Borden Ladner Gervais

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Maritime Law Key Judgments — 2016

AGF STEEL INC. V. MILLER SHIPPING LTD. et al, 2016 FC 461

In *AGF Steel Inc. v. Miller Shipping Ltd. et al,* 2016 FC 461, the defendants Miller Shipping Ltd. ("Miller") and Midnight Marine Limited sought summary judgment against the plaintiff, AGF Steel Inc. ("AGF"), pursuant to the *Federal Court Rules.* In particular, the defendants sought judgment stating that they were not liable for the loss of steel rebar cargo that resulted from its ship capsizing off the south coast of Newfoundland and Labrador.

Prior to the voyage, the parties entered into a contract in which the defendants agreed to transport, over six voyages, 43,000 metric tonnes of steel rebar from Sorel, Québec to Newfoundland between October 2012 and April 2013 (the "Contract"). Pursuant to the Contract, AGF obtained insurance to cover the risk of loss or damage to its cargo and Miller obtained Hull and Machinery insurance as well as Protection and Indemnity insurance. The Contract also contained what is referred to as a "knock for knock" clause, in which each party agrees to bear the risk of loss or damage to its own property. Two successful voyages were made in 2012. However, on the third voyage, the barge capsized on the south coast of Newfoundland and Labrador and the entire cargo was lost. The plaintiff claimed $8.2 million CAD from the defendants.

The Court first considered whether the matter was suitable for summary judgment. The plaintiff opposed the motion, arguing that the issues could not be properly determined on a summary basis due to the fact that there was a large volume of evidence that had yet to be tendered. Further, the plaintiff argued that the outcome of the action largely depended on the interpretation of the Contract which, as a matter of mixed fact and law, required a trial. The Court confirmed that the test with respect to a motion for summary judgment is that the moving party must show that there is "no genuine issue for trial". In order to do so, the Court had to examine the nature of the exclusion clause in the Contract and whether it operated to exclude the requirements under the Hague-Visby Rules. This question hinged on whether the contract in question was for "the carriage of goods by water," pursuant to section 43(2) of the *Marine Liability Act*, or whether it was a charterparty. If it was the former, the Hague-Visby Rules would apply, which would prohibit the parties from contracting with respect to liability. However, if the contract was determined to be a charterparty, the parties would be free to contract regarding liability

and the "knock for knock" clause, if interpreted accordingly, would limit the Miller defendant's liability for the cost of the lost cargo.

Miller pointed to the language of the Contract, claiming that it stipulated that the nature of the Contract was one for the hire of a ship, which is a principle attribute of a charterparty. For example, the preamble describes the parties as "contractor" and "charterer" and a section of the Contract is entitled "Time Charter Party." In addition, there were no bills of lading issued, which they argued was a further indicator that section 43(2) of the *Marine Liability Act* should not apply. The defendants submitted that the parties to the Contract, as sophisticated commercial entities, should be held to their bargains and that the plaintiff agreed, pursuant to the contract, to bear all risks of loss or damage to its own property. Further, Miller argued that the clause in the Contract requiring the plaintiff to insure the cargo also had the effect of relieving them from liability.

In response to the defendants, the plaintiff argued that the Contract was a contract of carriage by water and, as a result, the exclusion clause could not apply to limit the defendant's liability due to the Hague-Visby Rules. The plaintiff argued that in order for section 43(2) to not apply, there must be no bill of lading ***and*** the contract must stipulate that the Hague-Visby Rule do not apply. Because the contract did not mention or reference the Rules, they should apply. The plaintiff then turned to the issue of contractual interpretation, arguing that the "knock for knock" and mandatory insurance clauses did not extend to the cargo and therefore the defendants could not rely on these clauses to limit their liability.

Ultimately, the Court allowed the summary judgment in part, determining that the Contract in issue was a charterparty and therefore not subject to the Hague-Visby Rules. In other words, the bar against contractual terms relieving a party from liability for loss or damage did not apply and the parties were at liberty to include such terms in the Contract. However, the Court held that the interpretation and application of those terms did not readily yield to a final determination based on the evidence submitted and, as a result, the court held that a trial was necessary to determine the issue of contractual interpretation.

