Developments in Canadian Maritime Law

2001

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TABLE OF CASES

I. Marine Insurance

Liability Policies - Interpretation - Illegality - Pay to be Paid

Conohan v The Cooperators,
2002 FCA 60
This case arose out of a collision between the "Lady Brittany" and "Cape Light II" off Prince Edward Island. At the time of the collision the "Cape Light II" was at anchor. Following the collision, blood alcohol readings were taken from the Master of the "Lady Brittany" which indicated his blood alcohol content was above the legal limit. An action was commenced by the owners of the "Cape Light II" against the "Lady Brittany". The insurers of the "Lady Brittany" refused to defend or participate in that action alleging that the insured was in breach of the terms of the policy in that the vessel was being operated in an illegal manner. The owner of the "Lady Brittany" thereafter admitted liability for the collision, confessed to judgment and assigned all of his rights of claim against his insurers to the owners and underwriters of the "Cape Light II". The owners and underwriters of the "Cape Light II" then brought this action against the Defendant, the insurer of the "Lady Brittany". The Defendant denied it was liable on various grounds. First, it alleged that there was a breach of the implied warranty of legality contained in s. 34 of the Marine Insurance Act. Second, it alleged that the collision was caused by "wilful misconduct", an excluded peril under s. 53 of the Marine Insurance Act. Third, it alleged that the collision was caused by "drunken or impaired operation of the vessel or other wrongful act", an excluded peril under the policy of insurance. Finally, it alleged that it was only liable to pay the insured if the insured has "become liable to pay and shall pay by way of damages to any other person any sum...". As the insured had not actually paid any sum it argued that its liability was not invoked. At trial the Trial Judge held: first, that the implied warranty of illegality did not apply to the third party liability portions of the policy; second, that there was no "wilful misconduct"; third, that on a proper reading of the policy the exclusion of "drunken or impaired operation of the vessel or other wrongful act" did not apply to the third party liability clause of the policy as that clause contained its own separately enumerated exclusions. The Trial Judge did, however, hold that the policy was, in fact, a pay to be paid policy and that the Defendant was, accordingly, not liable. The Plaintiff appealed. The Federal Court of Appeal reviewed the case authorities relating to “pay to be paid” clauses and affirmed the decision of the Trial Judge.

Warranties - Authority of Broker

Elkhorn Developments Ltd. v Sovereign General Insurance Co. et al.,

This was an application by the Defendants for summary dismissal of the Plaintiff’s claim for coverage under a hull and machinery policy. The policy contained a warranty that any movements of the barge would be subject to underwriters’ prior approval. In breach of this warranty, the barge was moved without any notice to underwriters and sank four days after the move had been completed. A marine surveyor was appointed but he was unable to come to a firm opinion on the cause of the sinking. Subsequent to the sinking, the insurers and the broker agreed to cancel the insurance policies effective the day of the move. The issues in the case were whether the warranty was a true promissory warranty or merely a suspensive condition and was the insurance policy properly cancelled retroactively. At first instance the motions judge held that in order for a clause to constitute a promissory warranty there must be “a substantial relationship between the warranty and the loss incurred”. The motions judge further held that in order to answer this question there was a need for further evidence concerning the cause of the sinking of the barge. The motions judge therefore dismissed the application and ordered that the matter proceed to trial. On appeal, the British Columbia Court of Appeal held that the motions
judge erred in requiring that a “substantial relationship” exist between the warranty and the loss incurred. Such a test was retrospective in nature and would be a serious practical impediment to the marine insurance business. The Court of Appeal went on to find that the clause in issue was clearly intended by the parties to be a promissory warranty the breach of which discharged the insurers from any liability. The Court of Appeal further held that the cancellation of the policy by agreement between the insurers and the broker was effective as the broker had the apparent or ostensible authority of the assured.

Stay of Proceedings

**Waterworks Construction Ltd. v Liberty Mutual Insurance Co.**

This action arose out of the sinking of a concrete casing which was determined to be a hazard. The Plaintiff alleged that its liability for the cost of removal of the casing was covered by an insurance policy issued by the Defendant. There was, however, a second action between the Plaintiff and other parties relating to the liability for the sinking. The Defendant insurer brought this application to stay the insurance action pending the outcome of the liability action. The Court declined the stay holding that there were separate issues in the two actions.

Subrogation

**Chubb Insurance Co. of Canada v Cast Line Ltd.**
[2001] Q.J. No. 2363

This was a subrogated action by a cargo insurer against an ocean carrier for damage occasioned to a container of cheese. The Defendant carrier brought this motion arguing that the Plaintiff insurer had no right to bring the action as it had no rights of subrogation. The Defendant relied upon the terms of the receipt signed by the assured which referred to the payment by the insurer as a loan. Notwithstanding the language of the receipt, the court held that the payment by the insurer was a true insurance indemnity as it was reimbursable by the assured only in the event that it should obtain indemnification from another source. In result, the Defendant’s motion was dismissed.

II. Carriage of Goods

Freight - Set-off - Hague-Visby Rules - Limitation/Prescription - Exculpatory Clauses

**Mediterranean Shipping company S.A. v Sipco Inc.**, 2001 FCT 1046

The Plaintiff in this action claimed against the Defendant for ocean freight owing in respect of the carriage by sea of nine containers from Toronto to the Persian Gulf. The Defendant admitted non-payment of freight but alleged that it was entitled to a set-off and brought a counterclaim
alleging breaches of the contract by the Plaintiff. Specifically, the Defendant alleged that seven of the containers were shipped together, that six of those seven containers arrived on time at the port of discharge, that the seventh container did not arrive until months after its scheduled arrival, and that as a consequence the clearance through customs of all of the containers was delayed. The issues in the case were the entitlement to set-off and whether the Plaintiff had been negligent in its handling of the containers. On the first issue the Trial Judge reviewed the Anglo-Canadian authorities and concluded that there could be no right of set-off against freight under a contract for the carriage of goods by sea unless the contract specifically provided otherwise. As the contract did not provide otherwise, there was no right of set-off. The Trial Judge next turned to the counterclaim. The first defence raised against the counter-claim was that the claim had not been brought within the one year time period fixed by the Hague-Visby Rules. The success of this argument depended upon whether the prescription period set by the Rules ran from the date of discharge or the date of actual or constructive delivery to the consignee. The Trial Judge held that the prescription period runs from delivery not discharge and that any clauses in a bill of lading declaring delivery takes place at discharge are null and void. The Trial Judge further held that delivery takes place on the day the last piece of cargo is delivered, the seventh container in the case at bar. Accordingly, the Judge held the counterclaim had been commenced within time. The Judge next considered various defences raised by the clauses in the bill of lading, namely: a scope of voyage clause which gave the carrier complete discretion as to the ports at which to call; a period of responsibility clause which provided the carrier was not liable for damages occurring in the period before loading or after discharge; and a clause providing that there could be no claims for failure of the carrier to meet arrival or departure dates. The Judge held that these various clauses were contrary to the Hague-Visby Rules and therefore null and void pursuant art. 3 r. 8 of the Rules. The Judge next considered the damages suffered as a consequence of the breach of contract by the Plaintiff but found that the Defendant had failed to prove any damages. In result, therefore, the claim for freight was allowed and the counterclaim was dismissed.

**Hague Visby Rules - Burden of Proof - Water Damage**

*Nova Steel Ltd. et al. v The “Kapitonas Gudin” et al.*, 2002 FCT 100

*Samuel Son & Co. v The “Kapitonas Gudin” et al.*, 2002 FCT 101

These cases were for damage to rolled coils carried from Latvia to Montreal. The coils were “pitted”, allegedly by sea water. The Defendants denied liability arguing the damage was caused by the excepted perils of peril of the sea (condensation), act or omission of the shipper (defective packaging) or inherent defect (mill defects in the coils). After reviewing the evidence, the Trial Judge considered whether the Plaintiffs had satisfied their initial burden of proving tender of the cargo in good condition and held that the Plaintiff had not met this burden. In so holding, the Judge noted that the bill of lading was clause “partly rust stained wet before shipment”. Further, there was no evidence of how the cargo was stored before shipment or how it was conveyed to the loading port. The fact that the Plaintiffs had not proven tender of the cargo in good condition did not, however, end the matter. The Judge held the Plaintiffs could still establish liability by showing by a preponderance of evidence that the Defendants were the proximate cause of the
damage. The Judge held that the Plaintiffs had met this burden through “overwhelming”
evidence that the coils were damaged by exposure to sea salt during the voyage. The Judge found
that the Defendant ship was unseaworthy in that it was not watertight and had allowed sea water
to enter the holds during the voyage. On the issue of damages, the Defendants challenged the
allowances that had been established and agreed between the Plaintiffs and their insurers. The
Judge held that these allowances were supported by evidence and represented the loss actually
suffered by the Plaintiffs.

