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## Developments in Canadian Maritime Law

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NOTE: All of the summaries contained in this paper are from Admiraltylaw.com. Readers are advised to consult Admiraltylaw.com for updates and recent developments.

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## Synopsis of Developments

### *Admiralty Practice*

Practice cases of interest are: *Re: Bernard LLP*, 2015 BCSC 2382, where a law firm was entitled to interplead disputed funds notwithstanding that the Federal Court had ordered the funds be paid to one of the claimants; *Avina v. Sea Senior (Ship)*, 2016 BCSC 749, where the British Columbia Supreme Court refused an application to set aside an arrest under its rules but also refused an application to sell the arrested vessel *pendent lite*; *Leo Ocean S.A. v Westshore Terminals Limited Partnership*, 2015 FCA 282, where the Federal Court of Appeal held that there was sufficient evidence to determine if the claim was one of pure economic loss and referred the matter back to the trial division for a decision; *Roots v HMCS Annapolis*, 2015 FC 1339, where an action was dismissed for delay and for failure to comply with court orders; *LF Centennial Pte. Ltd. v. TRLU7228664 et al. (Containers)*, 2015 FC 214, where it was held that an *in rem* plaintiff has no right to commence proceedings and arrest in Federal Court when there are ongoing insolvency proceedings in a provincial superior court and an outstanding order under the *Bankruptcy and Insolvency Act* staying all proceedings; *Fingad Shipping Ltd. v. Ningbo Arts & Crafts Imp. & Exp. Co. Ltd.*, 2015 FC 851, where the court applied issue estoppel and struck an *in rem* action on the grounds that a French court had previously determined the owner at the time of the commencement of the action was not the same as at the time the cause of action arose; and *Allchem Industries Industrial v. CMA CGM Florida (Vessel)*, 2015 FC 558, where the court held that service of a statement of claim on a freight forwarder, who sometimes acted as agent for the defendant and who was identified as an agent on the defendant's website, was valid service.

### *Jurisdiction/Canadian Maritime Law*

Notable cases include: *Marcoux v. St-Charles-de-Bellechasse (Municipalité de)*, 2015 CanLII 59742, where the Quebec Superior Court held a municipal by-law restricting the use of watercraft on provincial lakes to be invalid and not saved by the ancillary powers doctrine; *West Kelowna (District) v. Newcombe*, 2015 BCCA 5, where the British Columbia Court of Appeal affirmed the decision of the trial Judge (2013 BCSC 1411) that anchoring/mooring was a core element of Federal jurisdiction over navigation and shipping and that a municipal by-law prohibiting mooring was constitutionally inapplicable, pursuant to the doctrine of interjurisdictional immunity, to the extent it prohibited temporary moorage; *Aquavita International S.A. v. M/V Pantelis (Ship)*, 2015 FC 180, where the Federal Court held that it had jurisdiction over a claim by a sub-charterer for excessive bunkers on board the ship when re-delivered at the conclusion of the sub-charter; and *Demers v. Marine Atlantic Inc.*, 2015 QCCQ 1793, where a Quebec Small Claims Court surprisingly held that the Federal Court had no jurisdiction over a claim involving an inter-provincial passenger ferry ticket.

### *Carriage of Goods*

The cases of interest concerning carriage of goods were: *AGF Steel Inc. v Miller Shipping Limited*, 2016 FC 461; where the Federal Court held that a transportation services contract was a charterparty and not subject to the Hague-Visby rules; *St. Paul Fire & Marine Insurance Company v. Vallée*, 2015 QCCQ 1891, where the Court of Quebec held that a contract to deliver a yacht by sailing it to the destination was a services contract and not a contract of carriage;

*Asia Ocean Services, Inc. (UPS Asia Group Pte Ltd) v. Belair Fabrication Ltd*, 2015 FC 1141, where the shipper was required to pay dead freight pursuant to the terms of a booking note; and *Canadian Pacific Railway Company v. Canexus Chemicals Canada LP*, 2015 FCA 283, where the Federal Court of Appeal held that s. 137 of the *Canada Transportation Act* prohibits rail carriers from contracting out of liabilities using hold harmless and indemnity clauses.

### *Collisions*

The sole collision case is *Turcotte v Dufour*, 2015 QCCZ 1914, where the Quebec Superior Court held that one vessel was 100% at fault for a collision between two pleasure craft.

### *Limitation of Liability*

The Federal Court addressed limitation of liability in two separate decisions relating to the same matter, *J.D. Irving Limited v. Siemens Canada Limited*. In the first decision, reported at 2016 FC 69, the court confirmed the right of the ship charterer to limit its liability but in the second decision, reported at 2016 FC 287, it was held that this right did not extend to subcontractors of the charterer.

### *Marine Insurance*

The marine insurance cases are: *Langlois v. Great American Insurance Company*, 2015 QCCS 791, where the Quebec Superior Court held that there was a right of direct action against the insurer of a ship repair yard under the provisions of the *Civil Code*; *Haryett v. Lloyd's Canada*, 2015 ONSC 853, where the Ontario Superior Court held that a liability insurer (1) had no duty to defend its insured where the policy had no such contractual obligation and (2) had no duty to indemnify because the insured was driving the vessel under the influence of alcohol and therefore illegally; and *C.H. Robinson Worldwide v. Northbridge Insurance*, 2015 ONSC 232, where a misrepresentation by an insured voided the policy of insurance and was a defence to a direct action pursuant to s. 132(1) of the *Insurance Act* of Ontario.

### *Liens, Mortgages and Priorities*

The cases dealing with liens, mortgages and priorities are: *Ballantrae Holdings Inc. v. The Ship "Phoenix Sun"*, 2016 FC 570, where the Federal Court addressed numerous competing priorities and issues including equitable re-assignment of priorities and the effect of a provincial PPSA charge; *National Bank of Canada v. Rogers*, 2015 FC 1207, where the bank/mortgagee was granted summary judgment upon default of the debtor in advance of the sale of the ship; *Offshore Interiors Inc. v. Worldspan Marine Inc.*, 2015 FCA 46, where the Federal Court of Appeal dismissed an appeal and confirmed the trial judgment holding that a builder's mortgage secured advances made by the purchaser and that the builder was under an obligation to repay those advances; and *Canpotex Shipping Services Limited v. Marine Petrobulk Ltd.*, 2015 FC 1108 where a charterer was entitled to interplead funds in satisfaction of its liabilities for bunkers purchased by it from an intermediary (OW Bunkers) who subsequently became insolvent.

### *Ship Building and Repair*

Cases involving ship building and repair are: *Platypus Marine Inc. v The Ship "Tatu"*, 2016 FC 501, where an agreement to pay an interest rate above 60% per annum was held to be invalid

but interest was allowed at 5%; *Transport Desgagnes Inc. v. Wartsila Canada Inc.*, 2015 QCCS 5514, where the Quebec Superior Court held that the sale of a marine engine was governed by provincial law and that pursuant to such law the vendor's limitation clause could not be relied on; *Forsey v. Burin Peninsula Marine Service Centre*, 2015 FCA 216, where the Federal Court of Appeal confirmed a trial judgment that refused to give effect to an exclusion clause on the grounds that it did not expressly or impliedly exclude negligence; *Capitaines Propriétaires de la Gaspésie (A.C.P.G.) Inc. v. Pêcheries Guy Laflamme Inc.*, 2015 FCA 78, where Federal Court of Appeal confirmed a trial judgment giving effect to an exclusion clause in a ship lifting contract notwithstanding that the clause did not specifically refer to negligence; and, *Ehler Marine & Industrial Service Co. v. M/V Pacific Yellowfin (Ship)*, 2015 FC 324, where a repair quote was held to be an agreed price when given in response to a request for a "reasonably accurate estimate" and "hard" numbers.

### *Personal Injury*

Personal injury case of interest include: *Ryan Estate v Canada*, 2015 NLTD(G) 90, where the court held that a joint and several tortfeasor was liable for 100% of the plaintiffs' damages even though any claim against the other tortfeasors might also be barred by workers' compensation legislation; and *Cormack v Chalmers*, 2015 ONSC 5564 where the court held a "Mary Carter" type settlement agreement with one defendant, who was entitled to limit his liability, did not change the liability of the other defendant to several from joint.

### *Miscellaneous*

Other notable cases are: *Snow Valley Marine Services Ltd. v. Seaspan Commodore (The)*, 2015 FC 304, where the sole cause of the sinking of a tug assisting with a fouled anchor was held to be the failure of the defendant to properly secure a safety line; *R v. Reinbrecht*, 2015 BCSC 1960, where the operator of a pleasure craft involved in a night time collision with a house boat was found guilty of criminal negligence; *Save Halkett Bay Marine Park Society v. Canada (Environment)*, 2015 FC 302, where an application for judicial review of a decision authorizing the sinking of a retired destroyer to create an artificial reef was dismissed for delay and also on the merits; and *Goodrich Transport Ltd. v. Vancouver Fraser Port Authority*, 2015 FC 520, where the Federal Court set aside the decisions of the Port Authority denying drayage licences to various truckers and ordered that their applications be reconsidered.

## **Admiralty Practice**

### ***Re: Bernard LLP<sup>1</sup>***

#### *Practice - Interpleader Order - Concurrent Jurisdiction*

A yacht was ordered to be sold by the Federal Court with the proceeds of sale to be deposited into the trust account of the petitioner. Before the vessel was sold, CCAA proceedings were commenced in the British Columbia Supreme Court. In the CCAA proceedings an order was made appointing a "Vessel Construction Officer" and authorizing that officer to borrow funds to

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<sup>1</sup> 2015 BCSC 2382

prepare a plan to complete the construction of the yacht. The “Vessel Construction Officer” borrowed \$144,000 from an interested party, Sargeant, to perform this task. The Federal Court granted a first charge on the vessel for these borrowed funds. Sargeant then assigned his interest in the charge to BHT and brought an application in Federal Court to pay out the funds. That application was contested on the grounds that the assignment was fraudulent. The Federal Court ordered the funds to be paid to Sargeant. Sargeant then appealed on the grounds that the funds should have been made payable to BHT but did not obtain a stay of the order pending appeal. The petitioner then brought an application in the British Columbia Supreme Court for the right to interplead the funds and was granted such an order. Sargeant appealed.

**Decision:** Appeal dismissed.

**Held:** The central complaint is that this court should not make an interpleader order when there is an order of the Federal Court which has determined who is entitled to the funds. However, the Federal Court itself recognizes that it has limited jurisdiction to address the fraudulent allegations regarding the assignment and has further recognized that this court has jurisdiction to hear the interpleader application. The Federal Court order is not a final determination of who is entitled to the funds in these circumstances. This is a proper case for an interpleader order.

### ***Avina v. Sea Senor (Ship)***<sup>2</sup>

#### *B.C. Admiralty Rules – Arrest – Sale – Shareholder’s Dispute*

The plaintiff and defendant purchased a vessel together through a company incorporated by the defendant and of which the defendant was the sole director. Differences arose between the parties leading to the plaintiff’s commencement of this action and the arrest of the vessel. The plaintiff now moves to sell the vessel under arrest. The defendant opposes the plaintiff’s motion and brings its own application to set aside the arrest and for a declaration that it may seize and sell the vessel pursuant to the provisions of the *Personal Property Security Act* of British Columbia.

**Decision:** Both motions are dismissed.

**Held:** The defendant argues that the arrest of the vessel should be set aside on the grounds that the dispute between the parties is a shareholder’s dispute and that there is accordingly no basis for the exercise of the court’s maritime law jurisdiction. However, Rule 21-2 of the Supreme Court Civil Rules provides that an action *in rem* may be brought whenever permitted in the Federal Court of Canada. The claim is “with respect to title, possession or ownership of a ship or any part interest therein” within the meaning of s.22(2)(a) of the *Federal Courts Act* and is therefore rooted in Canadian maritime law.

With respect to the defendant’s motion to sell the vessel pursuant to the PPSA, there are critical facts in dispute that must be resolved before this issue can be addressed.

Concerning the plaintiff’s application for sale, the plaintiff argues that the vessel is deteriorating

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<sup>2</sup> 2016 BCSC 749

and a sale is necessary to halt the deterioration in value. However, the defendant's evidence that the vessel is not seriously deteriorating is more convincing and the value of the plaintiff's claim is modest relative to the value of the vessel. Moreover, it appears the defendants have an arguable defence to the plaintiff's claims.

