

Federal Court



Cour fédérale

Date : 20140206

Docket: T-2259-12

Citation: 2014 FC 132

Ottawa, Ontario, February 6, 2014

PRESENT: The Honourable Madam Justice Heneghan

**ADMIRALTY ACTION *IN REM* AGAINST THE SHIPS *CAPE APRICOT*,
ASIAN GYRO, *BORON NAVIGATOR*, *CIELO DI AMALFI*, *LEO ADVANCE*,
LEO AUTHORITY, *LEO FELICITY*, *LEO MONO*, *LEO OSAKA*,
LEO PERDANA, *MEDI GENOVA*, *MOL PARAMOUNT*, *MOL SOLUTION*,
OOCL OAKLAND, *ROYAL ACCORD*, *ROYAL CHORALE*,
ROYAL EPIC, *SEASPAN OSPREY*, *SEASPAN RESOLUTION*,
AND A TUG BOAT WHOSE NAME IS UNKNOWN AND *IN PERSONAM***

BETWEEN:

**WESTSHORE TERMINALS LIMITED
PARTNERSHIP BY ITS GENERAL PARTNER
WESTSHORE TERMINALS LTD.,
WESTSHORE TERMINALS INVESTMENT
CORPORATION, AND
WESTAR MANAGEMENT LTD.**

Plaintiffs

and

**LEO OCEAN, S.A.,
TOKEI KAIUN COMPANY LIMITED,
KAWASAKI KISEN KAISHA LIMITED ('K'-
LINE), SEASPAN ULC,
JEFFREY MCDONALD, AND THE OWNERS
AND ALL OTHERS INTERESTED IN THE
SHIPS *CAPE APRICOT*, *ASIAN GYRO*,
BORON NAVIGATOR, *CIELO DI AMALFI*,
LEO ADVANCE, *LEO AUTHORITY*,
LEO FELICITY, *LEO MONO*, *LEO OSAKA*,
LEO PERDANA, *MEDI GENOVA*,
MOL PARAMOUNT, *MOL SOLUTION*,
OOCL OAKLAND, *ROYAL ACCORD*,
ROYAL CHORALE, *ROYAL EPIC*,
SEASPAN OSPREY,
SEASPAN RESOLUTION, AND A TUG BOAT
WHOSE NAME IS UNKNOWN**

Defendants

and

**JEFFREY MCDONALD, SEASPAN ULC,
SEASPAN OSPREY, *SEASPAN RESOLUTION*
AND *CHARLES H. CATES VII* OR
ALTERNATIVELY A TUG BOAT WHOSE
NAME IS UNKNOWN AND THE OWNERS AND
ALL OTHERS INTERESTED IN THE SHIP *CAPE
APRICOT*, THE SHIP *CAPE APRICOT*, LEO
OCEAN S.A., TOKEI KAIUN COMPANY
LIMITED AND KAWASAKI KISEN KAISHA
LIMITED ('K'-LINE)**

Third Parties

REASONS FOR ORDER AND ORDER

INTRODUCTION

[1] By Notice of Motion dated May 3rd, 2013, the Defendant and Third Party Leo Ocean S.A. (the “Defendant Leo” or “Leo”) seeks determination of certain questions of law pursuant to Rule 220 of the *Federal Courts Rules*, SOR/98-106 (the “Rules”) concerning the status of the Defendant and Third Party Captain Jeffrey McDonald as a “licensed pilot” within the meaning of the *Pilotage Act*, R.S.C. 1985, c. P-14 (the “Pilotage Act” or the “Act”), as of December 6 and December 7, 2012.

[2] In its Notice of Motion, Leo posed the following questions for determination:

1. Pursuant to Rule 220, a determination as to whether at the time of the allision:
 - i. the pilot, Defendant Jeffrey McDonald (“McDonald”): met the definition of “licensed pilot” as defined in the *Pilotage Act*, R.S.C. 1985, c. P-14 (the “*Pilotage Act*”), including whether McDonald held a valid licence or pilotage certificate taking into account s. 22 of the *Pilotage Act* and the applicable Regulations; and
 - ii. McDonald was allowed to have conduct of the vessel *Cape Apricot* (the “Vessel”) on December 6, 2012 and December 7, 2012 taking into account s. 25 of the *Pilotage Act*.
2. Pursuant to Rule 220, a determination as to whether McDonald is able to limit his liability for the allision pursuant to s. 40 of the *Pilotage Act*;
3. Pursuant to Rule 220, a determination as to whether s. 41 of the *Pilotage Act* affects the liability of Leo Ocean S.A. as owner of *Cape Apricot*;

BACKGROUND

[3] The facts referred to below are taken from the Statement of Claim that was issued on behalf of the Plaintiffs, Westshore Terminals Limited Partnership by its general Partner Westshore Terminals Ltd., Westshore Investment Corporation and Westshore Management Ltd. (“Westshore” or the “Plaintiffs”), on December 19, 2012, as well as the affidavits, together with attached exhibits, that were filed in respect of this motion.

[4] Early in the morning of December 7, 2012 the vessel “Cape Apricot” (the “vessel”) attempted to berth at berth #2 of the Plaintiffs’ terminal situated at Roberts Bank in the port of Delta, British Columbia. At the time, the vessel was under the control of Captain Jeffrey McDonald. The vessel hit the causeway leading to Westshore berth #1 and damaged that causeway. Westshore commenced an action in this Court on December 19, 2012, seeking damages estimated in excess of \$60 million.

[5] Access to that terminal required the vessel to transit a “compulsory pilotage area”, as defined in the Act.

[6] Captain McDonald obtained his watch-keeping mate’s certificate from Transport Canada in June 1977. On February 22, 1980 he received a training certificate for simulated electronic navigation level 2 (“S.E.N.II”). In April 1980, he received a master’s certificate for home-trade tug of any size or steamship under 350 gross tonnage.