**Deck Carriage - Exclusions - Hague-Visby Rules**

*Timberwest Forest Products v Gearbulk Pool Ltd. et al.,*

This was a summary trial application by the Plaintiffs for judgment against the Defendant
carriers. The Plaintiffs’ cargo of lumber was carried partly on deck and partly under deck. The on
deck cargo was damaged at the discharge port when the Defendants were unloading soda ash.
The Defendants failed to cover the lumber and it was dusted by the soda ash. Thereafter, the
Defendants attempted to clean the lumber by washing it to remove the soda ash but this merely
exacerbated the problem. The Defendants sought to avoid liability by arguing that the damaged
lumber was “cargo carried on deck” within the meaning of the Hague-Visby Rules and by
relying upon an exclusion clause in the bill of lading for damage to deck cargo. The Plaintiffs, on
the other hand, argued that the cargo was not exempt from the application of the Hague-Visby
Rules. The Plaintiffs led evidence to show that the bills of lading had not properly described the
proportions of cargo carried on deck and under deck. The Motions Judge agreed with the
Plaintiffs that this mis-description created an uncertainty making it unclear what cargo would be
carried on deck at shippers’ risk and what cargo would be carried under deck. In result, the
carriage was governed by the Hague-Visby Rules and the exclusion clause was inapplicable.

**Standing to Sue - Collisions**

*Porto Seguro Companhia De Seguros Gerais v The “Federal Danube” et al.,*

This was the re-trial of an action that had been previously dismissed by the Federal Court Trial
Division in a judgment reported at [1995] 82 F.T.R. 127. That judgment was ultimately
overturned by the Supreme Court of Canada and a new trial ordered on the grounds that the Trial
Judge erred in refusing to hear three expert witnesses because assessors had been appointed by
the court (see [1997] 3 S.C.R. 1278).

The Plaintiff was the cargo underwriter who had indemnified the cargo owners for damages
suffered as a result of a collision in the St. Lawrence Seaway between the “Beograd” and the
“Federal Danube”. The Plaintiff argued that the “Federal Danube” was wholly at fault for the
collision and liable for the damage to the cargo in the principal amount of $4.4 million. There
were two issues in the case; the standing of the Plaintiff to bring the action in its own name and
the liability for the collision. On the first issue, the Defendant argued that under Canadian
maritime law the Plaintiff ought to have commenced the action in the name of the cargo owners.
The Court, however, held that the matter was governed either by the law of Brazil (where the insurance contract was made) or the law of Quebec and that in either case the insurers became subrogated to the rights of their insured upon payment and were entitled to bring the action in their own name. With respect to the second issue, the liability for the collision, the Court held that the “Beograd” was wholly at fault for the collision. The faults found against the “Beograd” included: navigating through the anchorage area rather than in the navigation channel; navigating at an unsafe speed; and, failing to keep out of the way of an anchored vessel. In reaching the conclusion that the “Beograd” was wholly at fault the Court noted that where a vessel underway strikes a vessel at anchor the underway vessel is *prima facie* at fault unless it is proven the accident could not have been avoided by the exercise of ordinary skill. In the result, the Plaintiff’s action was dismissed.

**Hague-Visby Limitations - Turkish Law**

*Barzalex v The "EBN Al Waleed"*,
2001 FCA 111

This was an appeal from the Federal Court Trial Division. The bill of lading contained a general paramount clause incorporating the Hague Rules as enacted in the country of shipment. The country of shipment was Turkey. However, Turkey had enacted the Hague Rules twice into its legislation. Initially, the Rules were enacted through ratification of the convention. This enactment gave a limitation of 100 pounds sterling gold value (approximately $12,500) per package or unit. Later the Rules were enacted as part of Turkey's Commercial Code. This enactment, as amended, gave a limitation of 100,000 Turkish Lire (approximately $2.31) per package or unit. At issue in the case was which of these limitations applied. The Plaintiff argued and led expert evidence that the enactment in the Commercial Code applied only to internal shipments. The Trial Judge found as a fact however that under Turkish law the Commercial Code applied to international shipments as well as internal shipments. The Plaintiff then argued that a $2.31 limitation per package or unit was unconscionable and should not be enforced. The Trial Judge held that it was the result of a contractual provision which the Plaintiff could have avoided by declaring a value for the goods. The Plaintiff appealed. The Federal Court of Appeal dismissed the appeal saying they were not satisfied the Trial Judge had erred and that on the evidence before him it was open to him to make the findings he did.

**Road Carriage - Limitation of Liability**

*Paine Machine Tool Inc. v Can-am West Carriers Inc.*, 2001 BCSC 1633

This case arose out of damage to two high precision machine tools carried by the Defendant when they struck an overpass. The Defendant argued that its liability was limited to $4.41 per kilogram pursuant to the uniform conditions of carriage in Part 7 of the Motor Vehicle Act Regulations of British Columbia. The Court, however, held that the Defendant was not entitled to avail itself of the limitation provisions since the bill of lading did not substantially comply with the requirements of s.9.21 of the Regulations and was never sent to the Plaintiff and, therefore, was never “issued”. Further, the Court held the bill of lading failed to reflect the prior
course of dealings between the parties. The Court found as a fact that the carrier had previously advised the Plaintiff that insurance up to a value of $500,000.00 was included in freight rates.

**Air Carriage - Warsaw Convention**

*MDSI Mobile Data Solutions Inc. v Federal Express*
2001 BCSC 1411

This was an application by the Plaintiff for summary judgment for damage to computer equipment that occurred during the course of air carriage from Vancouver, British Columbia to Atlanta, Georgia. The Plaintiff sought to recover the full amount of its loss or, in the alternative, the declared value amount of $214,000. The Defendant carrier admitted liability but argued that its liability was limited to 250 francs per kilogram as per Art. 22(2) of the Warsaw Convention or, in the alternative, $50,000 as per its standard terms and conditions or, in the further alternative the declared value of $214,000. The Defendant argued that the Plaintiff was not entitled to recover the declared value amount since the Plaintiff’s clerk who filled out the air waybill said on discovery that she believed the declared value amount set the amount that could be recovered from the Plaintiff’s insurer. The Court found this argument wholly without merit. The Defendant next argued that its service conditions limited the amount that could be declared to $50,000. The Court held, however, that such a limit was contrary to Art. 23 of the Convention which renders null and void any provision “tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention”. The Plaintiff argued that the Defendant could not rely upon any limitations or the declared value as the air waybill was deficient. Specifically, the Plaintiff argued that contrary to Art. 8 the air waybill failed to disclose the agreed stopping places and failed to include a statement that the carriage was subject to the Warsaw Convention. The Court rejected both of these arguments. The Court held that as there was no stopping place actually agreed between the parties the carrier was free to stop wherever it saw fit and further held that a statement in the air waybill that the Convention “may” be applicable was sufficient compliance with Art. 8. In result, the Court granted summary judgment in the amount of the declared value.

**III. Arbitration/Jurisdiction Clauses**

*Marine Liability Act - Retrospective Application*

*Incremona-Salerno v The “Castor”*
2001 FCT 1330

This case arose out of a contract for the carriage of goods by water from Italy to Canada in 1999. In February and March 2001 the Defendants brought applications to stay the proceeding relying upon a jurisdiction clause in the bill of lading that gave exclusive jurisdiction to the courts of Hamburg. The stay motions were not set down for a hearing and were not abandoned. On 8 August 2001 the *Marine Liability Act* came into force. Section 46(1) of the *Marine Liability Act* provides that notwithstanding any jurisdiction or arbitration clause claims arising under a contract of carriage of goods by water may be brought in Canada where *inter alia* the port of
loading or port of discharge is in Canada. The issue in the present application was whether s. 46 applied to render moot the Defendants’ stay application. The Motions Judge held that it did.