***MURPHY V UNITED PARCEL SERVICE CHINA,* 2016 QCCQ 5550**

In *Murphy v United Parcel Service China,* 2016 QCCQ 5550, Chateau D'Argent Inc. ("Chateau"), insured by the plaintiff Sean Murphy, ***es qualite*** of attorney in Canada of Lloyds Underwriters ("Lloyds"), hired United Parcel Service China and United Parcel Service du Canada ("UPS") to delivery two packages of jewellery from China to UPS' factory in Lachine, Québec. Although the two packages did arrive in Québec, one of the packages inexplicably could not be located after having being scanned and entered into the non-bonded sorting area of the facility (the "Missing Package"). The plaintiff claimed from UPS the full amount of its loss, and at issue was whether a limitation of liability provision operated to deny the claim.

Both parties agreed that the *UPS Canada Terms and Conditions of Service* (the "UPS Terms") provided a maximum liability on the part of UPS for "loss or damage during shipping" where a shipper chooses not to indicate on the bill of lading a declared value for carriage of the shipment. Although the plaintiff admitted that Chateau did not enter a "Declared Value for Carriage" on the Waybill and accepted the limitation of liability, it

sought to set aside the limitation on the grounds that a) the limitation is inapplicable because the Missing Package was not in transit at the time of its loss; b) the defendant's gross negligence caused the loss; and/or c) the loss of the Missing Package was a result of UPS's intentional fault because it must be presumed to have been stolen by an UPS employee.

With respect to the first ground, the plaintiff argued the exclusion clause does not apply because, since the loss the occurred at UPS's facility, it therefore did not occur "during shipping." In dismissing the argument, the Court considered *Smith v. Agility Logistics Co. (Geologistics Co.),* 2009 QCCS 1915 ("Smith"), where a limitation of liability provision contained in a bill of lading was set aside because the goods were not "in transit" when they were stolen. In Smith, there were a series of successive contracts put in place to cover liability for each leg of the cargo's trip from Germany to Montréal. The Court found that the limitation of liability on the bill of lading was specifically limited to the final leg. Because the theft occurred prior to this leg, they were not yet "in transit" and therefore the limitation clause was inapplicable. In this case, the waybill was a single contract providing for carriage of the packages from China to Montréal. Since the Missing Package was lost before it arrived at its final destination, the loss occurred during the execution of the contract. To buttress this finding, the Court noted that Article 2040 of the *Civil Code of Québec* ("QCC") provides that a contract for carriage of property extends from the time the carrier receive the property into its charge for carriage until its delivery.

The plaintiffs' second ground for excluding the limitation of liability clause was that UPS was grossly negligent, which Article 1474 QCC provides operates to nullify such clauses. The basis of this claim was the alleged lack of systems UPS had in place, their failure to report and investigate the loss, and their lack carelessness given that at the time they suspected an employee of theft. The court dismissed the claim on the basis that none of the individual allegations constitute gross negligence, and two or more "simple" faults cannot amount, cumulatively, to gross fault or negligence. The Court found UPS' processes were thorough and noted that Chateau, having had the option to but declining to indicate a Declared Value for Carriage on the Waybill must accept the consequences of its decision.

The Court dismissed the plaintiff's final ground because they failed to demonstrate on a balance of probability that an employee stole the package, since no direct evidence was led and the Court was asked make an inference the Missing Package was stolen. Even if the Court had found on a balance of probabilities that an employee had stolen the package, the Court would not have found the theft to be an intentional fault of UPS since the theft would not have benefited UPS, even partially, which is required for an employer to be liable for the fault of its employees.