[7] In February 1993, Captain McDonald participated in a course on automatic radar plotting aids. In June 1993, he was issued a Class II (restricted) pilot's license. On June 15, 1994, he was granted a Class I licence as an unrestricted pilot for areas 2-5 off the British Columbia Coast.

[8] According to his affidavit filed in response to Leo's motion, Captain McDonald worked fulltime as a coastal pilot in British Columbia from 1993 until January 20, 2013. At that time, he took a leave that had been scheduled prior to the incident.

[9] In February 2013, Captain McDonald realized that his certificate of competency had expired as of April 24, 2012. He took immediate steps to rectify that situation beginning with a request to the Pacific Pilotage Authority (the "PPA") to provide a letter confirming his sea-time for the past five years. The letter was issued on February 21, 2013.

[10] On February 21, 2013, Captain McDonald submitted an application on a prescribed Transport Canada form for the renewal of his certificate of competency. That form was endorsed by an officer of Transport Canada on the same day, indicating that Captain McDonald had submitted all the necessary documentation in support of his application.

[11] On February 21, 2013, an "Examiner's Certificate" was issued by Transport Canada certifying the competency of Captain McDonald as a Master 500 Gross Tonnage, Near Coastal and that the certificate could be accepted as proof of competency until August 20, 2013.

[12] As of May 14, 2013, Captain McDonald had not received his renewed certificate of competency.

[13] In October 2012, Captain McDonald was advised by the PPA that it was time to renew his medical certificate. He attended upon Dr. Stevens, a Transport Canada approved physician, on or about October 16, 2012 and obtained a provisional medical certificate on October 16, 2012. According to a written statement issued by Dr. Stevens, entitled “Pacific Pilotage Authority Medical Report” dated October 16, 2012, Captain McDonald was found fit. In the Marine Medical Certificate issued January 16, 2013, Captain McDonald was found fit with the limitation that “corrective lenses required”. This certificate is valid until October 10, 2014.

[14] According to his affidavit dated May 14, 2013, no one from the PPA, Transport Canada or the British Columbia Coast Pilots (“BCCP”) asked him about the status of his certificate of competency following the incident of December 7, 2012.

SUBMISSIONS

The Defendant Leo

[15] Leo, the moving party, argues that in the context of the Canadian compulsory pilotage regime, Captain McDonald is entitled to the protection of the Act only if he satisfied at all times the legal requirements of a “licensed pilot”. Leo submits that those requirements include possession of an up-to-date certificate of competency. It argues that since Captain McDonald did not hold a valid certificate as of the date of the incident, his licence was no longer valid. In this regard, it relies on

the decision in *Gudzinski Estate v. Allianz Global Risks US Insurance Co. Limited* (2012), 519 A.R. 215.

[16] Leo submits that in the circumstances where Captain McDonald did not possess a current certificate of competency, his pilot's licence was not valid, and he was not a "licensed pilot". Consequently, the statutory limitation of liability in the amount of \$1,000, pursuant to section 40 of the Act, is not available to Captain McDonald and further, that Leo may plead the common law defence of compulsory pilotage to avoid or reduce its liability, if any, to the Plaintiffs.

[17] Leo relies specifically upon the provisions of the Act, as well as upon the *Pacific Pilotage Regulations*, C.R.C., c. 1270 (the "PPR") and the *General Pilotage Regulations*, SOR/2000-132 (the "GPR").

Captain McDonald

[18] Captain McDonald argues that subsection 22(4) should be read in a manner consistent with a person's acquired right to hold a pilot's licence and not in a manner that would result in an automatic loss of that licence if a person does not hold a certificate of competency at a given time.

[19] He argues that the words "able to meet" are not synonymous with "meets". He submits that he was "able to meet" the requirements to hold a licence, as illustrated by the fact that the certificate of competency was renewed quickly when he applied for renewal in April 2013.

[20] Further, Captain McDonald notes that there are no statutory or regulatory requirements that a licence holder possess an unexpired certificate of competency; that requirement applies to persons applying for a licence initially, pursuant to subsection 10(1) of the GPR. Section 1 of the GPR draws a distinction between the holder of a licence and an applicant for such licence.

[21] Captain McDonald further submits that the requirement of subsection 10(1) can be contrasted with the requirement of subsection 2(1) of the GPR that both “applicants” and “holders” of a pilot’s licence possess a valid medical certificate. This is an important distinction as health conditions may vary over time. On the other hand a pilot’s working experience, which is assessed during the issuance of a certificate of competency, only accrues with time. It is reasonable to expect a pilot to hold a current medical assessment as a qualification for an enduring licence and that a current certificate of competency is not required.

[22] As well, Captain McDonald argues that a pilot’s licence is an enduring right at common law and has no expiry date. As such, it continues to exist subject to the statutory requirements. Neither the Act nor the applicable regulations provide that a pilot’s licence becomes invalid upon the expiry of a certificate of competency.

[23] Finally, Captain McDonald submits that this interpretation of subsection 22(4) is consistent with the underlying policy of the Act. He argues that all relevant times he held a valid licence and was a “licensed pilot” within the meaning of the Act. As such, he is entitled to the benefit of the limitation of liability set out in subsection 40(1) of the Act and further, that Leo is not entitled to rely on the common law defence of compulsory pilotage.

Westshore

[24] The Plaintiffs argue that the Defendant Leo's challenge to the status of Captain McDonald is improperly based upon a technical interpretation of the Act and the relevant regulations, and erroneously ignores the modern approach to statutory interpretation endorsed by the Supreme Court of Canada in *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550 at paragraphs 2 and 6. According to the Plaintiffs, the modern approach requires that statutory interpretation take into account the purpose of the legislation, the consequences of the proposed interpretation, presumptions and special rules of interpretation, and applicable external aids.