**Stay of Proceedings - Arbitration Clause - Commercial Arbitration Code**

*Stella Jones Inc. v The “Mariana”*,
2001 FCT 1148

This was an application by the Defendant carriers for a stay of proceedings. The facts were that the parties had entered into a “Conline” booking note for the carriage of the Plaintiffs’ cargo. The booking note specified that its terms would be superceded by the terms of the bill of lading which were said to be set out in full on the reverse of the booking note. In fact, as the booking note had been sent by facsimile, the terms were not on the reverse. It was, however, common ground that those terms did not include an arbitration clause. On the actual bill of lading that was issued there was added a typed “Centrocon” arbitration clause in the margin which called for London arbitration. It was this clause which the Defendants sought to enforce. The Motions Judge referred to Article 8 of the Commercial Arbitration Code and noted that the court had no discretion where it finds an arbitration clause. However, the Motions Judge found that on the facts of the particular case there was no evidence the Plaintiff had ever signed or agreed to the arbitration clause. Accordingly, the motion was dismissed.

**Stay of Proceedings - Jurisdiction Clause - Proper Test - Deviation**

*Ecu-line N.V. v Z.I. Pompey Industrie*,

This was an appeal from a decision of a Motions Judge upholding the decision of a Prothonotary denying the Defendant's application for a stay of proceedings based on a jurisdiction clause in the bill of lading. At first instance, the Prothonotary considered the usual factors that are weighed on a stay application and determined that the balance of convenience was marginally in favour of granting the stay. However, the Prothonotary held that there had been an unreasonable deviation in that the bill of lading called for the cargo to be shipped from Antwerp and discharged at Seattle whereas the cargo was, in fact, discharged at Montreal and carried by rail to Vancouver. Accordingly, the Prothonotary held that the Defendant was not entitled to rely upon the jurisdiction clause in the bill of lading. On appeal, the Motions Judge held that the Prothonotary had taken into account all of the circumstances of the case and did not err by taking into the account the breach of contract by the Defendant. On further appeal the Court of Appeal upheld the decisions of the Prothonotary and the Motions Judge. However, and most importantly, the Court of Appeal held that the proper test to apply in stay applications is the tripartite test employed in applications for interlocutory injunctions. That test requires the court to consider; first, is there a serious issue to be tried; second, whether the party seeking the injunction (or stay) would suffer irreparable harm if the injunction (or stay) was not granted; and third, which party would suffer the greater harm as a result of the granting or refusal of the injunction (or stay).
(Editor’s Note: This is arguably a much more difficult test for a Defendant seeking a stay to meet
IV. Canadian Maritime Law/ Federal Court Jurisdiction

Application of Provincial Statutes

*R v Kupchanko*,

This case raised the issue of the constitutional validity of an Order made pursuant to section 7(4) of the *Wildlife Act* of British Columbia prohibiting motorized vessels in excess of 10 horsepower from navigating part of the Columbia River. The accused argued that the Order was an invalid infringement on Federal Government jurisdiction over navigation and shipping. At first instance, the Provincial Court agreed and the accused was acquitted. On appeal, the summary conviction appeal judge held that the impugned order was aimed at promoting the dominant purpose of the Act to which it was a part. That purpose was to protect wildlife and their habitat, a matter clearly within the constitutional jurisdiction of the provinces. The judge held that the fact that the Federal Government through the *Canada Shipping Act* had also legislated restrictions on boating similar to those in the impugned Order did not render the Order invalid as the Federal Government had not legislated specifically with respect to that part of the Columbia River the Order regulated. The summary conviction appeal judge held that there would have to be an express contradiction between federal legislation and provincial legislation before otherwise valid provincial legislation could be declared invalid. In reaching this decision the summary conviction appeal judge relied in large measure upon dicta of the British Columbia Court of Appeal in *Windermere Watersports Inc. v Invermere*, (1989) 37 BCLR (2d) 112. On further appeal the Court of Appeal of British Columbia reconsidered the *Windermere* case in light of recent judgments of the Supreme Court of Canada which were recognized to significantly narrow the scope for the application of provincial laws to maritime matters. The Court of Appeal affirmed the result in the *Windermere* case but noted that the holding therein that the province could enact legislation affecting a matter of shipping and navigation was incorrect. Accordingly, the Court of Appeal allowed the appeal and held that the Order under the *Wildlife Act* was inapplicable to conveyances operating in navigable waters.

Jurisdiction - Fisheries - Agency

*Radil Bros. Fishing Co. Ltd. v. Her Majesty the Queen et al.*,  
(19 October 2001) No. A-786-00 (F.C.A.)

The facts of this case are quite complicated involving licence swaps, fishing quotas and catch history. One of the issues in the case was whether the Federal Court had jurisdiction to entertain a claim arising out of an agreement of purchase and sale of a fishing licence. The Federal Court of Appeal concluded that such a claim did not fall under section 91(10) of the *Constitution Act*.
(navigation and shipping) as it was more specifically dealt with under section 91(12) (Sea Coast and Inland Fisheries). The Federal Court of Appeal also extensively reviewed the jurisprudence in relation to the definition of Canadian Maritime Law and concluded that Canadian Maritime Law does not include a claim arising out of an agreement to purchase a fishing licence or to matters arising out of a breach of an agency contract entered into for the purpose of purchasing a fishing licence. The Court of Appeal noted that agency claims cannot be entertained under the court’s admiralty jurisdiction “unless the true essence of the contract relied upon is maritime”.

**Jurisdiction - Claims Against Insurance Brokers**

*Royal & Sun Alliance v The “Renegade III”,*
2001 FCT 1050

This case is fully summarized under the heading “Admiralty Practice”. During the course of his reasons the Prothonotary seemed to suggest that Canadian maritime law had developed to the point where claims against brokers in a marine insurance context might be within the jurisdiction of the Federal Court.

**Log Salvage - International Convention on Salvage - application of Provincial Regulations**

*Early Recovered Resources Inc. v Gulf Log Salvage Co-Operative,*
2002 FCT 184

This was a summary trial application by the Defendant, the Provincial Crown, dismissing the Plaintiff’s claim for the salvage of logs in the Fraser River. The Defendant argued that the Plaintiff’s claim was prohibited by the Log Salvage Regulations adopted under the provincial *Forest Act*. The Court dismissed the Defendant’s application. The Court reviewed the *International Convention on Salvage, 1989* as enacted by the *Canada Shipping Act* and noted that it applied to vessels “and any other property in danger in navigable waters”. The Court held that these words extended the concepts of salvage to include logs or booms of logs. The Court therefore concluded that the claim of the Plaintiff was within the jurisdiction of the Federal Court and that the provincial regulations did not play any role in the Plaintiff’s claim for damages.

**Insurance - Subrogation**

*Porto Seguro Companhia De Seguros Gerais v The “Federal Danube” et al.,*

This case is summarized above under “Carriage of Goods”. One issue in this case was whether the Plaintiff cargo underwriters had standing to bring suit in their own name for damage caused to the cargo they insured and for which they indemnified the cargo owners. The Defendant argued that under Canadian maritime law the Plaintiff ought to have commenced the action in the name of the cargo owners. The Court, however, held that the matter was governed either by the law of Brazil (where the insurance contract was made) or the law of Quebec and that in either case the insurers became subrogated to the rights of their insured upon payment and were entitled to bring the action in their own name.
V. Limitation of Liability

Collisions - Limitation - Damage to Fishing Net

_Capilano Fishing Ltd. v The "Qualicum Producer",_

This was an action for damages suffered during the 1997 herring fishery when the Defendant's vessel cut the net of the Plaintiffs' vessel. The Plaintiffs claimed damages for the net, for the value of the lost catch and for the costs of fishing licences thrown away. The Defendants denied negligence and claimed the right to limit liability. On the issue of liability the trial judge found that the Master of the Defendant vessel was negligent in that he was aware of the Plaintiffs’ vessel yet manoeuvred his vessel in a direction that ultimately led to the collision. On the matter of limitation, the trial judge found that the Defendant vessel was well equipped and had a competent Master and crew and, therefore, held that the Defendants were without “fault or privity” and entitled to limit their liability to the amount of approximately $40,000.00. On appeal, the Court of Appeal upheld the finding on liability but overturned the finding on limitation. The appeal court adopted the reasoning from _North Ridge Fishing Ltd. et al. v The "Prosperity" et al.,_ (2000) 78 B.C.L.R. (3d) 388 and held that any owner who permits his vessel to participate in the roe herring fishery is not entitled to limit liability since the fishery compels the sacrifice of safe navigation and good seamanship. (Note: This case was decided under the old limitation of liability regime. Under the new regime the limitation amount is substantially higher ($500,000.00 for vessels under 300 tons) and the owner is entitled to limit unless the claimant establishes a personal act or omission committed with intent to cause loss, or recklessly, with the knowledge that loss would probably result.)

