contract (eg. the agreement to refer to matter to arbitration and abide by the results thereof) and was therefore subject to a six year limitation period. On the issue of the limitation amount the Defendant relied on the fact that

Johnson & Johnson prepared a bill of lading that stated liability was limited to $2.00 per pound. The Court found, however, that the original agreement between the parties was that the carriers would be liable for the value of the goods and that the bill of lading was nothing more than a record of the goods. It was not signed by the parties and did not have the effect of varying the original agreement.

Air Carriage - Notice Periods

Markham Meat Industries Supplies Inc. v Air France
(July 9, 1998) No. 98-BN-01639 (Ont. Ct. Gen. Div.)

This action concerned damage to cargo carried by air from Paris, France to Montreal. The cargo arrived on June 27, 1995 and was delivered on June 28, 1995. The air carriers were, however, not notified of the damage to the cargo until September 19, 1995. The carriers therefore brought this motion to dismiss the Plaintiff's claim for failure to give the required notice within 14 days of delivery as required by Article 26(2) of the Warsaw Convention. The Plaintiff argued that it had not given timely notice because the damage to the cargo was concealed. The Court resolved the matter by ordering that there be a trial of the issue and that the Plaintiff would have to prove that the damages were of such a nature that they were not discoverable.

Limitation of Liability

Limitation of Liability

An ***Act to amend the Canada Shipping Act (Maritime Liability)***, 1998 C. 6 (formerly Bill S-4) received Royal assent on May 12, 1998 and came into force on August 10, 1998. This Act implements substantial changes to the limitation of liability regime. Specifically, it will be much easier for shipowners to limit their liability but the limitation amounts are increased. The new limitation amounts for vessels under 300 tons are $1 million for personal injury and $500,000 for property damage. (The limitation amounts under the old legislation for these vessels were approximately $100,000 and $50,000.) For vessels over 300 tons the limitation amounts increase with the tonnage. The new Act extends the right to limit liability to salvors, and "any person for whose act, neglect or default the shipowner or salvor is responsible" .

Tug and Tow

Pilotage Fees

Laurentian Pilotage Authority v Techno Navigation Ltee.
(June 11, 1998) No.A-1027-96 (F.C.A.)

The issue in this case was whether a tug and barge combination are exempt from the pilotage requirement imposed by the Laurentian Pilotage Authority Regulations passed pursuant to the Pilotage Act. At trial, the judge considered the regulations were "vague and imprecise" and

held that both the tug and barge were exempt. On appeal, however, the Court of Appeal held that the trial judge had misread the regulations. The Court of Appeal agreed that the tug was exempt but held that the barge was subject to compulsory pilotage. The Court of Appeal further held that the Laurentian Pilotage Authority was entitled to take the dimensions of the tug into account when setting the pilotage charges for the barge.

Pollution

Limitation Periods

Canada v J.D. Irving Ltd.,
(December 21, 1998) No.T-1625-97 (F.C.A.)

This matter arose out of the sinking of the "Irving Whale", a tank barge, on September 7, 1970, while under tow of the tug "Irving Maple" from Halifax, Nova Scotia to Bathurst, New Brunswick.At the time of the sinking she was loaded with 4,297 long tons of Bunker C fuel oil. Immediately after the sinking a quantity of oil was discharged from the barge and 32 kilometres of coast line was contaminated. Clean up operations continued until November, 1970. Thereafter, small quantities of oil intermittently leaked from the barge. The barge was kept under surveillance until 1994 when the Minister of Transport decided that the sunken barge should be raised to avoid an inevitable catastrophe. The barge was successfully raised on July 30, 1996, at a cost of $42,000,000.00. On July 29, 1997, the Government of Canada commenced this action to recover the costs of raising the barge. The action was commenced against the owners and charterers of the "Irving Whale" and "Irving Maple" and against the Ship Source Oil Pollution Fund and the International Oil Pollution Compensation Fund 1971. The action against the owners and charterers was based on the statutory liability of an "owner" imposed by 677(1) of the Canada Shipping Act and on the torts of negligence and nuisance. The actions against the Ship Source Oil Pollution Fund and the International Oil Pollution Compensation Fund 1971 was pursuant to Part XVI of the Canada Shipping Act.

The various Defendants brought motions for summary judgement. The significant issues were:

1. whether the action against the Defendants was time barred by the terms of subsection 677(10) of the Canada Shipping Act;
2. whether the action against the "owner" in tort was time barred;
3. whether Part XVI of the Canada Shipping Act had retroactive effect.
4. whether the claim against the Ship Source Oil Pollution Fund was time barred by subsection 710(1) of the Canada Shipping Act; and
5. whether the claim against the International Oil Pollution Compensation Fund was time barred;

On the first issue the Court held that the Plaintiff's statutory cause of action against the "owner" was time barred by subsection 677(10). Subsection 677(10) provides for a limitation period of 3 years from the date of the damage and 6 years from the date of the "occurrence"

that caused the damage. The Plaintiff argued that these limitation periods did not apply because the claim was for "preventative measures" rather than pollution damage. In the alternative, the Plaintiff argued that since the claim was for "preventative measures" the word "occurrence" as used in subsection 677(10) should be interpreted as meaning the taking of "preventative measures" or the time when the Plaintiff first had reasonable grounds for believing such measures were necessary. The Court rejected the Plaintiff's arguments and held that the word "occurrence" could only mean the sinking of the barge. In result the Plaintiff's statutory action against the "owner" was time barred.

On the issue of whether the action in tort against the "owner" was time barred, the owner relied on section 681 of the Canada Shipping Act (which provides that the owner of a "Convention ship" is not liable for the matters referred to in subsection 677(1). The Court, however, noted that there was doubt as to whether the "Irving Whale" continued to be a "Convention ship" as the owner had abandoned ownership after the sinking. The further Court noted that the torts of negligence and nuisance may be of a continuing nature and that there was an absence of evidence on the motion as to the nature of the torts and when they may have been committed. The Court therefore allowed the Plaintiffs actions in negligence and nuisance to continue.

The third issue, whether Part XVI had retroactive effect, arose because Part XVI was not enacted until well after the sinking. The enacting legislation provided that it should apply to claims for expenses "regardless of the time of the occurrence that gave rise to the damage, loss, cost or expenses. The Court held that these words indicated a clear intent that the legislation should be applied retroactively.