[25] The Plaintiffs support the argument of Captain McDonald that section 10 of the GPR only applies to applicants for a licence, and that Captain McDonald was the holder of a licence, not an applicant, at the time of the incident. A pilot's licence can only be invalidated through positive action on the part of the licensing authorities, pursuant to subsection 30(2) of the Act.

[26] The Plaintiffs further submit that section 5 of the PPR does not incorporate the requirement of the GPR, regarding "applicants" for a licence, to "holders" of a pilotage licence. They argue that the only purpose of section 5 of the PPR is that both "applicants" for a licence and licence "holders" complete certain training courses in addition to satisfying other regulatory requirements.

Kawasaki Kisen Kaisha Limited

[27] The Defendant and Third Party Kawasaki Kisen Kaisha Limited (“Kawasaki”) argues that the expiry of Captain McDonald’s certificate of competency had no effect upon his status as a “licensed pilot” within the meaning of the Act.

[28] Kawasaki endorses the position of the Plaintiffs that there is only one principle of statutory interpretation, that is the modern principle. It relies, in this regard, upon the recent decision of the Federal Court of Appeal in *National Gallery of Canada v. Canadian Artists’ Representation et al.* (2013), 443 N.R. 121 at paragraph 93.

[29] Kawasaki also shares Westshore’s position that invalidating a pilot’s licence requires the licensing authorities to take positive steps to do so, pursuant to the Act.

[30] Kawasaki further argues that sections 5 through 8 of the PPR set out the requirements that must be met by a licence holder. None of these requirements are at issue in this case. Pursuant to both the PPR and the GPR, Captain McDonald’s licence was valid at the time of the incident.

Seaspan ULC

[31] The submissions of the Defendant and Third Party Seaspan ULC (“Seaspan”) parallel those of Westshore and Kawasaki with respect to the distinction between applicants for a licence and holders of a licence under the Act and regulations, as well as the requirement for positive action on the part of the licensing authority to invalidate or suspend a pilot’s licence.

[32] Relying on the maxim *expressio unius est exclusio alterius*, Seaspan argues that because the Act requires positive action by the licensing authority to suspend or invalidate a pilot's licence when a person no longer meets the requirements for a licence, Parliament intended to exclude the possibility of automatic invalidation of a licence upon the expiry of a pilot's certificate of competency. It points to the procedural protections found at sections 27 to 29 of the Act for pilots subject to such action by the licensing authority as further support for this argument.

DISCUSSION AND DISPOSITION

[33] This motion raises a question of statutory interpretation concerning the meaning of the words "licensed pilot" as they appear in subsection 22(4), section 40 and section 41 of the Pilotage Act. The question is critically important to the Defendant Leo and the Defendant Captain Jeffrey McDonald, for diametrically different reasons.

[34] Leo, as the owner of the vessel that allegedly injured the Plaintiffs' property, is facing a multi-million dollar claim for damages. In challenging the status of Captain McDonald as a "licensed pilot", Leo seeks to invoke and rely upon the common law defence of compulsory pilotage.

[35] Captain McDonald seeks recognition as a "licensed pilot" in order to avail of the limitation of liability conferred by subsection 40(1) of the Act, whereby the liability of a "licensed pilot" is limited to "one thousand dollars for any damage or loss occasioned by his fault, neglect or want of skill".

[36] Both Leo and Captain McDonald support a strict interpretation of subsection 22(4), again for different reasons. Leo urges a strict reading of the words in order to import compliance, at all times, with the underlying regulatory requirements to obtain a pilot's licence. The principal sources of those requirements are the GPR and the PPR. Leo focuses on the fact that at the time of the incident, Captain McDonald did not have a current certificate of competency and argues that this means that he is not entitled to the benefit of section 40 of the Pilotage Act.

[37] Captain McDonald seeks a strict interpretation of subsection 22(4) in order to protect himself against the automatic loss of his pilot's licence, an acquired right, simply on the basis of a technical oversight, that is the timely renewal of his certificate of competency. He also relies on a strict interpretation in order to preserve the benefits conferred by the Act, that is the limitation of liability in subsection 40(1) and the protection of section 41.

[38] As noted above, both Leo and Captain McDonald argue in favour of a strict reading of the words "licensed pilot" as those words are used in subsection 22(4), having regard to the interpretation of those words in section 1.1. That strict approach focuses on the word "valid". Leo argues that if Captain McDonald did not meet all of the requirements to hold a valid licence as of the date of the incident, in particular a current certificate of competency, he did not qualify to hold a pilot's licence and accordingly, was not a "licensed pilot".

[39] The strict approach to statutory interpretation involves reading the challenged legislation as narrowly as possible. General terms must be read down, ambiguities resolved in favour of non-application, and the conditions of application should be carefully enforced; see the decision in

Yukon (Minister of Energy, Mines and Resources) v. Bonnet Plume Outfitters (1989) Ltd., 2008 YKSC 3 at paragraph 28.

[40] The principle of strict construction has been tempered by the *Interpretation Act*, R.S.C. 1985, c. I-21, section 12, which provides as follows:

| Enactments deemed remedial | Principe et interprétation |
|---|---|
| 12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. | 12. Tout texte est censé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet. |

[41] In *Canada 3000 Inc., (Re); Inter-Canadian (1991) Inc. (Trustee Of)*, [2006] 1 S.C.R. 865, at paragraph 84 the Supreme Court of Canada said the following about the import and effect of section 12, as a directive to interpret legislation in a purposeful manner:

... [O]nly if a provision is ambiguous (in that after full consideration of the context, multiple interpretations of the words arise that are equally consistent with Parliamentary intent), is it permissible to resort to interpretive presumptions such as "strict construction". The applicable principle is not "strict construction" but s. 12 of the *Interpretation Act*, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects"; see *Bell ExpressVu*, at para. 28:

Other principles of interpretation -- such as the strict construction of penal statutes and the "*Charter* values" presumption -- only receive application where there is ambiguity as to the meaning of a provision. (On strict construction, see: *Marcotte v. Deputy Attorney General for Canada*, [1976] 1 S.C.R. 108, at p. 115, *per* Dickson J. (as he then was); *R. v. Goulis* (1981), 33 O.R. (2d) 55

(C.A.), at pp. 59-60; *R. v. Hasselwander*, [1993] 2 S.C.R. 398, at p. 413; *R. v. Russell*, [2001] 2 S.C.R. 804, 2001 SCC 53, at para. 46...).