Collisions - Limitation - Small vessels

_Leggat Estate v Leggat_,

In this case, also decided under the old limitation regime, the Court held that the operator of a small vessel was entitled to limit his liability but the owner was not. See the full summary below under “Miscellaneous”.

VI. Admiralty Practice

Service ex juris - _In Rem_ action

_McCain Produce Inc. v Visser Potato Ltd._,
2001 FCT 994
This was an ex parte motion by the Plaintiff for judgment in default of defence against the Defendant ship and her owners. The Defendants, including the ship, were apparently served in the Netherlands and a certificate of the Government of the Netherlands was offered in proof of service. Although the certificate did not indicate what was served or where the Prothonotary was prepared to assume the document served was the Statement of Claim. Nevertheless, the Prothonotary denied the motion on the grounds that there is no authority for the service on a ship outside of Canada nor for the service on a ship other than in an action in rem and the action was not styled in rem.

Stay of Proceedings - Insurance

*Royal & Sun Alliance v The “Renegade III”*,
2001 FCT 1050

This was an application for a stay of proceedings. The applicant was the owner of the Defendant yacht which had been damaged during the 2000 Victoria-Maui race. The applicant made a claim under his insurance policy for approximately $122,000 which was paid except for the sum of approximately $12,000. Subsequent to the payment the underwriters learned of circumstances which might void the policy and advised the applicant of this. On the same day the applicant commenced proceedings in the British Columbia Supreme Court for payment of the $12,000 he alleged was owing under the policy. Underwriters later did purport to void the policy for material non-disclosure and commenced in rem and in personam proceedings in the Federal Court claiming the return of the moneys paid. The applicant then brought this motion to stay the Federal Court proceedings. The application for a stay was denied. The Prothonotary noted that the Court would grant a stay only in the clearest of cases. The onus was on the applicant to prove (1) the continuation of the action would cause prejudice or injustice, not merely inconvenience or additional expense and (2) the stay would not be unjust to the Plaintiff. The Prothonotary held that although the British Columbia Supreme Court was a convenient forum it was not clearly the more appropriate forum. The Prothonotary noted that if underwriters were forced to bring their claim in the British Columbia Supreme Court they could not bring an in rem action by way of counterclaim and would have to start new proceedings and arrest the vessel for a second time. Further, the Prothonotary noted, without deciding, that there might be an issue as to whether the British Columbia Supreme Court had in rem jurisdiction. The Prothonotary concluded that there was no real prejudice or injustice to the applicant and that to allow the stay would deprive the underwriter of a legitimate juridical advantage. It is noteworthy that during the course of his reasons the Prothonotary considered whether a claim by the assured against his broker could be properly brought in the Federal Court. The Prothonotary seemed to suggest that Canadian maritime law had developed to the point where claims against brokers in a marine insurance context might be within the jurisdiction of the Federal Court.

Action In Rem - Necessaries

*Balcan ehf v The “Atlas”*
2001 FCT 1328
At issue in this case was the validity of the Plaintiff’s claim against the Defendant ship. The Plaintiff alleged it had a valid claim as a supplier of necessaries. The Court held, however, that the Plaintiff had neither supplied necessaries to the ship nor had it paid for the necessaries that were supplied by third parties. Consequently, the Plaintiff was not a necessaries claimant and the Statement of Claim and Warrant of Arrest were struck.

**Documents - Production - Average Adjusters Reports**

*Fiddler Enterprises Ltd. et al. v Allied Shipbuilders Ltd.*, 2002 FCT 44

This was an application by the Defendant shipyard for production of a Statement of Particular Average. The underlying case was for fire damage caused to the Plaintiffs’ vessel. The Defendant sought production of the adjuster’s report as it would disclose owner’s work from fire damage work. The Prothonotary ordered that the report be produced. In so doing he noted that although reports of average adjusters have no legal effect they are rarely questioned by the courts and are often looked upon as *prima facie* evidence of the matters disclosed.

**Dismissal for Failure to Produce Documents**


This was an application by the Defendant carrier to dismiss the claims of three Plaintiffs for failure to produce documents which had previously been ordered to be produced. Two of the Plaintiffs had produced the required documents but did so after the deadline imposed by the order requiring production. The other Plaintiff had failed to produce the invoices but advised that the documents had been destroyed. The Court dismissed the claim of the Plaintiff that had failed to produce the documents but declined to mete out this “drastic remedy” for the other two Plaintiffs.

**Dismissal For Delay**

*Ferrostaal Metals Ltd. v The “Herakles” et al.*, 2001 FCA 297

This was an appeal from an order made by the Prothonotary and affirmed by the Motions Judge dismissing the action for delay. The facts were that the Statement of Claim was filed on December 12, 1995 but was not served until a year later. The Plaintiff further delayed in waiting almost one year to file a Reply to a Statement of Defence. With the introduction of the Case Management Rules, an order was made on March 16, 1999 requiring the parties to file Affidavits of Documents by May 10, 1999. The Plaintiff failed to file its Affidavit of Documents by May 10, 1999 and made application on January 25, 2000 for an additional 30 days to complete this step. At first instance, the Prothonotary declined the extension of time and struck the claim for delay. In doing so the Prothonotary noted that unjustified non-compliance with a court order is a serious matter which is even more so when the order is made pursuant to a Notice of Status.
Review. The Prothonotary further noted that prejudice to a party is not a factor to be taken into account in such applications. On appeal, the Motions Judge agreed with the reasons given by the Prothonotary. The Motions Judge dealt with an additional submission not made before the Prothonotary, i.e. that the delay was due to the fault of counsel and not the fault of the party. However, the Motions Judge found that the Plaintiff was itself partly responsible for the delay. On further appeal, the Federal Court of Appeal held the Motions Judge had considered the relevant principles and committed no error of law.

**Extension of time - Stay**

*Global Enterprises International v The “Aquarius”, “Sagran” and “Admiral Arciszewski”, 2001 FCT 605*

This was an application by the Polish trustee in bankruptcy of the Defendant shipowner for an extension of time in which to file an appeal of an order authorizing the sale of the Defendant ships and for a stay of the sale proceedings. The Prothonotary reviewed the case authorities on time extensions and noted that an applicant must generally show an intention to appeal before the time ran out, that the appeal has merit, a reasonable explanation for the delay and that the other parties are not prejudiced. The Prothonotary held that the applicant had failed to address these issues in its affidavit evidence and further found that there was prejudice to the other parties given that the vessels were incurring substantial expenses and a delay might frustrate a sale. The Prothonotary next considered the stay application. The proper test on such an application is that there must be a serious question to be tried, there must be irreparable harm if the application is refused and the balance of convenience must be considered. The Prothonotary noted that the applicant’s material did not suggest the sale order was in error and was silent as to irreparable harm. On the matter of balance of convenience, the Prothonotary was of the view that the balance of convenience favoured an early sale of the ships.