***Mckeil Marine Limited v. Attorney General of Canada and Foss Maritime Company,* 2016 FC 1063**

In *Mckeil Marine Limited v. Attorney General of Canada and Foss Maritime Company,* 2016 FC 1063, the Federal Court considered an application from McKeil Marine Limited ("McKeil") following a decision of the Chief, Marine Policy and Regulatory Affairs Seaway and Domestic Shipping Policy of Transport Canada ("Transport Canada") concerning the towage of two decommissioned vessels from British Columbia to Nova Scotia via the Panama Canal. The two naval vessels, the

HMCS Protecteur and the HMCS Algonquin, were to be sent from British Columbia to Nova Scotia so to be scrapped at a shipyard operated by R.J. MacIsaac Construction Ltd. ("RJM"). RJM contracted with Atlantic Towing to tow the vessels from British Columbia to Panama and then from Panama to Nova Scotia. Atlantic then engaged the Foss Maritime Company ("Foss"), an American shipping company, to provide a tugboat to tow the vessels from British Columbia to Panama. The main issue at the hearing was whether or not this operation constituted engaging in the "coasting trade," as defined in the *Coasting trade Act,* SC 1992, c. 31 (the "Act") as this would determine whether or not Foss was required to have a licence when towing the ships.

At the hearing, Transport Canada held that this operation did not constitute engaging in the "coasting trade," and therefore there was no impediment to a Foss, a foreign ship, performing part of this journey without first having obtained a license under the Act.

The applicant, McKeil, is a Canadian tug and barge company based in Ontario. Mckeil was concerned that the respondent, Foss, had failed to acquire a valid licence to conduct the towage of the decommissioned vessels. McKeil argued that the towage fell under the definition of coasting trade set out in section 2(1)(a) of the Act, which states that coasting trade includes "the carriage of goods by ship... from one place in Canada or above the continental shelf of Canada to any other place in Canada or above the continental shelf in Canada, either directly or by way of a place outside Canada." In particular, Mckeil argued that towing a ship constitutes the "carriage of goods" under this definition. The respondents, however, were of the view that the towing of a ship cannot be properly characterized as the "carriage of goods" by ship. Further, McKeil argued that section 2(1)(f) provides that coasting trade is "the engaging, by ship, in any other marine activity of a commercial nature in Canadian waters." McKeil submitted that the towage here was one tow beginning and ending in Canadian waters and thus met the definition of coasting trade.

Prior to addressing the merits of the application, the Court first considered the issues of standing and mootness. Foss submitted that McKeil lacked standing to bring the application because it was not directly affected by the decision, as required under section 18.1 of the *Federal Courts Act,* RSC 1985, c F-7, and also argued that McKeil should be denied public interest standing. In the alternative, Foss argued that the issue before the Court was moot because the towage of the two ships was completed by the time of this proceeding and therefore the Court ought not to exercise its discretion to hear the matter.

With respect to standing, McKeil argued that it was directly affected by Transport Canada's decision because it lost the opportunity to object to an application for a licence under the Act being issued to a foreign vessel and to offer its own equipment to perform the job. Second, McKeil argued that it would be affected by the potentially negative precedential value that the decision could have on members of the Canadian shipping industry.

In order to be "directly affected," the matter at issue must “directly affect the applicant's legal rights, impose legal obligations on it, or prejudicially affect it in some manner.” The Court held that McKeil provided no evidence demonstrating that they were directly impacted by the decision and determined that any possible negative precedential effect was "speculative." Similarly, the Court denied granting McKeil public interest standing on the basis that it would be a better use of judicial recourses to address McKeil's

concerns if, in the future, there was a situation where that issue could be more effectively raised between parties directly opposing parties.

With respect to mootness, the Court held that even if McKeil had been granted standing, that the application would have been dismissed because the matter is moot. In its reasons, the Court stated that "a matter has become moot if the tangible and concrete dispute has disappeared and the issues have become academic." This was held to be the case here, where there was no longer a "live controversy" considering the vessels had completed the tugging operations and arrived in Nova Scotia.

Because of its findings regarding standing and mootness, the Court declined to hear the application on its merits.