In my view, there is no ambiguity in the statutory language creating the detention remedy and thus resort to "strict construction" is not called for.

[42] Generally, the strict construction approach has been overtaken by the purposive, contextual approach as set out in the decision of *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at paragraph 21. In *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601 the Supreme Court of Canada summarized the current principles of statutory interpretation at paragraph 10 as follows:

The interpretation of a statutory provision must be read according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[43] I note the instruction in *Canada Trustco, supra*, to read the words of a statute as a "harmonious whole". In the present case, the interpretation of the words "licensed pilot" begins with consideration of the purpose of the Act, the definition of those words in the Act, as well as the related regulations, that is the GPR and the PPR.

[44] In my opinion, there is no ambiguity in the statutory provisions at issue in this motion. All terms are defined in the Act and regulations. The approach to statutory interpretation that is applicable to the legislation and regulations in this case is the modern, contextual approach.

[45] The purpose of the Act is to provide for the establishment and management of compulsory pilotage areas in the designated areas off the coast of Canada and of certain inland waterways; see subsections 3(1), 15(1), and section 18 of the Act as follow:

| | |
|--|---|
| <p>Pilotage Authorities established</p> <p>3. (1) Each Pilotage Authority named in the schedule is hereby established as a body corporate consisting of a Chairperson and not more than six other members.</p> | <p>Constitution</p> <p>3. (1) Chaque Administration de pilotage dont le nom figure à l'annexe est constituée en personne morale composée d'un président et d'au plus six autres membres.</p> |
| <p>Employment of staff</p> <p>15. (1) Subject to subsection (2), an Authority may employ such officers and employees, including licensed pilots and apprentice pilots, as are necessary for the proper conduct of the work of the Authority.</p> | <p>Personnel</p> <p>15. (1) Sous réserve du paragraphe (2), une Administration peut employer le personnel, notamment les pilotes brevetés et les apprentis-pilotes, qu'elle estime nécessaire à l'exercice de ses activités.</p> |
| <p>Objects</p> <p>18. The objects of an Authority are to establish, operate, maintain and administer in the interests of safety an efficient pilotage service within the region set out in respect of the Authority in the schedule.</p> | <p>Mission</p> <p>18. Une Administration a pour mission de mettre sur pied, de faire fonctionner, d'entretenir et de gérer, pour la sécurité de la navigation, un service de pilotage efficace dans la région décrite à l'annexe au regard de cette Administration.</p> |

[46] Subsection 20(1) authorizes the enactment of regulations. Paragraphs (a), (e), (f), (g), and (h) are relevant and provide as follows:

Regulations

20. (1) An Authority may, with the approval of the Governor in Council, make regulations necessary for the attainment of its objects, including, without restricting the generality of the foregoing, regulations

(a) establishing compulsory pilotage areas;

[...]

(e) prescribing classes of licences and classes of pilotage certificates that may be issued;

(f) prescribing the qualifications that a holder of any class of licence or any class of pilotage certificate shall meet, including the degree of local knowledge, skill, experience and proficiency in one or both of the official languages of Canada required, in addition to the minimum qualifications prescribed by the Governor in Council under section 52;

(g) prescribing the manner for determining whether a person who applies for a licence or pilotage certificate, or a licensed pilot or holder of a pilotage certificate,

Règlements généraux

20. (1) Une Administration peut, avec l'approbation du gouverneur en conseil, prendre les règlements généraux nécessaires à l'exécution de sa mission et, notamment :

a) établir des zones de pilotage obligatoire;

[...]

e) établir les catégories de brevets et certificats de pilotage;

f) fixer les conditions que le titulaire d'un brevet ou d'un certificat de pilotage d'une catégorie quelconque doit remplir, notamment le niveau de connaissance des lieux, de compétence, d'expérience et de connaissance de l'une des langues officielles du Canada, ou des deux, requis en sus des conditions minimales fixées par le gouverneur en conseil aux termes de l'article 52;

g) prévoir la façon de déterminer si la personne qui demande un brevet ou un certificat de pilotage ou si le pilote breveté ou le titulaire d'un certificat de pilotage

meets the qualifications prescribed under paragraph (f) for the class of licence or pilotage certificate applied for or held, as the case may be;

remplit les conditions fixées en application de l'alinéa f) pour la catégorie du brevet ou certificat de pilotage dont il est titulaire ou dont il demande la délivrance, selon le cas;

(h) prescribing the manner of issuing licences and pilotage certificates;

h) prévoir le mode d'attribution des brevets et certificats de pilotage;

[47] It is noteworthy that according to section 18, safety is the paramount concern of the pilotage authorities that are created under the Act. A key factor in meeting that concern is the requirement that qualified individuals are accepted as “licensed pilots” or “holders of pilotage certificates”. Although mentioned in the relevant statutory provisions, the latter class is not an issue in the present motion.

[48] Section 1.1 of the Act defines “licensed pilot” as follows:

“licensed pilot”

« pilote breveté »

“licensed pilot” means a person who holds a valid licence.

« pilote breveté » Titulaire d'un brevet en cours de validité.

[49] “Licence” is defined in section 1.1 as follows:

“licence”

« brevet »

“licence” means a licence issued by an Authority under section 22.

« brevet » Brevet délivré par une Administration en application de l'article 22.

