Developments in Canadian Maritime Law

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Table of Contents

Synopsis of Developments 2
Admiralty Practice 4
Admiralty Jurisdiction/Canadian Maritime Law 6
Carriage of Goods 9
Liens, Mortgages and Priorities 10
Offences 14
Pollution 17
Miscellaneous 19
Table of Cases 26

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

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Synopsis of Developments

Admiralty Practice

Practice cases of interest are: *Saam Smit v. The "Hanjin Vienna"*, 2017 FC 745, where the Federal Court permitted partial payment out of proceeds from the sale of a vessel after assessing the best reasonable cases of the various claimants; *Offshore Interiors Inc. v. Worldspan Inc*., 2017 FC 478, where the Federal Court refused a motion for early payment of alleged surplus proceeds of sale; and *Sargeant v. Worldspan Marine Inc*., 2017 BCSC 1153, where the existence of a similar but not identical action in the Federal Court was not grounds to stay a proceeding in the British Columbia Supreme Court.

Jurisdiction/Canadian Maritime Law

The cases dealing with the jurisdiction of the Federal Court and what constitutes Canadian maritime law are: *Transport Desgagnes Inc. v. Wartsila Canada Inc*., QCCA 1471, where the Quebec Court of Appeal held that the sale of a marine engine was governed by Canadian maritime law, not the law of Quebec, and that the vendor was accordingly entitled to rely upon a limitation clause in its contract; *The Corporation of the City of Victoria v Zimmerman*, 2018 BCSC 321, where the British Columbia Supreme Court upheld a local by-law that prohibited long term moorage but allowed temporary moorage; and *Certain Underwriters at Lloyd's and Soline Trading Ltd. v. Mediterranean Shipping Company S.A.*, 2017 FC 893, where the Federal Court held it had no jurisdiction to adjudicate a third party claim for indemnity brought by an ocean carrier against a trucker who took delivery of the cargo either unlawfully or negligently.

Carriage of Goods

The two cases concerning carriage of goods are: *Nine Starz Fruits & Vegetables Inc. v. Schenker of Canada Ltd.*, 2017 QCCQ 2122, where the Court of Quebec refused motions to dismiss the claim of the plaintiff consignee against a freight forwarder and ship owner on the basis of lack of privity of contract; and *De Wolf Maritime Safety B.V v. Traffic-Tech International Inc*., 2017 FC 23, where the Federal Court held that a carrier was entitled to limit its liability under the Hague-Visby Rules for undeclared deck carriage.

Liens, Mortgages and Priorities

The cases dealing with liens, mortgages and priorities are: *Offshore Interiors Inc. v. Worldspan Inc.*, 2017 FC 479, where the court permitted the filing of a supplementary affidavit and addressed questions relating to the scope of cross-examinations and the documents to be produced; *ITB Marine Group Ltd. v. Northern Transportation Company Limited*, 2017 BCSC 2007, where the British Columbia Supreme Court held that the unpaid vendor of marine assets sold to the bankrupt and secured by a registered security interest had priority over the claims of the administrator of the pension plan of the bankrupt; *DP World Prince Rupert Inc. v. The "Hanjin Vienna"*, 2017 FC 761, where the court ordered that claimants proceeding by way of action produce documents that may be relevant; *Canpotex Shipping Services Limited v. Marine Petrobulk Ltd.*, 2017 FCA 47, where the Federal Court of Appeal held that the trial Judge erred in relying upon parole evidence when interpreting bunker supply contracts and further held that the error was sufficiently serious so as to constitute an error in principle justifying review

to the standard of correctness; and *Canadian National Railway Company v. Hanjin Shipping Co. Ltd.*, 2017 FC 198, where a motion by the Owner of the "Hanjin Vienna" to strike the Statement of Claim of the Canadian National Railway Company on the grounds that it disclosed no cause of action or was scandalous, frivolous or vexatious was dismissed.

Offences

The cases dealing with offences include: *Alassia Newships Management Inc. v. British Columbia*, 2018 BCCA 92, where the British Columbia Court of Appeal held that service of a summons on a Master of a managed ship was not valid service on the ship manager; and *R v. MV Marathassa*, 2018 BCPC 125, where the Provincial Court held that the Charter rights of the accused were infringed when Transport Canada inspectors seized evidence without a warrant.

Pollution

The pollution cases are: *British Columbia v The Administrator of the Ship-source Oil Pollution Fund*, 2018 BCSC 793, where the Province was permitted to restore the corporate owner of a derelict vessel but the restoration was without prejudice to the subrogated rights the SSOPF had acquired against the Province while the corporate owner was dissolved; *Administrator of the Ship-Source Oil Pollution Fund v. Beasse*, 2018 FC, where the defendant owner was held liable for pollution clean-up costs following the sinking of a tug; *Canada (Ship-Source Oil Pollution Fund) v. Canada*, 2017 FC 530, where the court held that the Administrator of the Ship-source Oil Pollution Fund does not have the right to require a claimant to execute a Release and Subrogation Agreement as a condition precedent to payment of their claim; and *Administrator of the Ship-Source Oil Pollution Fund v. Wilson*, 2017 FC 796, where the Federal Court granted default judgement to the Ship-Source Oil Pollution Fund against the owners of a barge for expenses incurred to clean up and mitigate pollution.

Miscellaneous

Other notable cases are: *Adventurer Owner Ltd. v. R.*, 2018 FCA 34, where the Federal Court of Appeal upheld a decision of the Federal Court that: (1) the Crown was not liable for damages caused to a ship running aground on an un-charted shoal in the Arctic when the shoal had been the subject of a Notice to Shipping; and (2) the ship was liable to the Crown for the costs of pollution abatement; *Broadgrain Commodities Inc. v. Continental Casualty Company*, 2017 ONSC 4721, where the Ontario Court of Appeal confirmed a judgment of the Superior Court holding that a cargo underwriter was not liable under a cargo policy for damage caused during transit when the insured/vendor had been paid in full by the buyer of the cargo; *Platypus Marine Inc. v. The Ship Tatu*, 2017 FCA 184, where the Federal Court of Appeal allowed an appeal holding that interest accrues in maritime law cases regardless of whether it is addressed in a contract; *Oddy v Waterway Partnership Equities Inc.*, 2017 BCSC 1879, where the British Columbia Supreme Court dismissed an action against the owner of a rented houseboat for personal injuries suffered by a renter when a mooring stake broke loose under strain and hit the plaintiff; *Shelburne (Town) v. The "Farley Mowat"*, 2017 FC 1184, where the plaintiff was awarded berthage costs and the costs of clean-up, security and maintenance of the defendant ship; *Lepage v. Bowen Island Municipality*, 2018 BCSC 613, where the British Columbia Supreme Court refused to strike a Notice of Civil Claim by a lay litigant, suggesting that permission from the Receiver of Wrecks to destroy a vessel might not be a defence to a claim for conversion;

and *Moray Channel Enterprises Ltd. v. Gordon*, 2017 FC 250, where the plaintiff marina was given judgement for mooring charges owed despite some irregularities in its accounting.

Admiralty Practice

Saam Smit v. The "Hanjin Vienna", 2017 FC 745

Judicial Sale - Early Distribution of Proceeds - Best Arguable Case - Interest

Précis: The Federal Court permitted partial payment out of proceeds from the sale of a vessel after assessing the best reasonable cases of the various claimants.

Facts: As a consequence of the well publicized international insolvency of Hanjin Shipping Co. Ltd., one of its chartered vessels, the "Hanjin Vienna", was arrested and later sold by order of the Federal Court for the sum of US$6,676,000. Her bunkers were sold for an additional US$939,000. Various claims were filed against against the vessel which totalled approximately US$3,600,000. In view of the fact that the proceeds of sales exceeded the claims, the former owner of the vessel moved for payment out of the surplus funds to it.

Decision: Motion granted, in part.

Held: The first issue to be determined is whether the proceeds from the sale of the bunkers should be taken into account in determining if there is a surplus. This depends on the ownership of the bunkers at the time of sale but the evidence of ownership is too unclear at the present time. Accordingly, the proceeds from the sale of the bunkers shall not be included in determining if there is a surplus.