***Lakeland Bank v The Ship "Never E Nuff." Hull No. DNAZ8012C303 and Patrick Salvail Saint-Germain,* 2016 FC 1096**

In a previous edition of the MariTimes Newsletter, we reported on the dismissal by the Federal Court of Lakeland's application for a summary judgment (2013 FC 864). On this occasion, the court had to consider whether to enforce an American mortgage on a ship sold, without the bank's permission, to an innocent third party purchaser for value. The plaintiff, Lakeland, lent US $150,000 to the defendant Mr. McMahon so he could purchase the "*Never E Nuff*." As security the bank took out a First Preferred Ship's Mortgage and registered it with the U.S. Coast Guard. When Mr. McMahon stopped making payment on the mortgage in 2008, Lakeland obtained an *in personam* judgment of US$190,000 against Mr. McMahon in the U.S. District Court, Northern District of New York, but was unable to proceed *in rem* against the ship because the ship could not be found because the ship had been sold to Mr. St-Germain and was anchored in Montreal. Eventually Lakeland instituted proceedings in Federal Court *in personam* against Mr. McMahon and Mr. St-Germain, and *in rem* against the ship, and obtained a Warrant for Arrest against the ship and an order putting the Bailiff in possession.

At trial, the Court dismissed the action against Mr. McMahon because he was never properly served and, in any event, as the action was against Mr. McMahon personally in respect of the loan, which had been adjudicated by the U.S. court, and was not an action enforcing the foreign judgment, the action would have been dismissed in accordance with principles of *res judicata.*

As against Mr. St-Germain, the Court noted that since he was an innocent purchaser for value, Mr. St-Germain should have immediately moved under Rule 221 to have the action struck as disclosing no reasonable cause of action. As it turned out, the bank discontinued its entire action against Mr. St.-Germain during the trial.

This left the "*Never E Nuff*" as the only defendant. At issue was whether the American mortgage could be enforced by Canadian Courts.

On behalf of the vessel, Mr. St-Germain argued that Lakeland has not established that it holds a valid US mortgage on the ship because it failed to prove American law. The Honourable Mr. Justice Harrington disagreed, holding that because the Bank is not asserting any greater rights under a foreign law than it would be entitled under Canadian domestic maritime law, it did not have to prove American law. As well, where

there is no proof of foreign law, the *lex fori* applies, and the mortgage document was valid under Canadian Maritime Law. As such, the Bank has a *droit de suite* which allows it to arrest the "*Never E Nuff* " while it is in Mr. St-Germain's possession.

The Court also dealt with Mr. St-Germain's argument that because registration was not required under the *Canada Shipping Act*, 2001, and he did not in fact register the ship, Québec law therefore applies. Regular readers will recall that in the 2013 case, the Court left it open to be determined whether the *Civil Code of Québec* applied to require the registration of the ship mortgage in Québec or whether Canadian maritime law applied to set aside the requirement. In this case, the Court acknowledged that application of Québec's law would render the mortgage not opposable to Mr. St-Germain because it was not registered pursuant to the *Québec Civil Code*.

In determining the issue, the court considered the four criterions set out in *Ordon Estate v Grail*, [1998] 3 SCR 437 as modified by *Marine Services International Ltd. v Ryan Estate,* 2013 SCC 44, [2013] 3 SCR 53, which are used to determine whether a provincial statute of general application is incidentally relevant to a claim based on Canadian maritime law.

First, is a mortgage on a ship a claim under exclusive federal legislative competence over navigation and shipping? In deciding it was, the Court focused on the object of ships sales, which concerns matters of navigation and shipping, as being determinative, despite the fact that the transaction itself ostensibly is a matter of provincial civil rights and property.

Second, is there a federal statutory counterpart to the provisions of the *Québec Civil Code*? This was unnecessary to answer because the *Canada Shipping Act*, 2001 would not apply to an American ship or to the Bank's American mortgage.

Third, should the *lex non scripta* of Canadian Maritime Law be altered? The court held it should not, and Canadian Maritime Law recognizes unregistered mortgages.

Fourth, if the *lex non scripta* should not be altered, does the provincial law entrench upon a protected "core" of federal competence? The Court held it does. In the case of conflict between provincial and federal law in this matter, the doctrine of paramountcy would apply to render the provincial law inapplicable.