**Extension of time**

*Global Enterprises International v The “Aquarius”, “Sagran” and “Admiral Arciszewski” 2002 FCT 193*

This was an application by the Polish trustee in bankruptcy of the Defendant shipowner for an extension of time in which to file appeal of an order striking the trustee’s affidavit of claim and of an order refusing the appointment of pro bono counsel. The Prothonotary dismissed the application on the grounds that there was not a continuing intention to appeal (as evidenced by the lack of effort put into the filing of materials), that the appeals were without merit, and that the reason given for the delay (the absence of the trustee from his office) was not an adequate explanation.

**Default Judgment - Reference**

*Island Tug & Barge Ltd. v Haedon Co. Ltd. et al, 2002 FCT 250*
This was an application by the Plaintiff for judgment in default of defence. Although the motion was not opposed, the court considered whether a reference to determine damages was necessary given that the action was in rem. The Prothonotary held that he had the discretion to give default judgment without a reference provided the claim was well founded, which he found it was.

Security For Costs - Priorities claimant

**Nedship Bank N.V. v The “Zoodotis”**, 2001 FCT 706

This was an application by the Plaintiff mortgagee for an order that one of the claimants to a priorities action be required to post security for costs. The Plaintiff argued that the claimant was a foreign corporation and that it was participating in the proceedings more as a party than a traditional lien claimant. Specifically, the claimant was challenging various aspects of the mortgagee’s claim. The Prothonotary declined the motion holding that there was no authority for ordering security for costs against a claimant. However, the Prothonotary noted such a claimant might be joined as a Defendant to the action and as a Defendant it would then be liable for security for costs.

Limitation Period - Extension of Time


This was an application to extend the two year limitation period set by s. 572(1) of the Canada Shipping Act for the commencement of an action against a ship for damage to property or personal injury. The evidence showed that the Plaintiff had sent the Defendant a notice of its claim within the two year period. The Defendant acknowledged the notice and requested the Plaintiff send relevant documentation “without prejudice and without making any admission”. No further evidence or explanation was offered. The Court held that the evidence was not a sufficient explanation by the Plaintiff of the delay and dismissed the application.

VII. Mortgages, Liens and Priorities

Bankruptcies - Stay of Proceedings

**Holt Cargo Systems Inc. v ABC Container Line N.V.**
2001 SCC 90

**Re: Antwerp Bulkerscarriers N.V.**, 2001 SCC 91

These cases address the issue of the apparent conflict between the law and procedures of bankruptcy and Canadian Maritime Law. They arose out of the arrest of the ship “Brussel” at
Halifax by the Respondent, a maritime lien holder. Shortly after the arrest the Belgium owner was declared a bankrupt and a Trustee in bankruptcy was appointed by the courts of Belgium with the mandate to realize upon the assets of the bankrupt worldwide. The Trustee brought an application before the Quebec Superior Court for an order recognizing the judgment of Belgium court and “declaring it executory in Quebec”. The Quebec Superior Court recognized the judgment and ordered that the property of the bankrupt be vested in the trustee subject to the rights of any secured creditors. The Trustee then applied to the Federal Court to adjourn the judicial sale of the “Brussel”. When this was unsuccessful, the Trustee returned to the Quebec Superior Court and obtained an order from that court directing the Federal court to pay the proceeds from the sale of the “Brussel” to the Trustee or, if the sale did not proceed, to deliver up the ship to the Trustee. The Trustee then applied to the Federal Court for an order staying the Federal Court proceedings and for payment of the proceeds of sale. The Federal Court declined the stay application and declined to pay the proceeds from the sale to the Trustee. The Trustee appealed to the Federal Court of Appeal. The Federal Court of Appeal dismissed the appeal holding that a legitimate legal advantage would accrue to the Respondent if its claim was adjudicated in the Federal Court since it was unlikely the Belgium courts would recognise the Respondent’s *in rem* claim. Further, the Federal Court of Appeal held that there was a "real and substantial connection" with Canada as Canada was where the ship was arrested. The Federal Court of Appeal was also critical of the Appellant's use of the Quebec Superior Court to obtain an order against the Federal Court. Meanwhile, the Respondent appealed the order of the Quebec Superior Court directing that the proceeds from the sale of the ship be paid to the Trustee. This appeal was allowed by the Quebec Court of Appeal. The Quebec Court of Appeal held that even if the matter was properly characterized as one of bankruptcy and not maritime law, the Superior Court did not have any jurisdiction to make an order against the Federal Court. Both the judgment of the Federal Court of Appeal and the judgment of the Quebec Court of Appeal were appealed to the Supreme Court of Canada.

With respect to the appeal from the Federal Court of Appeal, the Supreme Court of Canada held that the Federal Court of Canada was not obliged to defer to the bankruptcy courts of the bankrupt’s domicile and did not lose its jurisdiction by reason of the bankruptcy. The Supreme Court further held that the Federal Court had a discretion to decide whether to stay the Canadian proceedings. The Court noted that the Trial Judge addressed the relevant factors in determining whether to stay the proceedings and committed no error in principle. In particular, the Supreme Court held that the Trial Judge was justified in putting considerable weight on the fact the Respondent would not enjoy the same priority in Belgium as in Canada. The Supreme Court also considered and rejected an argument that the bankruptcy gave the Trustee a valid claim to the ship. The Court held that the bankruptcy operates as an assignment of the bankrupt’s property to the trustee but is subject to any existing charges.

With respect to the appeal from the Quebec Court of Appeal, the Supreme Court of Canada held, in addition to the above, that once the Quebec Superior Court recognized the Federal Court had maritime jurisdiction to deal with the “Brussel” it should have directed the Trustee to apply to the Federal Court for a stay and should not have issued what amounted to an anti-suit injunction.

**Applicable Law**

*Imperial Oil Limited v Petromar Inc.*, 

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**Halifax**
This was an appeal from a decision of the Trial Division declaring that the Defendant had a maritime lien. The issue in the case was whether the contract for the supply of marine lubricants was subject to American law and, consequently, whether the Defendant had a maritime lien. The Defendant, an American corporation, supplied lubricants through a sub-contractor to two Canadian registered ships owned by the Plaintiff at various Canadian ports. The ships were under demise charter to another Canadian corporation and were managed by an American corporation. The contract between the Defendant and the ships’ manager contained a choice of law provision calling for American law to be applied. Similarly, the contract between the Defendant and its sub-contractor who actually delivered the lubricants contained an American choice of law provision. There was no direct contract between the Defendant and the Plaintiff shipowner. The Plaintiff argued that the supply of lubricants should be governed by Canadian law because of s. 275 of the Canada Shipping Act (which provides a choice of law rule that matters relating to a ship shall be governed by the law of the port of registry) and because Canada was the place with the closest and most real connection to the transactions. At trial, on the issue of the application of s. 275 of the Canada Shipping Act, the Trial Judge held that this section applied only to matters dealt with in Part III of the Act (ie. in relation to seamen) and had no application to the case at bar. On the second issue, the Trial Judge recognized that there were a number of factors connecting the matters in issue to both Canada and the United States. However, the most significant factors were the contracts relating to the supply of lubricants both of which applied American law. In the result, the Trial Judge held that the contracts for the supply of lubricants were governed by American law and that the Defendant had a maritime lien.

On appeal, the Federal Court of Appeal reviewed the nature of a maritime lien and noted that such liens arise not from contract but by operation of law. The Court concluded that the Trial Judge had correctly determined that the law to be applied was the law with the “closest and most substantial connection” to the transaction and that this involved weighing various factors. The Court of Appeal held, however, that the Trial Judge erred in holding that the United States contracts were the most significant factors. The Court of Appeal considered that the most significant factor was that the demise charterer had its base of operations in Canada where the vessels traded and were based. When that factor was weighed with other factors connecting the transactions to Canada the proper law was the law of Canada. In result, the appeal was allowed and the Defendant did not have a maritime lien.