All of the parties are agreed that sufficient funds must be retained in Court to secure the best reasonably arguable cases of the various claimants taking into account principal, interest and costs. Taking into account that as a simple rule of thumb a 30% markup is applied to the principal amount of a claim to take into account interest and costs, and further taking into account that interest in admiralty matters is a function of damages and is left to the discretion of the court, the owners are entitled to a surplus of US$1,855,908.

Offshore Interiors Inc. v. Worldspan Inc., 2017 FC 478

Judicial Sale - Payment of Surplus Proceeds

Précis: The Federal Court refused a motion for early payment of alleged surplus proceeds of sale.

Facts: Under a vessel construction agreement ("VCA") Sargeant commissioned Worldspan to build a luxury yacht. Disputes arose during the course of construction which resulted in the vessel being arrested by Offshore, an unpaid supplier of materials and services. Various *in rem* claims were filed against the vessel totalling approximately $3.1 million. Sargeant claimed $20 million based on a builder's mortgage granted to it by Worldspan to secure the advances made towards the construction of the vessel. Worldspan claimed $5 million in respect of amounts

alleged to be due and owing to it by Sargeant. The vessel was sold by the Federal Court for $5 million. Prior to the full determination of the issues as between the various parties, Sargeant brought this motion for an order that the portion of the sale proceeds in excess of the amounts claimed by *in rem* creditors be paid out to it as the mortgage holder.

Decision: Motion dismissed.

Held: There is little precedent to guide the court on a motion such as this for early payment. However, prejudice is a relevant consideration in deciding whether there should be early payment of surplus funds. Sargeant has not shown a lack of prejudice to other parties if payment out is ordered nor has it shown any prejudice to itself if early payment is not made. Additionally, on the evidence, I cannot determine the rights of all claimants to the funds which is required by Rule 491(a) of the *Federal Courts Rules*.

Sargeant v. Worldspan Marine Inc., 2017 BCSC 1153

Ship Building - Insolvency - Stays of Proceedings - Balance of Convenience

Précis: The British Columbia Supreme Court refused to stay the action before it where a similar but not identical action was proceeding in the Federal Court.

Facts: Sargeant commissioned Worldspan build a luxury yacht. Disputes arose during the course of construction which resulted in the vessel being arrested in the Federal Court by Offshore, an unpaid supplier of materials and services. Various *in rem* claims were filed against the vessel in the Federal Court including claims by Sargeant and Worldspan. Subsequent to the commencement of the Federal Court action, Sargeant commenced this action against Worldspan in the Supreme Court of British Columbia for breach of duty, breach of trust, conversion, fraud and breach of contract. Worldspan brought this application for a temporary stay of these proceedings pending the adjudication of Sargeant's claim in the Federal Court proceeding.

Decision: Application dismissed.

Held: The jurisdiction to grant a stay of proceedings is to be exercised cautiously taking into account all relevant factors and prejudice to the parties. Worldspan says it will be prejudiced if it must take steps in this proceeding before the *in rem* claims are determined in the Federal Court and further says that the Federal Court action will fully determine the claims of the parties. However, Sargeant's claims for fraud and conversion will not be addressed in the Federal Court. Additionally, the potential recovery in the Federal Court is limited by the in *rem* claim and proceeds whereas the damages in this action are not so limited. A stay of proceedings will also not promote judicial economy and efficiency since Sargeant intends to pursue the fraud claim regardless of the outcome of the Federal Court proceeding. Finally, there is little risk of inconsistent verdicts since the adjudication of the conversion and fraud claims will not be part of the Federal Court proceeding. The balance of convenience favours dismissing the stay application.

Atlantic Container Lines AB v. Cerescorp Company, 2017 FC 465

Practice - Amendment of Pleadings

Précis: The Federal Court permitted a defendant to amend its Statement of Defence where the amendments were not a radical departure from prior pleadings, were not doomed to fail and the motion to amend was made in a timely fashion.

Facts: During the discharge of the plaintiff's vessel by the defendant a stack of containers collapsed causing damage to the vessel. The plaintiff brought the present action against the defendant. The defendant filed a defence pleading the containers had been negligently misaligned during loading. The defendant now brought an application to amend its defence to plead the misalignment was also due to defects in the placement of the cell guides and spacing bars and to plead that a stack of 8 containers was inherently dangerous. The plaintiff opposed the amendments arguing they constituted a radical departure from previous pleadings, were unsupported by evidence and doomed to fail, were untimely and were prejudicial since evidence had been lost and the plaintiff's rights of recourse were time barred.

Decision: The amendments are allowed.

Held: The proposed amendments are not a radical departure from the prior pleadings which identified misalignment and improper stowage as contributing factors. The amendments are also not doomed to fail as the defendant has demonstrated that there is some evidence in support of them. Amendments can be refused as untimely when allowing them would unduly delay the trial of the action, however, here the amendments are requested before expert reports have been prepared and before a trial date has been set and will not cause significant delay. The more significant argument made against the amendments is that to allow them would cause prejudice to the plaintiff that could not be compensated for in costs. The plaintiff relies on the fact the vessel has been sold and destroyed together with her documents. However, the evidence would have been lost even if the amendments were in the original pleading and therefore does not lead to an injustice.

Admiralty Jurisdiction/Canadian Maritime Law

Transport Desgagnes Inc. v. Wartsila Canada Inc., 2015 QCCS 5514, 2017 QCCA 1471

Sale of Marine Crankshaft - Product Liability - Application of Provincial Law - Sales of Goods Act - Limitation of Liability

Précis: The Quebec Court of Appeal held that the sale of a marine engine was governed by Canadian maritime law and the vendor was entitled to rely upon the limitation clause in its contract.

Facts: The respondent purchased a new bedplate and reconditioned crankshaft from the appellant for installation in one of its vessels. The appellant assembled and installed the bedplate and crankshaft at Halifax in February 2007. On 27 October 2009, after 13,653 running hours, the new crankshaft suffered a catastrophic failure. The respondent commenced this

proceeding in the Quebec Superior Court for damages in excess of $5.6 million. It was undisputed that the failure was caused by insufficient tightening of a connecting rod. The respondent alleged that the crankshaft was defective when delivered whereas the appellant alleged the respondent was responsible for the improper tightening during routine maintenance. The appellant also relied upon the terms of the sale contract between the parties which: provided for the repair or replacement of any defect discovered within six months; excluded all other warranties; and, limited the appellant's liability to €50,000. The validity of the limited warranty and limitation depended on whether the transaction was governed by Canadian Maritime law or the law of Quebec.

At first instance the Trial Judge held that the transaction related to the sale of a marine engine and that this was not something integrally connected to the pith and substance of Parliament's jurisdiction over navigation and shipping. Therefore, the dispute was not governed by Canadian maritime law but by the law of Quebec. Applying the Civil Code, the trial Judge held that the defect was presumed to have existed and to have been known to the seller at the time of sale and that any exclusion or limitation clause in the contract was invalid. Accordingly, judgment was rendered in favour of the plaintiff/respondent. The appellant appealed.

Decision: Appeal allowed in part.

Held: There are three issues on the appeal, namely:

(1) Does Canadian maritime law or Quebec law apply to the sale transaction?

(2) If Canadian maritime law applies, are the appellants liable? and

(3) If the appellants are liable, do the contractual terms apply to exclude or limit that liability?

(1) The first issue is whether Canadian maritime law or Quebec law applies to the transaction. It is undisputable that the contract in issue is one relating to repair or equipping of a ship within the meaning of s. 22(2) (m) and (n) of the *Federal Courts Act*. In the absence of a constitutional challenge, these provisions are dispositive and Canadian maritime law applies. The trial Judge failed to consider these provisions which was an error in law. Her conclusions are counter to the clear language of s. 22 of the *Federal Courts Act* and are at odds with the unbroken jurisprudence of the Supreme Court of Canada and the Federal Courts, which have recognized time and again that construction, repair or equipping of a ship are integrally connected to shipping and navigation. Therefore, Canadian maritime law applies to the exclusion of the law of Quebec.

