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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](http://Admiraltylaw.com). Readers are advised to consult [Admiraltylaw.com](http://Admiraltylaw.com) for updates and recent developments.

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## Synopsis of Developments

### Admiralty Practice

Practice cases of interest include: *Westshore Terminals Limited v. Leo Ocean S.A. (The Cape Apricot)*, 2014 FCA 231, where it was held that a letter of undertaking given to secure the release of a vessel from arrest was valid and binding and where it was further held that s. 43(8) of the *Federal Courts Act* did not permit the arrest of multiple vessels; *Offshore Interiors Inc. v. Worldspan Marine Inc.*, 2014 FC 655, where the Federal Court approved the private sale of a deteriorating vessel; *Comtois International Exports Inc. v. Livestock Express BV*, 2014 FC 475, where it was held the court had no discretion to not enforce an arbitration clause in a charter party/booking note; and, *Webasto (Hagedorn) v. Shasta Equities Ltd. (The Helios)*, 2014 FCA 135, where the Federal Court of Appeal held that preliminary investigation reports were not privileged even though counsel had been retained.

### Limitation Periods

Cases of interest concerning limitation periods include: *Malcolm v. Shubenacadie Tidal Bore Rafting Park Limited*, 2014 NSSC 217, where the Nova Scotia Supreme Court held that the limitation period applicable to a river rafting accident that occurred prior to the 2009 amendments to the *Marine Liability Act* was the two year limit in the *Athens Convention*, which could not be extended even though the plaintiff was an infant; *Gaudet v. Navigation Madelaine Inc.*, 2014 QCCS 4106, where, in contrast, the Quebec Superior Court held that the provisions of the Quebec Civil Code could apply to extend the limitation period in the *Athens Convention*, although the court did not do so in the circumstances; *G.B. v. L.Bo.*, 2014 QCCS 18, where the Quebec Superior Court held, in respect of an event that occurred before s. 140 of the *Marine Liability Act* was enacted, that the three year limitation period under that section commenced to run on the date s. 140 came into force; and *Sperling v. The Queen of Nanaimo*, 2014 BCSC 326, where the British Columbia Supreme Court held that a defendant could be added as a party to an existing action notwithstanding the expiry of the limitation period under s. 140 of the *Marine Liability Act* and where the court further held that the limitation period in s. 140 does not commence to run until the underlying material facts and the extent of the injury are known.

### Jurisdiction/Canadian Maritime Law

Notable cases include: *Harry Sargeant III v. Al-Saleh*, 2014 FCA 302, one of many cases involving the insolvency of Worldspan Marine, where the Federal Court of Appeal held that a foreign fraud judgment in a non-maritime matter could not support a claim *in rem* and was outside the jurisdiction of the Federal Court; *General MPP Carriers Ltd. v. SCL Bern AG*, 2014 FC 571, where it was held that the Federal Court had no jurisdiction over a shareholders dispute even though the company was a “one ship company”; and *AK Steel Corporation v. Acelormittal Mines Canada Inc.*, 2014 FCA 287 (digested under “Carriage of Goods”) where the Federal Court of Appeal confirmed a trial judgment holding that the sale of cargo to be transported by ship was a matter of navigation and shipping, and within the jurisdiction of the Federal Court. Surprisingly and (it is suggested) incorrectly, in *Demers v. Marine Atlantic Inc.*, 2015 QCCQ 1793, a Quebec Small Claims Court held that the Federal Court had no jurisdiction over a claim involving an inter-provincial passenger ferry ticket.

## Carriage of Goods

Carriage of goods cases include: *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; *AK Steel Corporation v. Acelormittal Mines Canada Inc.*, 2014 FCA 287, where the purchaser of a cargo of iron ore pellets obtained a judgment for indemnity against the vendor of the pellets on the basis that the pellets delivered had excessive moisture content; and *Oceanex Inc. v. Praxair Canada Inc.*, 2014 FC 6, where a shipper was held liable for damage caused to the ship as a consequence of a rupture of a container of liquid oxygen.

## Limitation of Liability

The sole, but very important, case concerning limitation of liability is *Peracomo Inc. v. Telus Communications Co.*, 2014 SCC 29, where the Supreme Court of Canada overturned a decision of the Federal Court of Appeal in which a vessel operator was held not to be entitled to the benefit of limitation of liability. The Supreme Court of Canada held that limitation of liability was available to the operator who had intentionally cut a submarine cable. However, the operator's conduct did constitute "wilful misconduct" within the meaning of the *Marine Insurance Act* and, as a consequence, the loss was excluded from the insurance coverage.

## Marine Insurance

In addition to the *Peracomo* case, 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 a direct action against the insurer of ship repair yard under the provisions of the Civil Code; *Verreault Navigation Inc. v. The Continental Casualty Company*, 2014 QCCS 2879, where the Quebec Superior Court held that a claim against underwriters for indemnity under ship repairer liability policies was governed by Canadian maritime law and not the civil law of Quebec and where the court further held that the underwriters were not liable based on a "faulty design" exclusion in the policy and a notice/reporting provision; and *Coastal Float Camps Ltd. v. Jardine Lloyd Thompson Canada Inc.*, 2014 FC 906, where the Federal Court refused to strike a claim for negligence against a marine broker as it was not "plain and obvious" the court was without jurisdiction.

## Collisions

In *Westshore Terminals Limited v. Leo Ocean S.A. (The Cape Apricot)*, 2014 FC 132, the Federal Court held that a pilot whose certificate of competency issued under the *Canada Shipping Act, 2001* had expired was nevertheless a "licensed pilot" within the meaning of the *Pilotage Act* with the result that the pilot was entitled to limit his liability and the ship owner was liable for his negligence. In *Atkinson (Guardian ad litem of) v. Gypsea Rose (Ship)*, 2014 BCSC 1017, a small vessel collision case, liability was apportioned 80% to the moving vessel whose operator was impaired and 20% to the stationary vessel. The case is also notable for holding that the owner of the moving vessel was not liable even though there were some maintenance issues with the boat that contributed to the accident.

## Liens, Mortgages and Priorities

The cases dealing with liens, mortgages and priorities are: *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; *Caterpillar Financial Services Corporation v. Boale Wood & Company*, 2014 BCCA 419, where the British Columbia Court of Appeal confirmed the trial judgment holding that an administrative charge under the *Companies Creditors Arrangement Act* applied to the proceeds from the sale of a vessel and had priority over a mortgage; and *Norwegian Bunkers AS v. Boone Star Owners Inc.*, 2014 FC 1200, where it was held that Brazilian law applied to a claim for bunkers supplied to a chartered vessel in Brazil and that such law gave the supplier a maritime lien but there was no *in personam* claim as against the ship owner when the charterer ordered the bunkers.

### Ship Building and Repair

In *Capitaines Propriétaires de la Gaspésie (A.C.P.G.) Inc. v. Pêcheries Guy Laflamme Inc.*, 2014 CAF 78, the Federal Court of Appeal confirmed the trial judgment giving effect to an exclusion clause in a ship lifting contract notwithstanding that the clause did not specifically refer to negligence. In contrast, in *Forsey v. Burin Peninsula Marine Service Centre*, 2014 FC 974, the Federal Court refused to give effect to an exclusion clause on the grounds that it did not expressly or impliedly exclude negligence. Other cases involving ship building and repair are: *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; *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; and *0871768 B.C. Ltd. v. Aestival (Vessel)*, 2014 FC 1047, where one of two defendants was found liable for damage caused to an adjacent vessel by grinding dust.

### Offences

In *R. v. Lilgert*, 2014 BCCA 493, the British Columbia Court of Appeal upheld the conviction of the Fourth Officer of the "Queen of the North" on two counts of criminal negligence causing death and leave to appeal to the Supreme Court of Canada was denied. In *R v. Cowan*, 2014 BCPC 334 a small vessel operator was found guilty of careless operation of a vessel for transiting a narrow pass on the wrong side and creating a close quarters situation with a large passenger ferry.

### 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; *Ranjbar v. Islamic Republic of Iran Shipping Lines*, 2014 BCSC 1983, where a terminal was found liable to a crew member, who was injured on an automatic gangway, for not properly warning users of the dangers inherent in such gangways; *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; *Adventure Tours Inc. v. St. John's Port Authority*, 2014 FC 420, where the Federal Court upheld the decision

of a Port Authority denying an application to conduct tour boat operations from port managed property; 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

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

*Allchem Industries Industrial v. CMA CGM Florida (Vessel)*, 2015 FC 558

The plaintiffs were the owners of cargo loaded on the “CMA CGM Florida” that 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 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.

### In Rem Actions - Arrest - Whether agreement to accept LOU vitiated by mistake? - Can more than one sister ship be arrested?

*Westshore Terminals Limited v. Leo Ocean S.A. (The Cape Apricot)*, 2014 FCA 231

The defendant vessel collided with and caused significant damage to a trestle/causeway at the plaintiff’s coal loading facility. As a consequence of the collision, the plaintiff alleged that it had suffered damages in excess of \$60 million. Immediately following the collision the plaintiff commenced an action and the defendant vessel was arrested. Counsel for the plaintiff and defendant ship owner then entered into discussions for the release of the vessel from arrest. The ship owner initially offered to provide a letter of undertaking in the amount of US\$24 million, being the value of the defendant vessel, as security for the release of the vessel from arrest. Plaintiff’s counsel questioned ship owner’s counsel on the availability of sister ships to increase the value of the security to \$100 million. Plaintiff’s counsel also suggested that the vessel be moved from the berth where it was arrested to permit operations at the terminal to resume. Ship owner’s counsel told plaintiff’s counsel that the basis for multiple sister ship arrests was very weak and that, in any event, the sister ships were likely fully mortgaged. Ship owner’s counsel further refused to consent to move the arrested vessel until the security issue

was resolved. Plaintiff's counsel, who had limited maritime law experience, consulted with a maritime law expert and ultimately agreed to accept a letter of undertaking in the amount of US\$26 million. The letter of undertaking, which contained a provision that the plaintiff would refrain from arresting sister ships, was delivered to plaintiff's counsel. The plaintiff then took the position that there was no binding agreement to accept the letter of undertaking as security and that it was free to arrest as many sister ships as necessary to obtain security for the value of its claim. The plaintiff argued that the agreement to accept the letter of undertaking was vitiated by reason of mistake of law (as to the right to arrest multiple sister ships and the amount of security that might be obtained) and coercion/economic duress (for refusing to move the ship from the berth).

At first instance (reported at 2014 FC 136), the motions Judge held the agreement to accept the letter of undertaking was not vitiated by mistake or duress and that, in any event, there was no right to arrest multiple vessels. On the issue of mistake, the motions Judge held that defendant's counsel owed no duty to plaintiff's counsel, who was experienced and had the assistance of experienced maritime counsel. With respect to duress, the motions Judge held that although the ship owner may have put pressure on the plaintiff, this did not amount to coercion of will and was not illegitimate. Finally, with respect to the availability of multiple sister ship arrests, the motions Judge held that section 43(8) of the *Federal Courts Act* did not permit multiple arrests. The plaintiff appealed the decision of the motions Judge respecting the issues of mistake and the availability of multiple arrests. (The duress issue was not appealed.)