***Fingad Shipping Ltd. v. Ningbo Arts & Crafts Imp. & Exp. Co. Ltd.***<sup>3</sup>

*In Rem Actions - Arrest - Issue Estoppel*

The plaintiffs contracted with the defendant for the construction of several vessels, including the defendant vessel, "Chemical Aquarius". The contracts were subsequently cancelled and arbitral proceedings were held. In 2012 the "Chemical Aquarius" was sold by the corporate defendants. In 2013 the plaintiffs obtained arbitral awards against the corporate defendants, substantial portions of which were outstanding. In April 2015 the plaintiffs commenced a proceeding in France to enforce the arbitral awards and had the "Chemical Aquarius" arrested. On 7 May 2015 the French court lifted the arrest of the vessel. On 3 July 2015 the plaintiffs commenced this action in the Federal Court for the amounts outstanding and again arrested the "Chemical Aquarius". The plaintiffs also commenced a separate application in the Federal Court for recognition and enforcement of the arbitral awards. The defendants then brought this application to strike the statement of claim or, alternatively, to set aside the arrest.

**Decision:** Application granted. The statement of claim is struck.

**Held:** To succeed in this application the defendants must show it is "plain and obvious" the statement of claim has no merit. The burden is high and the court should only strike a pleading in the clearest of cases. The facts pleaded are to be taken as true but the legal conclusions that are alleged to flow from such facts are not entitled to the same presumption. The defendants argue that the owner of the "Chemical Aquarius" at the time this action was commenced was different from the owner at the time of the events giving rise to the action and, therefore, there is no right of action *in rem*. In particular, the defendants argue that this issue was determined by the French court in a decision that gives rise to issue estoppel. The three pre-conditions for issue estoppel are: (1) the same question has been decided; (2) the judicial decision that creates the estoppel is final; and (3) the parties are the same in both actions. Conditions 2 and 3 are not disputed and the only condition at issue here is whether the French court decided the same issue. Although the French court was dealing with the *1952 Arrest Convention*, the central issue in that decision was the same as the central issue in the present motion, namely, whether the ownership of the "Chemical Aquarius" had changed. The French court held the vessel could not be arrested because of the change in ownership. The issue was considered in full and the decision was final. The plaintiffs now say they have new evidence that was not considered by the French court. To allow new evidence would "permit parties to gut issue estoppel of any substantial meaning". Accordingly, the conditions for issue estoppel are satisfied.

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<sup>3</sup> 2015 FC 851

***Leo Ocean S.A. v Westshore Terminals Limited Partnership***<sup>4</sup>***Summary Judgment - Sufficiency of Evidence - Damages - Pure Economic Loss***

On 7 December 2012 the “Cape Apricot” collided with and destroyed part of the trestle holding the conveyor system at the terminal leased and operated by the plaintiff. As a consequence, terminal operations were shut down for a period of time. The plaintiff commenced proceedings and arrested the vessel. The owner of the “Cape Apricot” subsequently brought limitation proceedings and the Federal Court ordered that all claims against the limitation fund were to be filed by 8 November 2013. A claim was filed by the Vancouver Fraser Port Authority, the owner and lessor of the lands on which the terminal was constructed. It claimed that as a consequence of the temporary shutdown of the terminal it suffered losses in excess of \$1 million. The Port Authority’s claim was premised on the terms of a lease between it and the plaintiff whereby it received “participation rent” based on the tonnage shipped through the terminal. The plaintiff, with the support of the defendant ship owner, brought this summary trial application for an order dismissing the claim of the Port Authority on the basis that it was a claim for pure economic loss and not recoverable.

At first instance<sup>5</sup>, the motions Judge refused to dispose of the matter by way of summary trial. She noted that as a general rule there is a bar against recovery of pure economic loss but that there were exceptions to the rule, notably: (1) where the claimant has a proprietary or possessory interest in the damaged property, (2) maritime general average cases, and (3) cases of a joint or common venture. She was not convinced that the Port Authority did not have a proprietary or possessory interest under the lease and specifically considered it arguable that the Port Authority had a proprietary or possessory interest in the trestle. She therefore held that there was a genuine issue as to whether the Port Authority had a sufficient proprietary or possessory interest and dismissed the motion for summary trial. The plaintiff and ship owner appealed.

**Decision:** Appeal allowed.

**Held:** It is clear that the decision of the motions Judge was not based on credibility. The principal issue to be decided was whether the Port Authority had a proprietary or possessory interest in the property damaged and, once that issue was decided, whether the claim fell within one of the exceptions to the rule against recovery of economic loss. These issues depended on the construction of the lease. The parties agree that credibility is not an issue and further agree that additional discovery will not lead to additional evidence relevant to the interpretation of the lease. As set out in *Teva Canada Ltd. v. Wyeth LLC*<sup>6</sup>, summary judgment is appropriate when: the issues are well defined; the facts necessary to resolve the issues are already in the evidence; the evidence is not controversial and there are no issues of credibility; and the questions of law, although far from simple, can be dealt with as easily now as after a full trial. This test is met in this case. The motions Judge was in error in failing to decide the matter by way of summary trial. The matter is to be returned to the Federal Court for

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<sup>4</sup> 2015 FCA 282

<sup>5</sup> 2015 FC 130

<sup>6</sup> 2011 FC 1169

determination of the issues.

### ***LF Centennial Pte. Ltd. v. TRLU7228664 et al (Containers)***<sup>7</sup>

#### ***Arrest of Cargo by Unpaid Seller Set Aside - Insolvency of Buyer - s. 69 Bankruptcy Act Stays - Jurisdiction of Federal Court***

The plaintiff is a buying agent on behalf of garment retailers and had acted as buying agent for Mexx. In December 2014 Mexx became insolvent. A stay of proceeding under the *Bankruptcy and Insolvency Act* was put in place and various insolvency related orders were made by the Quebec superior court. On 23 December 2014 the plaintiff commenced this *in rem* proceeding against various shipments and had the cargo arrested. The plaintiff did not obtain leave from the Quebec superior court before commencing the proceeding. The plaintiff alleged it was an unpaid seller exercising its right of stoppage in transit. Mexx and its receiver brought this application to quash the arrest and strike the statement of claim.

At first instance, the Prothonotary held the plaintiff had no right to bring this proceeding without first obtaining leave from the Quebec superior court. In reaching this conclusion the Prothonotary distinguished *Holt Cargo Systems Inc v ABC Containerline NV (Trustees of)*<sup>8</sup> on the basis that in *Holt* the ship had been arrested and sold before the bankruptcy proceedings had been commenced. The plaintiff appealed.

**Decision:** Appeal dismissed.

**Held:** Section 188(2) of the *Bankruptcy and Insolvency Act* is prescriptive and mandatory. It requires all courts to act in aid of the bankruptcy/insolvency court. The Prothonotary had no discretion and was bound to come to the aid of the superior court to ensure the stay was respected. The plaintiff did not obtain leave before commencing this proceeding and the proceeding is therefore ineffective. The Prothonotary correctly distinguished the Supreme Court's decision in *Holt* as nowhere in that decision is there a consideration of the s. 69 stay of proceedings. A more fundamental distinction between this case and *Holt* is that *Holt* concerned bankruptcy proceedings and secured creditors whereas this matter concerns insolvency proceedings. In bankruptcy proceedings secured creditors are not affected by the stay of proceedings but the stay does apply to secured creditors in insolvency proceedings. Additionally, the plaintiff's claim flows exclusively from a commercial contract of sale with no maritime component. The mere fact the garments were carried on a ship does not establish a sufficient connection to make it subject to maritime law. The underlying claim does not relate to shipping and navigation and does not fall within the court's admiralty jurisdiction.

### ***Roots v HMCS Annapolis***<sup>9</sup>

#### ***Practice - Dismissal for Delay - Status Review***

This action arose out of a project to decommission and sink the "HMCS Annapolis" as an

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<sup>7</sup> 2015 FC 214

<sup>8</sup> 2001 SCC 90

<sup>9</sup> 2015 FC 1339



artificial reef. The plaintiff was one of the subcontractors engaged to assist with the project. The plaintiff commenced this action, and arrested the vessel, on 24 April 2013. A Statement of Defence and Counterclaim was filed on 10 June 2013. On 28 October 2014 a motion to release the vessel from arrest was granted and the plaintiff was ordered to pay \$10,000 in costs on the basis that the plaintiff had been “highly adversarial”. On 6 February 2015 the plaintiff was again ordered to pay costs in the amount of \$2,500 on the basis that he had been “highly adversarial” and increased costs unnecessarily. On 21 July 2015 the Court issued a Direction requiring the plaintiff to file a status report and provide a proposed timetable by 8 September 2015. The plaintiff failed to comply with the Direction. On 15 September 2015 the Court asked the plaintiff to provide dates for a case management conference. The plaintiff failed to comply with the request. On 21 September 2015 at a case management conference scheduled by the Court the plaintiff undertook to comply with the Direction dated 21 July 2015 by 7 October 2015. The plaintiff failed to comply. On 14 October 2015 the Court issued an Order requiring the plaintiff to show cause, by written submissions to be filed by 9 November 2015, why the action should not be dismissed for failure to comply with the Court’s directions and for delay. The plaintiff failed to file the written submissions.

**Decision:** Action dismissed.

**Held:** A party in receipt of a notice of status review must address (1) whether there is justification for failure to move the case forward and (2) what steps the party proposes to move the case forward. In addition, any outstanding court orders or directions that have not been complied with must be addressed. Proceedings should only be dismissed in exceptional cases and where no other remedy would suffice. The focus is on the overall interests of justice. Here, the plaintiff has offered no explanation for his failure to respond to the notice of status review or for his repeated non-compliance with court orders and directions. His actions “demonstrate a continued pattern of ignoring his responsibilities to move the proceeding forward and a complete disregard of the case management process”. Dismissal of the action is “an appropriate remedy that is proportionate to the Plaintiff’s conduct”.

### ***Allchem Industries Industrial v. CMA CGM Florida (Vessel)***<sup>10</sup>

#### *Practice - Service - Whether service valid - Whether time for service can be extended*

The plaintiffs were the owners of cargo loaded on the “CMA CGM Florida”. The cargo was damaged when the vessel was involved in a collision. The plaintiffs purported to serve the statement of claim on Topocean, one of the defendants, by serving a freight forwarder. The freight forwarder sometimes acted as agent for Topocean but had not acted as such in relation to the cargo on the “CMA CGM Florida” or in relation to any services ever rendered to the plaintiffs. Topocean brought this application to set aside the service.

**Decision:** Motion dismissed.

**Held:** Given the admission of Topocean that the freight forwarder is an agent for shipments with a Canadian connection, it is clear that the forwarder carries on some integral part of Topocean’s business in Canada. The fact that the forwarder was not utilized in this capacity for

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<sup>10</sup> 2015 FC 558

this shipment is not important. Further, the forwarder considered it had a duty to bring the statement of claim to the attention of Topocean and promptly forwarded the document. Additionally, Topocean's website identifies the forwarder as an agent. "Topocean has put forward no evidence to contradict the impression created by the website's statements." Accordingly, the service is valid.

## **Admiralty Jurisdiction/Canadian Maritime Law**

### ***Marcoux v. St-Charles-de-Bellechasse (Municipalité de)*<sup>11</sup>**

#### *Constitutional Law - Validity of Municipal By-law restricting motor boats on lake*

The appellants were convicted of violating a municipal by-law that prohibited the use of certain watercraft on a lake. The appellants challenged the constitutional validity of the by-law on the grounds that it concerned navigation and shipping, a federal power. The municipality justified the by-law on the basis that it was part of a multifaceted strategy to protect the environment and was therefore valid under the ancillary powers doctrine. At first instance, the trial judge agreed with the municipality and held the by-law to be valid. The appellants appealed.

**Decision:** The appeal is allowed and the appellants are acquitted.

**Held:** The protection of the environment is a shared jurisdiction between the provinces and Federal Government and both levels of government should take a cooperative and coordinated approach to such matters. The legal analysis should be undertaken with these considerations in mind. The first part of the analysis is to identify the pith and substance, the primary purpose or dominant characteristic, of the impugned legislation. Once the matter has been classified the second step is to classify it under one of the heads of power in the Constitution Act.