The two remaining issues of whether the statutory claims against the Ship Source Oil Pollution Fund and the International Oil Pollution Compensation Fund 1971 were time barred were resolved against the Plaintiff. The Court held that these claims were time barred.

Pollution - Reasonable Doubt

R. v The "Elm",
(May 5, 1998) (Nfld. Prov. Ct.)

In this matter the "Elm", a lumber carrier, and her Master, Chief Engineer and Second Engineer were charged with various pollution offences. The charges arose when a Fisheries Surveillance aircraft observed an oil slick off the south coast of New Foundland on November 23, 1996. The slick was approximately 20 metres in width and 59 nautical miles long. The Fisheries aircraft followed the slick to the stern of the "Elm". The observers on the aircraft concluded that the oil was being discharged from the "Elm" even though they did not actually observe the discharge of pollutants from the ship. The ship vehemently denied the charges. The theory of the defence was that the slick had come from another vessel. Expert evidence was led indicating the the course of the slick was slightly different from the course of the ship. Evidence was also led that the ship was well run and well equipped. The trial judge acknowledged that the facts raised a suspicion but acquitted the accused. In doing so the trial judge noted the absence of oil sample analysis that would have conclusively proven

the oil slick had emanated from the "Elm".

Admiralty Practice

For Stays of Proceedings see Miscellaneous - Arbitration/Jurisdiction Clauses.

New Rules

The Rules of the Federal Court, including the Admiralty Rules have recently been substantially amended. The new rules, now called the ***Federal Court Rules, 1998*** came into effect for existing and future proceedings on April 25, 1998.

Personal Service on Solicitors as Business Agents

North Shore Health Region v Cosmos Shipping Lines
(November 17, 1998) No. T-1743-98 (F.C.T.D.)

This was an appeal of a decision by the Prothonotary in which the Prothonotary upheld personal service of a Statement of Claim on solicitors as business agents for the Defendant. The facts were that a crew member of one of the Defendant's vessels was seriously injured at Vancouver. The crew member was hospitalised. His medical bills were sent to the offices of the solicitors for the vessel's P&I Club. The solicitors paid four of the bills. Thereafter, no payments were made and the hospital commenced proceedings against the shipowner for payment of the ongoing medical costs pursuant to section 285 of the Canada Shipping Act. The hospital served the Defendant by delivering a copy of the Statement of Claim to the solicitors who had paid the bills. The Hospital argued that the service was valid pursuant to Rule 135 which authorises personal service on an agent where the Defendant "in the ordinary course of business, enters into contracts or business transactions in Canada" through an agent in Canada and who actually used the agent in respect of the contract or transaction giving rise to the action. The Prothonotary and the appeal judge agreed and upheld the service. The appeal judge further held that, if the requirements of Rule 135 had not been complied with, he would have validated service pursuant to Rule 147.

Evidence on Motions Challenging Jurisdiction

MIL Davie Inc. v Hibernia Management and Development Co.
(May 7, 1998) No. A-314-97 (F.C.A.)

This was a motion by the Defendant to strike the Statement of Claim as being outside the jurisdiction of the Federal Court. The Plaintiff relied on the Competition Act as the jurisdictional basis for the claim. The Plaintiff alleged that the Defendants engaged in anti-competitive behaviour, contrary to that Act, in the awarding of a construction contract. The Federal Court of Appeal reviewed the Statement of Claim and concluded that the Plaintiff had pleaded sufficient facts to invoke the Competition Act and the court's jurisdiction. In the course of its reasons the Court noted that there was some confusion in the caselaw as to whether a motion challenging the court's jurisdiction should be brought under Rule 401 or

419 and further noted that no evidence was generally allowed in a motion under Rule 419. The Court expressed the view that the prohibition against evidence in Rule 419(2) did not apply if the motion was to challenge the jurisdiction of the Court.

Production of Documents

Galehead Inc. v The "Trinity"
(November 3, 1998) No. T-1074-97 (F.C.T.D.)

This was a motion for production of documents. The significant issue in the motion was whether production of documents under the Federal Court Rules, 1998 was wider than under the old rules. The Prothonotary reviewed Rules 223(1) and 222(2) and determined that the definition of relevancy under the new rules was, if anything, narrower than under the old rules. Nevertheless, under either set of rules, the Prothonotary held that a party seeking additional production must produce persuasive evidence that additional documents are available or relevant information has been suppressed. A mere suspicion is not enough.

Court Ordered Sale - Naming the Sheriff

Annacis Auto Terminals v The "Cali"
(August 26, 1998) No.T-1261-98 (F.C.T.D.)

This was an application for reconsideration of an Order in which the court gave the owners until October 31, 1998 to complete a private sale of the ship failing which the ship would then be sold by the Court. The applicant was of the view that the order was deficient in that it ought to name the Sheriff who would conduct the court ordered sale and provide the Sheriff's address as the place where the Sheriff would receive bids. The Prothonotary held, however, that given the circumstances it was premature to include such particulars in the Order and Commission for Sale.

Injuctions - Damages

Ordina Ship Management Ltd. v Unispeed
(November 20, 1998) No.T-1721-98 (F.C.T.D.)

This was an action was for non-payment of charter hire. The Plaintiff obtained an *ex parte* mareva injunction which was later continued. The Plaintiff subsequently brought a motion to stay the action in favour of arbitration pursuant to the terms of the charter party and abandoned its injunction. The Defendant thereafter brought this application for assessment of damages suffered as a consequence of the injunction. The Defendant's application was dismissed. The Court held that it was not appropriate to assess damages until the matter was disposed of on its merits following the arbitration.

Sisterships

North Star Ship Chandler Inc. v The "Giuseppe Di Vittorio",
(June 3, 1998) No.T-1057-98 (F.C.T.D.)

This was a motion to dismiss the action in rem and set aside the arrest of a sistership. The Defendant maintained that the alleged sistership, the "Lynx", had a different owner from the "Giuseppe Di Vittorio", the ship was the subject of the action. The Defendant relied on the Lloyd's List of Shipowners and Monthly Supplement which showed Black Sea Shipping Co. as the owner of the "Giuseppe Di Vittorio" and Stockwell as the owner of the "Lynx". The Plaintiff presented evidence in the form of an invoice which mentioned Black Sea Shipping Co. and also presented an excerpt from Lloyd's Maritime Directroy 1998 listing the "Lynx" under the name Black Sea Shipping Co., albeit with the name "Stockwell" in parenthesis. The Prothonotary held that there was sufficient evidence for the Plaintiff to conclude the "Lynx" had the same beneficial ownership as the "Giuseppe Di Vittorio" and dismissed the motion.