(2) The second issue is whether the appellants are liable under Canadian maritime law. Canadian maritime law includes the (UK) *Sales of Goods Act, 1893*, 56-57 Vict., c. 71 and the implied warranty of fitness therein. Under that law, the onus is on the buyer to prove a latent defect that was known to the seller or that the seller showed reckless disregard for what it should have known. Based upon the findings of fact of the trial Judge, the respondent met this onus and the appellant is liable.

(3) The final issue is whether the appellant can rely upon the limited warranty and limitation clause in the contract. Under Canadian maritime law a limitation of liability clause is valid and the implied warranties can be excluded by contract. There is nothing inherently unreasonable about exculpatory clauses and they should be applied unless unconscionable when made or there is otherwise some paramount consideration of public policy that outweighs the very strong public interest in the enforcement of contracts. The contract between the parties does exclude the implied warranties and does limit the liability of the appellant. Accordingly, the appellant is entitled to limit its liability under the contract to €50,000.

Comment: Given that (1) the limited warranty under the contract was for a six month period, (2) the defect was discovered well outside the limited warranty period and (3) any other implied warranties had been excluded by the contract, it is not clear to the writer why the appellant was found liable to the respondent at all.

The Corporation of the City of Victoria v Zimmerman, 2018 BCSC 321

Application of Municipal Bylaw prohibiting long term mooring - Bylaw valid - Interjurisdictional Immunity - Public Right of Navigation - Right to Anchor

Précis: The British Columbia Supreme Court upheld a local bylaw that prohibited long term moorage but allowed temporary moorage.

Facts: The City of Victoria adopted a bylaw that, inter alia, purported to prohibit the anchoring or mooring of vessels within the Gorge Waterway for more than 48 continuous hours or for more than 72 hours in a 30-day period. The Gorge Waterway is a tidal inlet connected to Victoria Harbour and was a favourite anchoring spot for small vessels. The respondent vessel owners refused to comply with the bylaw. The City brought this application for an order that the respondents remove their vessels and for an injunction restraining the respondents from contravening the bylaw.

Decision: Application allowed.

Held: The foreshore and seabed of the Gorge Waterway are owned by the Province of British Columbia and have been leased or licensed to the City of Victoria. The waterway is not federally owned public property that would be immune from local bylaws. Nor is it located within the boundary of a public port where special restrictions would apply pursuant to the *Canada Marine Act*, S.C. 1998, c. 10. Local governments may enact bylaws to regulate the use of land that is covered by water or the use of water itself. Zoning bylaws in relation to ships or vessels on navigable waters do not necessarily fall outside of provincial/municipal jurisdiction. However, in *West Kelowna (District) v. Newcomb*, 2015 BCCA 5, it was held that a bylaw does intrude on the core of the federal power over navigation and shipping and is inapplicable under the doctrine of interjurisdictional immunity when the bylaw purports to prohibit even "[t]emporary moorage directly incidental and related to the active recreational use of vessels". In this case the bylaw does not purport to regulate or restrict temporary moorage. It prohibits only long term anchoring or moorage. The bylaw is valid.

Certain Underwriters at Lloyd's and Soline Trading Ltd. v. Mediterranean Shipping Company S.A., 2017 FC 460, 2017 FC 893

Third Party Action - Indemnity - Jurisdiction of Federal Court - Prothonotaries – Standard of Review

Précis: The Federal Court held it had no jurisdiction to adjudicate a third party claim for indemnity brought by the ocean carrier against a trucker who took delivery of the cargo either unlawfully or negligently.

Facts: The plaintiff and defendant entered into a contract for the carriage of one container of frozen shrimp from Ecuador to Montreal. The container was discharged at Montreal and was later released by the terminal, the defendant's agent, to a trucking company who was not entitled to delivery. The plaintiff commenced proceedings in the Federal Court against the defendant for wrongful delivery. The defendant then commenced these third party proceedings against the trucking company that took delivery alleging that it took delivery either unlawfully or negligently. The trucking company brought an application for an order striking out the third party claim on the grounds that the Federal Court did not have jurisdiction to hear the third party claim. At first instance (2017 FC 460), the Prothonotary agreed with the third party and held that the court did not have jurisdiction to adjudicate the claim. The defendant appealed.

Decision: Appeal dismissed.

Held: The order of the Prothonotary is discretionary and can only be interfered with if incorrect in law or based on a palpable and overriding error of fact. The defendant argues that the Prothonotary failed to take into account the modern context of navigation and shipping and mischaracterized the third party action as a matter of trucking governed by provincial law rather than as theft from a sea terminal which it says is governed by Canadian maritime law. Whether the claim is governed by Canadian maritime law requires a consideration of whether the subject matter of the claim is integrally connected to maritime matters. Here there is hardly any proximity between the activities of the third party and the sea and there is no contractual connection between the third party and the contract for the carriage of the cargo by sea. In fact, there is no contractual relationship with the third party at all. The activities of the third party are essentially those of a trucker and are governed by provincial law not Canadian maritime law. It is therefore plain and obvious that the Federal Court is without jurisdiction to hear the third party claim.

Carriage of Goods

Nine Starz Fruits & Vegetables Inc. v. Schenker of Canada Ltd., 2017 QCCQ 2122

Carriage of Goods - Freight Forwarder - Privity

Précis: The Court of Quebec refused motions to dismiss the claim of the plaintiff consignee against a freight forwarder and ship owner on the basis of lack of privity of contract.

Facts: The plaintiff was the owner/consignee of a cargo of tangerines that had to be destroyed

because of delay in delivery and temperature fluctuations during carriage. The plaintiff commenced suit against Schenker of Canada and against Mediterranean Shipping Company ("MSC"). Both defendants brought motions to dismiss the claims against them on the grounds of an insufficient legal relationship with the plaintiff.

Decision: Schenker motion referred to trial Judge. MSC motion dismissed.

Held: Schenker Canada argues that the claim against it should be dismissed because the contract of carriage as evidenced by the bill of lading was between the plaintiff and Schenkerocean not Schenker Canada. However, Schenker Canada does appear on documents, including the sea waybill, as a consignee, suggesting some relationship. At this stage of the proceeding it is premature to dismiss the claim as against Schenker Canada and this issue will be referred to the trial Judge. With respect to MSC, the documents show that the carrying vessel was owned by MSC and the law recognizes that the vessel owner can be liable as carrier. Thus, MSC's motion must be dismissed.

De Wolf Maritime Safety B.V v. Traffic-Tech International Inc., 2017 FC 23

Undeclared Deck Carriage - Right to Limit Liability

Précis: A carrier is entitled to limit liability under the Hague-Visby Rules for undeclared deck carriage.

Facts: The plaintiff was the owner and consignee of a cargo stuffed into a container and carried from Vancouver to Rotterdam under a bill of lading issued by the defendant. The container was carried on the deck of the carrying vessel but was not declared as being so carried on the bill of lading. During the course of the carriage by sea the container was lost overboard. The plaintiff commenced proceedings against the defendant for the value of the cargo. The defendant brought this application for determination of a question of law, namely, whether it was entitled to limit its liability under the Hague-Visby Rules notwithstanding the undeclared deck carriage.

Decision: The defendant is entitled to limit liability under the Hague-Visby Rules.

Held: The question of law is to be determined by examining the relevant provisions of the Hague-Visby Rules. The Hague-Visby Rules apply to "goods" of every description "except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried". Both conditions must be met before deck cargo is excluded from the Rules; it must both be carried on deck and be stated as being carried on deck. Therefore, cargo carried on deck but not so stated will be governed by the Hague-Visby Rules. The caselaw supports this interpretation.

Liens, Mortgages and Priorities

Offshore Interiors Inc. v. Worldspan Inc., 2017 FC 479

Priorities Procedures - Supplementary Affidavit of Claim- Place of Cross Examinations

Précis: The court permitted the filing of a supplementary affidavit and addressed questions relating to the scope of cross-examinations and the documents to be produced.