Priorities - Bankruptcy - Striking Claim of Trustee

Global Enterprises International v The “Aquarius”, “Sagran” and “Admiral Arciszewski”
2001 FCT 1311

In this case the Polish trustee in bankruptcy of the owner of the Defendant ships had filed an affidavit of claim claiming the entire proceeds of sale of the vessels for the purpose of distributing the proceeds in the Polish bankruptcy proceedings. An Intervening creditor brought this application to strike the trustee’s affidavit of claim. The Prothonotary commenced his analysis with the observation that parties ought not generally be permitted to strike out each others affidavits. The exceptions are where the affidavit is abusive or clearly irrelevant or is an abuse in the sense of prejudicing or delaying an orderly and fair hearing. The Prothonotary noted
this was a heavy burden but did go on to find that the burden had been met. The Prothonotary struck out the affidavit on three grounds. First, the Prothonotary held that the affidavit of the trustee was not a claim \textit{in rem} and did not even purport to be so. It being a pure claim \textit{in personam} it was irrelevant and liable to be struck. Second, that as the claim of the trustee was purely a claim in bankruptcy the Federal Court was without jurisdiction. Finally, the Prothonotary ordered the affidavit struck on the grounds that the conduct of the trustee was an abuse of the process of the Court. The abuse consisted of the placement by the Trustee of an advertisement in Lloyd’s List declaring any sale of the vessels by the Federal Court to be illegal. Further, the Prothonotary noted that the Trustee had hampered the efficient and orderly progress of the action by filing appeals which were not proceeded with.

\textbf{Priorities - Fines - Forfeiture}

\textit{Neves v The “Kristina Logos”},
2001 FCT 1034

This was an appeal from an Order of a Prothonotary setting priorities to the sale proceeds of the Defendant vessel. The vessel had been seized by the Crown for violations of the \textit{Fisheries Act} and was later arrested and sold at the application of the Crown. The claimants were the Crown, the mortgagee, and the co-owners of the vessel. The Crown claimed a priority for the costs of sale, the costs of maintaining the ship, for $50,000.00 ordered forfeited to the Crown and for a $120,000.00 fine imposed by the Supreme Court of Newfoundland for violations of the \textit{Fisheries Act}. The Prothonotary granted the Crown priority ahead of the mortgagee for the costs of sale and for the $50,000.00 ordered forfeited. The Prothonotary refused to grant the Crown a priority for the $120,000.00 fine or for the costs of maintaining the vessel. The Prothonotary further ordered that the amount owing to the mortgagee should rank after the claim of one of the co-owners of the vessel to the surplus. On appeal the Court altered the priorities. The Judge on appeal gave the highest priority to the Crown for the costs relating directly to sale. Second priority went to the mortgagee. Third in priority came the costs of the Crown incurred for the care of the crew. Fourth and fifth in priority, respectively were the claims for the $50,000.00 forfeiture and $120,000.00 fine. The balance of the fund was to be distributed to the owners of the ship. The Crown’s claim for the costs of preserving the ship were disallowed. It is noteworthy that the Judge on appeal held that the Crown’s claims in respect of the crew, the forfeiture and the fine were not \textit{in rem} claims but nevertheless ordered that they be paid out of the proceeds of sale.

\textbf{Supplies to Ships Under Charter}

\textit{Finansbanken ASA v The “GTS Katie”},
2001 FCT 1316

In this case a bunker supplier claimed a priority over mortgage creditors under Egyptian law for bunkers ordered by the charterer of the Defendant ship and supplied to the ship at Gibraltar while it was under charter. The bunker delivery receipt stated that the vessel was under charter and that the charterer had no right to subject the ship to maritime liens. The bunker supplier relied upon a
term in the bunker invoice that the agreement was to be determined by the law of Egypt. The Court held that the owner of the ship was not bound by the choice of law clause.

**Priorities - Validity of Seizure Under Mortgage**

*Greeley v The "Tami Joan"
2001 FCA 238*

This was a contest between the mortgagee and lessee of the fishing vessel "Tami Joan". The Plaintiff had leased the vessel from its owner and had effected improvements to it. Unknown to the Plaintiff the vessel was mortgaged and the mortgage was in arrears. The mortgagee seized the vessel pursuant to the mortgage and it was eventually sold. The Plaintiff alleged that the mortgagee had wrongly deprived him of possession of the vessel and that he was entitled to a possessory maritime lien for the materials and services he had supplied to the vessel. The Trial Judge held that the mortgagee was entitled to seize the vessel because the mortgage was in arrears and its security was impaired by reason that the vessel was uninsured. The Trial Judge further held that the Plaintiff was not entitled to a possessory lien because he had lost possession of the vessel to the mortgagee. The Plaintiff was, at most, entitled to a statutory right of action *In Rem* which gave him no priority. The Plaintiff appealed and further claimed monetary relief for equipment he alleged he supplied to the ship. On appeal the Court of Appeal affirmed the decision of the Trial Judge and further held that the Plaintiff had failed to properly prove any damages as a result of equipment he supplied to the vessel.

**Production of Documents - Cross-examination**

*Unitor ASA v The “Seabreeze I”,
2001 FCT 416*

In this matter a claimant alleged that the Defendant vessel was sold by judicial sale to a nominee of the ship’s mortgagee. This information came from various published newspaper reports. The claimant sought to compel the mortgagee to answer questions on cross-examination and to produce documents relating to the identity of the purchaser at the judicial sale, its corporate relationship to the mortgagee and whether the ship was resold or whether there was an agreement to resell the ship. The application was denied by the Court on the grounds that the evidence was not relevant to any of the issues then before the Court. Those issues were the entitlement of the mortgagee to reimbursement for the costs of repatriating the crew and maintaining the vessel while under arrest and for the value of the bunkers on board the vessel at the time of sale. The Court appeared to acknowledge that different considerations might apply when the claim of the mortgagee as mortgagee was considered.

**Lien For Necessaries - American Law**

*Richardson International Ltd. v The “MYS CHIKHACHEVA” et al.,
This was an action for necessaries supplied to the “Mys Chikhacheva”. The facts of the case were very complicated. The Plaintiff and one Defendant, Starodubskoe, had entered into a series of agreements relating to the re-fitting of a vessel, the supply and purchase of fish products and the supply by the Plaintiff of provisions to the “Mys Chikhacheva”. Starodubskoe later became bankrupt and the Plaintiff obtained a default judgment in Seattle, Washington. The “Mys Chikhacheva” was subsequently arrested in Nanaimo, British Columbia for the necessaries supplied to her and paid for by the Plaintiff. The Defendant resisted the Plaintiff’s claim arguing, inter alia, that the “Mys Chikhacheva” was not owned by Stardubskoe, that the Plaintiff had no maritime lien for necessaries, that the matter was res judicata because of the Washington judgment and that the Plaintiff had waived any right to a maritime lien. The Court reviewed the evidence of ownership and noted that the vessel had been registered both in Cyprus and Russia with different registered owners. The Court concluded that Stardubskoe was not the registered owner but held that it was nevertheless a bareboat charterer. The Court next considered the issue of applicable law and concluded that the contracts were governed by American law. In reaching this conclusion the Court noted that the agreements called for American law, that the place of arbitration was Seattle, that the currency of payment was United States dollars, that payments were to be made in Washington and that interest was fixed by reference to the prime rate of the U.S. Bank of Washington. The Court accepted the evidence of the Plaintiff’s expert on American law that, under American law, the Plaintiff had a maritime lien for the necessaries supplied and paid for by the Plaintiff. The Court further held that, under American law, a maritime lien could not be defeated unless there was an express waiver. On the issue of res judicata the Court held that the Washington judgment was not res judicata as the Washington case was against Stardubskoe whereas the case at bar was based on a maritime lien on the vessel “Mys Chikhacheva”. In result, the Plaintiff was awarded judgment.

VIII. Miscellaneous

Collision - Apportionment of Liability

De Merchant Estate v Price,

This matter involved a collision between a small runabout and a sailboat under power in a narrow channel. The main issue in the case was liability and apportionment. The Trial Judge found the parties equally at fault. The operator of the sailboat was at fault for not having the proper lights, for operating on the wrong side of the channel and for failing to take evasive action. The operator of the runabout was at fault for operating his vessel while impaired by alcohol and for failing to observe the other vessel.