Arrest Warrants - Setting Aside - Extension of Time for Service

Abitibi-Price Sales v C.V. The "Bontegracht",
(October 14, 1998) No.T-1270-97 (F.C.T.D.)

This was an appeal from a decision of a Prothonotary. The Statement of Claim had been issued on July 11, 1997. On August 14, 1998, after the Statement of Claim had expired, the Plaintiff obtained a Warrant of Arrest and threatened to arrest the "Bontegracht" at Baie Comeau, Quebec. The Defendants provided a letter of undertaking to prevent the arrest. The Defendants subsequently brought this motion to set aside the Warrant and the Plaintiffs brought a motion for an extension of time to serve the vessel. Both the Prothonotary at first instance and the appeal judge held that the Arrest Warrant had been issued out of time. The arrest was set aside and the Plaitniff was ordered to return the letter of undertaking. The Plaintiff was, however, allowed an additional six months in which to properly serve the Statement of Claim on the vessel. The fact that the vessel had been in Canadian waters on two prior occasions was not sufficient to disentitle the Plaintiff to the relief sought as the Plaintiff had taken reasonable measures to track the vessel.

Affidavit to Lead Warrant - Double Hearsay

Jean v The "Capitaine Duval",
(June 26, 1998) No.T-536-98 (F.C.T.D.)

This was an application to strike out the Statement of Claim as being outside the jurisdiction of the court. In the course of his reasons the motions judge noted that an affidavit to lead warrant sworn by the Plaintiffs' solicitor had been based on double hearsay. The motions judge said that although signing such an affidavit might not be technically illegal it was most unusual and should not in normal circumstances be done. See the full summary below under Canadian Maritime Law - Federal Court Jurisdiction.

Solicitor Client Costs

Jean v The "Capitaine Duval",
(September 15, 1998) No.T-536-98 (F.C.T.D.)

This was a motion for solicitor client costs. The applicants had been successful in a prior motion to strike the Statement of Claim on the grounds that it was outside the jurisdiction of the court. The motions judge granted increased costs in the amount of $20,000.00. The motions judge said he was satisfied that there had been misconduct on the part of the Plaintiff justifying an increased award of costs. The misconduct consisted of commencing the action prior to the date set for payment in a demand letter sent to the Defendants. Further, the court was satisfied that the arrest of the Defendant vessel was done solely to cause the Defendants embarrassment.

Failure to Attend Examination

Westwood Shipping Lines v Geo International et.al
(September 9, 1998) No. T-359-98 (F.C.T.D.)

In this matter the Defendant was found to have converted three containers of hikers shoes and was ordered to pay into court a substantial sum. When the Defendant failed to pay the money into court, the Plaintiff brought a motion for a writ of sequestration against the property of the President of the Defendant. The Plaintiff's initial motion was refused as premature but the court order that the President of the Defendant attend an examination in aid of execution. The President did not appear and, in fact, appeared to have left the country. The Plaintiff brought a further motion for a bench warrant against the President of the Defendant, a writ of sequestration against his property and an order requiring him to show cause why he should not be found in contempt of court. The Plaintiff's motion was granted.

Security For Costs - New Trial- Standard of review on Appeals From Prothonotary

Porto Seguro Companhia De Seguros Gerais v Belcan S.A. et.al.
(August 11, 1998) No. T-2057-85 (F.C.T.D.)

This was an appeal from a decision of the Prothonotary in which the Prothonotary refused to pay out money paid into court as security for costs. The Plaintiff's action against the Defendant had been dismissed at trial. The Plaintiff appealed to the Federal Court of Appeal and the appeal was dismissed. The Plaintiff further appealed to the Supreme Court of Canada. The Supreme Court allowed the appeal, ordered a new trial and awarded the Plaintiff its costs before the Court of Appeal and Supreme Court. The Plaintiff and Defendant each subsequently brought motions to be paid the amount posted as security. The Prothonotary ruled that the security should be kept in court pending the ultimate disposition of the new trial. On appeal, the appeal judge noted that a discretionary order of a Prothonotary should not be disturbed unless it was clearly wrong or raised issues vital to the final issue of the case. The appeal judge held that the Prothonotary's decision in the present case did not meet this test.

Motions by Telephone Conference Call

The Governor and Company of the Bank of Scotland v The "Nel",
(February 16, 1998), No.T-2416-97 (F.C.T.D.).

This was an appeal from an order of the Prothonotary in which the Prothonotary refused an adjournment of a pending motion and refused to allow counsel to appear by telephone conference call on short notice. The appeal was denied. The Judge on appeal noted, as did the Prothonotary, that the Court often tries to proceed by telephone conference call when feasible but noted that there was no absolute right in a party to be heard by telephone conference. The Court further noted that when there are multiple counsel present in court the appropriate procedure is to be represented by a local agent.

Costs - Offers to Settle

Canadian Pacific Forest Products v Termar Navigation Co. Inc.,
(March 23, 1998), No.T-1719-91 (F.C.T.D.).

This was a motion for costs by the successful Plaintiff. The Plaintiff sought costs assessed on a solicitor - client basis or, in the alternative in accordance with the maximum number of units under Column IV of Part II Tariff B and a doubling of the counsel fee as a result of offers to settle. The claim for solicitor client costs was disallowed on the grounds that there was no misconduct on the part of the Defendant. The claim for costs under Column IV was also disallowed on the grounds that both parties had made a relatively simple case complex. With respect to the request for a doubling of the counsel fee the Court noted that a number of offers had been made by the Plaintiff and that the only revocation of the prior offers was by the making of subsequent offers. Each of the offers was more favourable to the Defendants than the judgement at trial. Accordingly, the Plaintiff was entitled to a double counsel fee. The Court did, however, disallow disbursements of payments made to foreign counsel and of travel expenses of Plaintiffs' representatives at trial.

In Rem Actions

Paramount Enterprises International Inc. v The "An Xin Jiang" et. al.,
(March 30, 1998), No.T-956-97 (F.C.T.D.).