In the result, the Bank's mortgage was held to be valid and opposable to Mr. St-Germain.

***Avina v Sea Senor (Ship),* 2016 BCSC 749**

This case dealt with the parameters of the British Columbia Supreme Court's ("BCSC") jurisdiction over maritime matters. The plaintiff Oscar Avina ("Avina") and defendant Lenic M. Rodriguez ("Rodriguez") agreed to purchase the vessel "*Sea Senor*" (the "Vessel") through their jointly-owned corporation Sea-Chariot Holdings Inc. ("Sea-Chariot"), whose sole director was Rodriguez. Following a dispute over the terms of their agreement, Rodriguez moved the Vessel from its moorage in Vancouver to Bowen Island and told Avina that he was no longer entitled to the Vessel. In response, Avina filed a notice of civil claim and arrested the Vessel pursuant to an arrest warrant issued by the BCSC.

The court here dealt with two applications. It dealt first with Rodriguez's application for an order seeking, among other things, that the arrest warrant be set aside for want of jurisdiction on the basis that the matter was a shareholder dispute, not a maritime law dispute. The Court noted that the BCSC has *in rem* jurisdiction pursuant to Rule 21-1(2) of the *Supreme Court Civil Rules* in cases where the action could have been brought *in rem* in the Federal Court and is a claim for relief with respect to Canadian maritime law or relating to navigation and shipping.

The Court then considered the three-factor test for determining federal jurisdiction as found in *ITO-Int'l Terminal Operators v. Milda Electronics,* [1986] 1 S.C.R. 752:

1. There must be a statutory grant of jurisdiction by the federal Parliament.
2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.
3. The law on which the case is based must be a law of Canada as the phrase is used in *s* .101 of the *Constitution Act, 1867*.

Rodriguez only contested the presence second factor. He claimed that because there was no dispute over ownership, title, or possession of the Vessel since it was vested exclusively in Sea-Chariot, and because there was no question as to possession of the ship since the Sea-chariot was its owner, and since the entire factual matrix occurred in B.C., this was not a maritime issue but was a matter under the umbrella of the province's jurisdiction over property and civil rights.

The Court disagreed, citing *Sargeant v. Al-Saleh*, 2014 FCA 302 ("Al-Saleh") for the proposition that a claim is indisputably rooted in Canadian maritime law if it falls within a head of power found in s.22(2) of the *Federal Court Act.* Despite the Vessel being solely owned by the defendant, because the plaintiff sought a declaration that it had part ownership over the Vessel, the matter is a claim "with respect to title, possession or ownership of a ship" within the meaning of s.22(2). Pursuant to Al-Saleh, it is therefore rooted in Canadian maritime law and the application to set aside the arrest warrant for lack of jurisdiction was dismissed.

Having upheld the arrest, the Court then considered Avina's application seeking an order pursuant to Rule 13-5(1) of the *Supreme Court Civil Rules* for sale of the Vessel with proceeds to be held in trust pending further orders by the Court or a written agreement by the parties. The basis for this application was that the defendants have been unwilling and unable to make necessary payments relating to the Vessel (pursuant to their agreement) and, because it is not being properly maintained, the Vessel is deteriorating and needs to be sold.

The Court decline to permit the sale because, following *Moody Estate*, 2008 BCSC 786, the Court must be persuaded the sale is necessary or expedient (defined as "advantageous to both parties") before it exercise its discretion to order a sale. The Court noted there had been no appraisal of the Vessel which, while not necessary *per se* on an application for sale, makes it very difficult for the Court to determine any alleged deterioration or diminution of value of the Vessel.

In the result, the Court denied the application.