Facts: Under a vessel construction agreement ("VCA") Sargeant commissioned Worldspan to build a luxury yacht. Disputes arose during the course of construction which resulted in the vessel being arrested by Offshore, an unpaid supplier of materials and services. Various *in rem* claims were filed against the vessel totalling approximately $3.1 million. Sargeant claimed $20 million based on a builder's mortgage granted to it by Worldspan to secure the advances made towards the construction of the vessel. Worldspan claimed $5 million in respect of amounts alleged to be due and owing to it by Sargeant. The vessel was sold by the Federal Court for $5 million. Worldspan brought this motion: to file a supplementary affidavit of claim; to have the Sargeant affiants attend cross-examination in Canada; for production of documents on cross-examination; and for an order defining the scope of the cross-examinations.

Decision: Motion granted in part.

Held: Worldspan wishes to file a supplementary affidavit of claim attaching various change orders during the construction of the vessel. The relevance of these change orders is not clear but there is no prejudice to the other parties and in the absence of prejudice this part of the motion is granted. With respect to the motion for cross-examination, the witnesses of Sargeant who have filed affidavits are reluctant to attend in Vancouver for cross-examination and wish to be examined in Detroit. However, it is more practical to have the witnesses travel to Vancouver than to have a "gaggle" of lawyers travel to Detroit. Moreover, these are witnesses for a party that has chosen to conduct business in Canada and to litigate in Canada. They must accept the minor inconvenience of having to attend here for cross-examination. Additionally, it is normal for a witness at cross-examination to bring documents with them and they must do so. Finally, with respect to the scope of the cross-examination, the court should not make advance rulings on the relevancy of questions.

ITB Marine Group Ltd. v. Northern Transportation Company Limited, 2017 BCSC 2007

Insolvency of Shipowner - Pension Benefits - Deemed Trusts - Priority

Précis: The British Columbia Supreme Court held that the unpaid vendor of marine assets sold to the bankrupt and secured by a registered security interest had priority over the claims of the administrator of the pension plan of the bankrupt.

Facts: In 2013 ITB and NTCL entered into a conditional sale type transaction whereby ITB sold 19 vessels to NTCL. NTCL was to have the use and possession of the vessels but title was to remain in ITB until the purchase price was paid in full. The interest of ITB in the vessels was registered in the Personal Property Security Registry. Subsequently, in 2016 NTCL became insolvent and later made an assignment in bankruptcy. The Trustee in Bankruptcy sold the vessels for an amount that was less than the amount owing to ITB. ITB sought the proceeds from the sale of the vessels. However, the administrator of the pension plan of NTCL claimed priority to the proceeds on the basis of a deemed trust under the *Pension Benefits Standards Act, 1985,* RSC 1985, c. 32 (2nd Supp) (the "PBSA").

Decision: ITB has priority.

Held: ITB argues that the deemed trust under the PBSA does not arise as the deemed trust can only attach to assets owned by the debtor and the vessels were owned by it and not by NTCL. However, NTCL does hold a proprietary interest in the vessels by virtue of its interest under the conditional sales contract and the deemed trust will apply to the equity of NTCL in the vessels. Nevertheless, under the *Bankruptcy and Insolvency Act,* RSC 1985, c B-3, the deemed trust does not have priority over the secured interest of ITB.

DP World Prince Rupert Inc. v. The "Hanjin Vienna", 2017 FC 761

Priorities Proceedings - Production of Documents

Précis: The court ordered that claimants proceeding by way of action produce documents that may be relevant.

Facts: Following the well publicized bankruptcy of Hanjin Shipping Co. Ltd. in 2016, the "Hanjin Vienna", a ship under long term time charter to Hanjin, was arrested at Vancouver and sold by order of the Federal Court. Various claims were made against the proceeds of sale, some by way of action and some by way of affidavits of claim. All of the claims were subject to common case management in the Federal Court. The owner of the "Hanjin Vienna" brought this application for better production of documents from the various claimants.

Decision: Application granted, in part.

Held: The owner seeks production of documents from the claimants which might show they knew of Hanjin's perilous financial circumstances and the steps they took to deal with that. This is a reasonable request but the motion as drafted is too broad. The request for contracts and invoices should be limited to the year 2016, since there is no evidence of financial difficulties before that time. The documents should be further limited to those involving the "Hanjin Vienna" and her alleged sistership the "Hanjin Geneva".

Canpotex Shipping Services Limited v. Marine Petrobulk Ltd., 2015 FC 1108, 2017 FCA 47

Charters - Bunkers - Bankruptcy of OW Bunkers - Liens - Practice - Interpleader - Parole Evidence - Appeals - Standard of Review

Précis: The Federal Court of Appeal held that the trial Judge erred in relying upon parole evidence when interpreting bunker supply contracts and further held that the error was sufficiently serious so as to constitute an error in principle justifying review to the standard of correctness.

Facts: Canpotex obtained bunkers from OW Bunkers ("OW") for two foreign registered vessels that it chartered. The bunkers were actually supplied by the defendant, Marine Petrobulk ("MP"), a Canadian bunker supplier. MP invoiced OW for the bunkers and OW invoiced Canpotex. Before any of the invoices were paid, OW became insolvent and subsequently bankrupt. Pursuant to various court orders and agreements, any sums owing to OW were to be collected by ING, its receivers. MP and ING both claimed entitlement to payment of the amounts owing by Canpotex in respect of the bunkers supplied. Canpotex brought this action

and, pursuant to a consent order made by the Prothonotary under Rule 108, deposited the amount owing into a trust account. Canpotex then brought this application for a declaration that the payment of the funds into trust extinguished its liabilities and any *in rem* claims against the vessels. MP and ING each brought their own applications for declarations that they were entitled to the funds. ING also opposed the relief requested by the plaintiff.

A critical issue was the relevant contractual documents that applied to the purchases. This issue arose because Canpotex and OW had negotiated a Fixed Price Agreement that included as Schedule 3 a set of terms and conditions. However, because market conditions were not favourable, no purchases were made by Canpotex under this agreement. Rather, the parties were agreed that all purchases made by Canpotex were "spot purchases" not subject to the Fixed Price Agreement. Nevertheless, Canpotex led evidence and argued that Schedule 3 of the Fixed Price Agreement was intended to and did apply to "spot purchases". This issue was important because Schedule 3 to the Fixed Price Agreement provided that "where the physical supply of the fuel is being undertaken by a third party… these terms and conditions shall be varied accordingly". In contrast, OW's General Terms and Conditions, which were referred to in the bunker confirmations, provided that "where the physical supply of the Bunkers is being undertaken by a third party which insists that the Buyer is also bound by its own terms and conditions… these Terms and Conditions shall be varied accordingly".

At first instance (2015 FC 1108), the motions Judge: (1) allowed the plaintiff's interpleader application; (2) ordered that the full amount of MP's invoice be paid out of the funds held in trust; (3) ordered that the balance of the funds in trust be paid to OW/ING; and (4) declared that the *in personam* liability of the plaintiff and the *in rem* liability of the vessels would be extinguished upon the payments being made. In reaching this result, the motions Judge accepted the evidence of Mr. Ball of Canpotex that the purchases were subject to Schedule 3 of the Fixed Price Agreement. He further held that pursuant to Schedule 3 of the Fixed Price Agreement the terms and conditions were varied to include MP's Standard Terms and Conditions. He then applied MP's Standard Terms and Conditions and held that the plaintiff and OW were both customers of MP and were jointly and severally liable to pay it for the bunkers delivered. OW/ING appealed.

Decision: Appeal allowed. The matter is referred back to the Judge for reconsideration.

Held: Interpleader relief is available where "two or more persons make conflicting claims". The claims must pertain to the same subject matter, must be mutually exclusive and must be such that the applicant faces an actual dilemma as to how he should act. The only claims here that are conflicting and can give rise to interpleader relief are the contractual claims of OW and MP. The assertion of a maritime lien against the vessels by MP under s. 139 of the *Marine Liability Act* is not a conflicting claim as it is a claim against the vessels and their owners not Canpotex. It was wrong for the trial Judge to extinguish the shipowners' liability in relation to any s. 139 claim.