This was a motion to strike out an action In Rem against the Defendant ship and her cargo. The action was based on a contract between the Plaintiff and three of the Defendants for the carriage of a cargo of dynamite under a conlinebooking on board the vessel "Len Speer". The Plaintiff alleged in the Statement of Claim that it positioned the vessel for the carriage but that the Defendants breached the contract of carriage by having the cargo carried on the "An Xin Jiang". The Plaintiff further alleged that Defendant owners and operators of the "An Xin Jiang" wrongfully interfered with the conlinebooking contract. The Court held that the Plaintiff's action was not one which could be properly brought In Rem against the "An Xin Jiang" as she was not "the ship that was the subject of the action". Further, the Plaintiff never had possession of the cargo and had no lien on the cargo and therefore there was no basis for an In Rem action against the cargo. The Court granted the Defendants' motion and struck out the In Rem portions of the Statement of Claim.

Substitutional Service of *In Rem* Statement of Claim and Warrant

458093 B.C. Ltd. v The "Zomby Woof"
(January 26, 1998) No. T-2587-94 (F.C.T.D.)

It is generally thought that there can not be substitutional service on a ship of an *In Rem* Statement of Claim or Warrant for arrest. However, there are exceptions to even the most steadfast rules, as this case demonstrates. We can do no better but to introduce this case using the words of Prothonotary Hargrave.

> The Plaintiff applies, *ex parte*, for an order for substitutional service on the Defendant, Roger Hills, not an unusual application and one easily obtained on the material filed. However, the Plaintiff goes further and seeks an order for substitutional service of both the Statement of Claim and of the warrant for arrest on the Defendant vessel, for the "Zomby Woof" is apparently in the possession of a large and powerful animal, having short coarse hair, a broad head and pendant ears, namely a Rottweiler.

It seems the subject ship, a small fishing vessel, was on land on a trailer and was jealously guarded by a Rottweiler. Thus, access to the ship to serve the Statement of Claim or Warrant was impossible. Under these circumstances the Court ordered substitutional service by leaving copies in the Defendant's mailbox. The Prothonotary concluded: "In this way... the Sheriff will stand a sporting chance of staying beyond of the reach of the jaws of Mr. Hills' Rottweiler."

Canadian Maritime Law and Federal Court Jurisdiction

Supreme Court of Canada Defines Canadian Maritime Law and Applicability of Provincial Statutes

Ordon Estate v Grail,
(November 26, 1998) No.25702 (S.C.C.).

This case is essential reading for all Canadian maritime law practitioners. It concerns four separate actions commenced in the Ontario Court General Division. The actions involved two boating accidents which resulted in fatalities and in serious personal injury. The actions gave rise to similar legal issues. The issues were:

1. Do the superior courts of the provinces have jurisdiction over maritime fatal accident claims or are such claims within the exclusive jurisdiction of the Federal Court?;

2. When can provincial statutes of general application apply to maritime negligence claims? Specifically:

    a. Do the provisions of the Ontario Family Law Act allowing claims for loss of care, guidance and companionship by dependants (including common law spouses and siblings) apply to boating accidents?
    b. Do the provisions of the Ontario Trustee Act allowing the estate of a deceased

person to bring an action for damages apply to boating accidents?
    c. Do the provisions of the Ontario Negligence Act apply to boating accidents?

3. Is the the limitation period for fatal boating accidents one or two years?

The Supreme Court of Canada held as follows:

1. Provincial superior courts have an inherent general jurisdiction over maritime matters that can only be taken away by clear and explicit statutory language. The provisions of the Canada Shipping Act granting jurisdiction over fatal accident claims to the "Admiralty Court" (which is defined as the Federal Court) do not expressly exclude superior court jurisdiction. Therefore the superior courts have concurrent jurisdiction with the Federal Court over maritime claims.

2. The determination of whether a provincial statute is constitutionally applicable to a maritime negligence action involves a four part analysis:

    - **Step 1**: First, it must be determined whether the matter at issue is within the exclusive federal legislative competence over navigation and shipping, ie. is the subject matter under consideration so integrally connected to maritime matters so as to be legitimate Canadian Maritime Law;

    - **Step 2**: If the answer to step 1 is yes, the second step is to determine whether Canadian Maritime Law provides a counterpart to the statutory provision. If it does, Canadian Maritime Law applies;

    - **Step 3**:If there is no counterpart provided by Canadian Maritime Law, the third step is to consider whether the non-statutory Canadian Maritime Law should be altered in accordance with the principles of judicial reform established by the court, ie. to reflect the changing social, moral and economic fabric of the country. Such changes should only be incremental. Changes with complex or uncertain ramifications should be left for the legislature. Additionally, in making changes to Canadian Maritime Law the courts should consider the fabric of the broader international community of maritime states and the desirability of maintaining uniformity in maritime law;

    - **Step 4**: Finally, and only if the matter cannot be resolved through the application of steps 1 through 3, the court must determine whether the provincial statute is constitutionally applicable to a maritime claim. The Supreme Court noted that matters within exclusive federal jurisdiction are subject to provincial statutes of general application **provided** the provincial laws do not go to the core of the federal jurisdiction. If they do, they will be read down. The Court held that Maritime negligence law is a core element of federal jurisdiction over maritime law and that it would therefore be constitutionally impermissible for a provincial statute to regulate this area of law. The Court cautioned that they were not saying that no provincial statute could ever apply in any maritime context, however, the

Court was of the opinion that this would be a relatively rare occurrence.

- With respect specifically to the application of the Ontario Family Law Act to boating accidents, the Supreme Court applied the above analysis and held that Canadian Maritime Law should be reformed to allow claims by dependants for loss of guidance, care and companionship in respect of both personal injury accidents and fatal accidents. The Court further held that "dependants" should include common law spouses but not siblings. Because the Court was able to incrementally reform Canadian Maritime Law to address the issues raised it did not need to consider the constitutional applicability of the Family Law Act (step 4) except with reference to whether siblings could be plaintiffs and, on this issue, the Court held the Family Law Act should be read down so as not to apply to maritime negligence actions;

- With respect to the application of the Ontario Trustee Act, the Supreme Court also held that Canadian Maritime Law should be reformed to allow a claim by an executor of a deceased. Accordingly, the Court did not decide the constitutional applicability of the Act;

- With respect to the application of the Ontario Negligence Act, the Supreme Court noted that Canadian Maritime Law includes a general regime of apportionment of liability resulting in joint and several liability and contribution among tortfeasors. Thus, once again, having found a remedy in Canadian Maritime Law the Court did not address the constitutional question of whether the Negligence Act applied;

3. The final issue considered in the case was whether a fatal accident claim is subject to a one or two year limitation period. The issue arises because section 649 of the *Canada Shipping Act* provides that the limitation period for a fatal accident is one year whereas section 572(1), which deals with collisions, provides for a two year limitation period. The Court held that the plaintiff's claims prima facie came within section 572(1). The Court further held that the ambiguity created by the two sections must be resolved in favour of allowing the plaintiff to rely on the longer period.