**Decision:** Appeal dismissed.

**Held:** The motions Judge correctly concluded that there was nothing that vitiated the agreement on the grounds of mistake. The first mistake alleged was that plaintiff's counsel had been erroneously advised by defendant's counsel that the right to arrest multiple sister ships was weak. The motions Judge correctly held that defendant's counsel owed no duty to the plaintiff or plaintiff's counsel. Moreover, if plaintiff's counsel was uncertain about the issues he could have consulted with his maritime law expert. The second mistake alleged was plaintiff's counsel had been erroneously advised by defendant's counsel that the security was limited to the value of the offending vessel. The motions Judge correctly concluded that this advice was correct. It was clear to all concerned that there was uncertainty as to the right to arrest more than one ship since that issue had never been directly considered by the courts. There is no mistake of law that vitiated the agreement.

The motions Judge further correctly held that there is, in fact, no right to arrest more than one ship. Section 43(2) of the *Federal Courts Act* allows a party to arrest the ship that causes the damage and section 43(8) allows a party to arrest a ship owned by the beneficial owner of the offending ship. Section 43(8) only deals with the arrest of sister ships. It does not address whether a sister ship can be arrested in addition to the offending vessel. By enacting s. 43(8) Parliament intended only to allow the arrest of a sister ship in lieu of the offending vessel. The fact that Canada did not adopt the *Arrest Convention 1952* does not, as the appellant alleges, suggest Canada intended to allow multiple arrests. A claimant has the option of arresting either the offending vessel or a sister ship but not both. If Parliament had intended to allow multiple arrests, a dramatic departure from accepted practice, s. 43 would have been worded

differently.

### **Practice - Judicial Sale - Depreciating Asset - Appeals - Exercise of Discretion**

*Offshore Interiors Inc. v. Worldspan Marine Inc., 2014 FC 655*

Sargeant and Worldspan Marine entered into a vessel construction agreement in February 2008 whereby Worldspan was to construct a vessel for Sargeant. During the course of construction disputes arose and construction was halted in April 2010. By the time construction ceased, approximately US\$20 million had been advanced by or on behalf of Sargeant. The vessel was subsequently arrested in the Federal Court by Offshore, an unpaid supplier of materials, and Worldspan filed a petition in the British Columbia Supreme Court under the *Companies Creditors' Arrangement Act*. Offshore was granted default judgment on 31 May 2011 in the amount of \$273,000. Offshore subsequently obtained an order to market the vessel for sale at a price of US\$18.9 million but, notwithstanding extensive marketing efforts, no buyer could be found. Offshore then found a buyer willing to pay \$5 million for the vessel and brought this motion for an order that the vessel be sold by judicial sale for \$5 million.

At first instance (2014 FC 625), the Prothonotary ordered that the vessel be sold reasoning that: the vessel had been under arrest for four years; moving the vessel from its current location, instead of selling, would involve risk of damage; the vessel was incomplete and had a limited market; the vessel had significantly declined in value and would depreciate further with additional delay; and additional costs of rent will continue to accrue if the vessel is not sold. The Prothonotary's decision was appealed.

**Decision:** Appeal Dismissed, the vessel is to be sold.

**Held:** The first issue is whether the Prothonotary's order is vital to the final determination of the case and ought to be reviewed *de novo*. Following *Nordea Bank Norge ASA v "Kinguk"*, 2006 FC 1290, the discretion should be exercised *de novo*. Sargeant argues that an order for judicial sale cannot be made when the mortgagee does not consent. Assuming there is a presumption against a sale when the mortgagee objects, that will not prevent a sale when it is warranted by the circumstances. Vessels are subject to rapid deterioration in value and this court has approved private sales where there is evidence the vessel is deteriorating, timing is essential and prior efforts to sell have not led to higher offers. Here the evidence is that the value of the vessel has substantially diminished. It was aggressively marketed without success for several years. Further marketing will not produce a better price than is currently offered. The evidence is that the current offer of \$5 million is a fair offer and is approved.

### **Pleadings - Motion to Strike - Expiry of Limitation Period - Continuation of Earlier Action**

*Adventure Tours Inc. v. St. John's Port Authority, 2014 FCA 172*

The plaintiff previously commenced proceedings against the defendant Port Authority for the tort of abuse of public office. The statement of claim in that action was ultimately ordered to be struck by the Federal Court of Appeal in a decision rendered on 10 June 2011 (reported at 2011 FCA 198). In that decision the Court of Appeal expressly gave the plaintiff leave to file a fresh

statement of claim properly pleading the facts and elements of the tort. However, instead of filing a fresh statement of claim, the plaintiff commenced this entirely new action. The defendant brought this motion to strike the new statement of claim on the grounds that it was commenced out of time. The motion was dismissed by the Prothonotary and an appeal from that order was later dismissed by an appeal Judge (reported at 2012 FC 592). The defendant filed a further appeal to the Federal Court of Appeal.

**Decision:** Appeal dismissed.

**Held:** It would be inappropriate to strike a statement of claim that has been filed with the leave of this Court. It is not plain and obvious the action cannot succeed since the new action appeared to be a continuation of the earlier action that had been filed in time.

### **Booking Note - Charters - Arbitration Clause - Stay of Proceedings - Appeals - Standard of Review**

*Comtois International Exports Inc. v. Livestock Express BV, 2014 FC 475*

The defendant was the operator of the “Orient I”, a special livestock carrier. The plaintiff entered into a voyage charter of the vessel for a single voyage between Canada and Russia. The charter party was apparently contained in a booking note issued in Belgium. The booking note incorporated an arbitration clause in favour of London and a choice of law clause selecting English law. The booking note also contained an ice clause which gave the defendant the option of loading the cargo in St. John, New Brunswick if the port of Becancour, Quebec was not in ice free condition. The defendant in fact did sail to St. John because of forecasted ice conditions at Becancour. The loading of the cargo at St. John increased the plaintiff’s costs by \$250,000. The plaintiff claimed this amount from the defendant alleging it had no right to change the port of loading to St. John. The defendant brought this motion for a stay of proceedings on the basis of the arbitration clause in the booking note.

At first instance (reported at 2013 FC 1239), the Prothonotary dismissed the motion for a stay of proceedings. The Prothonotary held that s. 46 of the *Marine Liability Act* did not apply as the contract between the parties was a charter party. However, he also held that the Court had discretion to grant a stay under s. 50 of the *Federal Courts Act* and that the plaintiff had discharged the heavy burden of establishing the existence of strong grounds for denying the stay on this basis. The Prothonotary noted that there was nothing linking this matter to England and that an arbitration in England would result in prohibitive costs for the plaintiff, a small company of 6 employees. The defendant appealed.

**Decision:** Appeal allowed.

**Held:** With respect to the standard of review applicable in this case, the refusal to grant a stay of proceedings is a discretionary order vital to the final issues in the case. Therefore the Court can proceed with a *de novo* review on this appeal.

The Prothonotary correctly held that s. 46 of the *Marine Liability Act* did not apply as the contract was a charter party and s. 46 does not apply to charter parties. However, the



Prothonotary was in error when he held the Court had discretion to grant a stay under s. 50 of the *Federal Courts Act*. Article 8 of the *Commercial Arbitration Code* removes any discretion to grant a stay as was held by the Federal Court of Appeal in *Nanisivik Mines Ltd v FCRS Shipping Ltd*, 1994 CanLII 3466.

### **In Rem Actions - Arrest - Lien for Demurrage - Appropriate Security – Time Limited Guarantee**

*BBC Chartering Carriers GmbH & Co. KG v. Jindal Steel & Power Limited*, 2014 FC 1205

The plaintiff and defendant entered into a voyage charter on the Gencon form with the plaintiff as owner (in fact it was a time charterer) and the defendant as the charterer. The defendant was also the shipper of the cargo covered by bills of lading which were subject to the charter party. The charter party contained a lien clause that gave the plaintiff a lien on cargo for freight, dead-freight, demurrage and claims for damages. The plaintiff commenced these proceedings claiming demurrage and other expenses at discharge and arrested the cargo. The defendant then brought this motion to set aside the arrest on the basis there was no jurisdiction *in rem*. The plaintiff also brought a motion to enforce an agreement to provide security.

**Decision:** The defendant's motion is dismissed. The plaintiff's motion is granted.

**Held:** The defendant argues that the arrest should be set aside and the *in rem* action struck because the lien created by the charter party is a possessory lien and, since the plaintiff gave up possession, it no longer has a lien. The difficulty with this argument is the lien clause includes demurrage at discharge which implies that possession would be given up. At this stage of the proceeding it is arguable that the plaintiff has, at least, an equitable charge on the cargo. Consequently, the motion to set aside the arrest is dismissed. With respect to the security motion, the dispute arises because the security offered by the plaintiff is a bank guarantee with a two year time limit. This is not satisfactory. Security which lapses is no security at all. The cargo will not be released unless there is a guarantee by a Canadian chartered bank. If the guarantee has an expiration date, it must also have an evergreen clause stipulating it is to be automatically renewed. If the bank decides not to renew, the guarantee must provide that the agreed amount of security will be deposited with the court.

### **Discovery - Privilege - Appeals - Whether Order of Prothonotary Discretionary**

*Webasto (Hagedorn) v. Shasta Equities Ltd. (The Helios)*, 2014 FCA 135

A fire broke out on board the defendants' ship "Helios" and spread to other nearby vessels. The broker of the "Helios" appointed a surveyor and fire expert to attend the scene and investigate the fire on behalf of underwriters. The surveyor and fire expert were told they were being retained by counsel and would report directly to counsel. The broker next retained counsel who in turn retained a claims service to interview one of the owners of the "Helios". The moving party brought an application to compel production of various documents over which privilege was claimed including survey reports, the report of the fire expert and reports from the claims service which attached an interview and pre-fire survey reports. At first instance the Prothonotary was not convinced the documents were created "wholly or mainly" with litigation in mind and held they were not privileged. The "Helios" defendants appealed.

On appeal (reported as *Hagedorn v Helios I (Ship)*, 2013 FC 101), the appeal Judge held that the order of the Prothonotary was not discretionary and the correct standard of review was one of correctness. The appeal Judge further held that, with the exception of some pre-fire survey reports, the documents were privileged as the parties were in an adversarial position from the outset. A further appeal was taken to the Federal Court of Appeal.

**Decision:** Appeal allowed, in part.

**Held:** Litigation privilege requires both that litigation be ongoing or reasonably contemplated at the time of the creation of the document and that the dominant purpose of creating the document is for that litigation. Relevant considerations include: the author and the authority upon whose direction a report is prepared; the date of the report; when counsel was appointed; the person to whom the report was addressed; and, the content of the report. The initial report of the surveyor and the report of the fire investigator were prepared at a time when, although there was the possibility of litigation, neither party was in a position to assess the incident. The parties were in the preliminary stage of investigation. Litigation had not commenced and was not reasonably contemplated. These reports are not privileged as was held by the Prothonotary. The report from the claims service, on the other hand, is protected by privilege. The investigator was directly retained by counsel, the report was prepared when litigation was more clearly contemplated and the attached interview is detailed and extensive and in the nature of what one would expect of an interview of a possible witness. The balance of the documents were prepared when litigation was in reasonable contemplation and are privileged.