[50] Section 22 deals with the issuance of a licence. Subsections 22(1) and 22(4) are relevant and provide as follow:

| Issue of licence or pilotage certificate | Délivrance du brevet ou du certificat de pilotage |
|---|--|
| 22. (1) Subject to subsection (2) and any regulations made pursuant to paragraph 20(1)(j), an Authority shall, | 22. (1) Sous réserve du paragraphe (2) et des règlements d'application de l'alinéa 20(1)j), une Administration doit délivrer au demandeur un brevet ou un certificat de pilotage : |
| (a) on receipt of an application in writing for a licence or pilotage certificate, and | a) sur réception d'une demande écrite à cet effet; |
| (b) on being satisfied that the applicant therefor is able to meet the qualifications prescribed by the Governor in Council pursuant to section 52 and by the Authority pursuant to subsection 20(1), | b) lorsqu'elle est convaincue que le demandeur peut remplir les conditions fixées par le gouverneur en conseil en application de l'article 52 et par l'Administration en application du paragraphe 20(1). |
| issue a licence or pilotage certificate to the applicant, but no pilotage certificate shall be issued to an applicant therefor unless the Authority is satisfied that the applicant has a degree of skill and local knowledge of the waters of the compulsory pilotage area equivalent to that required of an applicant for a licence for that compulsory pilotage area. | Il ne doit toutefois pas être délivré de certificat de pilotage à un demandeur à moins que l'Administration ne soit convaincue qu'il possède un niveau de compétence et de connaissance des eaux de la zone de pilotage obligatoire comparable à celui que l'on exige du demandeur qui présente une demande de brevet pour cette même zone. |
| Term where qualifications met | Durée de validité — Conditions réunies |

(4) A licence or pilotage certificate of any class remains in force while the licensed pilot or holder of the pilotage certificate is able to meet the qualifications prescribed by the regulations for a holder of that class of licence or pilotage certificate, including any qualifications prescribed by regulation since the licence or pilotage certificate was issued or deemed to be issued.

(4) Un brevet ou un certificat de pilotage reste valide tant que le pilote breveté ou le titulaire du certificat de pilotage peut remplir les conditions fixées par règlement général pour un détenteur de cette catégorie de brevet ou de certificat de pilotage, notamment celles fixées depuis la date de délivrance du brevet ou certificat de pilotage.

[51] Subsections 25(1) and 25(3) of the Act limit conduct of a vessel in a compulsory pilotage area to a “licensed pilot” or “the holder of a pilotage certificate”. Those subsections provide as follows:

Prohibition where pilotage compulsory

25. (1) Except as provided in the regulations, no person shall have the conduct of a ship within a compulsory pilotage area unless the person is a licensed pilot or a regular member of the complement of the ship who is the holder of a pilotage certificate for that area.

[...]

(3) No licensed pilot or holder of a pilotage certificate

Interdiction — Zone de pilotage obligatoire

25. (1) Sauf dispositions contraires des règlements généraux, il est interdit à quiconque d’assurer la conduite d’un navire à l’intérieur d’une zone de pilotage obligatoire à moins d’être un pilote breveté ou un membre régulier de l’effectif du navire et titulaire d’un certificat de pilotage pour cette zone.

[...]

(3) Il est interdit à un pilote breveté ou au titulaire d’un certificat de pilotage d’assurer la conduite d’un

(a) who knows of any physical or mental disability that prevents that pilot or holder from meeting the qualifications required of a holder of a licence or pilotage certificate,

(b) whose ability is impaired by alcohol or a drug or from any other cause, or

(c) whose licence or pilotage certificate is suspended, shall have the conduct of a ship within a compulsory pilotage area or be on duty on board ship pursuant to a regulation of an Authority requiring a ship to have a licensed pilot or holder of a pilotage certificate on board.

navire dans une zone de pilotage obligatoire ou d'être de service à bord du navire en application d'un règlement général d'une Administration exigeant qu'un navire ait à son bord un pilote breveté ou le titulaire d'un certificat de pilotage quand il se trouve dans l'une ou l'autre des circonstances suivantes :

a) il a connaissance d'une incapacité physique ou mentale qui l'empêche de remplir les conditions exigées du détenteur d'un brevet ou d'un certificat de pilotage;

b) ses facultés sont affaiblies par l'alcool ou une drogue ou pour toute autre raison;

c) son brevet ou certificat de pilotage est suspendu.

[52] Subsection 40(1) of the Act limits the liability of a "licensed pilot" to \$1,000, as follows:

Limitation of liability

40. (1) A licensed pilot is not liable in damages in excess of the amount of one thousand dollars for any damage or loss occasioned by his fault, neglect or want of skill.

Limitation de la responsabilité

40. (1) Le montant maximal des dommages-intérêts qu'un pilote breveté est tenu de payer pour les dommages ou pertes causés par sa faute,

**sa négligence ou son
impéritie est de mille dollars.**

[53] In arguing that Captain McDonald was not a “licensed pilot” at the time of the incident, Leo is seeking to avoid the application of section 41 of the Act which provides:

**Employment of pilot does
not exempt owner from
liability**

**41. Nothing in this Part
exempts the owner or master
of any ship from liability for
any damage or loss
occasioned by the ship to any
person or property on the
ground that**

**(a) the ship was under the
conduct of a licensed pilot;
or**

**(b) the damage or loss was
occasioned by the fault,
neglect, want of skill or
wilful and wrongful act of a
licensed pilot.**

**Responsabilité du
propriétaire**

**41. La présente partie n’a
pas pour effet d’exonérer le
propriétaire ou le capitaine
d’un navire de sa
responsabilité pour tous
dommages ou pertes causés
par son navire à une
personne ou à des biens du
seul fait que :**

**a) le navire était sous la
conduite d’un pilote breveté;**

**b) les dommages ou pertes
résultent de la faute, de la
négligence, de l’impéritie ou
d’un acte délictueux d’un
pilote breveté.**

[54] The GPR are enacted pursuant to section 52 of the Act. Section 1 is an “interpretation” section in which “applicant” is defined as “applicant means an applicant for a licence or pilotage certificate”.