Collisions - Limitation

Leggat Estate v Leggat
This case arose out of a collision between a pleasure craft and a rock face in Lake Rosseau, Ontario. As a result of the collision two passengers were injured, one fatally. These actions were commenced against the owner of the pleasure craft and the driver of the pleasure craft, the owner’s brother. The Court found the driver liable in that he was operating the vessel at an unsafe speed, failed to maintain a proper lookout, and failed to properly navigate the vessel. Interestingly, the Court also found the owner liable even though the owner was not in the boat at the time of the accident and the operator was apparently an experienced operator of small pleasure craft. The Court held that Part IX of the Canada Shipping Act clearly indicates the intention of Parliament to make owners of small vessels liable for the fault of their vessels and that since the vessel was at fault it followed that the owner was at fault. On the issue of limitation, the Court found that the operator could limit his liability but that the owner could not. The Court held that the owner was at fault or privity in that he failed to properly consider the trip to be undertaken by his brother. The Court said that the owner should have obtained an undertaking from the operator that the boat would be operated at less than planing speed until the rock face was rounded and then at higher speed with the operator looking above the windshield.

Collision - Tug and Tow - Towage Conditions - Damages

Gravel and Lake Services Ltd. v Bay Ocean Management Inc., 2001 FCT 468

This case arose out of an alleged collision between the “Lake Charles” and the tug “Robert John” in the Port of Thunder Bay. The Plaintiff, the owner of the “Robert John”, alleged that, when the tug and another tug were hooked up to the “Lake Charles” to assist her to berth, the “Lake Charles” negligently drifted into the “Robert John” and caused her to go aground. The Defendants denied there was a grounding and denied negligence. The Court found as a fact that there had been a grounding and further held that the parties were both partly at fault. Liability was apportioned 75% to the “Lake Charles” and 25% to the “Robert John”. The Plaintiff also claimed that its standard terms and conditions entitled it to contribution and indemnity from the Defendants. The Court held, however, that the towage contract was between the Plaintiff and the charterer of the vessel. The owners and managers of the “Lake Charles” were never a party to the agreement and were therefore not bound. On the issue of damages, the Court allowed damages for replacement of a rudder stock on the principle that “no deduction is made from the damages recoverable on account of the increased valued of the tug or the substitution of new for old materials”. The Court disallowed damages for steering gear repairs on the grounds that the damage to the gear resulted from delay in drydocking the vessel and not from the original grounding. The Court also disallowed a claim for re-drydocking to re-install the original propeller holding that this could be done at the next scheduled five year drydocking.

Collisions - Mutual Legal Assistance Act - Standing


This case arose out of a collision 130 miles off the coast of Massachusetts between the F/V “Starbound” and an unidentified vessel. As a result of the collision the F/V “Starbound” sank and
three of her crew drowned. The T/V “Virgo” subsequently called at ports in Newfoundland where she was inspected by Transport Canada officials and U.S. Coastguard. Three search warrants were obtained under the Mutual Legal Assistance Treaty and the Mutual Legal Assistance Act. As a result of the execution of those warrants some 98 exhibits were seized. The present application was to determine who would have standing at a subsequent hearing when it was determined what was to be done with the exhibits seized. The intervenors who requested standing were the owners of the “Virgo”, the three crew members of the “Virgo” who had been charged in the United States and were subject to extradition proceedings, The remaining crew members of the “Virgo”, the owner of the “Starbound” and the estates of the deceased seamen. The Court granted standing to the owner of the “Virgo”, the owner of the “Starbound”, the estates of the deceased seamen, the three crew members who were subject to extradition proceedings and two other crew members who “were directly connected to the chain of command” of the “Virgo.

**Collisions - Damage to Fishing Net**

*Capilano Fishing Ltd. v The "Qualicum Producer",*  

This case is summarized above under Limitation.

**Collision - Liability - Damage to Fishing Net**

*Wilson Fishing Co. Ltd. v The “Western Investor”,*  
2001 FCT 1390

This was another collision action that occurred during the shotgun roe herring fishery, a fishery which the Trial Judge described as “a most unusual kind of maritime adventure - one that compels masters to sacrifice good seamanship for profit”. The Plaintiff alleged that due to the negligence of the Defendants, the Defendant vessel collided with the Plaintiff’s skiff and the Plaintiff’s net became entangled in the propeller of the Defendant ship. As a result, the Plaintiff was unable to participate in the fishery. The Defendant denied liability. The Trial Judge reviewed the circumstances leading to the collision. She found that the Plaintiff’s Master was 100% responsible for creating a situation of imminent peril by failing to keep a proper lookout. She also found that the Plaintiff’s skiff and the Defendant vessel were equally responsible for the collision because they failed to take evasive action. However, she held that the damage to the Plaintiff’s net was not an inevitable consequence of the collision. She found that immediately after the collision the Plaintiff’s net was not entangled in the propeller of the Defendant ship. Rather, the entanglement occurred when the Defendant Master ordered the engines to be restarted too soon after the collision and before the net could be towed a safe distance away. The Trial Judge therefore held the damage to the net was caused solely by the Defendants. On the issue of damages, however, the Trial Judge held that the Plaintiff was not entitled to damages for a lost catch since the Plaintiff had aborted his set before the collision when a third party vessel cut him off.

**Ship Repair - Negligence - Damages**
**Matson Navigation v Victoria Shipyard Co.,**
2001 BCSC 1344

The Plaintiff in this matter claimed that the Defendant Shipyard had obstructed a vent with sandblast grit in the No. 5 port wing ballast tank while sandblasting during a refit. As a result of the obstruction, the ballast tank became over-pressurized during ballasting operations and significant damage was caused to the hull. Upon inspection approximately 76 pounds of compacted sand blast grit was found inside and completely blocking the vent. It was not disputed that the sandblast grit came from the Defendant’s sandblasting operations of the ballast tank. The Defendant nevertheless argued that it was not liable. The Defendant alleged that the damage was wholly or partly caused by the Plaintiff in that: the vents were fitted with flash screens which was unusual and permitted the accumulation of sandblast grit; the Plaintiff had specifically instructed the Defendant to sandblast the vents as well as the tank; that the Plaintiff failed to properly maintain the vents; and the Plaintiff failed to check the vents. The Court rejected all of these arguments. The Court found: that the presence of flash screens are to be anticipated and that they were easily detected; that the Plaintiff had not instructed the Defendant to sandblast the vents and that there was a substantial body of credible evidence that the vents should not have been sandblasted; that there was no lack of maintenance on the part of the Plaintiff; and that the Plaintiff had no obligation to check the vents before ballasting. In result, the Court found the Defendant solely liable for the damage. The Plaintiff was awarded damages for temporary and permanent repairs and expenses, for lost charter income, for interest expense and price fluctuations during the delayed delivery of the cargo and compound prejudgment interest.

**Marinas - Exclusion Clauses**

**Dryburgh v Oak Bay Marina (1992) Ltd.,**
2001 FCT 671

This was an action for damages caused to a pleasure craft when docks at the Defendant marina broke apart during a severe wind storm. The claim was against the marina and its President. The Plaintiff alleged that the marina was poorly designed and constructed and that the President oversaw the design and construction. The Defendants argued that they were protected by an exclusion clause in the moorage contract signed by the Plaintiff. The exclusion clause provided:

“All vessels, boathouse and ancillary equipment of the Owner stored or moored on the Company’s premises shall be solely at the Owner’s risk, and the Company shall not be responsible under any circumstances for any loss or damage caused thereto whether caused by negligence of the Company, its servants or agents or the acts of third parties, or otherwise.”

On the face of the contract were the names of three entities, one of which was the Defendant marina. There was a mark in the box next to the name of the Defendant Marina. The Plaintiff argued that the exclusion clause did not apply to relieve the Defendants of liability because the identity of “Company” was ambiguous, the clause did not extend to past defects in design or construction of the marina, and the clause did not apply to the Defendant President. On the first
point the Prothonotary held that it was clear that the contract was between the Plaintiff and the Defendant marina. On the second point, the Prothonotary noted that the exclusion clause was very broadly worded. It referred to any loss or damage without limitation. The Prothonotary held that to interpret the contract in the manner suggested by the Plaintiff would be to distort the contract and produce an unrealistic result not in accord with commercial reality. On the final point, the Prothonotary held that the President was protected by the test set out by the Supreme Court of Canada in *London Drugs Ltd. v Kuehne & Nagel Ltd.*, [1993] 1 W.W.R. 1, in that, by implication it was intended that the benefit of the exclusion clause would extend to the President and the President was acting in the course of his employment. In the result, the exclusion clause was enforced and the Plaintiff’s claim was dismissed. An appeal by the Plaintiff was dismissed for substantially the same reasons as given by the Prothonotary. The Appeal Judge did note that he found it difficult to accept that the term “Company” as used in the exclusion clause should be interpreted to include the Defendant’s President but, given the decision of the Supreme Court of Canada in *London Drugs Ltd. v Kuehne & Nagel Ltd.*, he concluded that view was not open to him.