## Limitation Periods

**Athens Convention - Limitation Period - Provincial Limitation Laws not Applicable - Change in legislation not given retrospective effect - No Discretion to Extend Limitation Period - Choice of Provincial Law in Contract**

*Malcolm v. Shubenacadie Tidal Bore Rafting Park Limited, 2014 NSSC 217*

In August 2008 a twelve year old boy fell out of a zodiac owned and operated by the defendant while participating in a rafting excursion on the Shubenacadie River. Although the boy suffered immediate personal injuries which required treatment, this action in the Nova Scotia Supreme Court was not commenced by his litigation guardian until 23 May 2013. The defendant brought this motion to strike the statement of claim on the basis that the limitation period had expired. The plaintiff argued: (1) that the Nova Scotia *Limitation of Actions Act* applied; (2) that the amendments made to the *Marine Liability Act* in 2009 exempting adventure tourism activities from the *Athens Convention* ought to be given retrospective effect; (3) that any limitation period ought to be postponed as the plaintiff was an infant at the time of the accident: and (4) that the "Waiver" signed by the plaintiff, which provided for Nova Scotia law, had the effect of making the claim subject to the law of Nova Scotia and not Canadian maritime law.

**Decision:** Order granted. The action is dismissed.

**Held:**

- (1) Any question of the limitation period applicable to this claim is settled as being the two year limitation period in Article 16 of the *Athens Convention* attached as Schedule 2 to the *Marine Liability Act*, S.C. 2011, c.6. The decision of the Supreme Court of Canada in *Marine Services International v Ryan Estate*, 2013 SCC 44, which reframed the constitutional test for determining when provincial laws can apply to maritime matters does not undermine the rationale for the earlier decisions applying the *Athens Convention* to these types of claims. "The important objective of uniformity in Canadian maritime law and in the international community of maritime states should not be undermined by the application of individual, and different, provincial statutory regimes."
- (2) The fact that the *Marine Liability Act* was amended in 2009 to exempt adventure tourism activities from the application of the *Athens Convention* is not relevant. Limitation periods are substantive, not procedural, and the 2009 change in the *Marine Liability Act* is not to be given retrospective effect. The substantive law governing this claim at the time of the injury, including the limitation period, is the *Marine Liability Act* as it existed at the time.
- (3) Section 4 of the Nova Scotia *Limitation of Actions Act*, which provides for the suspension of limitation periods for claims by infants, has no application as it is not part of federal maritime law. The *Athens Convention* and the *Marine Liability Act* contain no provisions postponing limitation periods for infants and without such a provision there is no basis for the Court to do so. Further there is no general discretion to suspend or postpone the limitation period. Under the *Athens Convention* the two year limitation period commences to run from a fixed event, the disembarkation of the passenger, and the discoverability principle has no operation. The only provision in the *Athens Convention* permitting suspension or interruption of the limitation period is Art.16 s.3, which allows for a maximum extension of up to 3 years from the date of disembarkation.
- (4) With respect to the "Waiver", it merely says that the laws of Nova Scotia shall apply. Nova Scotia law includes federal law. The "Waiver" incorporates rather than excludes Canadian maritime law.

**Comment:** It is arguable that this case is correctly decided but for the wrong reasons. Specifically, the holding that limitation provisions are always substantive and will never be given retrospective effect is questionable. As discussed in *St. Jean v Cheung*, 2008 ONCA 815, a decision by the Ontario Court of Appeal, limitation provisions may be classified as procedural or substantive and may have retrospective application depending on their effect. The changes to the *Marine Liability Act* in 2009 had the effect of exempting adventure tourism activities from the two year limitation period contained in *Athens Convention* and substituted the three year period contained in s.140. For this action, at the time the changes to the *Marine Liability Act* came into force on 21 September 2009, the two year period under the *Athens Convention* had not expired and the effect of s. 140 was to extend the time within which the plaintiff could bring its action to August 2011. In such circumstances, under the approach discussed in *St. Jean v Cheung*, the amendments arguably should have been given retrospective effect and the limitation period would have expired in or about August 2011.

## **Pleasure craft Accident - Personal Injury - Limitation Period - Date from which s.140 MLA Limitation Period Runs**

*G.B. v L. Bo., 2014 QCCS 18*

The plaintiff was injured on 4 July 2008 while surf skiing behind his own boat which was being driven by the first defendant. At the time, the plaintiff and first defendant were living together. On 13 June 2012, almost four years after the accident, and one year after the couple separated, the plaintiff commenced these proceedings against the first defendant and against the plaintiff's own insurance broker, the second defendant. The defendants brought these motions to dismiss the proceedings on the grounds, *inter alia*, that the limitation period had expired.

**Decision:** Motions dismissed.

**Held:** The issue of the applicable law governing limitation periods in a case such as this is a difficult one. In *Frugoli v Services aeriens des Cantons de l'Est inc.*, 2009 QCCA 1246, the Quebec Court of Appeal affirmed that the two year limitation period in s. 14(1) of the *Marine Liability Act* applied to a claim by dependants of two passengers who were drowned when their boat capsized on a lake in Northern Quebec. On the basis of this case, it is concluded that Canadian maritime law governs the limitation period in the present case. However, as this is neither a claim by dependants nor an accident arising out of a collision between two vessels, ss. 14 and 23 of the *Marine Liability Act* have no application. The relevant section would be s. 140 which provides a period of three years "after the day on which the cause of action arises". But, s. 140 was not enacted until 23 June 2009 and became law on 21 September 2009. Therefore, there was no limitation period in effect during the period from the date of the accident, 4 July 2008 to 21 September 2009. The three year period under s. 140 did not begin to run until 21 September 2009 and did not expire until 21 September 2012. This action was therefore commenced within the limitation period.

**Comment:** The approach adopted by the Quebec Superior Court in this case is different from what is arguably the more traditional approach as discussed in *St. Jean v Cheung*, 2008 ONCA 815, a decision by the Ontario Court of Appeal. The more traditional analysis distinguishes between retroactive and retrospective statutes. If the new limitation provision extinguishes an existing claim, it is retroactive and will not apply. However, if the new provision merely abridges (or extends) the time left to bring a claim, it is retrospective and will apply. If this approach had been followed in this case, s. 140, which came into force on 21 September 2009, should have been given retrospective effect since it did not extinguish the claim on its coming into force but merely created a new three year limitation period expiring on 4 July 2011. As the plaintiff did not commence proceedings by 4 July 2011, the claim was out of time.

## **Passengers - Athens Convention - Limitation Period - Suspension/Interruption**

*Gaudet v. Navigation Madelaine Inc., 2014 QCCS 4106*

The plaintiff was a passenger on board the defendant's vessel and was injured when a door closed on his index finger. The accident occurred on 12 March 2011. The plaintiff subsequently commenced proceedings in the Quebec Superior Court against the defendant on 4 December 2013, more than two years after the accident. The defendant brought this application to

dismiss the claim on the grounds that the limitation/prescription period had expired.

**Decision:** Application allowed and claim dismissed.

**Held:** The plaintiff's claim is governed by Canadian maritime law. Article 16 of the *Athens Convention* stipulates a two year limitation/prescription period from the date of disembarkation for claims for the death or injury of a passenger. The plaintiff argues that the three year limitation period in s. 140 of the *Marine Liability Act* applies or, alternatively, that the provincial limitation period applies pursuant to s. 39 of the *Federal Courts Act*. However, these provisions only apply if there is no specific prescribed limitation period. Here there is a prescribed period namely, the two year period in the *Athens Convention*. The plaintiff further argues that the limitation period should be extended or interrupted because he was not able to fully quantify his claim until he received his expert assessment on 14 November 2013. Article 16(3) of the *Athens Convention* provides that issues of suspension or interruption of the limitation period are to be governed by the law of the court seized of the case and Art. 2904 of the *Civil Code* provides for suspension/interruption of limitation periods in limited circumstances. However, ignorance of the exact extent of the damage is not a grounds for suspending a limitation period.

**Comment:** The holding in this case that Art. 2904 of the Quebec *Civil Code* could apply to extend the limitation period is questionable. Cases to the contrary include: *MacKay v. Russell*, 2007 NBCA 55; *Frugoli v. Services aeriens des Cantons de l'Est inc.*, 2009 QCCA 1246; and *Malcolm v. Shubenacadie Tidal Bore Rafting Park Limited*, 2014 NSSC 217.

### **Personal Injury - Dependents' Claims - Applicable Limitation Period - Bereavement Claim under Alberta Statute**

*Toney v. Canada*, 2014 ABQB 585

This proceeding arises out of a boating accident on an Alberta lake in which a five year old child died. The accident occurred on 27 September 2008 and was witnessed by the plaintiffs, the parents and siblings of the deceased child. The plaintiffs alleged Canada (the Royal Canadian Mounted Police) and Alberta (the Alberta Fish & Wildlife Department) were negligent in mounting and carrying out search and rescue operations. The plaintiffs' claim was originally filed in the Federal Court against both Canada and Alberta but was dismissed as against Alberta on 18 December 2013 on the grounds that the Federal Court was without jurisdiction (reported at 2013 FCA 217). The remaining claim in the Federal Court against Canada was stayed on 23 October 2013 at Canada's request pursuant to s. 50.1 of the *Federal Courts Act*. This permitted the plaintiff to commence these proceedings in the Alberta Court of Queen's Bench against Canada (otherwise such a claim had to be brought exclusively in the Federal Court) and also permitted Canada to file third party proceedings against Alberta. The plaintiff commenced these proceedings on 20 November 2013, more than five years after the accident. The defendants brought this application to strike the plaintiffs' claim on the grounds that the claim was statute barred. The defendants argued that the applicable limitation period was two years from the date of death pursuant to s. 14(2) of the *Marine Liability Act* which governs claims by dependants. The plaintiffs, on the other hand, argued that their claims were not dependants' relief claims but claims for their own personal suffering. The plaintiffs further argued that any

limitation period should not commence before June 2011 when an inquiry was held and they learned the details of the accident and the defendants' involvement. The Plaintiffs also claimed for "grief" under the *Fatal Accidents Act* of Alberta.