The municipality admits that the pith and substance of the by-law is navigation which is within federal jurisdiction but says it is saved by the ancillary powers doctrine. The ancillary powers doctrine recognizes that a degree of jurisdictional overlap is inevitable. Under the doctrine an otherwise invalid law can be saved "where it is an important part of a broader legislative scheme that is within the jurisdiction of the enacting level of government". However, the municipality has not proven the existence of a complex regulatory scheme which would permit the application of the doctrine. Moreover, the seriousness of the intrusion of the impugned measure must be assessed relative to its degree of integration in the scheme. A serious intrusion requires a high degree of integration. The by-law here is a serious intrusion into the federal power over navigation and shipping and, if such intrusion was allowed, would have the effect of eviscerating the federal power. The by-law is therefore invalid and not saved by the ancillary powers doctrine. Additionally, the interjurisdictional immunity doctrine applies and the by-law is inapplicable. Control of navigation on lakes is at the core of the federal power over navigation. Finally, if the by-law was valid and applicable, it would deprive the federal government of its power to decide navigational restrictions under the *Vessel Operation Restriction Regulations*. This would be an operational conflict giving rise to the paramountcy

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<sup>11</sup> 2015 CanLii 59742

doctrine and rendering the by-law inoperative.

***Aquavita International S.A. v. M/V Pantelis (Ship)***<sup>12</sup>

*Charters - Excessive bunkers on Redelivery - Federal Court Jurisdiction*

The plaintiff was the sub-sub time charterer of the defendant vessel "Pantelis". The plaintiff commenced this proceeding alleging that when it re-delivered the vessel there were bunkers aboard belonging to it and that these bunkers were consumed by the defendants. The plaintiff arrested the "Pantelis". The defendants brought this motion to strike the action and set aside the arrest on the grounds that the court was without jurisdiction.

**Decision:** Motion dismissed.

**Held:** The owners argue that s. 22(2)(m) of the *Federal Courts Act* has no application as the plaintiff was not a bunker supplier. However, a claim need not fall within one of the categories in s. 22(2) to be within the court's admiralty jurisdiction. It is sufficient if a claim falls within s. 22(1) which is coextensive with Parliament's jurisdiction over navigation and shipping. What is at issue in this case "is fuel on board a ship, which fuel was allegedly used to propel her over the ocean blue. Nothing could be more maritime."

***Demers v. Marine Atlantic Inc.***<sup>13</sup>

*Claim arising from change in Ferry Service - Jurisdiction Clause - Whether the Federal Court or Provincial Courts have Jurisdiction*

The plaintiffs had purchased tickets on a ferry that was scheduled to leave from the Port of Argentia but was changed to Port aux Basques, both located in Newfoundland. The plaintiffs commenced this claim in the Quebec Small Claims Court alleging that they suffered additional expenses as a result of this change. The ticket contained a jurisdiction clause that provided the Federal Court in either Newfoundland or Nova Scotia was to have exclusive jurisdiction. The defendant sought to have the case dismissed on the basis of the jurisdiction clause.

**Decision:** Action dismissed.

**Held:** The Federal Court would not have jurisdiction to hear this dispute as the claim is based on the law of contract and there is no federal law to nourish the jurisdiction of the Federal Court. The parties cannot by agreement confer jurisdiction on the Federal Court. However, the courts of Quebec are also without jurisdiction pursuant to Art. 3148 of the Civil Code which provides the courts have no jurisdiction where the parties have agreed to refer the matter to a foreign court. The appropriate court to hear the dispute is the small claims court of either Newfoundland or Nova Scotia.

**Comment:** This decision is clearly wrongly decided. Although most of the reported cases involving carriage of passengers by sea are decisions of provincial superior courts, the law that is applied is, almost without exception, Canadian maritime law including, where applicable, the

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<sup>12</sup> 2015 FC 180

<sup>13</sup> 2015 QCCQ 1793

*Athens Convention*. Therefore, pursuant to s. 22(1) of the *Federal Courts Act*, the Federal Court would have concurrent jurisdiction. (Regrettably, as with many Quebec decisions, this decision is reported only in French and the summary is based upon a translation that may be imperfect.)

### ***West Kelowna (District) v. Newcombe***<sup>14</sup>

*Application of Municipal Bylaw prohibiting mooring - Bylaw inapplicable - Interjurisdictional Immunity - Public Right of Navigation - Right to Anchor*

The plaintiff, the District of West Kelowna, passed a bylaw in 2009 that permitted only “temporary boat moorage accessory to the use of the immediately abutting upland parcel”. The defendant/respondent, who did not own any “upland parcel”, moored his house boat in an area governed by the bylaw until he was issued a notice to relocate. He then moved his house boat to another anchorage that was also within the area governed by the bylaw. The plaintiff then brought these proceedings for an injunction against the defendant and any other person with notice of the order. The defendant challenged the constitutional validity of the bylaw.

At first instance<sup>15</sup>, the trial Judge held that, although constitutionally valid, the bylaw had to be read down so as not to prohibit temporary moorage which was within the protected core of exclusive federal constitutional jurisdiction over “navigation and shipping”. The trial Judge nevertheless held that the defendant was in breach of the bylaw as his moorage was not temporary. Both parties appealed.

**Decision:** Appeal dismissed.

**Held:** The trial Judge correctly held that the purpose and pith and substance of the impugned bylaw were to regulate land use including land use of the foreshore. “Land use” is inherently local and within the constitutional jurisdiction of a province under s. 92(13) [Property and Civil Rights] and s. 92(16) [Matters of a merely local or private Nature] of the *Constitution Act*. But the double aspect doctrine is also applicable. The trial Judge was correct in addressing “the ambit of moorage rights incidental to navigation as part of the interjurisdictional immunity analysis” and correctly read down the impugned provisions. The defendant relies upon *Ordon v Grail*<sup>16</sup> for the proposition that it is constitutionally impermissible for a validly enacted provincial statute of general application to affect matters coming within the exclusive jurisdiction of Parliament. However, *Ordon v Grail* was overturned by the Supreme Court in *Marine Services International Ltd. v. Ryan Estate*<sup>17</sup>.

**Comment:** It might not be entirely correct to say, as the Court of Appeal did, that *Ordon v Grail* was overturned by *Marine Services International Ltd. v. Ryan Estate*. Although the analysis and tests used in *Ordon v Grail* have clearly been modified by *Ryan Estate* (and *Canadian Western Bank v. Alberta*<sup>18</sup> and *British Columbia (Attorney General) v. Lafarge Canada Inc.*<sup>19</sup>) the Supreme Court of Canada has been careful not to expressly overturn the holding in *Ordon v Grail* that

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<sup>14</sup> 2015 BCCA 5

<sup>15</sup> 2013 BCSC 2299

<sup>16</sup> [1998] 3 S.C.R. 437

<sup>17</sup> 2013 SCC 44

<sup>18</sup> 2007 SCC 22

<sup>19</sup> 2007 SCC 23

maritime negligence law is subject to interjurisdictional immunity.

## Carriage of Goods

### ***AGF Steel Inc. v Miller Shipping Limited***<sup>20</sup>

#### *Carriage of Goods - Is Transportation Services Contract a Charter? - Application of Hague-Visby Rules - Agreements to insure*

The plaintiff and the defendant, Miller Shipping (“Miller”), entered into a contract for the transportation of 43,000 metric tonnes of steel rebar over 8 voyages by tug and barge. The contract was called a “Time Charter Party”, identified the plaintiff as “charterer” and referred to “Employment of the Vessel” and “Hire”. The contract contained a so called “knock for knock” clause stipulating, *inter alia*, that each party would be liable for all losses, costs, damages and expenses incurred by it on account of loss of or damage to its property. The contract also contained insurance clauses requiring the plaintiff to obtain cargo insurance and Miller to obtain Hull and Machinery insurance and protection and indemnity insurance. The first two voyages were completed without incident. During the third voyage on 10 May 2013 the barge capsized with the loss of the entire cargo. The plaintiff commenced suit for the value of the lost cargo (in excess of \$8 million) against Miller and its various subcontractors including the actual owner of the tug and barge and the surveyor that surveyed and approved the stowage of the barge. Miller brought this summary judgment application for a declaration that it was not liable. The plaintiff opposed the application.

**Decision:** The application is allowed, in part.

**Held:** The test on a summary judgment application is that there is no genuine issue for trial. The onus is high and is on the party bringing the application. Summary judgment should be granted only in the clearest of cases.

Miller argues that the contract between the parties is a charterparty and that the contract excludes the liability of Miller and the other defendants. The plaintiff, on the other hand, argues that the contract is one for the carriage of goods by water, that the Hague-Visby Rules apply, that any exclusion or limitation clauses in the contract are rendered invalid by article III, r.8 of those rules and that, in any event, on a proper interpretation, the contract does not exclude the liability of Miller and the other defendants. Thus, there are two issues: first, is the contract governed by the Hague Visby Rules; and, second, if the contract is not governed by the Hague Visby Rules, do the “knock for knock” and insurance clauses exclude the liability of Miller and the other defendants.

The nature of the contract between the parties is a discrete issue that is capable of being determined by summary judgment as the principal evidence required to assess its nature is the contract itself. The contract is entitled “Time Charter Party”, describes the plaintiff as

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<sup>20</sup> 2016 FC 461 (Note that this case has two citations; 2016 FC 461 is to the Reasons and 2016 FC 447 is to the Judgment. Unfortunately, as of 1 June 2016 only the Judgment has been published. The reasons can, however, be accessed through the link at AdmiraltyLaw.com.)

“charterer” and refers to “Employment of the Vessel” and to “Hire”. This is sufficient to find the contract is a charterparty and not covered by the Hague-Visby Rules. Accordingly, the parties were free to negotiate their own terms concerning liability. However, the contractual interpretation of the “knock for Knock” and insurance clauses is an issue of mixed fact and law which is not appropriate for summary judgment. These issues will proceed to trial.

***Asia Ocean Services, Inc. (UPS Asia Group Pte Ltd) v. Belair Fabrication Ltd.***<sup>21</sup>

*Carriage by Sea - Dead Freight - Practice - Summary Judgment*

The plaintiff, a logistics company, entered into an agreement with the defendant to carry the defendant’s cargo from China to Vancouver. The agreement was contained in a booking note that contained an estimated shipping date of 23 May 2013 and a “dead freight” clause requiring the defendant to pay the full amount of the freight if the booking was cancelled. The plaintiff subsequently sub-contracted the carriage by entering into a booking note with another carrier. This contract also contained a dead freight clause. The cargo was not ready to be shipped on 23 May and the vessel sailed without the cargo. The parties attempted to come to an agreement to ship the cargo on another vessel but were unsuccessful. The defendant ultimately shipped the cargo with another carrier. The plaintiff was required to pay dead freight to the carrier with whom it had sub-contracted and now claimed dead freight from the defendant. The defendant filed a counterclaim. The plaintiff brought this application for summary judgment.

**Decision:** The plaintiff’s motion for summary judgment is allowed. The defendant’s counterclaim is dismissed.

**Held:** The defendant argues that this matter is not suitable for summary judgment as the affidavit evidence is contradictory and disputed and a full trial is required to adequately address the issues. However, conflicting affidavits and disputed evidence do not necessarily render a matter inappropriate for summary judgment. The conflicting evidence can be tested against the documentary evidence and the cross-examinations. Other factors to consider include the amounts involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, and proportionality. Proportionality and the other factors support a disposition by way of summary trial.

The defendant seeks to avoid liability under the dead freight clause of the booking note by first arguing that the corporate entity that paid dead freight to the other carrier was not the plaintiff but a related company. There is no evidence of how or why the plaintiff accounted for the dead freight payment within its group of companies but this is not relevant. The issue is whether the defendant is required to pay dead freight to the plaintiff under the booking note as between them.

The defendant next argues it should not be required to pay dead freight because such a clause is a penalty clause or, alternatively, that the amount it should pay should be limited to the amount the plaintiff paid to the other carrier. The dead freight clause is, however, a reasonable attempt to estimate the damages and is not a penalty clause. Such clauses are to be assessed at

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<sup>21</sup> 2015 FC 1141

the time they were made and are enforceable whether or not the actual damages are less than the estimated amount. It is therefore not relevant that the plaintiff may have paid less in dead freight to the other carrier than is owed by the defendant.

Finally, the defendant argues that at the time the booking note was entered into the plaintiff agreed to communicate with the defendant's supplier and to ensure that the cargo would be at the port when required. The defendant says the plaintiff failed to do this and that it is therefore not liable to pay dead freight. But, the evidence does not support the defendant's arguments in this regard. The booking note contains no such term and the extensive correspondence does not support such a term.