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

Dreifelds v Burton

(March 6, 1998) No. C 2456 &: C24580 (Ont. C.A.)
Leave to Appeal denied October 8, 1998, [1998] S.C.C.A. No. 261 (S.C.C.)

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. Leave to appeal to the Supreme Court of Canada was denied without reasons on October 8, 1998.

(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. However, the correctness of the decision in ***Vogel v Sawbridge et.al.*** must now be viewed with some suspicion given the Supreme Court of Canada's decision in ***Ordon v Grail***.)

Expenses paid by Shareholders - Affidavit to Lead Warrant

Jean v The "Capitaine Duval",
(June 26, 1998) No.T-536-98 (F.C.T.D.)

This was an application to strike out the Statement of Claim as being outside the jurisdiction of the Court. The Plaintiffs were former shareholders and officers of the Defendant. The claim was to recover various expenses paid by the Plaintiffs on behalf of the Defendant. The expenses were in relation to the construction of a vessel being built by the Defendant. The motions judge held that the Plaintiffs' claims were not maritime matters and were therefore outside the jurisdiction of the court.

In the course of his reasons the motions judge noted that an affidavit to lead warrant sworn by the Plaintiffs' solicitor had been based on double hearsay. The motions judge said that although signing such an affidavit might not be technically illegal it was most unusual and should not in normal circumstances be done.

Breach of Sale and Brokerage Agreement

Amirault v The "Prince Nova",
(May 1, 1998) No.T-521-98 (F.C.T.D.)

The issue in this matter was whether the agreement between the Plaintiff and Defendant was one of purchase and sale or a mere brokerage agreement. The court noted, without deciding, that if it was a brokerage agreement only then it might not come within the court's jurisdiction. A further issue was whether was whether the claim against the President of the corporate Defendant for interference with economic relations and inducing breach of contract

was within the court's jurisdiction. The court held that such a claim was outside of its jurisdiction. See the full summary below under "Miscellaneous - Other"

Third Party Jurisdiction

Caterpillar Overseas S.A. v The "Canmar Victory" et.al.
(August 21, 1998) No. T-1110-97 (F.C.T.D.)

This was a motion by the Third Party Defendant for an order dismissing the Third Party Claim. The main claim by the Plaintiff was for damage caused to an engine shipped in a container and carried from Chicago to Denmark via the Port of Montreal. The Defendant brought Third Party proceedings against the Third Party, an American company, who was responsible for loading the container. The Third Party challenged the jurisdiction of the Federal Court on the grounds that its services were performed in Illinois and that there was therefore not a sufficient nexus between it and the territorial jurisdiction of the court. The motions Judge held that there was a sufficient legal nexus and dismissed the motion.

Jurisdiction over Road Carriers

Garfield Container Transport Inc. v. Uniroyal Goodrich Canada Inc.,
(May 5, 1998), No.A556-94 (F.C.A.)

This was an action by a motor carrier to recover unpaid freight charges in respect of road carriage of goods. The Federal Court of Appeal held that the claim was not one "integrally connected with maritime law and, therefore, the Federal Court did not have jurisdiction.

Jurisdiction of the Federal Court over Land Lease

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.

Mortgages, Liens and Priorities

Priorities - Storage Charges

Canadian Imperial Bank of Commerce v The "Barkley Sound"
(March 4, 1999) Vancouver Reg. No.A983054 (B.C.S.C.)

This was an application to determine priorities. At issue was whether a ship repairer in

possession could claim priority over the mortgagee for storage charges and interest. The Court found that the repairer had retained possession of the vessel and that the storage charges were incurred for the purpose of protecting the repairer's interest. Under these circumstances, the Court held that such charges cannot be added to the maritime lien. On the matter of interest the Court held that the repairer was entitled to interest at 5% per annum in priority to the bank. A secondary issue in the case was whether a supplier of goods to the vessel could obtain a priority over the bank on the basis of unjust enrichment. The Court held that the supplier was a simple unsecured creditor and that he had not established any of the requirements of unjust enrichment.

Bankruptcy - Stays of Proceedings

Holt Cargo Systems Inc. v The "Brussel"
(March 12, 1999) No. A-307-97 (F.C.A)

In this matter the Appellants, the Trustee in Bankruptcy, argued that the motions judge erred in refusing to stay the proceedings before the Federal Court in order to allow the Belgian Commercial Court to dispose of the Respondent's claim in the Belgium bankruptcy proceedings. The Federal Court of Appeal dismissed the appeal. The Court held that a legitimate legal advantage would accrue to the Respondent if his claim was adjudicated in the Federal Court since it was unlikely the Belgium courts would recognise the Respondent's *in rem* claim. Further, the Court held that there was a "real and substantial connection" with Canada as that was where the ship was arrested. The Court was also critical of the Appellant's use of the Quebec Superior Court to obtain an order enjoining the Federal Court to Release the arrested ship. The Court said the Appellants should have sought the assistance of the Federal Court.

Affidavits - supplemental Affidavits

The Governor and Company of the Bank of Scotland v The "Nel"
(December 30, 1998) No. T-2416-97 (F.C.T.D.)

This was a motion by the Plaintiff for leave to rely upon documents produced by it at cross examination and for leave to file a supplementary affidavit of claim. The Prothonotary held that documents produced at the cross examination did not form part of the evidence to be used at the upcoming priorities hearings unless cross-examining counsel wished to rely upon a document and then related or explanatory documents could be relied upon by the Plaintiff. The Prothonotary further held that the Plaintiff was barred by Rule 492 from filing a supplementary affidavit.

Marshalling

The Governor and Company of the Bank of Scotland v The "Nel"
(July 2, 1998) No. T-2416-97 (F.C.T.D.)