**Decision:** All claims are struck with the exception of the claims for personal injuries as against Canada.

**Held:** A reading of the pleadings discloses the plaintiffs' claims include nervous shock, post-traumatic stress and depression. Such claims are compensable personal injuries under Canadian maritime law, are not derivative claims and are not restricted in any way by s. 6 of the *Marine Liability Act*. The limitation period applicable to such claims is either the two year period in the *Athens Convention*, if the plaintiffs were passengers, or the three year period set out in s. 140 of the *Marine Liability Act*. In respect of the personal injury claims against Canada, s. 50.1 of the *Federal Courts Act* deems the date of commencement of the claim to be the date the original claim was filed in the Federal Court. That date was 26 September 2011, a date within three years of the accident. Since it is not plain and obvious the plaintiffs were passengers subject to the two year limitation period in the *Athens Convention*, the plaintiffs' claims for personal injuries as against Canada should not be struck. However, in respect of the personal injury claims against Alberta, the deeming provision in s. 50.1 of the *Federal Courts Act* is not applicable. The date of commencement of the action against Alberta was more than five years after the accident, well past the three year limitation period in s. 140 of the *Marine Liability Act*. The plaintiffs' argument that they did not discover the details underlying the cause of the accident until the inquiry in June 2011 is not accepted and the discoverability principle has no application. The personal injury claims against Alberta are out of time.

With respect to the claim for "grief" under the *Fatal Accidents Act* of Alberta, it is questionable whether such a claim can be made on constitutional grounds but this need not be decided as the limitation period applicable would be the two year period in the provincial *Limitations Act*. That limitation period expired on 28 September 2010.

**Comment:** Although the court correctly identified that there was a constitutional issue with respect to the "grief" claim advanced under the *Fatal Accidents Act* of Alberta, the determination that the provincial *Limitations Act* would apply to the "grief" claim is questionable. It has been repeatedly held that provincial limitation statutes do not apply to maritime matters.

### **Substitution/Addition of Party after Limitation Period Expiry - Limitation Period Applicable to Claim by Passenger against Repairer – When s. 140 MLA Commences to Run**

*Sperling v. The Queen of Nanaimo, 2014 BCSC 326*

The plaintiff was injured when the ferry "Queen of Nanaimo" hit the dock at Village Bay Terminal on 3 August 2010. A malfunction in the propulsion equipment of the ferry was implicated in the cause of the accident. The plaintiff originally commenced proceedings on 2 August 2012 against the owner/operator of the ferry as well as "John Doe 1, ABC Company and John Doe 2". The plaintiff now sought to add a number of additional companies alleging they

were involved in the installation or repair of the malfunctioning equipment. The plaintiff argued the proposed parties could be substituted for “ABC Company” on the basis of correction of a misnomer in the pleading or, in the alternative, that the rules permitted the addition of the proposed parties in the circumstances. The proposed defendants challenged the motion on the basis, *inter alia*, that the limitation period had expired. The issues were:

1. Can the proposed parties be substituted for “ABC Company” on the basis of a misnomer in the pleading?
2. If this is not a case of misnomer, can the additional parties be added if a limitation period has intervened?
3. What is the applicable limitation period? Is it two years under the *Athens Convention* or three years under s. 140 of the *Marine Liability Act*?
4. If the Limitation period is under s. 140 of the *Marine Liability Act*, from what date does the limitation period commence to run and has it expired?

**Decision:** Motion allowed, in part.

**Held:**

- (1) There is an important distinction between amendment applications to correct a misnomer in a pleading and applications to add a party. The correction of a misnomer is permitted notwithstanding the expiration of a limitation period after the action was originally commenced. On the other hand, where the application is to add a party, the expiration of a limitation period will be one of the factors taken into account in the court’s determination of whether it is “just and convenient” to add the new party.

The test for correcting a misnomer is whether the party is sufficiently described in the pleading as an identifiable and identified person by role, responsibility or involvement. In this case the plaintiff lumps defendants together and makes blanket allegations without meaningful distinctions. The activities described are so broad they could apply to many people. There is insufficient particularity in the pleading to point the finger at any distinct person. Therefore, this is not a case of misnomer.

- (2) A new party may be added at any stage of a proceeding where it is just and convenient to do so. The existence of a limitation defence is a relevant but not a determinative factor. In this case the parties disagree as to whether a limitation defence has accrued. The proposed defendants argue that the court has no discretion to add them as parties, if the limitation period under the *Marine Liability Act* has accrued. The court does not agree. Even if a limitation period has accrued under the *Marine Liability Act*, the court still has a discretion to add parties.
- (3) The limitation period of two years in art. 16 of the *Athens Convention*, enacted by the *Marine Liability Act*, applies only to “carriers” and has no application to the proposed defendants. The application of the three year limitation period in s. 140 of the *Marine Liability Act* is challenged by the plaintiff on the grounds that the negligent acts alleged

against the proposed defendants have nothing to do with navigation and shipping. The proposed defendants, on the other hand, say that the subject matter of the claim is squarely in the domain of federal maritime negligence law and s. 140 of the *Marine Liability Act* therefore applies. This is a difficult issue but it need not be decided since, in any event, the discoverability issue is to be resolved in the plaintiff's favour.

- (4) The *Marine Liability Act* does not provide for the postponement or extension of the three year limitation period. However, the s. 140 limitation period commences on the day the cause of action arose which, pursuant to the discoverability principle, means it does not commence until the underlying material facts and the extent of injury are known. The plaintiff did not receive the investigation report identifying the malfunctioning equipment until 20 May 2011. This is the earliest date from which the limitation period could commence. Therefore, even if the three year period applies, it has not expired.

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

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

*Demers v. Marine Atlantic Inc., 2015 QCCQ 1793*

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 *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.)



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

*West Kelowna (District) v. Newcombe, 2015 BCCA 5*

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 (2013 BCSC 2299), 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*, [1998] 3 S.C.R. 437, 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*, 2013 SCC 44.

**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*, 2007 SCC 22 and *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23) the Supreme Court of Canada has been careful to not expressly overturn the holding in *Ordon v Grail* that maritime negligence law is subject to interjurisdictional immunity.

## **Jurisdiction - In Rem Proceedings - Constructive Trust - Whether Alleged Proceeds of Fraud used to Construct a Vessel Support an In Rem Action**

*Harry Sargeant III v. Al-Saleh, 2014 FCA 302*

Sargeant and Worldspan entered into an agreement for the construction of a vessel by Worldspan. Sargeant advanced funds to build the vessel which were secured by a builder’s mortgage. Sargeant advanced approximately \$11 million towards the construction and then

entered into a loan agreement with Comerica to finance the completion of the building. Sargeant's interest in the construction agreement was assigned to Comerica. Comerica advanced an additional \$9 million towards the construction. A dispute then arose concerning the costs of construction and construction was halted. The vessel was arrested in Federal Court and Worldspan filed a petition in the British Columbia Supreme Court seeking relief under the *Companies Creditors Arrangement Act* ("CCAA") of British Columbia. Pursuant to the process adopted in the two courts, *in rem* claims against the vessel were to be decided in the Federal Court and all other claims were to be decided in the British Columbia CCAA proceedings. Al-Saleh sought an order for leave to file an *in rem* claim to enforce a judgement obtained from the Florida Circuit Court. The judgment was in the amount of US\$28 million and was for fraud and conspiracy to commit fraud in relation to a business scheme that had nothing to do with maritime matters. Al-Saleh alleged some of the monies of which he was defrauded were paid to Worldspan and used in the construction of the vessel and that this gave rise to an *in rem* claim. Sargeant opposed the application and by its own motion requested that the Al-Saleh claim be dismissed.

At first instance (unreported), the Prothonotary granted the motion of Al-Saleh, held the court had jurisdiction to adjudicate the *in rem* claim, recognized the Florida judgment and dismissed the motion of Sargeant. Sargeant and Comerica appealed and were successful, in part. On appeal (2013 FC 1204) the appeal Judge held that: (a) the court had jurisdiction to adjudicate the *in rem* claim; (b) the Sargeant motion should be dismissed; and, (c) the Florida judgment should not be recognized and enforced. With respect to the Florida Judgment, the appeal Judge held that the relief granted in that judgment did not fall within the Federal Court's jurisdiction pertaining to Canadian maritime law and therefore could not be recognized and enforced. Sargeant and Comerica further appealed on points (a) and (b).

**Decision:** The appeal is allowed and the *in rem* claim of Al-Saleh (the "Respondent") is dismissed.

**Held:** Both the Prothonotary and the appeal Judge were clearly wrong when they decided the Federal Court had jurisdiction to entertain the Respondent's claim. The claim does not relate to any subject matter over which the court has jurisdiction. It cannot succeed and must be dismissed. The Respondent alleges that the funds of which he was defrauded were used to finance the construction of the vessel and that he therefore has an interest in the vessel. He also asserts that the doctrines of constructive trust and unjust enrichment support his claim. He finally adds that he can trace his property to the vessel. In essence, the Respondent alleges that his claim is one for an ownership interest in a ship pursuant to s. 22(2)(a) of the *Federal Courts Act*. The Appellant argues that a claim of an ownership interest is not sufficient to support jurisdiction. That is not correct. "There can be no doubt whatsoever that once a claim is held to fall within one of the heads found in subsection 22(2) of the *Act*, there is necessarily substantive maritime law to support the claim." However, the question is, does the Respondent's claim fall within s. 22(2)? The Respondent could not have brought in Federal Court the claim that he brought in the Florida court as it has nothing to do with maritime law. This is why the appeal Judge correctly refused to recognize the Florida judgment. There must be a body of federal law essential to the disposition of the case before the Federal Court has jurisdiction. There is no such federal law here. Further, the Respondent's claims are not "so integrally connected to

maritime matters as to be legitimate Canadian maritime law within federal competence". Rather the claim raises issues that are within the exclusive legislative jurisdiction of the provinces.

**Comment:** Perhaps the most interesting point made in this decision is the statement that where a claim falls within s. 22(2) of the *Federal Courts Act* there is necessarily substantive maritime law to support it.

### **Pleadings - Striking - In Rem Actions - Arrest - Shareholder Dispute - Federal Court Jurisdiction**

*General MPP Carriers Ltd. v. SCL Bern AG, 2014 FC 571*

The plaintiff loaned the first defendant US\$5 million for a 40% interest in the defendant ship "SCL Bern". The loan was secured by a shareholders agreement granting the plaintiff 40% of the shares of the second defendant, the owner of the "SCL Bern". The remaining 60% of the shares were owned by the first defendant. The shareholders agreement included provisions concerning a right of first refusal and prohibiting the disposal of shares. In particular, the plaintiff was prohibited from disposing of its shares to third parties but could require the second defendant to purchase its shares at a specified price upon the giving of notice. The plaintiff alleged that it gave the appropriate notice but the second defendant refused to purchase the shares. The plaintiff commenced proceedings in Switzerland and obtained judgement against the second defendant, which was under appeal. The plaintiff then commenced these proceedings and arrested the "SCL Bern". The plaintiff alleged it was a part owner of the "SCL Bern" and that it had suffered damages as a result of the defendant's breach of the shareholders agreement. In the alternative, the plaintiff alleged that the \$5 million loaned was secured by a mortgage or charge on the "SCL Bern". The defendants brought this motion to strike the in rem action and set aside the arrest on the basis that the Federal Court had no jurisdiction.