***St. Paul Fire & Marine Insurance Company v. Vallée***<sup>22</sup>

*Damage to Yacht while being re-positioned - Is the contract one of carriage? - Jurisdiction of Quebec Courts*

The plaintiff was the insurer of a yacht that was damaged while being re-positioned. The yacht owner contracted with the defendant to transport the yacht from Quebec City to the State of New York. The transportation involved the defendant taking possession of the vessel and sailing it to the destination. During the voyage the yacht was damaged. The plaintiff fully indemnified its insured and commenced these subrogation proceedings against the defendant. The defendant then brought this application to dismiss the action on the basis that: (1) the Quebec courts were without jurisdiction: and, (2) no notice of claim was provided within 60 days of delivery as required by art. 2050 of the *Quebec Civil Code*.

**Decision:** Application dismissed.

**Held:** (1) The Quebec Court has jurisdiction in admiralty and s. 22 of the *Federal Courts Act* does not operate to restrict that jurisdiction. (2) The contract was not a contract of carriage but a service contract and art. 2050 does not apply. In any event, notice is not required where, as here, the carrier notifies the property owner of the damage.

**Comment:** Although the plaintiff in this action was the insurer of the vessel, in the common law provinces it is not usual for an insurer to be named as the plaintiff in subrogation proceedings. In the common law provinces the insured is normally the named plaintiff.

***Canadian Pacific Railway Company v. Canexus Chemicals Canada LP***<sup>23</sup>

*Rail Carriage - Right to Limit Liability - s. 137 Canada Transportation Act*

The Canadian Transportation Agency was asked by a group of shippers for a ruling on whether Item 54 of a Tariff published by the Canadian Pacific Railway Company violated s. 137 of the *Canada Transportation Act (the "CTA")*. Item 54 contained a group of clauses dealing with liability and indemnity. The Agency rendered two decisions and ordered that portions of Item 54 were contrary to s. 137 of the *CTA*. Both parties appealed.

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<sup>22</sup> 2015 QCCQ 1891

<sup>23</sup> 2015 FCA 283

**Decision:** The appeal of Canadian Pacific is allowed. The cross-appeal is dismissed.

**Held:** Under s. 117 of the *CTA*, a railway may only charge the rates and apply the terms and conditions that have been set out in its published tariffs. Section 126 of the *CTA* allows the parties to deviate from the published tariffs if there is a “confidential contract” between them. Section 137 of the *CTA* provides that a railway company may only restrict or limit its liability pursuant to a written agreement signed by the shipper. Otherwise the company’s liability is limited or restricted only to the extent prescribed by the Agency in the *Railway Traffic Liability Regulations* which largely reproduce the common liabilities of a carrier. In this case Canadian Pacific published a tariff in relation to hazardous commodities. Item 54 of that tariff provided Canadian Pacific would not be liable in respect of such commodities, included a broadly worded indemnity in respect of third party claims arising from the carriage of such commodities and included a joint liability clause.

The Agency published two decisions which were contradictory. In the first decision, the Agency gave s. 137 of the *CTA* a broad interpretation that includes “any liability that is caused by, arising from, or associated in any way with the movement of traffic” and held that Item 54 was a limitation or restriction of liability not contained in a written agreement and therefore invalid. In the second decision the Agency restricted the scope of s. 137 by excluding liabilities of the railways to third parties and the reallocation of those liabilities between the railway and the shipper. The first decision is the correct interpretation of s. 137. Section 137 is not a codification of the common law but is a restriction on a railway company’s ability to limit its liability. Where a third party suffers damage by the railway’s negligence and seeks to recover that damage from the shipper, the shipper would have a claim against the railway under provincial contributory negligence law and any limitation of the railway’s liability to the shipper is be caught by the plain meaning of s. 137.

With respect to the interpretation of Item 54, it is to be noted that shippers are not subject to any limitation or restriction of liability by the mere publication of the tariff. Such limitations or restrictions must be contained in a signed agreement. Nevertheless, when properly interpreted, Item 54 does not contain prohibited limitations of liability. The broad limitation expressed in the opening words of Item 54 is subject to later exceptions that preserve the railway’s liability to shippers.

## Collisions

### *Turcotte v Dufour*<sup>24</sup>

#### *Pleasure Craft – 100% Liability*

On 23 August 2008, a vessel operated by the appellant was involved in a collision with another pleasure craft. The two vessels were traveling at about 40 miles per hour in the same direction in a channel having a width of 150 to 200 metres with little traffic. The trial Judge found that the appellant swerved in front of the second vessel spraying the operator of the other vessel with water and then stopped. The second vessel was not able to stop in time to avoid a

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<sup>24</sup> 2015 QCCA 1914



collision. The trial Judge found that the appellant was 100% at fault for the collision. The appellant appealed.

**Decision:** Appeal dismissed.

**Held:** The evidence was sufficient to enable the trial Judge to find that the sole cause of the collision was the sudden and unpredictable manoeuvre of the appellant.

**Comment:** Regrettably, and once again, this case is reported only in French.

## Limitation of Liability

### *J.D. Irving Limited v. Siemens Canada Limited*<sup>25</sup>

#### *Right to Limit Liability Upheld*

Siemens entered into a contract with Irving for Irving to transport heavy cargo by road and sea. To effect the transport Irving chartered a barge and a tug and retained a marine consultant (“MMC”) to provide architectural and consulting services. While in the process of loading, a piece of the cargo loaded on a transporter fell off the barge and into the harbour at Saint John, New Brunswick. Siemens then commenced various proceedings in the Ontario Superior Court (for \$45 million) against Irving and its various subcontractors and Irving commenced this proceeding for a declaration that it was entitled to limit its liability to \$500,000 under the *Marine Liability Act* and the *Convention on Limitation of Liability for Maritime Claims, 1976*, as amended by the *Protocol of 1996* (collectively, the “*Limitation Convention*”).

**Decision:** Irving is entitled to limit its liability.

**Held:** Siemens argues that Irving and its subcontractors are not entitled to limit their liability as they acted recklessly and with knowledge that the loss of the cargo would probably result, within the meaning of Art. IV of the Limitation Convention. In essence, Siemens argues that Irving knew the barge was too small and was unsuitable to transport the cargo. It further argues that during loading the transporter on which the cargo was loaded veered off the centreline which was not marked and that Irving “knowingly deviated from the load plan in critical respects with knowledge of the consequences”. The evidence establishes that the barge used was, in fact, suitable for the intended move. Further, although the stability calculations and load plan prepared by MMC assumed a divided aft peak ballast tank, based on the expert evidence, this did not render the barge unstable or unsuitable for the planned load-out and voyage. The capsizing was due to a number of contributing factors, each of which alone had a minimal effect. The contributing factors included: the cargo was loaded slightly off centre; the aft peak tank was unsealed which reduced the GM of the barge; and, hydraulic manipulation of the transporter decks which raised the centre of gravity. Some combination of these and possibly other factors caused the loss.

There is a presumptive right to limit liability and a very high burden on the party seeking to

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<sup>25</sup> 2016 FC 69

break limitation to establish that the loss resulted from: (i) the personal act or omission of the person seeking to limit liability, (ii) committed recklessly and, (iii) with knowledge, (iv) that such loss, (v) would probably result. “The contracting states to the Limitation Convention intended the fault requirement to be high resulting in a virtually unbreakable right to limit liability”. The evidence presented does not establish that Irving or its subcontractors acted recklessly and with knowledge that the loss would probably result. They did not know that the combination of factors outlined above would probably result in the loss of the cargo. They took steps to ensure the safe loading of the cargo. Siemens argues that recklessness and knowledge should be inferred from the fact that Irving cannot establish the precise cause of the loss and relies upon cases decided under the Warsaw Convention relating to the carriage of goods by air. The air carriage cases are distinguishable. Here, Irving presented a wealth of direct evidence regarding the circumstances of the loss and it is not appropriate to infer recklessness and knowledge. Article IV of the Limitation Convention requires actual conscious knowledge. It has not been established that Irving and its subcontractors had subjective knowledge that the loss would probably result from their acts or omissions. Accordingly, Irving is entitled to limit its liability.

**Comment:** See the companion decision 2016 FC 287 for the right of the Irving subcontractors to limit their liability.

### ***J.D. Irving Limited v. Siemens Canada Limited***<sup>26</sup>

#### *Limitation of Liability - Persons Entitled to Limit - Independent Contractors*

Irving contracted with Siemens to transport cargo by tug and barge. During the loading of the cargo at Saint John, New Brunswick, the cargo fell off the barge. MMC provided naval architectural and consulting services to Irving in relation to the loading and transport of the cargo pursuant to a contract between it and Irving. The actual services were provided by Mr. Bremner who was the owner and principal of MMC. In a decision reported at 2016 FC 69, the Federal Court held that Irving had the right to limit its liability but deferred any decision on the limitation rights of MMC and Bremner. MMC and Bremner now apply for a determination of their rights to limit liability pursuant to the *Marine Liability Act* and Art. 1(4) of the *Convention on Limitation of Liability for Maritime Claims, 1976*, as amended by the *Protocol of 1996* (collectively, the “*Limitation Convention*”).

**Decision:** MMC and Bremner are not entitled to limit their liability.

**Held:** Art. 1(4) of the Limitation Convention extends the right to limit liability to “any person for whose act, neglect or default the shipowner or salvor is responsible”. MMC and Bremner argue that Art. 1(4) extends the right to limit to subcontractors of the shipowner provided the shipowner is responsible at law for the actions of the independent contractor. MMC and Bremner rely upon the non-delegable obligation of a shipowner to provide a seaworthy vessel and assert that an independent contractor who renders a ship unseaworthy saddles the shipowner with liability. Thus, they say they are persons for whom Irving is responsible within the meaning of the Limitation Convention. However, a contractual relationship between two independent entities does not give rise to vicarious liability unlike the relationship between

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<sup>26</sup> 2016 FC 287

employer and employee or principal and agent. Moreover, Bremner was not an employee or agent of Irving but of MMC. The text writers acknowledge that Art. 1(4) could be interpreted broadly or narrowly. Some suggest it could be interpreted to apply to independent contractors whereas others disagree. The *Travaux Préparatoires* suggests that it was not intended to extend the right to limit liability to independent contractors. Accordingly, given it was not intended to extend the right to limit to subcontractors and given that the contractual relationship between Irving and MMC did not attract vicarious liability, MMC and Bremner are not entitled to limit their liability.

## Marine Insurance

### *Haryett v. Lloyd's Canada*<sup>27</sup>

#### *Insurance - Duty to Defend and Indemnify - Driving while impaired*

The insured crashed his motor boat into a dock killing himself and injuring a passenger. At the time, the insured had a blood/alcohol level of more than three times the legal limit. The injured passenger sued the insured's estate and the estate sought defence and indemnity coverage from the insurer. The insurer refused on the grounds that the policy contained no "duty to defend" clause and that there was no coverage for illegal operation of the vessel. The estate then brought this application for a declaration the insurer had a duty to both defend and indemnify.

**Decision:** Application dismissed.

**Held:** The policy in issue does not contain a duty to defend clause and, in the absence of such a clause, there is no duty on the part of an insurer to defend. A duty to defend cannot be implied from a duty to indemnify. The clause in the policy relied upon by the estate provides that the insurer "will settle or defend, as we consider appropriate, any claim or suit asking for these damages". This wording does not oblige the insurer to defend every action but merely gives the insurer the discretion to defend where it determines, acting reasonably, that it is appropriate to do so.

With respect to the duty to indemnify, the policy provides the insurer is not liable if the vessel is operated illegally. It is an offence under the Criminal Code to operate a vessel with a blood/alcohol level of more than 0.08. The insured's blood/alcohol level was well above that limit and no insured would reasonably believe that there would be insurance coverage in the circumstances. There is probably no better example of illegal operation of a vessel.

### *Langlois v. Great American Insurance Company*<sup>28</sup>

#### *Fire Damage to Vessel While Being Repaired - Applicable Law - Direct Action Against Insurer - Liability of Repairer*

The plaintiff's fishing boat was damaged by fire while it was being repaired/welded at a ship

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<sup>27</sup> 2015 ONSC 853

<sup>28</sup> 2015 QCCS 791

yard. The plaintiff's boat was insured by the defendant, GAIC, who was also the liability insurer of the ship yard. GAIC assigned an adjuster who obtained several quotes to repair the damage caused by the fire but no agreement was reached between the plaintiff and GAIC as to the extent of the damage and necessary repairs. The plaintiff later hired his own surveyor whose estimate of damage and repairs was approximately twice that of GAIC's adjuster. GAIC then retained another surveyor for yet another estimate and submitted a cheque to the plaintiff in the amount of \$781,000 "as full and final payment". The plaintiff commenced this action against both GAIC and the ship yard.