**Sale of Vessel - Entitlement to Commission**


This was a claim by a yacht broker for commission. The Defendant denied the broker was entitled to a commission as the Listing Agreement had been terminated and the vessel was sold to a person who had not been introduced by the broker. The Prothonotary found, however, that the Defendant terminated the Listing Agreement to sell the vessel himself and that the Defendant knew, or was wilfully blind, to the fact that the purchaser was purchasing the vessel on behalf of a person introduced by the broker. The Prothonotary therefore held that the yacht broker was the effective cause of the sale and was entitled to a commission of 10%. The Prothonotary was not satisfied, however, with the evidence as to the purchase price of the vessel since the price was paid in cash in paper bags. He therefore based the commission on a previous arms length offer.

**Breach of Contract of Sale - Parole Evidence**

*Sproule v The “Compass Rose II”,* 2001 FCT 1304

This was an action by the Plaintiff to recover the balance of $25,000.00 alleged to be owing on a written contract of purchase and sale of a vessel. The defence was that there had been an oral variation of the written contract whereby the Plaintiff agreed to accept a lesser amount in return for prompt payment. The Plaintiff argued, *inter alia*, that the parole evidence rule applied to prohibit proof of an oral agreement that contradicted the written contract. The Court, however, held that the parole evidence rule had no application since the Defendant did not seek to adduce extrinsic evidence to add to, subtract from or vary the meaning of the written agreement but merely claimed that the agreement had been amended verbally. The Court found that there had been such an amendment and dismissed the action.
Immigration - Deportation Costs - Liability of Agent

*Greer Shipping Ltd. v Canada*,
2002 FCA 80

This was an appeal from a decision of the Trial Division holding the agent of the ship liable for the costs of deportation of a crew member who deserted the ship while at Vancouver in 1992. The appeal turned on the definition of “transportation company” in the *Immigration Act*. The Federal Court of Appeal noted that the statutory definition had been changed in 1993 from “persons carrying or providing for the transportation of persons” to “persons carrying or providing for the transportation of persons or goods”. The Court of Appeal held that the old definition applied and that under the old definition a cargo ship was not a “transportation company”. Accordingly, the appeal was allowed and the agent was not liable for the costs of deportation.

Stevedoring Services - Liability of Agent

*Logistec Stevedoring Inc. v Amican Navigation Inc. et al.*,  
2001 FCT 681

This was an action by the Plaintiff stevedoring company to recover $240,000.00 in stevedoring charges. The Defendants were the shipowner and the shipowner’s general agent. The shipowner did not appear at the trial and default judgment was given against it. The agent argued that it had contracted with the Plaintiff as agent only and was therefore not personally liable to the Plaintiff. On the particular facts of the case, the Court held that the agent was personally liable to the Plaintiff. The Court noted that, although some of the agent’s correspondence with the Plaintiff identified it as the “general agent” for the shipowner, the agent failed to indicate to the Plaintiff that it was contracting “as agent only”.

Pollution - Offences

*R v Glenshiel Towing Co. Ltd.*,  
(June 21, 2001) No. CA027681 (B.C.C.A.)

On December 16, 1997, the tug “Glenshiel” was found heeled over and submerged at her mooring in False Creek, Vancouver. As a result of the sinking a considerable amount of diesel fuel escaped from the vessel into the water and the owner was charged pursuant to s. 668 of the *Canada Shipping Act* with discharging a pollutant. At trial, the accused was acquitted on the grounds that the Crown had failed to prove sufficient evidence to support a conviction. On appeal, the Crown argued that all it needed to prove to support a conviction was that the pollutant emanated from the ship. The accused argued that it was incumbent on the Crown to prove that the accused caused the discharge. The Judge on appeal agreed with the accused holding that the Crown must prove some causal link between the accused and the discharge of the oil before liability will arise, at which point the onus shifts to the accused to prove due diligence. On further appeal, the Court of Appeal held that the offence was a strict liability offence which carries a conviction upon mere proof of the prescribed act. The Crown was not required to prove
that an act or omission of the master or some other person on board the ship caused the discharge. All that is required is proof beyond a reasonable doubt that the discharge occurred. Thereafter, the onus shifts to the accused to prove that all due care was taken to avoid the discharge.

Pollution - Sentencing


This was an appeal of sentence imposed by a Provincial Court Judge. The Defendant ship was charged under the Oil Pollution Prevention Regulations of the *Canada Shipping Act*. The charges stemmed from a spill of approximately 1,000 litres of fuel during refuelling operations. The cause of the spill was that a valve in the overflow line had been inadvertently left open. The spill affected 1,500 feet of shoreline and the clean up costs, which were paid by the shipowner, amounted to $65,000.00. Under these circumstances, the Trial Judge imposed a fine of $20,000.00. The shipowner appealed the fine to the Newfoundland Court of Appeal arguing that the fine far exceeded the range customarily imposed for similar offences. The Court of Appeal noted that it could only intervene to vary a sentence imposed at trial if the Trial Judge committed “an error in principle” leading to a sentence that was “demonstrably unfit”. Upon reviewing the circumstances, the Court of Appeal found no such error in principle and dismissed the appeal.

Liability for Bunkers

*Trans Tec Services Inc. v The “Lyubov Orlova”,* 2001 FCT 958

This was a summary trial application brought by the Defendant to dismiss the claim of the Plaintiff. The Plaintiff had supplied bunkers to the Defendant ship pursuant to a contract between the Plaintiff and the Charterer. The Defendant was a sub-charterer. The Defendant paid to the Plaintiff the amounts said to be owing in respect of bunkers delivered to the Defendant ship. The payments specified that they were for the amounts owing in respect of bunkers delivered to the Defendant ship. The Plaintiff, however, applied the payments to other invoices owing to the Plaintiff by the Charterer. The Plaintiff argued it was entitled to do so by the terms of its contract with the Charterer. The Court held, however, that the contract between the Plaintiff and Charterer did not bind the Defendant. The Court found the Plaintiff accepted the payment terms of the Defendant by retaining the payments made by the Defendant. The Plaintiff’s action was therefore dismissed.

Fishing Contracts

*458093 BC Ltd. v Dieterle et al.,* 2001 FCT 823

This case concerned the interpretation of an agreement between the Plaintiff and Defendant relating to the roe herring fishery. The Plaintiff alleged an agreement between it and the
Defendant fishermen the terms of which required the Plaintiff to lease the Defendant fishing licences and to provide specific services such as packing and trucking. In return, the Defendant would fish exclusively for the Plaintiff. The agreement further specified how the profits from the fishing would be split between the parties but was silent on what would happen in the event of a loss. Precisely such an event occurred after the 1997 fishery and the Plaintiff sought to recover from the Defendant a portion of the loss. The Prothonotary dismissed the Plaintiff’s claim holding that there was no provision in the contract imposing personal liability on the fishermen in the event of a loss and that the Plaintiff had failed to establish a “long standing and consistent practice” that such losses were shared.

Forfeiture - Fisheries Act

*R v Ulybel Enterprises Ltd.,*
2001 SCC 56

This case concerned the interpretation of the forfeiture provisions of the *Fisheries Act.* Specifically, the issue was whether, upon conviction for a *Fisheries Act* offence, s. 72(1) authorized the sentencing court to order forfeiture of the proceeds of sale of a vessel sold under the jurisdiction of the Federal Court of Canada. The Supreme Court of Canada thoroughly reviewed the forfeiture provisions of the *Fisheries Act* and concluded that s. 72(1) did authorize the forfeiture.

**TABLE OF CASES**

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