**Decision:** The *in rem* action is struck and the arrest set aside.

**Held:** The test for striking pleadings is whether it is plain and obvious the claim discloses no reasonable cause of action. The onus on the party seeking to strike pleadings is a heavy one. The evidence discloses that the registered owner of the "SCL Bern" is the second defendant and there is no mortgage or charge registered against the vessel. The plaintiff acquired an interest in the shares of the second defendant, not an ownership interest in the vessel. It is quite clear that the plaintiff's claims arise from alleged breaches of the shareholders agreement concerning the sale of shares. The dispute is therefore one of corporate law not maritime law. The subject matter is not so integrally connected to maritime matters as to fall within maritime law.

### **Carriage of Goods**

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

*St. Paul Fire & Marine Insurance Company v. Vallée, 2015 QCCQ 1891*

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 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.

**Jurisdiction - FOB Contract of Sale - Liability of Vendor/Shipper to Indemnify Purchaser/Charterer for Demurrage and other Expenses***Arcelormittal Mines Canada Inc. v AK Steel Corporation, 2014 FCA 287*

The plaintiff was the purchaser of a cargo of iron ore pellets and the voyage charterer of the "Rt. Hon. Paul J. Martin", a self-unloading bulk carrier and the ship that was to carry the pellets. The defendant was the vendor of the pellets. The cargo was sold FOB ship's hold. The terms of sale specified the cargo was to have a maximum moisture content of 2.5% (to prevent freezing) and required the vendor to indemnify the purchaser for additional costs incurred in the event the pellets were frozen. The cargo of iron ore pellets was loaded in very cold weather, about -18 degrees Celsius, at Port Cartier, Quebec. The "Rt. Hon. Paul J. Martin" then sailed to Toledo, Ohio where it was to discharge the cargo. Upon discharge it was discovered that the cargo was frozen and, as a consequence, the plaintiff was required to pay to the ship owner demurrage, additional loading costs and costs to repair damage to the ship during the unloading. The plaintiff brought this indemnity action against the defendant alleging that the moisture content of the cargo was in excess of that required by the contract of sale. The defendant argued that it was not in breach of its contract with the plaintiff, that the cause of the loss was the failure of the carrier to properly load, carry and discharge the cargo and that it had not been given timely notice of the alleged breach of contract.

At trial (2014 FC 118), the Judge addressed two issues; whether the Federal Court had jurisdiction; and whether the defendant was liable. On the first issue, the trial Judge held that the claim was really about the suitability or fitness of the cargo for transport, a matter of navigation and shipping, and therefore within the maritime jurisdiction of the Federal Court. On

the second issue the trial Judge held that the cause of the freezing was the excessive moisture content of the pellets and was not due to any fault on the part of the carrier. The Judge further held the defendant was aware of the breach before the plaintiff and did not require notice. Accordingly, judgment was rendered for the plaintiff. The defendant appealed the substantive finding that it was liable (but apparently not the decision concerning the jurisdiction of the Federal Court).

**Decision:** Appeal dismissed.

**Held:** The appellant challenges the trial Judge's findings on liability, reasonable notice, and spoliation. These are, however, questions of fact or mixed fact and law and the appellant must show the Judge committed a palpable and overriding error. The appellant has failed to meet this threshold. The Judge's findings are supported by the evidence.

### **Domestic Carriage - Application of Hague-Visby Rules - Dangerous Goods - Liability of Shipper for Damage Caused to Ship**

*Oceanex Inc. v Praxair Canada Inc., 2014 FC 6*

The ship "Cabot" was damaged while discharging cargo when a 20 foot tank container filled with liquid oxygen ruptured. The escaped liquid oxygen fell onto the ship's plating causing it to become extremely brittle which ultimately led to the plate cracking. The ship owner brought this action against the defendant, the lessee of the container, for the costs to repair the ship and for loss of revenue during the nine days required to repair the ship. The defendant counterclaimed against the ship for the damage to the container. The defendant alleged that the carrier had dropped or mishandled the container resulting in damage to the bottom railings and a misalignment of the piping which caused increased pressure on the valves and the leak. The defendant further challenged the damages claimed. In particular, the defendant argued that the plaintiff could not recover the costs of forwarding other cargoes to their consignees as it could have declared an event of force majeure.

**Decision:** Judgment for the ship owner.

**Held:** The evidence established that the container was leaking from two fire block valves, the purpose of which is to seal the tank in the event of a fire. The evidence further established that these valves had leaked previously and only one of them had been tightened. The valves leaked because they had not been sufficiently tightened and not because of the damage to the bottom rails of the container which, in any event, did not occur during or in connection with the voyage. Pursuant to the *Consolidated Transportation of Dangerous Goods Regulations*, dangerous goods must be loaded by the shipper in a "means of containment" to prevent damage. Also, at common law, a carrier is not liable for damage caused by insufficiency of packing. Concerning damages, the ship owner's duty to mitigate did not require it to jeopardize its contracts with others by claiming force majeure. The costs of forwarding other cargoes to their consignees was recoverable.

## Limitation of Liability

### Limitation of Liability - Marine Insurance - Wilful Misconduct

*Peracomo Inc. v. Telus Communications Co., 2014 SCC 29*

The respondent was the owner of two submarine cables on the bottom of the St. Lawrence River. The appellants were the corporate owner and operator of a fishing vessel. The operator snagged one of the submarine cables belonging to the respondent while fishing. The operator cut the cable with a saw believing that it was not in use. A few days later he snagged the cable a second time and did the same thing. The respondent commenced these proceedings alleging negligence and damages of approximately \$1 million to repair the cable. The appellants denied liability saying insufficient notice had been given of the location of the cables and that, in any event, the cables should have been buried. The appellants further disputed the damages and claimed the right to limit liability. A further issue was whether the appellants' insurance coverage was jeopardized by reason of "wilful misconduct" on the part of the appellants.

At trial (reported at 2011 FC 494), the trial Judge found that the cables were included in notices to mariners and were shown on navigation charts and that it was the duty of the appellants to be aware of them. The trial Judge further found that it was not practical to bury the cables and held that the sole cause of the loss was the intentional and deliberate act of the appellant operator. With respect to damages, the trial Judge held that the respondent was entitled to damages in the nature of superintendence and overhead and allowed 10% for this. The trial Judge then turned to limitation of liability and noted that to avoid limitation the respondent had to prove a personal act or omission of the appellants committed either "with intent to cause such loss" or "recklessly and with knowledge that such loss would probably result". The trial Judge held, for the first time in Canada, that this test had been met and the appellants were not entitled to limit liability. The trial Judge said that the operator had intentionally cut the cable and that the loss was the diminution in value of the cable, not the cost of repair. The trial Judge said the operator intended the very damage that occurred but just did not think the cable would be repaired. The trial Judge further held that the operator was "reckless in the extreme" and that the loss was a certainty. Turning to the insurance issue, the trial Judge referred to authorities that established wilful misconduct "implies either a deliberate act intended to cause the harm, or such blind and uncaring conduct that one could say that the person was heedless of the consequences". The trial Judge had little difficulty in concluding this test had been met and the insurance coverage void.

On appeal (reported at 2012 FCA 199), the Federal Court of Appeal agreed with the trial Judge on the issue of liability finding, among other things, that the appellants ought to have used up-to-date charts which disclosed the existence of the cable. A liability issue raised on appeal that does not appear to have been raised at trial was whether the operator could be jointly and severally liable with the corporate appellant. The operator argued that he should not be liable as his acts were those of the corporation. However, the Court of Appeal said that employees, officers and directors are personally liable for their tortious conduct causing property damage even when their actions are pursuant to their duties to the corporation. Concerning the limitation issue, the Court of Appeal also agreed with the trial Judge that the appellants intended to physically damage the cable and that it did not matter whether they were aware of

the actual loss that would result. Finally, on the insurance issue, the Court of Appeal was not persuaded the trial Judge had made an error in concluding that the conduct of the appellants was "a marked departure from the norm and thus misconduct". Further, the Court of Appeal agreed that this misconduct was the proximate cause of the loss. The appellants appealed to the Supreme Court of Canada. There were three issues on the appeal:

1. Is the operator personally liable?
2. Are the appellants entitled to limit their liability?
3. Was the loss caused by wilful misconduct such that it is excluded from coverage under the insurance policy?

**Decision:** Appeal allowed, in part. The appellants were entitled to limit liability but the loss is excluded from the insurance coverage.

**Held:**

- (1) The Federal Court of Appeal correctly held that the operator was personally liable even though he was carrying out his corporate duties.
- (2) The Federal Court of Appeal took too narrow a view of the intent requirement under art. 4 of the *Convention on Limitation of Liability for Maritime Claims*. The Federal Court of Appeal held that if the operator knew he was cutting a cable that the intent requirement is satisfied. This undermines the *Convention's* purpose to establish a virtually unbreakable limit on liability and does not accord with its text. The conduct barring limitation is expressed in restrictive language. The person is entitled to limit liability unless it is proved that "the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result". There is some dispute in the authorities as to how specifically the loss must have been intended. Some authorities say the "very loss" intended must have resulted. Other authorities say it is sufficient if the resulting loss was the "type of loss" intended. We do not have to take a firm position on this issue as, on either view, the appellants are entitled to limit their liability. The trial Judge found as a fact that the operator thought the cable was useless. The operator did not think his actions would damage someone's property or necessitate the repair of the cable. Therefore, there was neither "the intent to cause such loss" or "knowledge that such loss would probably result".
- (3) The policy of insurance covered the appellants in respect of their liability for damage to any fixed or movable object arising from an accident or occurrence. The policy was subject to s.53(2) of the *Marine Insurance Act* which excludes coverage for any loss attributable to the "wilful misconduct" of the assured. The standard of fault under s. 53(2) is not the same as the standard under the *Convention*. Both the purposes and the texts are different. The essence of wilful misconduct includes not only intentional wrongdoing but also conduct exhibiting reckless indifference in the face of a duty to know. The findings of fact by the trial judge make it clear that the operator's conduct constituted wilful misconduct. He had a duty to be aware of the cable and "he failed miserably in that regard". His conduct exhibited

a “lack of elementary prudence”. His actions were “far outside” the range of conduct expected of a person in his position. He was aware he was cutting a submarine cable and had knowledge of the risk that he could be cutting a live cable. His conduct is consistent with indifference to the risk in the face of his duty to know. The fact he believed the cable was not in use is beside the point. “To hold otherwise is to conflate recklessness with intention.” Wilful misconduct does not require either intention to cause the loss or subjective knowledge that the loss will probably occur. “It requires simply misconduct with reckless indifference to the known risk despite a duty to know.”

## Marine Insurance

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

*Langlois v. Great American Insurance Company, 2015 QCCS 791*

The plaintiff’s fishing boat was damaged by fire while it was being repaired/welded at a ship yard. The plaintiff’s boat was insured by the defendant, GAIC, who was also the liability insurer of the shipyard. 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 shipyard.

**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, [1983] 1 SCR 283*, 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 shipyard 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 shipyard 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, [1981] 1 S.C.R. 363*, 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.

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

*C.H. Robinson Worldwide v. Northbridge Insurance, 2015 ONSC 232*

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 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.