[55] Part I of the GPR is entitled “Licences and Pilotage Certificates” and consists of sections 2 to 14, inclusive. Sections 2 to 9 address “Health Qualifications”. Subsection 2(1) is relevant to the present matter and provides as follows:

2. (1) Every applicant or holder shall undergo a medical examination, at the time or within the interval prescribed in this subsection, conducted by a designated physician to determine their physical and mental fitness for pilotage duties

(a) in the case of an applicant, before the licence or certificate is issued; and

(b) in the case of a holder, at least once every two years.

2. (1) Le demandeur ou le titulaire doit subir, au moment ou selon l’intervalle fixés au présent paragraphe, un examen médical effectué par un médecin désigné dans le but de déterminer sa capacité physique et mentale pour exercer les fonctions de pilotage :

a) dans le cas du demandeur, avant que le brevet ou le certificat ne soit délivré;

b) dans le cas du titulaire, au moins une fois tous les deux ans.

[56] Subsection 2(3) is also relevant and provides as follows :

2(3) An applicant or holder is physically and mentally fit for pilotage duties if the applicant or holder

(a) does not suffer from any of the disabilities referred to in subsection 3(1); and

(b) meets the medical standards referred to in subsection 3(2).

(3) Le demandeur ou le titulaire possède la capacité physique et mentale requise pour exercer les fonctions de pilotage si les conditions suivantes sont remplies :

a) il ne souffre d’aucune incapacité visée au paragraphe 3(1);

b) il se conforme aux normes médicales visées au paragraphe 3(2).

[57] Subsection 3(2) of the GPR describes what the examining physician shall consider when conducting a medical examination, as follows:

3(2) The designated physician conducting a medical examination shall

(a) take into account, when assessing an applicant or holder, the medical fitness standards referred to and set out in Division 8 of Part 2 of the *Marine Personnel Regulations*; and

(b) determine if the applicant or holder has depth perception.

3(2) Le médecin désigné qui effectue un examen médical doit :

a) tenir compte, à l'évaluation du demandeur ou du titulaire, des normes relatives aux aptitudes physiques et aux aptitudes mentales visées et prévues à la section 8 de la partie 2 du *Règlement sur le personnel maritime*;

b) établir si le demandeur ou le titulaire possède la perception de la profondeur.

[58] Subsection 4(2) of the GPR prescribes the standards by which the designated physician is to assess “an applicant or a holder” as follows:

4(2) The designated physician shall set out in the medical report an assessment of the applicant or holder as

(a) unfit for pilotage duties;

(b) fit for pilotage duties with limitations; or

(c) fit for pilotage duties without limitations.

(3) A designated physician

4(2) Le médecin désigné inscrit sur le rapport médical son évaluation du demandeur ou du titulaire en y indiquant si le demandeur ou le titulaire :

a) est inapte à exercer les fonctions de pilotage;

b) est apte à exercer les fonctions de pilotage, avec restrictions;

c) est apte à exercer les fonctions de pilotage, sans restrictions.

who assesses an applicant or holder as fit for pilotage duties with limitations shall state those limitations in the medical report.

(3) Le médecin désigné qui détermine que le demandeur ou le titulaire est apte à exercer les fonctions de pilotage, avec restrictions, doit inscrire les restrictions sur le rapport médical.

[59] Subsection 5(1) provides that a medical report is “valid for a period of not more than two years beginning on the day of its issuance”.

[60] The evidence submitted by Captain McDonald in response to Leo’s motion shows that he met the required standards of subsection 2(1); he had undergone a medical examination on October 16, 2012 and received a marine medical certificate, dated January 16, 2013, valid until October 16, 2014.

[61] Sections 10 and 12 of the GPR address navigational qualifications. Subsection 10(1) is relevant and provides as follows:

10. (1) An applicant who intends to perform pilotage duties in a compulsory pilotage area set out in column 1 of the table to this subsection shall hold the certificate of competency set out in column 2 or, if more than one certificate of competency is set out in that column, at least one of those certificates.

10. (1) Le demandeur qui a l’intention d’exercer les fonctions de pilotage dans une zone de pilotage obligatoire figurant à la colonne 1 du tableau du présent paragraphe doit être titulaire du brevet figurant à la colonne 2 ou, si plus d’un brevet figure à cette colonne, d’au moins un de ces brevets.

[62] Captain McDonald obtained a pilot's licence, Class I, on June 15th, 1994. He was working within the region of the PPA, an area identified in column 1 of the table attached to the GPR.

Column 2 of that table sets out a list of certificates, which is a prerequisite for a pilot's licence to be issued by the PPA. Master 500 Gross Tonnage, Near Coastal is one of those certificates. Captain McDonald held such a certificate of competency.

[63] Qualifications to hold a pilot's licence for the Pacific region are also addressed in the PPR. Subsection 4(1) of those regulations requires, among other things, that "an applicant for a licence or pilotage certificate shall hold a certificate of competency not lower than Master 500 Gross Tonnage, Near Coastal". Captain McDonald satisfied that requirement.

[64] Section 5 of the PPR addresses certificates, as follows:

5. In addition to the certificates required by subsection 10(4) and section 11 of the *General Pilotage Regulations*, an applicant for or a holder of a licence or a pilotage certificate shall hold a training certificate indicating that they have successfully completed a course approved in accordance with section 114 of the *Marine Personnel Regulations*

(a) in simulated electronic navigation, level 2; and

(b) in automatic radar

5. En plus des certificats et des brevets exigés au paragraphe 10(4) et l'article 11 du *Règlement général sur le pilotage*, le demandeur ou le titulaire d'un brevet ou d'un certificat de pilotage doit être titulaire d'un certificat de cours de formation attestant qu'il a suivi avec succès un cours approuvé conformément à l'article 114 du *Règlement sur le personnel maritime* portant sur les aspects suivants :

a) la navigation électronique simulée, niveau 2;

b) les aides au pointage de radar automatiques.

plotting aids.