**Decision:** Judgment for the plaintiff.

**Held:** The first issue is whether the applicable law is Canadian maritime law or the Quebec *Civil Code*. As was held in *Triglav v. Terrasses Jewellers Inc.*<sup>29</sup> Canadian maritime law applies to contracts of marine insurance and, therefore, the *Civil Code* is not applicable to that part of the claim against GAIC. However, as to the claim against the ship yard and GAIC as its insurer, the applicable law is the *Civil Code* because the repairs were being done on dry land and there were no navigation or maritime operations involved. The plaintiffs therefore have a direct cause of action against GAIC as the liability insurer of the ship yard pursuant to articles 2501 & 2628 of the *Civil Code*. With respect to the amount the plaintiff is entitled from GAIC under his own insurance policy, the plaintiff is entitled to an additional \$69,000. With respect to the liability claim, there is a strong presumption that the ship yard is liable given the fire started while welding was being done and this presumption has not been rebutted.

**Comment:** (1) This decision is reported in French only and the summary is based upon a translation that may be imperfect. (2) The holding that the liability claim against the ship yard is not subject to Canadian maritime law is doubtful. Since *Wire Rope Industries v B.C. Marine Shipbuilders*<sup>30</sup> there has been no doubt that contracts and torts involving ship repair are subject to Canadian maritime law. However, this would not necessarily mean that articles 2501 and 2628 of the *Civil Code* would not apply. They may well apply incidentally pursuant to the double aspect doctrine.

### ***C.H. Robinson Worldwide v. Northbridge Insurance***<sup>31</sup>

#### *Direct Action Against Motor Carrier Insurer - Misrepresentation - Policy Void*

The applicant, a freight forwarder, retained the services of a motor carrier, KLM, to transport a shipment of food products. The contract between the applicant and KLM provided that KLM would be liable for the value of any shipments tendered to it and also required KLM to maintain insurance coverage. KLM applied for and obtained coverage from the respondent. The insurance application contained a question as to whether there were any contracts with shippers that stipulated higher limits of liability than were contained in the KLM's standard bill of lading. KLM answered this question in the negative. During the course of transit, the truck was involved in an accident and the food products were destroyed. The applicant commenced proceedings against KLM and provided the respondent insurer with notice of the claim. Default

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<sup>29</sup> [1983] 1 SCR 283

<sup>30</sup> [1981] 1 S.C.R. 363

<sup>31</sup> 2015 ONSC 232

judgment was subsequently obtained against KLM. The applicant then brought this proceeding against the respondent pursuant to s. 132(1) of the *Insurance Act* of Ontario, which provides for direct action against insurers. The respondent defended arguing that the policy was void for misrepresentation and contained a clause limiting recovery.

**Decision:** Application dismissed. The policy is void for misrepresentation.

**Held:** An applicant for an insurance policy has an obligation to fully and accurately disclose all matters within its knowledge relevant to the nature and extent of the risk to be insured. For the respondent to succeed it must prove the insured concealed or misrepresented a fact or circumstance concerning the insurance and that the fact or circumstance was material. Here the insured, KLM, did not disclose the contract term with the applicant. Under Ontario law any contract of carriage by motor carrier is deemed to include the Uniform Conditions of Carriage which limit the liability of the carrier to \$4.41 per kilogram. The contract with the appellant expanded the liability of KLM beyond that limitation. This was a material fact that plainly bears on the issue of insurability and should have been disclosed. Further, the non-disclosure was material as the affidavit evidence establishes that there would have been an effect on the premium charged if the contract terms had been disclosed. Although the evidence did not establish the exact amount of the increase, this is not relevant. It is sufficient that there would have been an increase. Consequently, the policy is void and there can be no recovery under s. 132(1) of the *Insurance Act*. The second issue need not be considered.

## Liens, Mortgages and Priorities

### ***Ballantrae Holdings Inc. v. The Ship "Phoenix Sun"***<sup>32</sup>

#### *Priorities*

The "Phoenix Sun" was purchased while under arrest by a person who intended to repair her, find a cargo and sail her to Turkey where she would be sold for scrap at a profit. The ship was purchased for \$1 million which was borrowed from the plaintiff, Ballantrae, and secured by a mortgage on the ship. The mortgage was never registered in a ship registry but it was registered as a charge under the Ontario *Personal Property Security Act* ("PPSA"). The purchaser hired a crew and persuaded other chandlers and repairers to provide goods and services to the vessel. The purchaser also obtained some additional funds from a Mr. Hamilton. Eventually, the funds ran out and the ship was again arrested in this proceeding commenced by Ballantrae. The ship was subsequently sold for \$680,000. Pursuant to the normal procedure established by the Federal Court, claimants to the proceeds of sale filed their claims with the court. The court was called upon to adjudge and rank the claims. The claimants and claims included:

- The Marshall for the fees and expenses of bringing the ship to sale;
- Ballantrae for its costs of bringing the vessel to sale;
- The Master and crew of the vessel for the amounts due to them under their

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<sup>32</sup> 2016 FC 570

employment contracts;

- The City of Sorel for berthage and the costs of supplying electricity, which it claimed had a priority under either the *Canada Marine Act*, the *Marine Liability Act* or in equity;
- Various necessities supplier who claimed lien rights under s. 139 of the *Marine Liability Act*;
- Mr. Hamilton, who also claimed lien rights under s. 139 of the *Marine Liability Act* or in equity;
- Ballantrae for the amount due under the mortgage; and
- Skylane, who also claimed to have a valid mortgage registered in Panama.

**Decision:** The claims will rank in accordance with the reasons.

**Held:** Generally, the highest priority claims are the Marshall's fees and expenses and the costs of the creditor that brought the ship to sale. Thereafter come maritime liens and liens created by statute, which enjoy the same status. Next in ranking are mortgages followed by *in rem* creditors. On occasion, when the interests of justice require, this traditional ranking may be altered.

The Marshall's claim for expenses (\$39,000) is the claim with the highest priority. Ranking second is the claim of the plaintiff, Ballantrae, for the costs incurred to bring the ship to sale. These costs are not the actual solicitor client costs but are to be taxed under the tariff. Also, this priority is limited to the costs associated with bringing the ship to sale. It does not include the costs of asserting its own claim or contesting the claims of other parties.

Ranking next are the claims of the Master and crew for wages and benefits. These are alleged to be \$180,000. However, the claim is calculated using an exchange rate at the date of judgment and includes a retainer or stand-by fee of one third of one month's wages. The exchange rate to be used is the rate on the date of the breach not the date of judgement. Additionally, the retainer or stand-by fee component does not enjoy maritime lien status. Finally, although the crew left the ship on 21 September 2014, their wage claims are to be calculated pursuant to the terms of their contracts which give additional payment.

The City of Sorel claims for berthage (\$75,000) and for the supply of electricity (\$22,000). It argues it is entitled to priority under s. 122 of the *Canada Marine Act* or s. 139 of the *Marine Liability Act* or, alternatively, on an equitable basis. Section 122 of the *Canada Marine Act* gives priority to a Port Authority or to "a person who has entered into agreement under s. 80(5)". The City of Sorel is not a Port Authority and is not "a person who has entered into agreement under s. 80(5)" since s. 80(5) relates to parts of the Saint Lawrence Seaway and Sorel is not within the Seaway. Sorel therefore has no priority under s. 122 of the *Canada Marine Act*. Neither does the city's claim fall under s. 139 of the *Marine Liability Act*. The claim of the city is not for "goods, materials or services" supplied to a vessel. This follows from the distinction in s. 22 of the *Federal Court Act* between necessities and docking charges and from the purpose of

s. 139 of the *Marine Liability Act* which was to give Canadian necessities supplier a priority to that enjoyed by foreign suppliers. In the traditional ranking, the claims of the City of Sorel should, therefore, have no priority. However, the court does have an equitable jurisdiction to vary the traditional ranking if the interests of justice so require. It is appropriate to alter the traditional ranking in respect of the claim for supply of electricity to the ship since this did benefit all of the creditors. The claim for the costs of electricity will rank immediately after the claims of the Master and crew.

The claims of necessities suppliers with lien claims under s. 139 of the *Marine Liability Act* rank after the claim of the City of Sorel for the supply of electricity.

One of the claimants, Skylane, claims a Panamanian mortgage over the vessel in the amount of \$1.7 million. This court previously ordered that it file evidence as to the validity of its Panamanian mortgage and it failed to do so. The claim of Skylane is struck for failure to comply with this order. In addition, the claim of Skylane would have been defeated because: the only evidence before the court is an affidavit to the effect the Skylane mortgage is invalid under Panamanian law; and, the Skylane mortgage was granted while the ship was under arrest. A shipowner cannot deal with a ship under arrest in such a way as to dissipate its value to other creditors.

Another creditor claimed to be a crew member and entitled to priority for unpaid wages of \$50,000. This creditor was not, in fact, a crew member. He was an employee and shore labour and does not benefit from any priority.

Mr. Hamilton claims a priority for various amounts advanced to the purchaser to pay crew, service providers, ship chandlers and other vessel maintenance expenses. However, the evidence establishes Mr. Hamilton was in a joint venture with the purchaser and was not a lender. As a joint venture he is only entitled to whatever funds are left over after all other creditors are paid.

The claim of Ballantrae as mortgagee is challenged on the grounds that its mortgage was not registered. Hamilton argues that as an unregistered mortgage it is an equitable mortgage which ranks just above that of ordinary *in rem* creditors. It is not correct that an unregistered mortgage is necessarily an equitable mortgage. An unregistered legal mortgage would have difficulty ranking ahead of a subsequently registered mortgage but outranks equitable charges and *in rem* creditors.

The registration of the Ballantrae mortgage under the Ontario PPSA also raises issues. Ballantrae argues this gives the mortgage priority over ordinary *in rem* creditors whereas Hamilton argues the registration under the PPSA is not relevant. Specifically, Hamilton says the PPSA registration is not relevant because, first, the vessel was never in Ontario and, second, the PPSA cannot constitutionally apply to maritime matters. It is correct that the PPSA does not apply as the vessel was not in Ontario and this is sufficient to dispose of this issue. However, the point of the general application of the PPSA to maritime matters is of such importance that it deserves comment. Recent jurisprudence indicates that the scope for the "incidental" application of provincial statutes in a maritime context is much broader than was thought. This court may "take cognizance of the Ontario PPSA".

Finally, with respect to interest on the claims, prejudgment interest is in the discretion of the court. In the circumstances, it is appropriate that no prejudgment interest be awarded.

**Comment:** The statement that maritime liens and liens created by statute have the same status may be questionable as a rigid rule. It will depend in each case on the precise wording of the statute in issue. Also, the court's treatment of the Ontario PPSA is notable but raises a question of what happens when the priorities established by the PPSA differ from those that arise under Canadian maritime law.

### ***Offshore Interiors Inc. v. Worldspan Marine Inc.***<sup>33</sup>

#### *Priorities*

Worldspan was building a yacht for Sargeant under the terms of a vessel construction agreement ("VCA"). Disputes arose during the course of construction, the vessel was arrested and numerous creditors filed claims. Various trade creditors filed claims totalling \$1.7 million. Sargeant filed a claim based on a Builder's Mortgage in the amount of \$20 million. Worldspan also filed a claim in the amount of \$5 million which it alleged was for capital advances due and owing by Sargeant and secured by the VCA with a priority above the mortgage. The vessel was eventually sold for \$5 million, leaving a substantial shortfall. Meanwhile, a petition under the *Companies Creditors' Arrangement Act* was filed by Worldspan and suits and countersuits were filed by Worldspan and Sargeant in the British Columbia Supreme Court. Worldspan applied for an order that its claim relating to unpaid advances had priority over the claim of Sargeant under the Builder's Mortgage. Sargeant also applied for an order that the *in personam* claims between it and Worldspan proceed in the British Columbia Supreme Court leaving only the *in rem* claims to be addressed in the Federal Court.

**Decision:** Both applications are dismissed.

**Held:** Concerning the Worldspan motion, Sargeant argues that this issue is *res judicata* or estopped or an abuse of process on the grounds that the priority issue was already decided. However, the earlier decisions did not directly concern the issue raised here and these doctrines are not applicable. Section 12.1 of the VCA gives Sargeant a first priority interest for all sums advanced but this interest is "subordinate to Owner's obligations under the Contract Documents including Builder's right to receive payments pursuant to this Agreement". Worldspan argues that this section creates a condition that it be paid in full before Sargeant can exercise its mortgage security. On the other hand, Sargeant argues this section merely gives Worldspan the right to deduct any amounts owed from the mortgage claim. Considering the contract as a whole, Sargeant's interpretation is correct. Accordingly, Worldspan's application is dismissed.