The Judge erred in considering Mr. Ball's evidence which led him to err in concluding that Schedule 3 of the Fixed Price Agreement applied to the purchases at issue. There is nothing in the contractual documents to support his oral evidence. The trial Judge should not have used

that oral evidence to replace or overwhelm the words used in the contractual documents. "The parole evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing." In failing to follow the principles of contractual interpretation the Judge erred in law and, although errors of contractual interpretation are normally errors of mixed fact and law and not subject to a standard of correctness, this error constitutes an extricable error in principle and is subject to the standard of correctness. Therefore, this matter is referred back to the trial Judge for reconsideration.

Canadian National Railway Company v. Hanjin Shipping Co. Ltd., 2017 FC 198

s. 139 MLA Lien - Pleadings - Motion to Strike Claims of Railway Against Shipowner

Précis: A motion by the owner of the "Hanjin Vienna" to strike the Statement of Claim of the Canadian National Railway Company on the grounds that it disclosed no cause of action or was scandalous, frivolous or vexatious was dismissed.

Facts: Following the well publicized bankruptcy of Hanjin Shipping Co. Ltd. in 2016, the "Hanjin Vienna", a ship under long term time charter to Hanjin, was arrested at Vancouver in the Federal Court. The plaintiff had provided rail services to Hanjin, including to the "Hanjin Vienna", and was allegedly owed approximately $20 million in respect of these services. The plaintiff commenced this action against Hanjin and various vessels owned or chartered by it, including the "Hanjin Vienna". The owner of the "Hanjin Vienna" then brought this application to strike the claim of the plaintiff as against it.

Decision: Application dismissed.

Held: The owner of the "Hanjin Vienna" brings this application to strike the statement of claim on the grounds that it discloses no reasonable cause of action or is scandalous, frivolous or vexatious. The burden on the owner is a heavy one. If there is a chance the plaintiff might succeed, the action should be allowed to continue. The plaintiff alleges that it has a maritime lien by virtue of s. 139 of the *Marine Liability Act* for services supplied to the vessel. The owner says that there can be no such lien as there is no contract between the owner and the plaintiff and therefore no personal liability on the part of the owner. However, it is not clear whether the personal liability of the owner is required for a lien under s. 139 of the *Marine Liability Act*. The plaintiff's lien claim is therefore arguable. It is further arguable that the plaintiff's claim is governed by Canadian maritime law. The claim of the plaintiff is arguably one for freight and may fall within s.22(1) of the *Federal Courts Act*. The *Canada Transportation Act,* S.C. 1996, c. 10, may also provide a basis for the plaintiff's claims.

Offences

Alassia Newships Management Inc. v. British Columbia, 2018 BCCA 92

Pollution - Offences - Service of Summons - Certiorari - Prohibition

Précis: The British Columbia Court of Appeal held that service of a summons on a Master of a

managed ship was not valid service on the ship manager.

Facts: In April of 2015 oil allegedly spilled from the ship "Marathassa" while at anchor in English Bay, Vancouver. An Information was subsequently sworn laying charges under various statutes against the "Marathassa" and against the applicant, her manager. A summons to appear was served on the applicant by personal service on the Master of the "Afroessa", another ship managed by the applicant. At a hearing before the Justice of the Peace, the Crown advised the Court that the applicant had been served with the summons. The presiding Justice of the Peace confirmed the service and adjourned the matter to a future date. The applicant did not formally appear at that hearing to contest the service as such an appearance would have been an attornment to the Court's jurisdiction. Subsequent to the hearing, the applicant applied to the Supreme Court of British Columbia for an order of *certiorari* quashing the order of the Justice of the Peace and for an order of *prohibition* prohibiting the Provincial Court from proceeding with the charges against the applicant until it had been properly served.

At first instance, the application was dismissed. The motions Judge held that *certiorari* and *prohibition* were available if the Justice of Peace had exceeded her jurisdiction but she had not done so by determining whether the service was valid. The ship manager appealed.

Decision: Appeal allowed.

Held: Section 703.2 of the *Criminal Code, RSC 1985, c. C-46* permits service on an organization by serving "the manager, secretary or other senior officer of the organization or one of its branches". The Master that was purportedly served was not a manager or secretary of the appellant and was not a "senior officer" since he did not play an important role in the establishment of its policies and was not responsible for managing an important aspect of its activities. The appellant was therefore not properly served under s. 703.2 of the *Criminal Code*. However, the Crown contends that service was nevertheless proper since the existence of the Summons came to the notice of the appellant. This is not correct. There is a distinction between notice in fact and notice in law. The notice given must be that which is authorized by law meaning service of a summons must be effected pursuant to s. 703.2. Accordingly, because the appellant was not properly served, the Justice of the Peace exceeded her jurisdiction. The Provincial Court is prohibited from proceeding with the prosecution until the appellant is properly served.

R v. Alassia New Ships Management Inc., 2018 BCPC 5

Pollution - Offences - Service of Summons on Master - Service of Summons on Counsel

Précis: The court declared that service of a summons on the ship's Master was valid service on the accused operator of the ship.

Facts: The accused was the corporate manager/operator of the vessel "Marathassa" which was the alleged source of an oil spill in Vancouver Harbour. The accused had been charged with various offences in connection with the oil spill. The accused was served with the summons by serving the Master of another vessel also managed/operated by the corporate accused. That service has been the subject of various proceedings including a petition to quash the summons

which was dismissed on 14 August 2017. The accused had not entered an appearance and the Crown now applied for an order for an *ex parte* trial.

Decision: Order granted.

Held: The Criminal Code permits service on a senior officer of a corporate accused. A senior officer is "a representative who plays an important role in the establishment of an organization's policies or is responsible for managing an important aspect of the organization's activities". The Master of a vessel qualifies as a senior officer of the accused within the meaning of the Criminal Code. Additionally, service of the Summons on counsel for the accused was also effective service.

Note: The decision of the British Columbia Court of Appeal in 2018 BCCA 92 and summarized above was rendered after this decision and effectively overrules it.

R v. MV Marathassa, 2018 BCPC 125

Criminal Proceedings - Pollution - Investigations - Unreasonable Search and Seizure

Précis: The court held that the Charter rights of the accused were infringed when Transport Canada inspectors seized evidence without a warrant.

Facts: In April of 2015 oil allegedly spilled from the ship "Marathassa" while at anchor in English Bay, Vancouver. Transport Canada Inspectors boarded the vessel and seized certain documents and evidence. The ship was later charged with various regulatory offences. During the course of the trial the Crown sought to introduce the evidence obtained from the vessel by the Transport Canada Inspectors. The accused applied to exclude the evidence on the basis that it was obtained in breach of the accused's section 8 Charter rights which provide a right against unreasonable search and seizure.

Decision: The evidence is excluded.

Held: The first issue concerns the reason for the attendance of the Transport Canada inspectors on the "Marathassa". The parties are agreed that if the inspectors were conducting a compliance inspection under s. 211[1] of the CSA, the seizures are lawful, however, if they were conducting an enforcement investigation under s. 219[2], they were required to obtain a warrant or informed consent. The evidence is overwhelming that Transport Canada was conducting an enforcement investigation from the moment inspectors boarded the "Marathassa". Therefore, a warrant or informed consent was required.

The second issue is whether there was a breach of the accused's s. 8 Charter rights. This

[1] "211(1) A marine safety inspector referred to in section 11 or a person, classification society or other organization authorized to carry out inspections under section 12 may, for the purpose of ensuring compliance with a relevant provision, board any vessel or enter any premises or other place at any reasonable time and carry out any inspection that the inspector, person, classification society or other organization considers necessary and that the Minister has authorized them to carry out."