[65] According to Captain McDonald's affidavit, he had completed a course in simulated electronic navigation, level 2 ("S.E.N. II") as of February 1980. In February 1993, he completed a course in Automated Radar Piloting Aids ("ARPA").

[66] I note the reference in section 5 of the PPR to subsection 10(4) of the GPR. Subsection 10(4) has been repealed, and subsection 10(1) of the GPR now lists the certificates of competency that "applicants" for a licence are required to hold. I accept the submissions of Leo and the Plaintiffs that the reference in section 5 of the PPR to subsection 10(4) of the GPR should be read as a reference to subsection 10(1) of the GPR to avoid an unacceptable absurdity in the interpretation of the PPR.

[67] The difficulty raised by Leo relates to the status of Captain McDonald as a "licensed pilot" and the words "able to meet the qualifications prescribed by the regulations" in subsection 22(4). Leo proposes that the words "able to meet" mean that any time, he satisfies those requirements.

[68] On the other hand, Captain McDonald argues that subsection 22(4) contains no temporal limit and means his licence is valid, as long as he is capable of meeting the qualifications "prescribed by the regulations for a holder of that class of licence".

[69] Further, Captain McDonald refers to other provisions of section 22 where a distinction is drawn between an "applicant" for a licence and a "holder" of a licence. The key question, then, is what is a valid licence?

[70] Subsection 22(1) is of particular relevance in this regard. It addresses the circumstances under which a licence can be issued, that is upon submission of a written application and upon proof that an applicant meets the prescribed qualifications pursuant to section 52 of the Pilotage Act, as well as the qualifications of “the Authority pursuant to subsection 20(1)” of the Pilotage Act. It does not impose a temporal limit on the validity of a licence once issued.

[71] Section 27 of the Act gives the licensing authority the power to suspend, cancel or revoke a licence when the applicable qualifications are not met; see the decision in *Champoux v. Great Lakes Pilotage Authority Limited* (1976), 11 N.R. 441. Nothing in the Act or the regulations indicates that a pilot is no longer able to meet the necessary qualifications for a licence upon the expiration of a certificate of competency. In my opinion, the relevant statutory and regulatory provisions favour the interpretation that once issued, a licence remains in force while the holder is capable of meeting the necessary requirements, absent action by the licensing authorities.

[72] From the evidence submitted, it is clear that Captain McDonald was “able to meet” the requirements for a pilot’s licence as of December 7, 2012. As noted above, the purpose of the Act is to provide for the establishment of compulsory pilotage areas in the interests of safety, whereby ships are under the control of qualified Mariners who are familiar with the navigation of Canadian territorial waters. I refer to the decision in *Alaska Trainship. v. Pacific Pilotage*, [1981] 1 S.C.R. 261.

[73] The safety interest is met by establishing standards of expertise and monitoring physical and mental fitness. The PPA is authorized to establish those standards. Regulations have been enacted in that regard. Neither the Act nor the regulations impose a temporal limit on the validity of a licence.

[74] The health qualifications found in the GPR apply to both “applicants” and “holders”. In that sense the licensing requirements are similar to those in issue in *Gudzinski, supra*, relied on by Leo, which required a licence holder to possess a valid medical certificate.

[75] In that case, the fact that the deceased aviation pilot did not hold a valid medical certificate at the relevant time meant that his pilot’s licence was invalid. Possession of a valid pilot’s licence was also a condition of his insurance and the absence of that licence was accepted by the Alberta Court of Appeal as a reason to deny coverage.

[76] The possession of a valid medical certificate for marine pilots is consistent with the safety interest expressed in section 18 of the Act, together with the regulatory regime. The medical condition of a pilot may fluctuate over time. It is in the interests of safety that the medical conditions of a pilot be assessed at regular intervals.

[77] The regulations require that both “applicants” and “holders” of a licence must satisfy the requirements concerning medical fitness and completion of certain training programs. Yet subsection 10(1) imposes the requirement of a valid certificate of competency only upon “applicants” for a licence. It does not mention “holders” of a licence. Unlike *Gudzinski, supra*, where a valid medical certificate was a requirement for the continuing validity of a licence,

subsection 10(1) of the GPR contains no similar requirement with respect to a certificate of competency.

[78] The Act, the GPR and the PPR distinguish between “applicants” for a licence and “holders” of a licence. To extend the requirement of a valid certificate of competency, at any or all times, to “holders” of a licence as Leo submits, would require reading words into the statute and the regulations. It is presumed that courts will not add words to a statute unless they are already implied; see the decisions in *United Fishermen and Allied Workers’ Union v. British Columbia Packers Ltd.*, [1978] 2 S.C.R. 97 and *Canada (A.G.) v. McKinnon et al.* (2000), 262 N.R. 242 at paragraph 57.

[79] The requirement imposed on “applicants” for a licence to hold a valid certificate of competency is consistent with the safety purpose of the Act. As submitted by Captain McDonald, the experience of a pilot will only accrue with time. Subsection 22(1) of the Act requires “applicants” for a licence to satisfy the licensing authority that they have sufficient knowledge and skill to perform the duties of a “licensed pilot” in a relevant compulsory pilotage area. “Holders” of a licence will only increase their skill and knowledge of the compulsory pilotage area with experience.