With respect to the Sargeant motion, Sargeant cites no authority that would permit this court to require the parties to litigate the issues in another court. Sargeant chose the Federal Court to adjudicate its *in rem* claims and this must include the ability to address the underlying *in personam* liability. Finally, the order requested would require the Federal Court's process for adjudication of the *in rem* claims be paced in abeyance which is inconsistent with the objectives

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<sup>33</sup> 2016 FC 27



judicial sale process to provide a summary means of resolving competing priorities. Accordingly, Sargeant's application is dismissed.

### ***National Bank of Canada v. Rogers***<sup>34</sup>

#### ***Mortgages - Default - Summary Judgement***

In February 2010 the defendants purchased a yacht for \$924,000 of which approximately \$675,000 had to be financed. The defendants obtained the financing through a facility the vendor had with the plaintiff bank. The transaction was recorded in a conditional sales contract on the plaintiff's form which showed the vendor and the defendants as buyers. The vessel and a mortgage in favour of the plaintiff were subsequently registered on 16 November 2010. Meanwhile, the defendants took possession of the yacht in May 2010 but were not happy with it and complained to the vendor but not the plaintiff. In August 2010 the vendor agreed to replace the yacht with delivery of the new vessel to be in April 2011. In October of 2010, the yacht was returned to the vendor and it was further agreed that the vendor would provide cash for the mortgage payments on the yacht which were drawn from the defendants' account. The yacht was resold by the vendor on 26 October 2011. The plaintiff was unaware of the resale which was never registered. The plaintiff was also unaware that the vendor was providing the mortgage payments to the defendants. The defendants never received the replacement vessel nor did they receive any part of the proceeds from the resale of the yacht. The vendor went bankrupt in early 2015 and the defendants ceased making mortgage payments in February 2015. The plaintiff commenced this action for the balance owing *in rem* and *in personam* against the defendants and brought this application for summary judgment. The defendants contested the application. At the time the application was heard, the yacht had been arrested and was subject to an order of judicial sale.

**Decision:** Judgment for the plaintiff.

**Held:** The defendants argue that this summary judgment motion is premature as the plaintiff has not yet sold the yacht. They rely on case law relating to real estate which says a mortgagee in possession is obliged to sell at the best possible price. However, a ship is not real estate. A mortgagee of a ship is under no obligation to commence an action *in rem* or to arrest the vessel and, in any event, an arrest does not put the mortgagee in possession of the vessel. It is the court that will sell the vessel and the proceeds from the sale will be distributed between the claimants thereto who, at present, comprise only the plaintiff and the purchaser of the yacht on resale.

With respect to the merits, the defendants argue that the plaintiff as assignee of the conditional sales contract is liable for the many deficiencies in the vessel and for the actions of the vendor who, they say, was the agent of the plaintiff. But, the vendor did not have any authority to represent the plaintiff and no reasonable person could reasonably believe the vendor had ostensible authority. From the evidence it is perfectly clear that the defendants knew the vendor was not an agent for the plaintiff.

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<sup>34</sup> 2015 FC 1207

***Offshore Interiors Inc. v. Worldspan Marine Inc.***<sup>35</sup>***Construction Mortgage - Entitlement of Purchaser/Mortgagee to Return of Advances - Interpretation of Contracts - Standard of Review on Appeal***

Pursuant to a vessel construction agreement the builder was to retain title to the vessel until delivery to the purchaser and the purchaser was to make periodic payments in the nature of advances to the builder. The advances were to be secured by a continuing first party security interest supported by a mortgage. A current account Builder's Mortgage was filed in the ship registry in favour of the purchaser. Disputes arose during the course of construction of the vessel with the result that construction ceased and the builder filed a petition in the British Columbia Supreme Court under the *Companies Creditors' Arrangement Act*. The plaintiff, a supplier of goods and services to the vessel, also commenced these proceedings in the Federal Court for unpaid invoices and had the vessel arrested. In the B.C. Supreme Court action an order was pronounced on 22 July 2011 providing that any claimant with an *in rem* claim against the vessel could pursue that claim in the Federal Court. The Federal Court issued an order on 29 August 2011 establishing a process for the filing of *in rem* claims against the vessel which included a requirement that any claim be described with sufficient particulars so the court could establish whether it was a proper *in rem* claim and determine its priority. A claim was filed in the Federal Court by the purchaser/mortgagee for repayment of the funds advanced. The plaintiff brought this application for a declaration that the mortgage did not create a lien or charge on the vessel other than to secure delivery of the vessel. If correct, the effect would be that the funds advanced by the purchaser/mortgagee would be excluded from its claim.

At first instance<sup>36</sup>, the Prothonotary granted the declaration sought. The Prothonotary said the question of whether there was an obligation under the mortgage that funds advanced be repaid depended on the construction of the vessel construction agreement and mortgage. The Prothonotary held there was no express provision requiring repayment of funds advanced for the construction of the vessel. Despite the mortgage stating it was a "current account" mortgage, the Prothonotary found no evidence that, in fact, an account current was created by the vessel construction agreement which allowed the builder to retain all advances. The Prothonotary found the parties contemplated that all monies advanced would be used in the construction of the vessel and not exist as a fund. The purchaser/mortgagee appealed.

On appeal<sup>37</sup>, the appeal Judge allowed the appeal holding:

- (1) The Prothonotary correctly recognized that he was to determine the intent of the parties based on the language of the contract documents and correctly identified the principles of interpretation but failed to properly apply those principles. The purpose of the mortgage was to provide a continuing security interest in the vessel to secure the advances. It was intended to be effective as against third parties and was not limited to securing the delivery of the Vessel. Although the documents did not state the advances were a loan, they did state they would be made "on

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<sup>35</sup> 2015 FCA 46

<sup>36</sup> 2013 FC 221

<sup>37</sup> 2013 FC 1266

account”.

- (2) Although there was no express requirement for repayment of advances, considering the agreements as a whole and within the factual matrix, there was an implied obligation to repay the advances. With respect to the Prothonotary’s reasoning that the funds advanced were not a loan because they would be used in the construction and not available as a fund, the purpose of any loan is to permit the borrower to spend the monies lent. A commercial absurdity would result if the advanced funds could not be used for the intended purpose and instead had to be set aside to create a fund. The sums advanced comprised the “account current” secured by the mortgage, even in the absence of an explicit reference in the construction agreement. It was not necessary to specify the amount owing or the time of repayment in the mortgage when there was sufficient detail in the construction agreement. It is also difficult to see how the mortgage could be intended to only secure the delivery of the vessel when the construction agreement expressly states it is to create a first priority security interest to secure advances.
- (3) In addition, the purchaser has a claim pursuant to s. 22(2) (n) of the *Federal Courts Act* (which addresses claims arising out of the construction, repair or equipping of a ship), which can be addressed at the priorities hearing.

The plaintiff appealed to the Federal Court of Appeal. There were four issues on appeal, namely:

- (1) What is the correct standard of review?
- (2) Was the appeal Judge plainly wrong in her interpretation of the agreements?
- (3) Was the appeal Judge plainly wrong in concluding there was an implied repayment obligation in the construction agreement?
- (4) Did the appeal Judge err in law in her consideration of s. 22(2)(n) of the *Federal Courts Act*?

**Decision:** Appeal Dismissed.

**Held:**

- (1) The standard of review enunciated in *Bristol-Myers Squibb Co. v. Apotex Inc.*<sup>38</sup> applies to issues 2 and 3, i.e. whether the appeal Judge was plainly wrong in her interpretation of the agreements and in concluding there was a repayment obligation. The test is whether the appeal Judge “had no grounds to interfere with the Prothonotary’s decision or, in the event such grounds existed, if the Judge’s decision was arrived at on a wrong basis or was plainly wrong”. The proper test for issue 4, is whether the appeal Judge was correct in her conclusions with respect to s. 22(2)(n) of the *Federal Courts Act*.

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<sup>38</sup> 2011 FCA 34

- (2) In *Sattva Corp. v. Creston Moly Corp.*<sup>39</sup> the Supreme Court set out the guiding principles for contractual interpretation to determine the intent of the parties and the scope of their understanding. The contract is to be read as a whole giving the words their ordinary and grammatical meaning consistent with the surrounding circumstances. However, the surrounding circumstances “must never be allowed to overwhelm the words of that agreement” and must consist of “objective evidence of the background and facts”. The court should interpret the contract in accord with sound commercial principles and good business sense and avoid commercial absurdity. The appeal Judge was aware of these principles and applied them in construing the documents. After proper consideration she held the intent of the parties was to secure the advances which were in the nature of a loan. She did not imply a term of repayment. The Prothonotary’s finding that no “account current” was created because the advances were to be used in the vessel construction and not kept in a fund does not withstand scrutiny. It ignores the express wording in the Builder’s Mortgage which refers to an “account current” and would render the mortgage of no force or effect to secure delivery. Moreover, it ignores the essential promise of a builder’s mortgage which is to pay the mortgagee. While the documents may be unclear as to when and how advances are to be repaid, this is not fatal.
- (3) The appeal Judge’s conclusion that there was an implied repayment term was an alternative conclusion. As she was correct in her interpretation, this issue need not be considered.
- (4) There is no doubt the appeal Judge was correct in concluding that the purchaser had a claim falling within s. 22(2) (n) of the *Federal Courts Act*. This section provides that the Federal Court has jurisdiction over “any claim arising out of a contract relating to the construction, repair or equipping of a ship”.

***Canpotex Shipping Services Limited v. Marine Petrobulk Ltd.***<sup>40</sup>

*Charters - Bunkers - Entitlement to Payment - Bankruptcy of OW Bunkers*

The plaintiff had ordered and obtained bunkers from OW Bunkers (“OW”) for two foreign registered vessels that it chartered. The bunkers were actually supplied by the defendant, Marine Petrobulk (“MP”), a Canadian bunker supplier. MP invoiced OW for the bunkers and OW invoiced the plaintiff. Before any of the invoices were paid, OW became insolvent and subsequently bankrupt. Pursuant to various court orders and agreements any sums owing to OW were to be collected by ING, its receivers. MP and ING both claimed entitlement to payment of the amounts owing by the plaintiff in respect of the bunkers supplied. The plaintiff brought this action and, pursuant to a consent order made by the Prothonotary under Rule 108, deposited the amount owing into a trust account. The plaintiff then brought this application for a declaration that the payment of the funds into trust extinguished its liabilities and any *in rem* claims. MP and ING brought their own applications for declarations that they were entitled to the funds. ING also opposed the relief requested by the plaintiff.

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<sup>39</sup> 2014 SCC 53

<sup>40</sup> 2015 FC 1108

**Decision:** MP shall be paid the amount owing to it from the funds in trust and OW/ING shall be paid an amount equal to the mark-up. Upon payment, all liabilities of the plaintiff and any lien rights will be extinguished.

**Held:** ING now argues that the plaintiff does not meet the test to interplead property under Rule 108. However, the order of the Prothonotary allowing payment into trust under Rule 108 was not appealed and necessarily involved a determination that the plaintiff was entitled to interplead the funds. It is now too late to challenge this Order. Alternatively, this is an appropriate case for an interpleader order. Justice requires that the plaintiff does not have to pay twice for the bunkers delivered to the vessels.

The entitlement of MP and ING to the funds depends upon the terms of the agreements between the parties. The plaintiff and OW had entered into an agreement for the time to time purchase of bunkers but it is disputed whether this agreement was to apply only to fixed price supplies or to spot purchases such as the purchases at issue. The evidence presented, in particular the evidence of the discussions between the individuals involved, establishes that the spot bunker purchases in issue were subject to the agreement between the plaintiff and OW and the General Conditions of OW. Those conditions include a term that, where the physical supply of fuel is made by a third party, they are to be varied to include the conditions of the third party. MP is such a third party and its conditions of sale therefore apply. Pursuant to the MP conditions, the plaintiff and OW are both customers of MP and are jointly and severally liable to pay it for the bunkers delivered. Accordingly, the plaintiff is liable to pay to MP the full invoice price of MP for the bunkers delivered. OW/ING is entitled to an amount equal to the mark-up of OW (the difference between the OW invoice and the MP invoice).