[2] "**219 (1)** The Minister may appoint any person to investigate a shipping casualty or an alleged contravention of a relevant provision."

requires first that the accused establish it had an expectation of privacy. After the expectation of privacy is determined, the enquiry moves on to consider if the search was reasonable. Although the Marathassa was subject to inspections by Transport Canada and would have a diminished expectation of privacy on account of such inspections, it did have an expectation of privacy in relation to much of the conduct of the inspector. In respect of whether the searches were reasonable, there is a presumption that a warrantless search is unreasonable. The Crown has failed to discharge the onus on it of proving the search was reasonable.

The final issue is whether the admission of the evidence would bring the administration of justice into disrepute. This requires consideration of (i) the seriousness of the Charter-infringing conduct; (ii) the impact of the breach on the Charter-protected rights of the accused; and (iii) society's interest in the adjudication of the case on its merits. In this case there was deliberate and repeated infringements of the accused's charter rights which amounted to bad faith. The impact of these breaches was not trivial. Finally, considering that the exclusion of the evidence will not "gut" the prosecutions case and that the spill was "very, very small" a reasonable person would conclude that the evidence should be excluded.

Pollution

British Columbia v The Administrator of the Ship-source Oil Pollution Fund, 2018 BCSC 793

Pollution - Dissolved Corporate Owner - Liability of Province

Précis: The province was permitted to restore the corporate owner of a derelict vessel but the restoration was without prejudice to the subrogated rights the SSOPF had acquired against the Province while the corporate owner was dissolved.

Facts: The Administrator of the Ship-source Oil Pollution Fund paid a claim by the Canadian Coast Guard for the costs and expenses incurred by it to remove oil and hydrocarbons from "Chilcotin Princess". At the time the owner of the vessel, Inter Coast Towing Ltd., had been dissolved for failure to file annual reports and, as a result of the dissolution, the "Chilcotin Princess" vested in the province of British Columbia. The Administrator therefore commenced subrogation proceedings against British Columbia to recover the amounts it paid to the Canadian Coast Guard. The province responded with this petition to restore Inter Coast Towing Ltd. to the Register of Companies as if it had never been struck and dissolved.

Decision: The company is restored but without prejudice to the rights acquired by persons before the restoration.

Held: The Administrator does not oppose the restoration of Inter Coast Towing Ltd. but says that it must be without prejudice to the rights acquired during the dissolution of the company. The restoration of a British Columbia company is governed by s. 360 of the *Business Corporations Act, S.B.C. 2002, c. 57.* Generally, the restoration is without prejudice to the rights acquired before the restoration. The onus is on the province to prove the restoration should be with prejudice to such rights. The province has not discharged this onus.

Administrator of the Ship-Source Oil Pollution Fund v. Beasse, 2018 FC 39

Pollution - Clean-up Costs - Defence of Deliberate Action by Third Party - Summary Judgment

Précis: The court held the defendant owner liable for pollution clean up costs following the sinking of a tug, rejecting the owner's allegation the sinking was due to the deliberate act of a third party.

Facts: The tug "Elf" sank on 14 January 2014 near Squamish, British Columbia causing pollution. The defendant tug owner was aware of the sinking but took no steps to raise the tug or to contain, minimize or clean up the pollution. Instead, he left it for Canadian Coast Guard to do these things. The tug was successfully raised and inspected by a surveyor and by a representative of the Coast Guard. Neither the surveyor nor the Coast Guard representative found any damage to the hull or the source of the water ingress that had caused the sinking. The tug was then towed to just off Port Atkinson where it was handed off to another tug. Shortly after the hand over the tug sank a second time in deep water. The expenses of the Canadian Coast Guard were paid by the Ship-source Oil Pollution Fund who then brought this subrogated action. and this application for summary judgement.

Decision: Judgement for the plaintiff.

Held: The main defence of the defendant is that the first sinking was caused by the act or omission of a third party done with intent to cause damage. The evidence relied upon in support of this third party involvement is that, when the tug was raised after the first sinking, the door was torn off its hinges and a padlock was missing. The defendant argues that this is not an appropriate case for summary judgement because the second sinking has resulted in a loss of the only evidence that could substantiate their case of third party involvement. The defendant alleges there has been spoliation of evidence. However, spoliation requires that the evidence be intentionally destroyed and there is no evidence of such intention here. Moreover, the inspections done of the tug following its raising after the first sinking found no evidence of third party involvement and no indication the door was locked at the time of the sinking. The sinking was due to the unseaworthiness of the tug. The defendant has failed to raise a genuine issue for trial.

Canada (Ship-source Oil Pollution Fund) v. Canada, 2017 FC 530

Pollution - Payments - Whether Release and Subrogation Agreement Required

Précis: The court held that the Administrator of the Ship-source Oil Pollution Fund does not have the right to require a claimant to execute a Release and Subrogation Agreement as a condition precedent to payment of their claim.

Facts: A vessel was reported to the Canadian Coast Guard as sinking and discharging oil. In response, the Coast Guard contained the pollution from the vessel and later raised and removed the wreck. The Coast Guard subsequently submitted its expenses relating to the pollution prevention and wreck removal to the Administrator of the Ship-source Oil Pollution

Fund pursuant to the provisions of Part 7 of the *Marine Liability Act*. The Administrator allowed a substantial portion of the claim but requested that the Coast Guard sign a Release and Subrogation Agreement before the claim was paid. The Coast Guard refused to sign the Agreement. The Administrator then brought this application for a determination as to whether it had the right to require a claimant to execute a Release and Subrogation Agreement as a condition precedent to payment of their claim.

Decision: The Administrator has no such right.

Held: Section 106 of the *Marine Liability Act* provides that once an offer from the Administrator has been accepted by a claimant, the Administrator must pay the claim "without delay". Section 106 also addresses the release of claims and the rights of subrogation that flow upon payment. There is no requirement that a claimant execute a release or subrogation agreement.

Administrator of the Ship-source Oil Pollution Fund v. Wilson, 2017 FC 796

Pollution - Default Judgment

Précis: The Federal Court granted default judgement to the Ship-source Oil Pollution Fund against the owners of a barge for expenses incurred to clean up and mitigate pollution.

Facts: A barge was found adrift in high winds and in danger of sinking. The Canadian Coast Guard contacted one of the two owners of the barge about the situation, but the owner advised they were unable to rescue the barge. The Coast Guard retained a contractor to tow the barge to a safe moorage. The Coast Guard subsequently submitted a claim under the *Marine Liability Act* to the plaintiff, the Administrator of the Ship-source Oil Pollution Fund, for the costs incurred to salvage the barge. The claim was accepted and paid by the plaintiff after a small reduction. The plaintiff then demanded payment of the amount paid to the Coast Guard from the defendant owners of the barge. The defendants refused to pay. The plaintiff then commenced this action. The defendants failed to appear. The plaintiff brought this *ex parte* motion for default judgment.

Decision: Default judgment granted.

Held: The defendants were properly served and as owners of the barge they are liable under s. 77 of the *Marine Liability Act* for the reasonable expenses incurred by the Canadian Coast Guard to prevent, repair, remedy or minimize the oil pollution associated with the barge.

Miscellaneous

Adventurer Owner Ltd. v. R., 2017 FC 105, 2018 FCA 34

Grounding - Uncharted Shoal - Liability of Crown - Pollution - Liability of Vessel - Appeals - Standard of Review

Précis: The Federal Court of Appeal upheld a decision of the Federal Court that: (1) the Crown was not liable for damages caused to a ship running aground on an un-charted shoal in the

Arctic when the shoal had been the subject of a Notice to Shipping; and (2) the ship was liable to the Crown for the costs of pollution abatement.

Facts: The "Clipper Adventurer", a small cruise ship, ran aground in the Canadian Arctic on 27 August 2010 while en route from Port Epworth to Kugluktuk. The shoal had been the subject of Notice to Shipping A102/07 issued in September 2007 but it had not been marked on the applicable chart. The chart being used by the vessel had been issued by the Canadian Hydrographic Service on 30 May 1997 and had been updated/corrected with Notices to Mariners but not with Notices to Shipping. The Canadian Hydrographic Service had intended to replace the Notice to Shipping with a Notice to Mariners but due to an apparent miscommunication this was not done.