[80] When the Act and regulations are read as a whole, it is clear that different requirements are imposed on “applicants” for a licence than are imposed on “holders” of a licence. There is no dispute that at all times Captain McDonald satisfied all of the requirements imposed on “holders” of a licence. The requirement to hold a current certificate of competency is only imposed on

“applicants” for a licence, and did not impact the validity of his licence. In my opinion, Captain McDonald’s licence was valid at the time of the incident and he was a “licensed pilot” within the meaning of the Act. Accordingly, he is entitled to the benefits of the Act.

CONCLUSION

[81] I would answer the questions posed by Leo as follows:

(1)(i) At the time of the incident, did Captain McDonald meet the definition of “licensed pilot” as defined in the Pilotage Act, including holding a valid licence or pilotage certificate, taking into account section 22 of the Pilotage Act and the applicable Regulations?

[82] Yes, Captain McDonald met the definition of “licensed pilot”, as defined in the Act, at the time of the incident, in light of section 22 of the Act and the applicable regulations. He held a valid licence at the relevant time.

(1)(ii) At the time of the incident, was Captain McDonald allowed to have conduct of the vessel Cape Apricot (the “Vessel”) on December 6, 2012 and December 7, 2012 taking into account section 25 of the Pilotage Act?

[83] Yes, Captain McDonald was allowed to have conduct of the vessel at the time of the incident because he was a “licensed pilot” within the scope of subsection 25(1) of the Act. On the basis of the evidence submitted, he was not subject to any of the impediments identified in subsection 25(3).

(2) Is Captain McDonald able to limit his liability for the allision pursuant to section 40 of the Pilotage Act?

[84] Yes, Captain McDonald is able to limit his liability under subsection 40(1) of the Act because at all material times he was a “licensed pilot” within the scope of the Act.

(3) Does section 41 of the Pilotage Act affect the liability of Leo Ocean S.A. as owner of Cape Apricot?

[85] Yes, section 41 of the Act affects the liability of Leo because it makes Leo responsible for the acts of Captain McDonald, who had conduct of the vessel in his capacity as a “licensed pilot”.

[86] Leo’s interpretation of the Act and regulations would deprive Captain McDonald of his status as a “licensed pilot”. Leo’s goal in making this submission is to avoid the application of section 41 of the Act and to argue that it is entitled to rely on the common law defence of compulsory pilotage.

[87] The defence of compulsory pilotage was available at common law to exempt a shipowner from liability for damage caused by its ship while under the control of a pilot in a compulsory pilotage area. The defence is premised on the principle that a shipowner should not be liable for the negligent actions of a pilot when it was required by law to give them control of its ship; see *The Halley* (1868), L.R. 2 P.C. 193. It requires a shipowner to prove that it was compelled to give control of the ship to a pilot and that the damage was caused solely as a result of the pilot’s negligence; see the decision in *The Benue* (1915), [1916] P. 88.

[88] Section 41 of the Act abolishes the defence of compulsory pilotage when the ship is under the control of a “licensed pilot”; see the decision in *Maritime Telegraph and Telephone Company Limited v. The Ship “Dumurra”* (1977), 15 N.R. 382 at paragraph 6.

[89] In the result, the motion is dismissed, with costs against Leo Ocean S.A., in any event of the cause, in favour of the Plaintiffs, the Defendant and Third Party Captain Jeffrey McDonald, the Defendant and Third Party Kawasaki Kisen Kaisha Limited, and the Defendant and Third Party Seaspan ULC. If the parties are unable to agree on costs, brief submissions can be made on or before February 25, 2014, such submissions not to exceed five pages.

JUDGMENT

THIS COURT'S JUDGMENT is that the motion is dismissed, with costs against Leo Ocean S.A., in any event of the cause, in favour of the Plaintiffs, the Defendant and Third Party Captain Jeffrey McDonald, the Defendant and Third Party Kawasaki Kisen Kaisha Limited, and the Defendant and Third Party Seaspan ULC. If the parties are unable to agree on costs, brief submissions can be made on or before February 25, 2014, such submissions not to exceed five pages.

"E. Heneghan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2259-12

STYLE OF CAUSE:

WESTSHORE TERMINALS LIMITED PARTNERSHIP
BY ITS GENERAL PARTNER WESTSHORE
TERMINALS LTD., WESTSHORE TERMINALS
INVESTMENT CORPORATION, AND, WESTAR
MANAGEMENT LTD.

v.

LEO OCEAN, S.A., TOKEI KAIUN COMPANY
LIMITED, KAWASAKI KISEN KAISHA LIMITED, ('K'-
LINE), SEASPAN ULC, JEFFREY MCDONALD, AND
THE OWNERS AND ALL OTHERS INTERESTED IN
THE SHIPS *CAPE APRICOT*, *ASIAN GYRO*, *BORON*
NAVIGATOR, *CIELO DI AMALFI*, *LEO ADVANCE*, *LEO*
AUTHORITY, *LEO FELICITY*, *LEO MONO*, *LEO OSAKA*,
LEO PERDANA, *MEDI GENOVA*, *MOL PARAMOUNT*,
MOL SOLUTION, *OOCL OAKLAND*, *ROYAL ACCORD*,
ROYAL CHORALE, AND *ROYAL EPIC*, *SEASPAN*
OSPREY, *SEASPAN RESOLUTION*, AND A TUG BOAT
WHOSE NAME IS UNKNOWN

and

JEFFREY MCDONALD, SEASPAN ULC, *SEASPAN*
OSPREY, *SEASPAN RESOLUTION* AND *CHARLES H.*
CATES VII OR ALTERNATIVELY A TUG BOAT
WHOSE NAME IS UNKNOWN AND THE OWNERS
AND ALL OTHERS INTERESTED IN THE SHIP *CAPE*
APRICOT, THE SHIP *CAPE APRICOT*, LEO OCEAN
S.A., TOKEI KAIUN COMPANY LIMITED AND
KAWASAKI KISEN KAISHA LIMITED ('K'-LINE)

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: JUNE 12, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT:** HENEGHAN

J.

DATED: FEBRUARY 6, 2014

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