MP also claims a contractual lien pursuant to its conditions of sale and a maritime lien under s. 139 of the *Marine Liability Act*. It is clear that the conditions of sale give a contractual lien over the vessel but it is not clear whether this lien extends to the funds that have been put in trust to replace the *res*. Likewise, it is clear that MP would have a lien over the vessels under s. 139 of the *Marine Liability Act* but unclear whether this lien can attach the funds. These issues need not be decided as any lien MP has will be extinguished upon payment.

## Ship Building and Repair

### ***Platypus Marine Inc. v The Ship "Tatu"*<sup>41</sup>**

#### *Criminal Interest Rate*

The plaintiff provided ship repair and maintenance services to the defendant vessel. The plaintiff had provided an estimate outlining the work to be done and the defendant accepted that estimate. The estimate included various terms, none of which referenced interest on overdue amounts. The plaintiff sent several invoices all of which were "DUE UPON RECEIPT" but which again, did not reference interest. The plaintiff led contradicted evidence of an oral agreement that interest of US\$100,000 would be paid. The defendant brought this application

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<sup>41</sup> 2016 FC 501

for a determination that no interest was owed.

**Decision:** \$35,000 in interest is owing.

**Held:** The interest alleged to be owing represents an interest rate in excess of 60% per annum and is therefore a criminal rate of interest under the *Criminal Code*. In these circumstances, an appropriate interest rate is 5% per annum as provided by the *Interest Act* which works out to \$35,000.

***Transport Desgagnes Inc. v. Wartsila Canada Inc.***<sup>42</sup>

*Sale of Marine Crankshaft - Product Liability - Defects - Exclusion Clause - Application of Provincial Law*

The plaintiff purchased a new bedplate and reconditioned crankshaft from the defendant for installation in one of its vessels. The defendant assembled and mounted the crankshaft to the bedplate in November 2006 and delivered both items to the plaintiff at Halifax in February 2007. On 27 October 2009, after 13,653 running hours, the new crankshaft suffered a catastrophic failure. The plaintiff commenced this proceeding for damages in excess of \$5.6 million. It was undisputed that the failure was caused by insufficient tightening of “the big end stud of the connecting rod of unit 5L”. The plaintiff alleged that the crankshaft was defective when delivered whereas the defendant alleged the plaintiff was responsible for the improper tightening during routine maintenance. The defendant also relied upon the terms of the sale contract between the parties which provided a six month limited warranty and a limitation of liability equivalent to approximately \$80,000. The plaintiff argued that the limitation of liability was invalid in the circumstances and pursuant to the Civil Code of Quebec.

**Decision:** The plaintiff is entitled to judgment.

**Held:** The issues in the case are: (1) whether the transaction is governed by Canadian maritime law or Quebec civil law; and, (2) based on such governing law, is the defendant liable or entitled to limit its liability.

- (1) With respect to the applicable law, this matter relates to a contract of sale and such contracts are not integrally connected to the pith and substance of Parliament’s jurisdiction over navigation and shipping. Although related to maritime activities, this matter is not integrally connected with same. Moreover, there is no practical necessity for a uniform federal law to prescribe the rules governing a seller’s obligations. The fact that such rules may vary by province does not hinder the efficient and coherent conduct of the activities of navigation and shipping. Therefore, as the contract of sale was formed in Quebec, it is the laws of Quebec that apply.
- (2) Pursuant to the Civil Code of Quebec: a seller of property is required to warrant that the property to be sold is free of latent defects (art. 1726); in the case of a sale of property by a “professional seller”, a defect is presumed to have existed at the time of sale if the property malfunctions or deteriorates prematurely (art. 1729); and, a seller may not

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<sup>42</sup> 2015 QCCS 5514

exclude or limit liability unless the defects of which he was aware or could not have been unaware are disclosed (art. 1733). These provisions apply here. The defect is presumed to have existed at the time of sale and this presumption has not been rebutted on the balance of probabilities. The defendant, as a professional seller, is presumed to have known of the existence of a defect at the time of sale and is deemed to be acting in bad faith. This has the effect of rendering any exclusion or limitation clause invalid unless the seller rebuts the presumption of bad faith. Evidence of the seller's good faith or ignorance of the defect or honest belief in the adequacy of the product sold is not enough. The seller must either demonstrate that the buyer or a third person caused the defect or that only scientific or technological discoveries made after the product was sold would have permitted discovery of the defect at the time of sale.

**Comment:** The constitutional analysis in this case is deficient but the result may be correct. There would seem to be relatively little doubt that the sale of a piece of equipment installed on a ship, such as a crankshaft, is subject to federal Canadian maritime law, as has been held in a number of cases. However, the provinces also have *prima facie* jurisdiction over such a sale. The real constitutional issue is whether the doctrines of paramountcy or inter jurisdictional immunity apply to render the provincial law inoperative or ineffective.

***Ehler Marine & Industrial Service Co. v. M/V Pacific Yellowfin (Ship)***<sup>43</sup>

***Liability for Repair Costs in Excess of Quotation - Liability of Repairer for Damage During Launching***

The plaintiff ship repairer provided an estimate to re-fasten and re-caulk the defendant's wooden vessel pursuant to a request for proposals that asked for a "reasonably accurate estimate" for 15 seams below the waterline. The estimate included some items that were quoted on the basis of the actual time and materials to be expended and other items, including the re-caulking and re-fastening, that were not so qualified. The final costs for the re-caulking and re-fastening exceeded the estimate. Additionally, when the vessel arrived at the repair yard it was discovered that there were more than 15 seams below the waterline that required re-caulking and re-fastening. It was agreed that the additional seams would be repaired but the plaintiff thought the agreement was to proceed on a time and materials basis whereas the defendant thought there would be proration of the original contract price. Finally, during the launching of the vessel, the vessel was damaged. The plaintiff commenced proceedings to recover the actual amount of the re-caulking and re-fastening and the defendant counterclaimed for the damage caused to the vessel during launching.

**Decision:** Judgment for the plaintiff, in part. The counterclaim is dismissed.

**Held:** The plaintiff argues the estimate was only a "best guess" and that it was entitled to charge on the basis of actual time and materials expended on the repair. The defendant argues that the estimate was an agreed amount that would be charged. The proper test is not what the parties subjectively believed the terms of the contract to be but what a reasonable person would understand the contract to be. Such a person would conclude in the circumstances that

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<sup>43</sup> 2015 FC 324

the estimate was an agreed price. The fact that the estimate did not qualify the disputed items as being billed on a time and materials basis favours this interpretation as does the fact that the defendant asked for a "reasonably accurate estimate" and "hard numbers". In relation to the additional seams, a reasonable person would similarly conclude that the price for the additional work would be prorated based on the original contract. With respect to the counterclaim, the evidence of the damage is incomplete and contradictory and the counterclaim is therefore dismissed.

***Capitaines Propriétaires de la Gaspésie (A.C.P.G.) Inc. v. Pêcheries Guy Laflamme Inc.***<sup>44</sup>

*Damage to Ship during Lifting Operation - Bailment - Presumption of Liability - Exclusion Clauses*

The fishing boat "Myrana I" was damaged when it was dropped into the water while being lifted with a crane. The ship owner demanded damages in excess of \$550,000 from the crane operator and its employee operating the crane at the time. The crane operator and employee denied liability and further asserted that they were protected by an exclusion clause in the contract. The crane operator, its employee and their insurer commenced this action for a declaration that they had no liability. The defendant ship owner counter-claimed for damages to the ship. The exclusion clause in the contract provided "I accept liability for any risk resulting from the towage, docking, wintering and/or launching of this vessel, and I release the Owner of this dry dock and its Operator, \_\_\_\_\_, from any civil liability resulting from these associated operations or handling".

At first instance<sup>45</sup>, the trial Judge held the plaintiffs had failed to rebut the presumption that they were liable as bailees. However, the Judge further held the exclusion clause was broad enough in scope to cover any negligence. The Judge relied on *Tercon Contractors v British Columbia*<sup>46</sup> where Justice Binnie said "There is nothing inherently unreasonable about exclusion clauses..." and added that there are many valid reasons for contracting parties to use exemption clauses, most notable to allocate risks. The trial Judge further held that the clause was neither abusive nor draconian and that the defendant should have been aware of it as the contract was sent to the defendant on at least 36 prior occasions. The defendant appealed.

**Decision:** Appeal dismissed.

**Held:** The interpretation of a contract is a question of mixed fact and law and is reviewable only if the trial Judge made a palpable and overriding error. The same is true of the Judge's conclusion as to whether the exclusion clause was harsh or unconscionable. The defendant argues that the clause does not expressly exclude negligence and the trial Judge failed to read it *contra proferentem*. However, the clause in question releases the plaintiff from "any civil liability" and it is clear that the term "liability" is synonymous with negligence. There was no ambiguity in the clause so as to attract the *contra proferentem* doctrine. In addition, the Judge's finding that the defendant was bound by the exclusion clause is supported by the evidence as is

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<sup>44</sup> 2015 CAF 78

<sup>45</sup> 2014 FC 456

<sup>46</sup> 2010 SCC 4



his conclusion that the clause was not abusive or draconian. "Risk allocation avoids litigation and the heavy expenses they entail."

***Forsey v. Burin Peninsula Marine Service Centre***<sup>47</sup>

*Vessel Damaged Falling from Cradle - Bailment - Exclusion Clause - Spoliation of Evidence - Survey Costs as Damages - Appeals - Interpretation of Contract is Mixed Fact and Law*

The plaintiff's/respondent's fishing vessel was lifted out of the water and placed on a cradle at the premises of the defendant/appellant for the purpose of repairs and maintenance. The cradle failed 13 days later causing the vessel to fall, as a consequence of which it was damaged. The respondent claimed against the appellant for the damages to the vessel and for the costs of fuel containment and clean up. The appellant denied liability saying the cradle was constructed by the respondent and further relied upon a sign that provided "Boats stored at Owner's Risk" and an exclusion clause that provided:

"I understand and agree that the securing and locking of my boat is my responsibility, and not that of the said Marine Service Centre, or of its agents, servants, employees, or otherwise. Furthermore, I agree to indemnify and save harmless the said Marine Service Centre and its officers, agents, employees, servants or otherwise from, any claims on my part with respect to the same."

At first instance<sup>48</sup>, the trial Judge held that a bailment was created and that the cradle had been constructed by the defendant. As bailee, the burden was on the appellant to prove that it was not negligent in relation to the fitness of the materials used to construct the cradle and the manner in which it was constructed. She held that this onus had not been discharged. In doing so she noted that the materials used to construct the cradle were disposed of by the appellant within 48 hours of the incident. She held that this gave rise to a presumption that the materials were intentionally destroyed, which was not rebutted, and an adverse inference that the materials were unfit. With respect to the exclusion clause, the trial Judge held that neither the sign nor the exclusion clause in the contract expressly or impliedly excluded liability for negligence. She also applied the rule of *contra proferentum* to the words "securing and locking" in the exclusion clause and held that they did not transfer responsibility for the safety of the vessel to the respondent. In result, the respondent was entitled to damages for the vessel (which was declared a constructive total loss), the containment and clean-up costs and the costs of a surveyor. The survey costs were recoverable notwithstanding they were not paid for by the respondent on the grounds that they were a natural and probable consequence of the tort. The appellant appealed.

**Decision:** Appeal dismissed.

**Held:** The two issues on appeal are whether the trial Judge erred in drawing an adverse inference for destruction of evidence and whether she erred in her interpretation of the exclusion clause. The appellant argues there was no evidence supporting an inference the

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<sup>47</sup> 2015 FCA 216

<sup>48</sup> 2014 FC 974

cradle materials were intentionally destroyed and that the issue was not pleaded and was raised by the trial Judge *proprio motu*. It argues that procedural fairness was breached as it was not given a chance to respond to the trial Judge's theory of the case. The respondent, however, notes that the issue had been pleaded, raised in advance of the trial and was argued at trial. In the circumstances, there was no procedural unfairness. The true question is whether the trial Judge made a palpable and overriding error in concluding the appellant failed to rebut the inference of negligence. The appellant as bailee had the onus of proving it was not negligent which required it to prove the materials used to construct the cradle were in good condition. Having removed those materials, the appellant could not disprove the presumption of negligence. There was no need on the part of the trial judge to find the appellant intended to destroy the materials.