As a consequence of the grounding, a number of the vessel's double-bottomed tanks were breached resulting in a small amount of pollution. The vessel was re-floated on 14 September 2010, underwent temporary repairs in Canada and then sailed to Poland for permanent repairs. The plaintiff, the owner of the "Clipper Adventurer", commenced this action against the Crown for the Canadian dollar equivalent of approximately US$13.5 million alleging that the Canadian Coast Guard and Canadian Hydrographic Service had failed to properly warn mariners of the danger and were in breach of their SOLAS obligations to publish, disseminate and update nautical information. The Crown counter-claimed under the *Marine Liability Act* and the *International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001* for the costs and expenses incurred to prevent, repair, remedy or minimize oil pollution damage in the amount of CDN$468,000.

At trial, the action by the owner of the "Clipper Adventurer" was dismissed and the counter-claim of the Crown was allowed. The trial Judge held:

- There was no duty on the Crown to seek out and chart unchartered shoals but, once the presence of the shoal became known, the Canadian Coast Guard and Canadian Hydrographic Service were under a duty to warn mariners of its presence;

- The issuance of the Notice to Shipping A102/07 was sufficient to discharge the duty to warn imposed on the Crown. Pursuant to section 7 of the *Charts and Nautical Publications Regulations, 1995 (SOR/95-149),* it is the responsibility of Masters to ensure all charts "are correct and up-to-date based on information that is contained in Notices to Mariners, Notices to Shipping and radio navigation warnings";

- The crew of the "Clipper Adventurer" were negligent in that they should have known there were unchartered shoals and should have proceeded at a slower speed; and

- With respect to the counter-claim of the Crown, liability does not depend on proof of negligence. Pursuant to section 77(3) of the *Marine Liability Act*, to escape liability the shipowner must establish that the occurrence was <u>wholly</u> caused by the negligence or other wrongful act of a government authority. Thus, even if there was contributory negligence on the part of the Crown, the shipowner would still be liable in full.

The ship owner appealed the finding that the issuance of Notice to Shipping A102/07 was

sufficient to discharge the Crown's duty to warn and also appealed a minor issue relating to interest.

Decision: Appeal dismissed.

Held: The appellant does not challenge the finding that it was negligent but only the finding that the publication of Notice to Shipping A102/07 was sufficient to discharge the Crown's duty to warn. The appellant argues that this finding is an extricable error of law and therefore subject to the standard of review of correctness. This is not correct. Questions involving the standard of care are normally mixed questions of law and fact and reviewable only if there is a palpable and overriding error. Additionally, there is no issue of the trial Court having improperly characterized the legal test before it. The trial Court clearly understood the issue was whether Notice to Shipping A102/07 satisfied the Crown's duty to warn. The trial Court held that it did and there was ample evidence to support this conclusion.

One final issue concerned whether the trial Court correctly held that the interest rates under s. 116(1) of the MLA did not apply to the claim of the Crown. Section 116 only applies to claims under Part 7 of the MLA involving the Ship Source Oil Pollution fund. It has no application to a direct claim by the Crown against a shipowner.

Platypus Marine Inc. v. The Ship Tatu, 2016 FC 501, 2017 FCA 184

Criminal Interest Rate - Ship Repair - Interest as Damages

Précis: Interest accrues in maritime law cases regardless of whether it is addressed in a contract.

Facts: The plaintiff provided ship repair and maintenance services to the defendant and rendered ten invoices in respect of the work done. Each of the ten invoices was marked "Due Upon Receipt" but made no mention of interest. The defendant failed to pay the first nine invoices. Shortly after the tenth invoice was sent, the parties entered into an oral agreement whereby the plaintiff granted an extension of four months to pay the outstanding invoices and the defendant agreed to pay $100,000 as a lump sum interest payment. The defendant failed to pay the agreed interest. The trial Judge held that the interest payment of $100,000 represented an interest rate in excess of 60% per annum and was therefore a criminal rate of interest under the *Criminal Code, RSC 1985, c. C-46*. The trial Judge allowed interest at 5% per annum as provided by the *Interest Act, RSC 1985, c. I-15* and awarded only $35,000 to the plaintiff on account of interest. The plaintiff appealed.

Decision: Appeal allowed.

Held: The issue of whether the interest rate is criminal depends in part on whether the interest is calculated from the date of the oral agreement or from the date of the respective invoices. The defendant says it should be calculated from the date of the oral agreement since there was no agreement on interest before then. However, in maritime cases pre-judgement interest is always awarded as a function of damages. There was no need for a prior agreement on interest. Therefore, interest is to be calculated from the due date of the respective invoices and, when so calculated, does not exceed a rate of 60% per annum. The plaintiff is entitled to the agreed

$100,000 on account of interest.

Broadgrain Commodities Inc. v. Continental Casualty Company, 2018 ONCA 438

Cargo Insurance - Insurable Interest - Sweat Damage - Proof of Loss – Appeals – New Evidence

Précis: The Ontario Court of Appeal confirmed a judgment of the Superior Court holding that a cargo underwriter was not liable under a cargo policy for damage caused during transit when the insured/vendor had been paid in full by the buyer of the cargo.

Facts: The plaintiff sold 26 containers of sesame seeds to be transported from Nigeria to Xingang, China. The sale was on terms "CIF Xingang" meaning the plaintiff was to obtain insurance but the risk of loss or damage passed to the buyer upon shipment. The goods were insured under an open cargo policy with the defendant and were declared under the open policy. During the course of carriage from Nigeria to China, the goods were damaged. All 26 containers were declared unfit for human consumption and were sold for salvage. Even though the plaintiff had been paid in full by its buyer, it filed a claim with the defendant insurer. The insurer denied the claim on 24 of 26 containers on the basis that the cause of the damage was condensation or sweat, a non-transit related fortuity. The plaintiff commenced proceedings against the insurer. The insurer then brought this motion for summary judgment on the grounds that the plaintiff had no insurable interest and that the plaintiff had been paid in full by its buyer.

At first instance (2017 ONSC 4721), notwithstanding the transfer of the risk of loss to the buyer, the motion Judge held the plaintiff had an insurable interest; a term that was broadly defined in the *Marine Insurance Act,* S.C. 1993, c. 22*,* and required an expansive interpretation. However, the motion was dismissed because the plaintiff had been paid in full by its buyer and therefore suffered no loss. In reaching this conclusion the motion Judge refused to accept a bald statement in one of the plaintiff's affidavits that it had suffered a loss because the buyer had short-paid on subsequent shipments.

The plaintiff appealed the dismissal of the motion and also sought to introduce new evidence on appeal. The defendant cross-appealed the finding that the plaintiff had an insurable interest.

Decision: The plaintiff's appeal and motion to introduce new evidence are both dismissed. The cross-appeal is dismissed as being moot.

Held: There was no palpable and overriding error by the motion Judge in concluding that the plaintiff was paid in full. The plaintiff filed no evidence of any kind in support of the purported short-payments by the buyer nor was any explanation given for the absence of any supporting details or documents. This is sufficient to dispose of the appeal. The motion to introduce fresh evidence must also fail since the evidence was available at the time of the original motion. Additionally, the fresh evidence would not have affected the outcome.

Oddy v Waterway Partnership Equities Inc., 2017 BCSC 1879

Personal Injury - Pleasure Craft Rentals - Liability of Owner for inadequate mooring line

Précis: The British Columbia Supreme Court dismissed an action against the owner of a rented houseboat for personal injuries suffered by a renter when a mooring stake broke loose under strain and hit the plaintiff.

Facts: The defendant was engaged in the business of houseboat rentals on Shuswap Lake, British Columbia. The plaintiff and her party rented one of the defendant's houseboats for a 5-day period. The plaintiff's party was instructed by the defendant to moor the houseboat at night by driving its bow onto the beach and then by attaching mooring lines from either side of the stern of the houseboat to "beaching stakes" driven deep into the beach. Each mooring line was to be at about a 45-degree angle away from the sides of the vessel. On the first night the houseboat was moored as instructed but the following morning it was discovered that port mooring line had become loose. The plaintiff approached the helm of the vessel intending to start the engines to reposition the vessel. Suddenly, the starboard beaching stake pulled loose and, due to the tension on the line, catapulted towards the vessel. The beaching stake shattered the wind screen and struck the plaintiff on her left side causing significant injuries. The plaintiff sued the defendant in negligence.