### **Action Against insurance broker - Applicability of Canadian Maritime Law - Jurisdiction of Federal Court**

*Coastal Float Camps Ltd. v. Jardine Lloyd Thompson Canada Inc., 2014 FC 906*

The plaintiff's vessel capsized and sank on 5 November 2009. The plaintiff's insurer denied coverage on the grounds of material non-disclosure and misrepresentation. The plaintiff commenced this action against the insurer for a declaration that the loss was covered. The plaintiff later amended the statement of claim to include a claim against its marine broker for negligence and breach of contract. The broker then brought this application to strike the allegations against it on the grounds that the Federal Court had no jurisdiction in respect of

those claims.

**Decision:** Application dismissed.

**Held:** The applicable test on a motion to strike is whether it is plain and obvious the claim discloses no reasonable cause of action. The fact that a claim is novel or difficult is not sufficient. "The burden on the defendant is very high and the Court should exercise its discretion to strike only in the clearest of cases." The broker relies upon the decision in *Intermunicipal Realty & Development Corp v Gore Mutual Insurance Co*, [1978] 2 FC 691 where it was held the Federal Court did not have jurisdiction over a marine insurance broker in agency and misrepresentation. However, the plaintiff cites a number of authorities that show the law concerning the jurisdiction of the Federal Court has evolved considerably since *Intermunicipal Realty* was decided and that it may no longer be good law. In the circumstances, it is not plain and obvious the plaintiff's claim cannot succeed.

### **Marine Insurance - Ship Repairer's Legal Liability - Application of Provincial Laws - "Faulty Design" Exception - Notice of Loss Requirement**

*Verreault Navigation Inc. v. The Continental Casualty Company, 2014 QCCS 2879*

The plaintiff ship repairer sued its primary liability underwriter (Continental) and its excess liability underwriter (Lombard Insurance Company of Canada) to recover costs incurred to correct certain deficiencies in the heating, ventilating and air conditioning (HVAC) system of a passenger ferry it had repaired for the Government of Canada. The actual defective work had been done by a subcontractor of the plaintiff. The underwriters denied liability on two grounds: first, that the policies contained a "faulty design" exception which applied in the circumstances; and, second, that both policies excluded losses not discovered and reported within one year of delivery of the vessel to the customer.

**Decision:** Action dismissed.

**Held:** The claim is subject to uniform Canadian maritime law and not Quebec civil law. The "faulty design" exception of the two policies applies since the HVAC equipment installed on the ferry was inadequate and defective. At the time of its installation, the equipment did not comply with applicable state-of-the-art standards for such systems on passenger vessels operating in Canada. In addition, the notice of loss was given more than 12 months after the redelivery the ferry to the Government, contrary to the requirements of both policies. This was a violation of the assured's obligation of utmost good faith under s. 20 of the *Marine Insurance Act*.

## **Collisions**

### **Collisions - Pilotage - Whether pilot with expired certificate is a licensed pilot - Liability of Ship Owner if Pilot not licensed**

*Westshore Terminals Limited v. Leo Ocean S.A. (The Cape Apricot), 2014 FC 132*

On 9 December 2012 the defendant vessel collided with and caused significant damage to a trestle/causeway at the plaintiff's coal loading facility. At the time of the collision the ship was under the command of a compulsory pilot. After the collision the pilot realized that his certificate of competency issued pursuant to the *Canada Shipping Act, 2001* had expired. He took immediate steps to rectify this and his certificate of competency was renewed. Nevertheless, the ship owner brought this motion for a determination of points of law including:

- (1) Was the pilot a "licensed pilot" within the meaning of the *Pilotage Act*;
- (2) Is the pilot entitled to limit his liability to \$1,000 pursuant to s. 40 of the *Pilotage Act*; and
- (3) Is the ship owner liable for the negligence of the pilot pursuant to s. 41 of the *Pilotage Act*.

**Decision:** The pilot was a licensed pilot at the time of the collision and is entitled to limit his liability. The ship owner is liable for the acts of the pilot.

**Held:**

- (1) This motion raises an issue of statutory interpretation concerning the meaning of the words "licensed pilot" in ss. 22(4), 40 and 41 of the *Pilotage Act*. The ship owner argues that the pilot was not licensed within the meaning of the *Pilotage Act* with the result that the pilot cannot limit his liability and the ship owner is not liable for the pilot's negligent acts. The ship owner says it can rely upon the common law defence of compulsory pilotage. The ship owner argues that, because a valid certificate of competency is required to initially obtain a pilot's licence, an expired certificate of competency means the license is no longer valid. The interpretation of the words "licensed pilot" begins with a consideration of the purpose of the act and the definition of the words in the act and related regulations. The purpose of the *Pilotage Act* is to establish compulsory pilotage areas. Safety is a paramount concern, a factor that is addressed by ensuring only qualified individuals are licensed. There are, however, no temporal restrictions on a pilot license once issued. Section 27 of the *Pilotage Act* gives the licensing authority the power to suspend, cancel or revoke a license. Once issued a license remains in force unless suspended, cancelled or revoked by the licensing authorities. Accordingly, the pilot was licensed.
- (2) As the pilot was a "licenced pilot", it follows that he is entitled to limit his liability pursuant to s. 40.
- (3) Further, because the pilot was licensed, pursuant to s. 41 the ship owner is responsible for the acts of the pilot.

**Pleasure Craft Collision - Apportionment of Liability - Liability of Owner - Failure to Keep Lookout - Alcohol**

*Atkinson (Guardian ad litem of) v. Gypsea Rose (Ship), 2014 BCSC 1017*

On 30 June 2008 a vessel owned by Maridee Skidmore and driven by her son Cory Skidmore (the "Skidmore Vessel") collided with a vessel owned and operated by Norman Atkinson (the "Atkinson Vessel") causing personal injury and property damage. At the time of the collision, the Atkinson Vessel was stationary in the water with its engine off and had been stationary for about 30 minutes. The operator of the Atkinson Vessel was at the back of the boat attempting to untangle a tow line from the propeller. A passenger in the Atkinson Vessel noticed the Skidmore Vessel approaching at a distance of about 300 feet with its hull straight out of the water. She alerted the others in her vessel and jumped on the seat to wave her arms and scream at the approaching vessel. The operator of the Skidmore Vessel did not see the Atkinson Vessel because he could not see over the bow and did not hear the screams until it was too late. The Skidmore Vessel hit the starboard bow of the Atkinson Vessel at a speed of 15 mph. The operator of the Skidmore Vessel was impaired at the time and the Skidmore Vessel had the wrong propeller with the result that at a speed of 15 mph it would not plane and the operator could not see over the bow.

Three actions were commenced against the owner of the Skidmore Vessel, the operator of the Skidmore Vessel and the owner/operator of the Atkinson Vessel. The operator of the Skidmore Vessel admitted his liability. The issues were whether the Owner of the Skidmore Vessel and the owner/operator of the Atkinson Vessel were also liable and how liability ought to be apportioned.

**Decision:** The Owner of the Skidmore Vessel is not liable. The owner/operator of the Atkinson Vessel is liable. Liability is apportioned 80% to the operator of the Skidmore Vessel and 20% to the owner/operator of the Atkinson Vessel.

**Held:** With respect to the liability of the owner of the Skidmore Vessel, it was held by the Nova Scotia Court of Appeal in *Conrad v Snair*, 1995 CanLII 4175, that a boat owner's responsibilities could be divided into three principal categories: (1) the ship must be seaworthy for the intended voyage, in good repair and properly equipped and safe for those on board; (2) the ship must be provided with proper navigational aids including charts, rules and information; and, (3) the ship must be properly and competently staffed. In addition, for the owner to be at fault there must be consent, express or implied, for the operator to have the vessel at the time of the accident. The owner of the Skidmore Vessel had a strict rule that no one was to drive or be on board the vessel if they had been drinking alcohol. The operator was aware of this rule and had been refused permission to use the boat on two prior occasions when he had been drinking. On this occasion, the operator did not ask for permission to use the boat as he knew it would be refused. On the facts, the owner did not provide consent and no consent can be implied. Further, although the Skidmore Vessel was unseaworthy to the knowledge of the owner because it had the wrong propeller, the lack of consent vitiates the breach of that duty.

With respect to the liability of the owner/operator of the Atkinson Vessel, he was not keeping a proper lookout and did not instruct the other adults to keep a look out.

The apportionment of liability under the *Marine Liability Act* is to be handled in the same way

as under the *Negligence Act*. The Court is to assess the degree to which each party is at fault not the degree to which each party's fault has caused the loss. In other words, the Court is to assess the respective blameworthiness of the parties. The actions of the operator of the Skidmore Vessel are far more blameworthy than those of the owner/operator of the Atkinson Vessel. He drunkenly set out in an unseaworthy vessel with reckless indifference and disregard for the safety of others. In contrast, the negligence of the owner/operator of the Atkinson Vessel was a minor lapse of care. Therefore, liability is apportioned 80% to the operator of the Skidmore Vessel and 20% to the owner/operator of the Atkinson Vessel.

**Comment:** The finding that the operator of the Atkinson vessel was 20% at fault for not keeping a proper lookout might be questioned. As is apparent from the facts, the Skidmore vessel was observed prior to the collision and efforts to alert the driver of that vessel were not successful. Under these circumstances, it is difficult to say there was not a proper lookout and, even if that was true, the lack of a proper lookout was not causative. Also, in the circumstances, one might question whether the owner of the Skidmore vessel should have been held liable as she was aware it had the wrong propeller and would not plane properly. Her lack of consent had nothing to do with the unseaworthiness of the vessel.

## Liens, Mortgages and Priorities

### Construction Mortgage - Entitlement of Purchaser/Mortgagee to Return of Advances – Interpretation of Contracts – Standard of Review on Appeal

*Offshore Interiors Inc. v. Worldspan Marine Inc., 2015 FCA 46*

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 (2013 FC 221), 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 (2013 FC 1266), 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 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.*, 2011 FCA 34, 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*.
- (2) In *Sattva Corp. v. Creston Moly Corp.*, 2014 SCC 53, 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”.

## Liens and Mortgages - Ranking of CCAA Administration Charge - International Insolvencies

### *Caterpillar Financial Services v Boale Wood & Company, 2014 BCCA 419*

The petitioner, Worldspan Marine Inc., was a builder of custom yachts who had entered into a contract for the construction of a 144' yacht. During the course of construction, a dispute arose with the purchaser. As a result, the purchaser ceased making payments and the petitioner sought the protection of the *Companies Creditors Arrangement Act* ("CCAA"). A Monitor was appointed by court order under that act and a stay of all proceedings against the petitioner was ordered. The court's initial order included an "Administration Charge" to secure the fees and expenses of the Monitor which were to rank in priority to all other security in the "Non-Vessel Property". "Non-Vessel Property" was all property of the petitioner other than the 144' yacht. (*In rem* claims against the yacht were being addressed in the Federal Court.) Caterpillar held a mortgage over another vessel owned by the petitioner, the "A129", which was located in the State of Washington. Caterpillar commenced foreclosure proceedings in Washington and had the "A129" arrested there. The U.S. Bankruptcy Court subsequently granted a "Recognition Order", at the request of the petitioner, under Chapter 15 of the U.S. *Bankruptcy Code* recognizing the British Columbia CCAA proceedings as the "Foreign Main Proceeding" and staying any execution against the assets of Worldspan located in the United States. The "A129" was subsequently released from arrest and sold with the proceeds to be dealt with in the CCAA proceedings. The sale order provided that Caterpillar was to have a first priority to the proceeds but subject to the potential claim of the Monitor for "Administrative Charges". Caterpillar applied for an order declaring that the "Administration Charges" did not attach to the proceeds from the sale of the "A129" or, alternatively, that Caterpillar's claim under its mortgage had priority to the Administrative Charge. Caterpillar argued, *inter alia*, that under Canadian maritime law the "Administrative Charge" was a statutory lien which ranks below the mortgage.