With regard to the exclusion clause, the parties disagree as to the meaning of the words "securing and locking". The appellant says these words refer to the placing of the vessel on the cradle whereas the respondent says they refer to the securing of lines, buoys and equipment and the locking of hatches, doors and windows. The trial Judge applied the *contra proferentem* rule of construction and, because it was clear the erection of the cradle was the responsibility of the appellant, held the words could not have had the meaning advocated for by the appellant. There is no basis to interfere with this holding. The main concern of contractual interpretation is to determine the parties' intent and scope of their understanding. This is not a question of pure law but of mixed fact and law and can only be interfered with on appeal if there is a palpable and overriding error. There is no such error. Moreover, even if the word "securing" was given the meaning advocated for by the appellant, the clause would not protect it since it is not an exclusion clause. Once the appellant assumed the responsibility for securing the vessel, it was bound to secure it properly.

## Personal Injury

### ***Ryan Estate v. Canada***<sup>49</sup>

#### *Personal Injury - Workers' Compensation - Joint and Several Liability*

The plaintiffs were the estates of two crew members of a fishing vessel, the "Ryan's Commander", that capsized and was lost at sea on 19 September 2004. The plaintiffs commenced proceedings against the builder and designer of the vessel alleging negligence in the design and construction of the vessel and against Transport Canada alleging negligence in the inspection of the vessel. The builder and designer challenged the right of the plaintiffs to bring any proceedings against them on the grounds that the action was barred by the *Workplace Health, Safety and Compensation Act* ("WHSA") of Newfoundland. On 2 August 2013 the Supreme Court of Canada ruled in favour of the builder and designer and held that the plaintiffs' action as against them was in fact barred by the WHSA.<sup>50</sup> As a consequence, the plaintiffs discontinued the action as against the builder and designer leaving only the Government of Canada as a defendant. Canada then brought this application on a point of law

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<sup>49</sup> 2015 NLTD(G) 90; 2015 CanLii 35487

<sup>50</sup> 2013 SCC 44

for a determination of whether its liability to the plaintiffs, if any, was joint and several. More specifically, Canada requested a holding that it could only be liable to the extent that it was actually at fault.

**Decision:** Application dismissed.

**Held:** It is not disputed that Canada is a concurrent tortfeasor and that concurrent tortfeasors are subject to joint and several liability. This means that a plaintiff may recover the full amount of damages from any one tortfeasor even though that tortfeasor may be only partially responsible for the damage. Section 3 of the *Contributory Negligence Act* of Newfoundland and s. 17 of the federal *Marine Liability Act* both impose joint and several liability when there is more than one tortfeasor and both permit tortfeasors to claim contribution and indemnity as amongst themselves. Canada submits that the discontinued defendants can never be liable to the plaintiffs because of the application of the WHSA and that it can make no claim for contribution and indemnity. Further, Canada says the “historic trade-off” imposed by the WHSA will be disrupted if joint and several liability is imposed because the plaintiffs will have double recovery. This court accepts that there is a possibility of double compensation and of circumventing the “historic trade-off”, however, as said by the Supreme Court of Canada in *Parkland (County) No. 31 v Stetar*<sup>51</sup>, a plaintiff is entitled to recover the full amount of the damages against only one of several tortfeasors even if that tortfeasor has no right of contribution from the others. Clear statutory language would be required to render joint and several liability not applicable and such language is not present in the WHSA. This is in contrast to the workers’ compensation legislation in some of the other provinces which specifically address the issues presented here and provide that the remaining tortfeasor can be held liable only for that portion of the loss or damage caused by its own fault or negligence.

### ***Cormack v. Chalmers***<sup>52</sup>

#### *Personal Injury - Mary Carter Agreement - Effect on Joint Liability*

The plaintiff was badly injured when she was struck by a motor vessel while swimming. The plaintiff commenced proceedings in the Ontario Superior Court against the first defendant, the owner/operator of the vessel that struck her and also against the second defendant, the owner of the residence where she was staying at the time as a guest. The plaintiff alleged the second defendant had failed to warn her of the dangers of swimming off his dock. The plaintiff also alleged that the defendants were jointly liable for her injuries pursuant to the provisions of the *Negligence Act* of Ontario. Subsequently, the first defendant commenced limitation proceedings in the Federal Court pursuant to the provisions of the *Marine Liability Act*. The plaintiff and second defendant were parties to the limitation proceeding and consented to a judgement declaring that the first defendant’s liability was limited to \$1 million. The plaintiff and first defendant also entered into a settlement agreement to the effect that the first defendant’s liability to the plaintiff was limited to \$1 million and that the plaintiff would indemnify and hold the first defendant harmless in the event he was called upon to pay more than this amount. The second defendant was not a party to the settlement agreement and later

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<sup>51</sup> [1975] 2 SCR 884; 1974 CanLii 198

<sup>52</sup> 2015 ONSC 5564

brought this application to strike those parts of the Statement of Claim pleading that the liability of the defendants was “joint”.

**Decision:** Motion Dismissed.

**Held:** The second defendant argues that the hold harmless provision in the settlement agreement has the legal effect of nullifying the joint liability of the defendants under the *Negligence Act* and renders him severally liable only. This is not the effect of the agreement as the liability of the first defendant is capped at \$1 million with or without the settlement agreement. Whether a settlement agreement has the effect of changing a defendant’s liability to one of several from joint and several depends on the language of the agreement in question. This case is analogous to a situation where one of several defendants enjoys legal immunity or limitation of liability and, in such circumstances, the remaining defendants are not protected from joint liability.

## Miscellaneous

### ***Snow Valley Marine Services Ltd. v. Seaspan Commodore (The)***<sup>53</sup>

#### *Tug and Tow - Clearing of Fouled Anchor by Tug - Liability - Marine Personnel Regulations - Value of Lost Tug*

The plaintiff’s assist tug was sunk and lost on 5 October 2011 when she was assisting the defendant vessel with a fouled anchor. Specifically, a line was attached from the plaintiff’s tug to the anchor of the defendant vessel and when the anchor came free it fell rapidly and sunk the plaintiff’s tug. The plaintiff commenced this proceeding against the defendant vessel and her owners alleging they were solely responsible for the sinking. The defendants argued that the cause of the accident was the failure of the plaintiff’s crew to take reasonable steps for their own safety including that they failed to utilize a release mechanism when they attached the line to the tug. The defendants further argued that the crew of the plaintiff’s tug did not have the certificates required by the *Marine Personnel Regulations* passed under the *Canada Shipping Act, 2001*.

**Decision:** Judgment for the plaintiff.

**Held:** Neither of the crew of the plaintiff’s tug held a Master’s certificate as required by s. 212 of the *Marine Personnel Regulations* but they had years of experience and this cannot be ignored. They were responsible for the safety of their own tug and they were the ones that attached the line to the tug, however, that tow line connection was not the cause of the sinking. The cause of the sinking was the failure of a safety chain from the defendant vessel to the anchor and anchor chain. The defendants alone were responsible for securing the safety line and their failure to properly secure it caused the sinking. With respect to damages, the proper measure of damages is the value of the lost tug to the plaintiff as a going concern at the time and place of loss. This is to be assessed by considering the market value of comparable tugs, the costs of refitting tugs to do her work and the compensation required to put the

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<sup>53</sup> 2015 FC 304

plaintiff in the same position it would have been in had the loss not occurred.

***R v. Reinbrecht***<sup>54</sup>

*Collisions - Offences - Criminal Negligence*

The accused was charged with criminal negligence causing death and criminal negligence causing bodily harm. The charges arose out of a collision between the accused's vessel and a houseboat on Shuswap Lake at 11:15 p.m. on 3 July 2010. As a result of the collision one person was fatally injured and several others were injured.

**Decision:** The accused is guilty on both counts.

**Held:** The evidence establishes that the defendant consumed some beer in the afternoon and during the evening of 3 July 2010 and smoked marijuana. However, no conclusions can be drawn as to the amount the accused consumed and it cannot be said his ability to operate his vessel was impaired by alcohol or marijuana. The evidence does establish that shortly before 11:00 p.m. the accused took two others out on a "joy ride" which involved high rates of speed, "donuts" and "zig zag" manoeuvres in close proximity to other boaters and boats moored near the shore. At the time of the collision the accused's boat was proceeding at a speed of approximately 30 miles per hour and had just performed a "U" turn. Within seconds of the last "U" turn the boat collided with the starboard quarter of the houseboat. At the time the accused was sitting in the boat and had not seen the houseboat. The houseboat was proceeding at a speed slower than 8 miles per hour and had been following a consistent path of travel. The houseboat had its port and starboard lights and its stern light illuminated but not its mast light. It also had some interior lights on. The operator of the houseboat was impaired by alcohol and marijuana at the time of the collision. Considering all the evidence, the accused was operating his vessel in a manner that demonstrated wanton or reckless disregard for the lives or safety of other persons and constitutes a pattern of wanton or reckless behaviour that amounts to a marked and substantial departure from the standard of care of a reasonably prudent vessel operator in the circumstances. The accused "ought to have foreseen in the circumstances the obvious and serious risk of collision with any number of navigation hazards, lit and unlit, stationary and moving, that close to shore and the consequences to others as a result. Striking other vessels, even dimly lit ones, was well within the reasonably foreseeable risk of engaging in that kind of conduct in those circumstances. The risks were so obvious and serious that [the accused] either recognized them and ran them, or gave no thought to them at all."

***Goodrich Transport Ltd. v. Vancouver Fraser Port Authority***<sup>55</sup>

*Judicial Review of Truck Licencing Decision by Port Authority*

The Port of Metro Vancouver had been plagued with labour issues relating to the drayage of containers to and from the port for many years. In an effort to resolve the issues, the licencing system was changed to, *inter alia*, decrease the number of trucks used to service the Port's requirements. The Port evaluated the licence applications received based upon various

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<sup>54</sup> 2015 BCSC 1960

<sup>55</sup> 2015 FC 520

published criteria but the applications were processed in batches rather than at a single time. The Port did not advise that applications were to be evaluated in this way. The result was that some of the applications that were processed at a later point in time were denied licences even though those applicants had higher scores than applicants who had been processed earlier. A number of the applicants who were denied licences brought this proceeding for judicial review.

**Decision:** Application allowed.

**Held:** The Port had a duty of fairness in relation to the evaluation of the licence applications. The Applicants were entitled to a fair, impartial and open process. Effective notice is at the heart of procedural fairness. The Port had published the criteria that would be used to evaluate licences and was under no duty to advise in advance exactly how the different criteria would be weighted. However, “fairness demanded the disclosure of the more onerous scoring system that applied to later applications”. The Port is to re-assess the licence applications of the applicants “in accordance with the most favourable benchmark applied to any of the successful licensing applications”.

### ***Save Halkett Bay Marine Park Society v. Canada (Environment)***<sup>56</sup>

#### *Judicial Review of Permit Authorizing Artificial Reef - Dismissal for Delay*

The respondent had obtained a Disposal at Sea Permit from the Minister of the Environment to sink a decommissioned destroyer in the waters of Halkett Bay near Vancouver for the purpose of creating an artificial reef. The applicant filed an objection to the permit and ultimately commenced these proceedings for judicial review of the Minister’s decision. The issues were: (1) was the Application filed late? (2) Did the Minister fail to consider that the destroyer contained TBTs which are banned in Canada? and, (3) was the issuance of the permit unreasonable?

**Decision:** Application dismissed.

**Held:**

- (1) Section 18.1(2) of the *Federal Courts Act* requires that an Application for judicial review be commenced within 30 days. This Application was filed more than two months beyond that time limit and is therefore filed late. The court does, however, have a discretion to extend the time limit. The relevant factors are whether: (i) there was a continuing intention to pursue the application; (ii) there is merit to the application; (iii) the other parties have suffered prejudice as a result of the delay, and (iv) there is a reasonable explanation for the delay. Here, there is substantial prejudice to the respondent from the delay and the delay has not been explained. Accordingly, the Application is dismissed for delay.
- (2) The Applicant argues that TBTs are subject to a complete ban in Canada and that the Minister failed to take this into account. However, there is no such complete ban in the relevant statutes and the Minister was entitled to issue a permit.

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<sup>56</sup> 2015 FC 302

- (3) Finally, the Applicant argues the Minister's decision was unreasonable in that: (i) the basis for the decision was not explained; (ii) the Minister failed to follow accepted protocols for the testing of anti-fouling paint; and (iii) the existence of any TBTs whatsoever in the hull required the permit be refused. However, the Minister was under no duty to issue detailed reasons for the decision separate and apart from the decision record and the permit itself. The record discloses the reasons of the Minister. Also, contrary to the submissions of the Applicant, the Minister did observe the accepted protocols for testing anti-fouling paint. Finally, there is no clear and compelling evidence that the vessel did contain TBTs and, in the absence of such evidence, the Minister's decision is deserving of deference.

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