Decision: Action dismissed.

Held: The plaintiff alleges that the defendant failed to take reasonable care to equip the vessel with the appropriate mooring line. More specifically, the plaintiff says that the line was too elastic. However, the line in issue was a double braided nylon line that is widely used for mooring lines and has been used by the defendant without incident since 2010. The defendant purchased the line from a reputable dealer and there is no evidence the defendant knew or ought to have known the line was not suitable for the purpose. The defendant did not breach the duty of care owed to the plaintiff. Additionally, even if there had been a breach of duty, the damages were not reasonably foreseeable and are therefore too remote.

Baril v Beaumier, 2018 QCCQ 3111

Small Vessel Collision - Stationary Boat - Presumption of Fault

Précis: The defendant vessel was found 100% at fault for a collision with a stationary vessel.

Facts: The plaintiffs were fishing from a small aluminium boat that was at anchor between two points of land. A second vessel operated by the defendant was proceeding at a speed of approximately 25 knots and collided with the plaintiff's vessel causing property damage and minor personal injury.

Decision: The defendant is 100% at fault.

Held: The incident is governed by federal maritime law. There is a presumption that when a moving vessel collides with a stationary vessel the moving vessel is at fault. The defendant has failed to rebut this presumption. The visibility at the time of the collision was clear. The defendant has not explained why he did not see the plaintiff's boat. Either he was not

maintaining a proper lookout or his vision forward was obscured by the raised bow of his boat.

Shelburne (Town) v. The "Farley Mowat", 2017 FC 1184

Marinas - Dilapidated Vessels - Contempt for Failure to Remove Vessel - Summary Judgment - Recovery of Actual Legal Fees

Précis: The plaintiff was awarded berthage costs and the costs of clean-up, security and maintenance of the defendant ship.

Facts: The plaintiff was the operator of a marine terminal and marina. The plaintiff and defendant entered into a "Berthing Agreement" pursuant to which the defendant was permitted to berth the defendant vessel at the marina. While the defendant was in arrears on the moorage, the vessel sank at the marina. The vessel was refloated by the Canadian Coast Guard and the plaintiff also incurred some expenses in relation to the refloating. The plaintiff commenced this proceeding to recover those expenses, moorage and its legal costs. The defendant counterclaimed alleging the plaintiff prevented him from accessing the vessel which led to the sinking. Subsequently, the court made several orders requiring the defendant to remove the vessel from the marina. The defendant failed to do so and was arrested and imprisoned. The plaintiff then brought this motion for summary judgement.

Decision: Judgement granted.

Held: The plaintiff is awarded the berthing fees to which it is entitled under the Berthing Agreement. The plaintiff is additionally entitled to the costs incurred in connection with the sinking and refloating of the vessel. With respect to the counterclaim, there is no evidence that any actions or omissions of the plaintiff contributed to the damage to the defendant vessel. The plaintiff is also entitled to recover its legal fees directly related to the recovery of the unpaid berthage fees as provide for in the Berthing Agreement.

Lepage v. Bowen Island Municipality, 2018 BCSC 613

Wrecks - Liability of Municipality for Wrongful Removal

Précis: The British Columbia Supreme Court refused to strike a Notice of Civil Claim, suggesting that permission from the Receiver of Wrecks to destroy a vessel might not be a defence to a claim for conversion.

Facts: The plaintiff was the owner of a sailboat which the defendant municipality considered to be a derelict. The municipality contacted the Receiver of Wrecks about the boat and was told by the Receiver that "it was free to proceed with the salvage of the sunken vessel". The municipality had the vessel destroyed. The self-represented plaintiff commenced action against the municipality. The municipality filed a defence and then brought this application to strike the Notice of Civil Claim or, alternatively, for summary judgment.

Decision: Application dismissed.

Held: The defendant municipality alleges that it was authorized by the Receiver of Wrecks to

take possession of and to dispose of the vessel. However, the provisions of the *Canada Shipping Act, 2001, S.C. 2001, c. 26* relating to wrecks do not limit or extinguish the availability of common law causes of action. The plaintiff's pleading is sufficient to support the tort of conversion. Moreover, the evidence falls short of establishing the vessel was a wreck within the meaning of the *Canada Shipping Act, 2001*. The defendant has failed to prove there is no genuine issue for trial.

Moray Channel Enterprises Ltd. v. Gordon, 2017 FC 250

Marinas - Float Homes - Moorage Agreements

Précis: The plaintiff marina was given judgement for mooring charges owed despite some irregularities in its accounting.

Facts: The plaintiff, the owner and operator of a marina, entered into a moorage agreement with the defendant, the owner of a float home that was a registered vessel. The defendant failed to pay for moorage and related services and the plaintiff commenced this action. The defendant filed a defence alleging the plaintiff overcharged and misrepresented the charges.

Decision: Judgment for the plaintiff**.**

Held: Although the plaintiff was negligent in its invoicing procedures, which caused much confusion, it has established that the defendant is in arrears and is entitled to damages.

Table of Cases

Cases

Administrator of the Ship-Source Oil Pollution Fund v. Beasse, 2018 FC 39 18
Administrator of the Ship-Source Oil Pollution Fund v. Wilson, 2017 FC 796..... 19
Adventurer Owner Ltd. v. R., 2017 FC 105, 2018 FCA 34..... 19
Alassia Newships Management Inc. v. British Columbia, 2018 BCCA 92 14
Atlantic Container Lines AB v. Cerescorp Company, 2017 FC 465..... 6
Baril v Beaumier, 2018 QCCQ 3111..... 23
British Columbia v The Administrator of the Ship-source Oil Pollution Fund, 2018 BCSC 793 17
Broadgrain Commodities Inc. v. Continental Casualty Company, 2018 ONCA 438 22
Canada (Ship-Source Oil Pollution Fund) v. Canada, 2017 FC 530 18
Canadian National Railway Company v. Hanjin Shipping Co. Ltd., 2017 FC 198 14
Canpotex Shipping Services Limited v. Marine Petrobulk Ltd., 2015 FC 1108, 2017 FCA 47 .. 12
Certain Underwriters at Lloyd's and Soline Trading Ltd. v. Mediterranean Shipping Company S.A., 2017 FC 460, 2017 FC 893..... 9
De Wolf Maritime Safety B.V v. Traffic-Tech International Inc., 2017 FC 23 10
DP World Prince Rupert Inc. v. The "Hanjin Vienna", 2017 FC 761 12
ITB Marine Group Ltd. v. Northern Transportation Company Limited, 2017 BCSC 2007 11
Lepage v. Bowen Island Municipality, 2018 BCSC 613..... 24
Moray Channel Enterprises Ltd. v. Gordon, 2017 FC 250..... 25
Nine Starz Fruits & Vegetables Inc. v. Schenker of Canada Ltd., 2017 QCCQ 2122 9
Oddy v Waterway Partnership Equities Inc., 2017 BCSC 1879..... 23
Offshore Interiors Inc. v. Worldspan Inc., 2017 FC 478 4
Offshore Interiors Inc. v. Worldspan Inc., 2017 FC 479 10
Platypus Marine Inc. v. The Ship Tatu, 2016 FC 501, 2017 FCA 184..... 21
R v. Alassia New Ships Management Inc., 2018 BCPC 5 15
R v. MV Marathassa, 2018 BCPC 125..... 16
Saam Smit v. The "Hanjin Vienna", 2017 FC 745 4
Sargeant v. Worldspan Marine Inc., 2017 BCSC 1153 5
Shelburne (Town) v. The "Farley Mowat", 2017 FC 1184 24
The Corporation of the City of Victoria v Zimmerman, 2018 BCSC 321 8
Transport Desgagnes Inc. v. Wartsila Canada Inc., 2015 QCCS 5514, 2017 QCCA 1471 6