This was motion by *in rem* creditors of the Defendant vessel to compel production from the

Plaintiff mortgagee of various documents relating to the financing of the Defendant ship and of a sistership. In the course of his reasons the Prothonotary considered at length the doctrine of marshalling and whether it could apply to the benefit of *in rem* creditors. The Prothonotary held that notwithstanding some Canadian case law to the contrary, unsecured creditors, and particularly *in rem* creditors could benefit from marshalling. (Note: The application of the doctrine of marshalling forces a secured creditor with two funds or securities, one of which other claimants have a claim against, to exhaust his rights against the fund or security that the other claimants have no access to before proceeding against the "shared" fund or security.)

Priorities - Master's Disbursements

Doris v The "Ferdinand",
(September 23, 1998) No.T-1416-98 (F.C.T.D.)

The Plaintiff was the C.E.O. of a company that in turn owned 12 other companies each of which owned one ship. The ships were floating homes. The Plaintiff alleged that as Master of the ships he disbursed funds for the payment of maintenance expenses. The Plaintiff claimed a maritime lien for Master's disbursements in respect of such payments. The Plaintiff's claim was disallowed. The Court held that the payments by the Plaintiff were for operating expenses of the company (primarily for principal and interest payments on loans) and not for necessaries. Further, the Court held the payments were not made by the Plaintiff in the capacity of Master but in his capacity as a shareholder. Finally, The Court held that a critical element of a Master's disbursement is the Master's inability to communicate with owners and that such element was totally missing in this case.

Priorities - Classification and Survey Fees

Fraser Shipyard and Industrial Centre v The 'Atlantis Two",
(August 4, 1998) No.T-111-98 (F.C.T.D.)

This was an application by Lloyd's for an order that it be given priority for amounts due to it for classification services rendered to the "Atlantis Two" in 1997 and 1998. At the time of the motion the "Atlantis Two" had been ordered to be sold *pendente lite*. The Acting Marshall had requested that Lloyd's make it books and records available to potential purchasers. Lloyd's refused to do so or to provide further classification services unless the Acting Marshall agreed to pay its outstanding account in full. The Acting Marshall declined to pay the outstanding account and the matter came before the court on the motion by Lloyd's. At the initial hearing of the motion the Prothonotray urged the parties to attempt to reach a settlement of the dispute. The parties were, in fact, able to achieve a settlement which was ultimately included in an Order. The settlement was that Lloyd's would make its records available but reserved the right to claim priority for its fees. Notwithstanding the settlement, the Prothonotary issued reasons in which he commented that Lloyd's came to the court with "unclean hands" and that, under the circumstances, it would have been premature and improper to have granted Lloyd's immediate priority. The Prothonotary further commented that the English practice of having the Marshall recommend payment of classification society fees at the conclusion of the sale (provided there has been an enhanced sale price as a result

of the classification societies cooperation) was a sensible and workable practice.

Taxation of Marshall's Costs

Logunov et.al v The "Sheduva",
(April 24, 1998), No.T-2514-96 (F.C.T.D.).

This was an application by the Plaintiffs, the officers and crew of the Defendant ship, to review the taxing of the Marshall's costs. The Taxing Officer had awarded the Marshall in excess of $7,000.00 for his services. The Court reduced the award to slightly in excess of $2,000.00 noting that the Marshall had done the minimum amount of work and that much of his work had been done by the Plaintiffs.

Container storage charges as Marshall's expenses

Holt Cargo Systems Inc. v. The "Brussel" et.al.,
(December 3, 1998) No. A-384-97 (F.C.A.)

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 motions judge 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. On appeal, the Federal Court of Appeal said they could not find fault with the order of the motions judge and dismissed the appeal.

Payment of Proceeds Pendente Lite

The Governor and Company of the Bank of Scotland v The "Nel",
(February 5, 1998), No.T-2416-97 (F.C.T.D.).

This was an application by the Plaintiff mortgagee for payment out of Court of part of the proceeds from the sale of the Defendant vessel. The Prothonotary noted that there has been a practice to pay out, from sale proceeds, funds which are clearly in excess of the amount needed to satisfy the claims against the vessel provided full disclosure is made of other claimants and all claims are before the Court. The Court was satisfied that more than sufficient funds would be left in Court after the payment out and that all claimants had had an opportunity to lodge claims. The Court therefore ordered that the excess funds could be paid out upon the undertaking of the Plaintiff to repay any portion of the advance should it later be determined the advance was excessive to the prejudice of the other claimants.

Salvage and Wrecks

Salvage

Cox v The "Trade Up",
(February 20, 1998), No.T-466-95 (F.C.T.D.).

This was a reference to determine a salvage award. The Plaintiff successfully salvaged the Defendant vessel which had been stranded on rocks. The salvor had retained two other vessels to assist him in the salvage and paid the owners of those vessels what the court considered "overgenerous" amounts. The Court noted that salvage awards "are intended to award a person who comes to the aid of a vessel in distress, and to reward that person handsomely so as to encourage persons to render aid in the future. Salvage awards are not intended to provide a living for the maritime community of the area in which salvage takes place." The Court ultimately awarded the Plaintiff $15,000.00 being 1.5 times the actual and prospective out of pocket expenses of the Plaintiff.

Arbitration/Jurisdiction Clauses

Stay of Proceedings - Jurisdiction Clause

Mitsui & Co. v The "Evelyn"
(May 28, 1998) Vancouver Registry No C976626 (B.C.S.C.)

This was an application to stay proceedings in British Columbia in favour of Japan. The action was for damage to a cargo of coils shipped from Japan to British Columbia. The Defendants relied upon a jurisdiction clause in the bills of lading selecting the Tokyo District Court as the appropriate forum. The motions judge followed well established case law to the effect that such clauses will be enforced unless the Plaintiff can show "strong cause" to override the agreement. The motions judge held that the Plaintiff had not shown "strong cause" for not enforcing the jurisdiction clause. The factors that the motions judge thought were persuasive were: that the contract was subject to Japanese law; that the shipper was a Japanese company; that the evidence of pre-shipment damage was in Japan; and that the Defendant had agreed to waive any time bar.

Stay of Proceedings - Arbitration Clause

Fibreco Pulp Inc. et.al v Star Shipping A/S et.al.
(October 20, 1998) No. T-2178-96 (F.C.T.D.)

This was an appeal from the order of the Prothonotary in which the Prothonotary order that the action be stayed not only against parties to an arbitration agreement but also against Defendants not parties to the agreement. The 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 Prothonotary held that pursuant to the Commercial Arbitration Act he had no alternative but to grant a stay of proceedings against Star Shipping. The Prothonotary 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 Prothonotary 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 Prothonotary 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 Prothonotary granted the motion and ordered that the *In Rem* proceeding be struck and that the security be returned.