At first instance (reported at 2013 BCSC 1593), the Judge held that the "super priority" given by s. 11.52 of the CCAA trumps the ranking of claims *in rem* under Canadian maritime law and that the "Administrative Charge" therefore had priority over the Caterpillar mortgage. Caterpillar appealed.

**Decision:** Appeal dismissed.

**Held:** There are two different issues that are relevant: first, did the "Administrative Charge" attach to the "A129" *in rem*; and second, what is the status of the charge in light of both the CCAA proceedings and the "Recognition Order". With respect to the first issue, there is nothing in the CCAA to suggest that it has extra-territorial application to *in rem* property outside of Canada. Neither the CCAA nor the orders made in this case support a conclusion that the "Administrative Charge" attached *in rem* to the "A129". With respect to the second issue, the "Administrative Charge" gave priority over all creditors on "Non-Vessel Property" including the proceeds. The order creating the "Administrative Charge" was made in accordance with the CCAA and the "Recognition Order" of the U.S. Bankruptcy Court did not purport to limit in any way the process of realization to be undertaken under the CCAA. Once the Canadian proceedings were recognized as the foreign main proceeding, it was entirely for the British



Columbia Supreme Court to determine priority. Thus, although the “Administrative Charge” did not attach *in rem*, it does attach to the proceeds from the sale of the “A129” and gives the Monitor priority.

### **Supply of Bunkers in Brazil to Time Chartered Vessel - Applicable Law - Whether Supplier has Lien - Application of s. 139 MLA to Foreign Suppliers - Liability of Owner in Personam - Presumption**

*Norwegian Bunkers AS v. Boone Star Owners Inc., 2014 FC 1200*

The plaintiffs, Norwegian and Belgium companies respectively, supplied bunkers to the ship “Samatan”, a Maltese flagged vessel, in Brazil using a local Brazilian supplier. At the time of the supply, the vessel had been chartered and sub-chartered on the NYPE form. The NYPE form provided, among other things, that the charterer was not permitted to create maritime liens against the vessel. The bunkers were ordered from the plaintiffs by the sub-charterer. The plaintiffs acknowledged the order with a standard form that specified the bunkers had been ordered for “Master and/or Owner and/or Operator”. The plaintiffs knew the sub-charterer was not the owner of the vessel but had not been notified of the “no-lien” clause in the charter parties. The bunkers supplied by the plaintiffs were not paid for. The plaintiffs commenced this action and arrested the vessel in Canada. The plaintiffs argued that Brazilian law applied to the transaction and gave them a maritime lien against the vessel for the unpaid bunkers. The defendants argued that Canadian law applied by default (no law other than Brazilian being proven) and that pursuant to Canadian law there was no lien and no *in personam* action against the ship owner.

**Decision:** Judgment granted in part. The plaintiffs’ claim against the vessel for unpaid bunkers ranks as a maritime lien but the *in personam* action against the ship owner is dismissed.

**Held:** The parties are agreed that where, as here, there is no direct contract between the vessel owner and the supplier of the bunkers, the proper law is to be determined not by reference to the choice of law provision in the supply contract but by determining the jurisdiction with the closest and most substantial connection with the transaction. The seven factors to be considered are: (1) the place of the wrongful act; (2) the law of the flag; (3) the domicile of the plaintiff; (4) the domicile of the defendant ship owner; (5) the place where the contract was made; (6) inaccessibility of a foreign forum; and (7) the law of the forum. The defendants say Norway has the closest connection because the seller is Norwegian, the contract was made in Norway and payment was to be made in Norway. However, in a non-contractual claim such as this, it is more appropriate to consider the perspective of the parties involved in the claim rather than the contracting parties. In such a case, the place of delivery should be accorded greater weight than the other factors. The law of Brazil therefore applies and the uncontradicted expert evidence presented by the plaintiffs establishes that under such law a maritime lien exists for the bunkers supplied.

If Canadian law had applied by default, s. 139 of the *Marine Liability Act* (which gives persons “carrying on business in Canada” a lien against foreign vessels for goods and services “wherever supplied to the foreign vessel”) would not have applied as the plaintiffs are “foreign suppliers”.

With respect to the *in personam* claim against the ship owner, the plaintiffs were required to prove either that the owner was a party to the supply contract or had authorized someone to contract on its behalf. The mere fact the owner allows the charterer to accept bunkers is not sufficient. The presumption that necessaries are supplied on the credit of the ship is easily rebutted under Canadian law and is rebutted in this case. The plaintiffs knew their customer was a charterer and never inquired as to whether it had authority to bind the ship.

## Ship Building and Repair

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

*Ehler Marine & Industrial Service Co. v. M/V Pacific Yellowfin (Ship)*, 2015 FC 324

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 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.

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

*Capitaines Propriétaires de la Gaspésie (A.C.P.G.) Inc. v. Pêcheries Guy Laflamme Inc., 2015 CAF 78*

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 (2014 FC 456), 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*, 2010 SCC 4, 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 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 his conclusion the clause was not abusive or draconian. "Risk allocation avoids litigation and heavy expenses they entail."

**Vessel Damaged Falling from Cradle - Bailment - Exclusion Clause - Spoliation of Evidence - Survey Costs as Damages**

*Forsey v. Burin Peninsula Marine Service Centre, 2014 FC 974*

The plaintiff's fishing vessel was lifted out of the water and placed on a cradle at the premises of the defendant 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 plaintiff claimed against the defendant for the damages to the vessel and for the costs of fuel containment and clean up. The defendant denied liability saying the cradle was constructed by the plaintiff 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.”

**Decision:** The defendant is liable.

**Held:** The parties dispute who provided the wood used to construct the cradle and who actually built the cradle. On the evidence the wood used to construct the cradle was provided by the defendant and the cradle was constructed by the defendant. The plaintiff’s involvement in the construction of the cradle was peripheral. The vessel was placed in the custody of the defendant and a relationship of bailment was constituted. It does not matter that employees of the plaintiff carried out some work on the vessel while on the cradle. As bailee, the burden is on the defendant 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. The defendant has failed to discharge this onus. The materials used to construct the cradle were disposed of by the defendant within 48 hours of the incident. This gives rise to a presumption that the materials were intentionally destroyed and, if not rebutted, an adverse inference that the materials were unfit. The defendant ought to have known that litigation would be contemplated and that the broken cradle would be important evidence in the litigation. The defendant has failed to rebut the presumption the materials were intentionally destroyed and it is therefore inferred the cradle was unfit.

The ability of the defendant to rely upon the exclusion clause in the contract and the signage depends solely upon their construction and not any consideration of fundamental breach. Neither the sign nor the exclusion clause in the contract expressly or impliedly excluded liability for negligence. Applying the rule of *contra proferentum* the words “securing and locking” in the exclusion clause do not transfer responsibility for the safety of the vessel to the plaintiff.

The plaintiff is entitled to damages for the vessel (which was declared a constructive total loss), the containment and clean-up costs and the cost of a surveyor. The survey costs are recoverable notwithstanding they were not paid for by the plaintiff on the grounds that they were a natural and probable consequence of the tort.

### **Damage to Vessel Caused by Grinding Dust - Liability - Practice - Summary Judgment - Motion for Non-Suit - Joint and Several Liability**

*0871768 B.C. Ltd. v. Aestival (Vessel), 2014 FC 1047*

The plaintiff commenced these proceedings for damage allegedly caused to his vessel by grinding dust, including metal particles, that spread from the defendant vessel. The plaintiff’s vessel had been on blocks next to the defendant vessel while grinding work was being carried out. The defendants were the owner of the defendant vessel and a repairer hired by that owner. The defendants denied liability. Shortly before trial the defendant owner brought an

application for non-suit and/or no-evidence and, at the trial brought a motion to file affidavit evidence.

**Decision:** Judgment for the plaintiff against the defendant owner but not the repairer.

**Held:** With respect to the non-suit motion, there is doubt as to whether such a motion is compatible with a motion for summary judgment or summary trial but, in any event, the defendant owner did not comply with the time requirements for bringing such a motion. Moreover, even if the motion for non-suit had been properly brought, it would not succeed as the plaintiff has established a *prima facie* case. The defendant owner says there is no causal link between the grinding and the damage done to the plaintiff's vessel but there is some evidence supporting causation and this is sufficient to dispose of the non-suit motion.

The defendant owner's motion to file affidavit evidence is also dismissed. Non-suit rules require a defendant to elect whether to call evidence. If they elect to call no evidence, the non-suit motion is decided immediately and the defendant forfeits the right to call evidence.

The plaintiff has established the four elements necessary to support its claim against the defendant owner, those elements being: a duty of care; breach of the standard of care, causation and compensable damage. On the evidence there was a duty of care. The vessels were "neighbours" in close physical proximity and the defendants knew or should have known that the defendant vessel should be tarped before sanding or grinding. It was reasonably foreseeable that failure to contain debris would cause damage to other vessels. The standard of care is that expected of an ordinary, reasonable and prudent person in the same circumstances as the defendant. Grinding without a tarp or other containment mechanism was in breach of the standard of care. However, the evidence establishes that only the defendant owner was carrying out grinding on 26 July 2012 and only the defendant repairer was carrying out the grinding on 27 July 2012. Accordingly, the defendant owner breached the standard of care on 26 July and the defendant repairer breached the standard on 27 July. With respect to causation, the proper test is the "but for" test. The plaintiff must prove that "but for" the negligence of the defendant the damage would not have occurred. This burden has been met but, because the damages caused by the 26 July grinding are divisible and separate from the damages caused by the 27 July grinding, this is not a case of joint and several liability. Each defendant is liable only for the damages caused by their own negligent acts. The defendant owner is liable for the damage caused as a result of the grinding that occurred on 26 July. The defendant repairer would have been liable for any damage caused on 27 July but no damage was caused to the plaintiff's vessel that day.