On appeal, the appeal Judge noted that the Prothonotary's reasons were detailed and sound. In result, the appeal was dismissed.

Stay of Proceedings - Jurisdiction Clauses - Carriage of Goods - Identity of Carrier

Jian Sheng Co. Ltd. v The "Trans Aspiration,
(April 14, 1998), No.A-442-97 (F.C.A.),
Leave to Appeal denied December 10, 1998, [1998] S.C.C.A. No. 287.

The issue in this appeal was whether a jurisdiction clause in a bill of lading requiring that any dispute "be decided in the country where the carrier has his principal place of business" was void for uncertainty. At first instance 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, the appeal Judge held that the carrier was clearly the owner and therefore there was no uncertainty. On further appeal to the Court of Appeal the Court held that where the bill of lading is signed for or on behalf of the Master it is a shipowner's bill and the shipowner is prima facie the carrier. The Court expressly rejected the notion that both the charterer and owner could be a carrier. Nevertheless, the Court did not order a stay of proceedings. The Court went on to find that the Defendant had not led sufficient evidence as to the location of its "principal place of

business". The Court noted that the test was a demanding one requiring the Defendant to come forward with as much information as possible. The Defendant had not led sufficient evidence on this point and the Court therefore held that the jurisdiction clause was inapplicable.

Leave to appeal this decision was denied without reasons on December 10, 1998.

Stay of Proceedings - Letters of Undertaking

Methanex New Zealand v Fontaine Navigation S.A.
(January 9, 1998) No. T-2655-95 (F.C.T.D.)

This was an application for a stay of proceedings on the grounds of an arbitration clause in a contract of affreightment and a jurisdiction clause in the bill of lading. The Plaintiff resisted the application on various grounds including that the Defendants, through their solicitors, had given a letter of undertaking. The letter of undertaking provided that, in consideration of the Plaintiff refraining from arresting the Defendant vessel, the Defendants undertook to instruct named solicitors to accept service of the Statement of Claim and to file a Statement of Defence. The letter further provided that it was "without prejudice as to any rights or defences which the owners or vessel may have, non of which is to be regarded as waived". The Court held that the letter of undertaking superseded the arbitration and jurisdiction clauses with the result that the stay was refused. In addition, with respect to the jurisdiction clause, the Court felt there were strong reasons to exercise its discretion against a stay. These reasons included: that under Japanese law only the owner would be a carrier; that a stay would result in duplicitous proceedings, a strong grounds for refusing a stay; that the security provided by the letter of undertaking applied only to a judgement of the Federal Court of Canada and the Defendant had not offered to post alternate security, a strong reason to deny a stay; and that the Defendant did not waive any time bar defence it might have.

Personal Injury

Burden of Proof - Limitation Period

Ferguson v Arctic Transportation Ltd.,
(May 8, 1998) No.T-1941-93 (F.C.T.D.)

This was an action for damages for personal injury. The Plaintiff was a Panama Canal Pilot. At the time of the accident he was one of three Pilots on board the barge "AMT Transporter",ex the "Arctic Tarsiut", when she was transiting the Panama Canal. He was injured when an emergency tow line secured to the sides of the barge apparently became snagged, whipped up and hit him. The Plaintiff alleged that the Defendants were negligent and the barge was unseaworthy in that the emergency tow line had been improperly secured. The trial judge, however, dismissed the Plaintiff's claim. She found that the barge had been prepared for transit through the canal by a reputable contractor, that the Panama Canal Commission had approved the method of securing the tow line and that the Panama Canal

Commission inspectors had inspected the work after it was done. The trial judge further noted that at the time of the accident the barge was under the exclusive control of Panama Canal Commission employees. Accordingly, the trial judge found that the Plaintiff had failed to prove negligence or unseaworthiness.

A second issue in the case concerned the applicable limitation period. The Defendant argued that the matter was governed by Panamanian law which provided for a one year limitation period. The Plaintiff argued that the matter was governed by section 275 of the Canada Shipping Act which provides that in the absence of a limitation period in the act itself the case should be governed by the law of the Port of registry (ie. Canada). The trial judge held that section 275 applied only to seamen working on Canadian ships and that it had no application to an accident involving a foreign pilot in foreign waters. Consequently, she found that the action was time barred.

Charterparties

Option to Purchase - Substantial Performance

Sail Labrador ltd. v The "Challenge One"
(February 4, 1999) No. 26083 (S.C.C.)

This was an appeal from the Federal Court of Appeal. The Appellant/Plaintiff had entered into a 5 year charterparty with the Respondent/Defendant. The terms of the charterparty included an option to purchase the vessel at the end of the five year term subject to "full performance' of its obligations under the charterparty. Clause 10 of the charterparty specified an annual payment and clause 11 provided that the annual payment was to be paid in seven monthly instalments. The practice of the parties was for the Plaintiff to provide the Defendant with seven post dated cheques at the beginning of each year. Due to an error by the Plaintiff's bank, the first cheque for the fifth year was returned insufficient funds. The Defendant then wrote to the Plaintiff advising that the option to purchase was void. The Plaintiff immediately rectified the non-payment and all subsequent payments were made on time. Pursuant to clause 25 of the charterparty, the Defendant also requested that the Plaintiff provide it will all of the log books for the vessel. The Plaintiff failed to do so. At the conclusion of the charter term, the Plaintiff attempted to exercise the option to purchase but the Defendant took the position that the option was void because of the late payment and the failure to provide the log books.

At trial, the trial judge held that the Plaintiff had substantially performed its obligations under the charterparty and was entitled to exercise the option to purchase. On appeal, the Federal Court of Appeal held that a party exercising an option to purchase must strictly comply with the conditions of the option and that as the Plaintiff had not done so it was not entitled to exercise the option. On further appeal, the Supreme Court of Canada held that the option to purchase was part of a bilateral agreement between the parties comprising both the charter and the option. As a bi-lateral contract the doctrine of substantial compliance was applicable and the Court found that there had been substantial compliance by the Plaintiff. Further, the

Court held that the words used in the option were not precise enough to make time of the essence of the contract. On the issue of the Plaintiff's failure to provide the log books the Court noted that pursuant to section 26 of the Canada Shipping Act the log books must remain on the vessel. Therefore, the Court held that all the Plaintiff was required to do was to make the logs available for inspection on the vessel. In result, the appeal was allowed.

Brokerage Fee

Spellacy v. Marine Management Inc.,
(February 4, 1998), No.4141, (Nfld. S.C.)

The issue in this case was the brokerage fee to which the Plaintiff was entitled. The Plaintiff had negotiated a two year charter of a tug at $1,100.00 per day with an option to purchase for $900,000.00. The option to purchase was exercised. The Plaintiff argued that he was entitled to a 5% commission on the basis that he was acting for both parties to the transaction and, pursuant to industry practice, was therefore entitled to a double fee.The Court held, however, that he acted only for the owner of the tug and was therefore only entitled to a fee of 2.5% of the sum of the total charter payments and the purchase price.

Other

Wharfage

Robin Maritime Inc. v chemarketing Industries
(October 16, 1998) No.T-820-95 (F.C.T.D.)

This was an action for wharfage dues. The Plaintiff, an agent for the vessel owner, paid wharfage dues to the Port of Montreal and sought reimbursement from the Defendant, the charterer of the vessel and consignee of the cargo. The Plaintiff claimed that it either paid the charges as agent for the Defendant or that it was entitled to be reimbursed pursuant to the terms of the charterparty between the Defendant and vessel owners. The Court held that the Plaintiff acted only as agent for the vessel owner and had never been appointed as agent for the Defendant. Further, the Court held that the claim for wharfage was made out of time as the terms of the charterparty required that any claims against the charterers be presented within 90 days of discharge. An alternate claim based on unjust enrichment was also dismissed.

Marine Navigation Fees

Canadian Shipowners Assoc. v Canada
(September 17, 1998) No.A-535-97 (F.C.A.)

This was an appeal of a decision of the Trial Division in which the trial judge upheld the validity of the Marine Navigation Service Fees Regulations passed pursuant to the Financial Administration Act. The regulations provide for the payment of fees by commercial shipping, domestic and foreign, for marine navigation services provided by Canadian Coast Guard. The

regulations were imposed as part of a policy of cost recovery instituted by the Government of Canada. The applicants argued that the regulations were not authorized by the Financial Administration Act, were discriminatory and were, in essence, a tax on commercial shipping. The trial judge, however, held that the regulations were made for valid reasons and in good faith and that the enabling statute impliedly authorized the creation of classes of users and the power to include or exclude certain types of ships from the payment of fees. The trial judge further held that the fees were not a tax and noted that the fees collected would not exceed the cost of providing the services. On appeal, the Court of Appeal in a short judgement indicated their approval of the reasons of the trial judge and dismissed the appeal.

Crown Liability - Closure of Seaway

CSL Group Inc. v Canada,
(July 3, 1998) No.A-1016-96 (F.C.A.),
Leave to Appeal denied February 11, 1999, [1998] S.C.C.A. No. 420 (S.C.C.).

This matter was 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. Because of the strike ice breakers were not in service and the summer buoys were not removed. This resulted in restrictions on navigation being imposed including closure of sections of the river. Prior to the commencement of the strike, the Crown had the right to designate employees as necessary for the security of the public and if so designated those employees would have been required to perform their duties regardless of the strike. The Crown, in fact, had intended to designate Coast Guard crews but the designation was made out of time and was disallowed.The Plaintiff argued that the Crown's failure to designate the Coast Guard crews was negligent. At trial, the Court dismissed the Plaintiff's action. The trial judge held that the Crown had no obligation to designate employees for the purpose of preventing inconvenience or economic hardship and that the Crown employees who neglected to designate the relevant employees in a timely manner also owed no duty to the Plaintiff. On appeal, the Court of Appeal agreed with the trial judge that there was no duty owed. The Court of Appeal noted that the decision of the Crown as to whether to designate any employees was a policy decision and that a failure to designate was therefore not actionable.Leave to appeal to the Supreme Court of Canada was denied without reasons on February 11, 1999.

Breach of Sale and Brokerage Agreement

Amirault v The "Prince Nova",
(May 1, 1998) No.T-521-98 (F.C.T.D.)

This was a motion to strike the Statement of Claim as being outside the jurisdiction of the court. The Plaintiff, a ship broker, alleged that it had entered into an an option to the "Prince Nova" with the corporate Defendant. the owner of the "Prince Nova". The alleged terms of the option were that it was to be exercised only after the Plaintiff found a buyer for resale and that the Plaintiff was to be paid a 5% commission on the initial sale price. The Plaintiff alleged that it had found a buyer who was willing to purchase the ship for US$1.85 million

but that the Defendant entered into direct negotiations with the purchaser and ultimately sold the ship for US$1.4 million. The Plaintiff further alleged that the President of the Defendant had wrongly interfered with their economic relations by inducing the Defendant corporation to breach its contract with the Plaintiff. The Defendants admitted that the corporate Defendant had entered into a non-exclusive brokerage agreement with the Plaintiff with a 5% commission. The corporate Defendant further admitted it had given the Plaintiff an option to purchase but alleged that the option to purchase had expired.

The Defendants brought this motion to strike the Statement of Claim on the basis that it was outside the court's jurisdiction. The motions judge noted, without deciding, that if the agreement was a mere brokerage agreement it might not fall within the court's jurisdiction. However, if the agreement was one relating to the sale of a ship, it would fall within the court's jurisdiction. Given the pleadings and the contradictory affidavits, the motions judge was not able to decide the true nature of the agreement and therefore dismissed the motion by the corporate Defendant. The motions judge did, however, allow the motion by the President of the corporate Defendant. The motions judge held that the claim against him was one in tort and was outside the jurisdiction of the court.

Breach of Contract of Sale - Specific Performance - Setting Aside Arrest

Gleason v. The "Dawn Light" et.al.,
(January 29, 1998), No. A-438-97 (F.C.A.).

This was a summary judgement 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. The motions Judge held the evidence did not show the vessel was unique or irreplaceable and further held that the fact the vessel had been sold to a bona fide purchaser for value without notice was a strong discretionary reason not to grant specific performance. With respect to the application to set aside the arrest of the vessel, the Motions Judge held that the arrest could not be set aside as the Plaintiff still had a claim in damages for breach of contract. On appeal, the Court of Appeal held that the arrest ought to be set aside because the effect of the sale to a bona fide purchaser for value was that the vessel could not be used to satisfy any potential award of damages.