## Offences

### Offences - Criminal Negligence - Elements of Offence - Charter of Rights - Appeals - Raising New Issue on Appeal

*R. v. Lilgert, 2014 BCCA 493*

The accused was the fourth officer of the passenger ferry, "Queen of the North", and the officer

on watch and in command of the bridge when the “Queen of the North” struck Gil Island and sank on 22 March 2006. At the time there were 101 passengers and crew on board the ferry. Two individuals lost their lives. The accused was charged and convicted by a jury of two counts of criminal negligence causing death and was sentenced to a prison term of four years. (The sentencing decision is reported at 2013 BCSC 1329.) The accused appealed the conviction on four grounds, namely:

- (1) the sections of the *Criminal Code* pertaining to criminal negligence causing death were contrary to the *Charter of Rights* (an issue not raised at trial);
- (2) the trial Judge failed to properly instruct the jury with respect to the legal duty of the accused and the standard of care;
- (3) the trial Judge failed to properly instruct the jury with respect to the essential elements of criminal negligence; and,
- (4) the trial Judge failed to instruct the jury on the defence of mistake of fact.

**Decision:** Appeal dismissed.

**Held:**

- (1) The accused challenges the sections of the *Criminal Code* pertaining to criminal negligence causing death arguing these sections are contrary to s. 7 of the *Charter of Rights* because they are vague, offend the presumption of innocence and permit an accused to be convicted without a finding of *mens rea*. This issue was not raised at trial and, generally, a new issue cannot be raised on appeal unless all relevant evidence is in the record. A new charter defence may only be raised on appeal in exceptional circumstances. It is only in circumstances where “balancing the interests of justice to all parties leads to the conclusion that an injustice has been done”, that a new ground may be raised on appeal. The test is not met in this case. There is insufficient evidence to raise this issue on appeal and it is not apparent that refusing to hear the charter issue will lead to an injustice. There are numerous precedents where the Supreme Court of Canada has carefully considered the *mens rea* component of criminal negligence causing death which the accused impugns.
- (2) The accused submits the trial Judge erred in her charge to the jury by stating the accused had a duty to “safely” or “properly” navigate the vessel, as opposed to a duty to simply navigate the vessel. Although the accused argued these adjectives implied guilt regardless of fault, they do not. They are mere forms of speech used to describe an obligation to be careful. Moreover, the Crown’s expert stated the duty as being one of “safe navigation”. The accused also argues the trial Judge failed to properly describe the standard of care by suggesting the accused was bound to follow the *Collision Regulations*. However, there was no real controversy at trial as to the scope of the duties of a professional mariner. The jury was under no doubt that they were to compare the appellant’s conduct against the standard of a reasonably prudent mariner.
- (3) The accused argues the trial Judge conflated the *mens rea* and *actus reus* elements of the

offence of criminal negligence but the Judge correctly made clear to the jury that they must find both elements and left nothing out of the charge. There is no requirement that these elements be satisfied independently from one another. The Judge's charge closely followed the model instruction prepared by the Canadian Judicial Council. To prove the accused showed a wanton or reckless disregard for the lives or safety of others, the Crown is not required to prove the accused intended to kill or seriously harm. It is sufficient if the Crown proves, beyond a reasonable doubt, that the accused's conduct showed a marked and substantial departure from the conduct of a reasonable person and that a reasonable person in the same circumstances would have foreseen that this conduct posed a serious risk of bodily harm.

- (4) The accused contends that his evidence of what transpired supported a defence of mistake of fact and that this defence ought to have been put to the jury. The evidence of the accused was that he had given instructions for a course change prior to the collision. However, the evidence of the Crown did not support this testimony. The Judge instructed the jury that if they believed the accused, they should acquit him. The jury must have accepted the Crown's evidence and rejected the testimony of the accused.

**Comment:** An application for leave to appeal to the Supreme Court of Canada was dismissed at 2015 CanLII 26235.

### **Offences - Operating a Vessel in a Careless Manner - Collision Regulations - Narrow Channels - Passing**

*R. v. Cowan, 2014 BCPC 334*

The accused was charged with operating a vessel in a careless manner contrary to s. 1007 of the *Small Vessel Regulations* passed under the *Canada Shipping Act, 2001*. The charge arose out of a close quarters situation that developed between the accused's sailboat and a large ferry in Active Pass. The ferry was transiting the pass westbound from Tsawwassen to Swartz Bay on Vancouver Island. The accused was transiting the pass eastbound but was on the North side of the pass at the pinch point at precisely the time the ferry needed to execute a 90 degree turn.

**Decision:** The accused is guilty.

**Held:** This offence is a strict liability offence meaning the prosecution must prove the offence took place and, once it does so, the accused is guilty unless he proves on a balance of probabilities that he exercised due diligence. The act of transiting Active Pass on the North side at the pinch point at precisely the time the ferry was executing a 90 degree turn was operating a vessel in a careless manner. The pass is a narrow channel and the rule is that vessels are to pass port to port. "It is careless, and without reasonable consideration for persons navigating vessels the size of the [ferry], for a person to navigate through Active Pass such that vessels pass starboard to starboard, rather than port to port." The accused has failed to establish a defence of due diligence. He was aware of the risk of meeting a ferry and, having taken the route he did, he put himself in a position of not being able to see it until the last moment.

## Miscellaneous

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

*Snow Valley Marine Services Ltd. v. Seaspan Commodore (The), 2015 FC 304*

The plaintiff's assist tug was sunk and lost on 5 October 2011 when she was assisting the defendant's vessel with a fouled anchor. Specifically, a line was attached from the plaintiff's tug to the anchor of the defendant's vessel and when the anchor came free it fell rapidly and sunk the plaintiff's tug. The plaintiff commenced this proceeding against the defendants 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 defendant 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's 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 plaintiff in the same position it would have been in had the loss not occurred.

### **Personal Injury - Gangway Accident - Liability of Terminal – Damages - Wage Loss - Employability of Plaintiff - Failure to Mitigate - Refusing Treatment**

*Ranjbar v. Islamic Republic of Iran Shipping Lines, 2014 BCSC 1983*

The plaintiff, a ship's cook, fell from a gangway while boarding a vessel at a terminal in the Port of Prince Rupert and fractured his right femur. The gangway was owned and operated by the terminal. It was an unmanned automatic lifting gangway that moved up and down and side to side as the position of the ship shifted. A horn would sound before movement of the gangway was initiated and posted signage warned that the gangway should be cleared immediately when the horn sounded. The plaintiff was thrown from the gangway onto the deck of the ship when it raised automatically. The plaintiff had heard the horn sound but did not understand its purpose. He had not seen the posted signs and would not have understood them in any event as he had a very limited knowledge of the English language. The plaintiff commenced these proceedings against the owner of the vessel and against the terminal. The defendants each alleged that the other was responsible and that the plaintiff was contributorily negligent.



Damages were agreed except for past and future wage loss and it was alleged the plaintiff failed to mitigate.

**Decision:** The terminal is 100% liable for non-pecuniary damages which are reduced by 15% for failure to mitigate.

**Held:** The terminal owed a duty to persons using the gangway to take reasonable care that the gangway was safe from an unusual danger of which the terminal was aware. An unusual danger is one that is not usually found in the place concerned and depends on the class of persons involved. A danger that is usual for one class of persons may be unusual for another class. Prior safe use is a factor to be taken into account in assessing whether something constitutes an unusual danger and whether reasonable care was taken but is not determinative. Where an occupier knows of an unusual danger it must warn users of the danger but a warning is only adequate if it provides sufficient detail about the danger such that the users understand the full danger and how to act to avoid it. Here the gangway posed an unusual danger even though it had been used for 24 years without a mishap. Adequate steps were not taken by the terminal to notify users of the danger. The signs were inadequate and confusing especially for persons who could not read and understand English, a foreseeable issue at a terminal. The terminal could easily have taken other measures to warn users. The failure to adequately warn the plaintiff of the danger was the cause of the plaintiff's fall and injuries and the terminal is liable.

The ship owner also owed a duty to the plaintiff and other crew members to take reasonable care for their safety. If the ship owner knows of a dangerous condition it should ensure the condition is addressed and made safe. In this case, the ship owner was not aware of the danger posed by the automatic gangway and is therefore not liable.

The plaintiff was not contributorily negligent. He was not aware of the risk and could not have been reasonably aware of the danger posed by the gangway. In the circumstances, he took reasonable precautions for his own safety.

The plaintiff is entitled to non-pecuniary damages in the agreed amount of \$95,000. The plaintiff also claimed \$100,000 for past wage loss during the four years between the accident and trial and \$300,000 for loss of future earning capacity. However, the plaintiff elected to remain in Canada following the accident but he lacked motivation to learn English and was not competitively employable, regardless of the injury. It is extremely unlikely the plaintiff could obtain employment in Canada even if the injury had not occurred. In these circumstances, no award is made for past wage loss or loss of future earning capacity.

A plaintiff has an obligation to take all reasonable measures to reduce his damages, including undergoing surgery to alleviate or cure injuries. The defendant has the burden of showing the plaintiff has failed to mitigate his damages, including to prove that the plaintiff acted unreasonably in avoiding the recommended treatment and the extent to which the plaintiff's damages would have been reduced if he had acted reasonably. Here, the plaintiff has unreasonably refused recommended surgery and physiotherapy which would have reduced his pain and discomfort and increased mobility and function. Accordingly, damages are reduced by 15% for failure to mitigate.

## Judicial Review of Truck Licencing Decision by Port Authority

*Goodrich Transport Ltd. v. Vancouver Fraser Port Authority, 2015 FC 520*

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 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".

**Comment:** See also *ATL Trucking Ltd. v. Vancouver Fraser Port Authority, 2014 FC 420*, where it was held that the Port was a "federal board, commission or tribunal" and its decision was subject to judicial review by the Federal Court.

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

*Save Halkett Bay Marine Park Society v. Canada (Environment), 2015 FC 302*

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.
- (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.

### **Judicial Review of Port Authority Decision Denying Application to Operate Tour Boat - Public Right of Navigation**

#### *Adventure Tours Inc. v. St. John's Port Authority, 2014 FC 420*

The applicant had conducted tour boat operations in the Port of St. John's and in October 2001 requested that the St. John's Port Authority (the "Authority") permit it to renew its operations from port managed property. The Authority denied the request as it had implemented a policy in 2006 restricting the number of such operators to three, none of whom were the Applicant. The Applicant then brought a judicial review application to set aside the decision of the Authority. On motion by the Authority that application was struck on the grounds that there was neither a formal request nor an application made by the Applicant that could be the subject of judicial review (2012 FC 305). An appeal from that decision was dismissed on 22 January 2013 (2013 FC 55). In March 2013 the Applicant again requested permission to resume its tour boat operations from port managed property and the Authority again declined the request. The Applicant then brought this second judicial review application. The main issue was whether the Authority had the power to require that commercial tour boat operators be licensed.

**Decision:** Application denied.

**Held:** Pursuant to the *Canada Marine Act* and its letters patent, the Authority has the power to license operations relating to the carriage of passengers. Good management of a port requires that the activities of tour operators be licensed. The decision of the Authority is not *ultra vires* on the grounds that it is an infringement of the public right of navigation. The public right of navigation is not unrestricted. Parliament has the right to legislate in respect of navigation and shipping and is not restricted to using only one statute, the *Canada Shipping Act, 2001*, to so

legislate. The *Canada Shipping Act, 2001* may be the primary legislative vehicle used to regulate navigation and shipping but other legislation such as the *Canada Marine Act* can also be used.

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