C.H. Robinson Worldwide Inc. v. Northbridge Commercial Insurance, 2016 ONCA 364

In last year's edition of the MariTimes Newsletter, we reported on the dismissal of C.H. Robinson Worldwide Inc.'s application for insurance coverage from the respondent, Northbridge Commercial Insurance Corporation (*C.H. Robinson Worldwide v. Northbridge Insurance*, 2015 ONSC 232). This year, we can report on the outcome of the appeal instituted by C.H. Robinson Worldwide Inc. The issue on appeal was whether the insurance policy in question was void due to a material representation made by the insured on its policy renewal application. The Court of Appeal allowed the appeal and held that the insurance company did not meet its strict onus of proof to show that there had been a material representation.

C.H. Robinson Worldwide Inc. ("Robinson") entered into an agreement to retain the insured, KLM Express ("KLM"), to transport a cargo of food products from Ajax to Calgary. During transport, the truck carrying the cargo was involved in a collision and the cargo was destroyed. Part of the agreement between the parties stipulated that KLM would be liable for "actual loss and damage to shipments" arising from its "performance or failure to perform the services required by this contract." Further, the contract stated that KLM would be liable for the "full, actual value of the shipments tendered by Robinson." After the accident, and relying on this paragraph of the agreement, Robinson obtained a default judgment against KLM for $223,701.85, which was the full value of the lost cargo.

Under the agreement, KLM was required to obtain, at its own expense, cargo insurance of at least $25,000 per shipment. At the time of the collision, KLM had an insurance policy from the respondent with a limit of $250,000. After receiving default judgment against KLM, Robinson applied for an order that Northbridge pay the amount of the default judgment, pursuant to section 132 of the Insurance Act, which permits a judgment creditor with an unsatisfied judgment against a judgment debtor to recover the amount from the judgment debtor's insurer. However, Northbridge denied the insurance claim on the basis that KLM was alleged to have made a material misrepresentation on its insurance application. Part of the application process involved KLM completing a "Small Business Fleet Transportation Insurance Survey" where one of the questions was: "Does the applicant have any contracts with shippers that stipulate limits of liability that are required to supersede the applicant's standard Bill of Lading?" KLM answered this question "no."

Section 132 of the *Insurance Act* stipulates that recovery is "subject to the equities" between the judgment debtor and its insurer. In other words, if KLM was found to have made a material misrepresentation to Northbridge, that material misrepresentation would void KLM's policy and give Northbridge a valid defence to Robinson's claim. The Court confirmed that the insurer has the onus of proving a material misrepresentation, and this onus is significant. The insurer argued that KLM's survey answer was a material misrepresentation because in its contract with Robinson, KLM agreed to be liable for the full or actual value of any lost or destroyed shipment. However, Northbridge failed to produce a copy of its insured's standard bill of lading, nor did it lead any evidence of its terms.

In his reasons, J.A. Laskin noted that because the respondent had not produced a copy of KLM's standard bill of lading, the court was unable to determine what its terms were.

Although he could speculate that KLM did have a standard bill of lading that limited its liability to less than the full or actual value of any lost shipment, Northbridge could not rely on "mere speculation" to meet the strict onus of proving that there was a misrepresentation. All of the arguments put forward by Northbridge required the Court to make assumptions regarding KLM's bill of lading and its terms.

Northbridge's failure to produce the document undermined its misrepresentation defence and J.A. Laskin held that in the absence of the document that was the subject of the survey question in issue, he was not satisfied that KLM's answer to the survey question was a misrepresentation. In light of this conclusion, the Court allowed the appeal and granted Robinson judgment against Northbridge in the amount of its default judgment against KLM, inclusive of interest and costs.

***Ballantrae Holdings Inc. v. The Owners and All Those Interested in the Ship "Phoenix Sun" and the Ship "Phoenix Sun",* 2016 FC 570**

In *Ballantrae Holdings Inc. v. The Owners and All Those Interested in the Ship "Phoenix Sun" and the Ship "Phoenix Sun,"* 2016 FC 570, the Federal Court had to determine the ranking of various creditors following the sale of the Phoenix Sun (the "Ship"). The owner of the Ship, Mengu Pasinli ("Pasinli") purchased the ship when it was under arrest in the port of Sorel. Pasinli intended to repair the Ship to render it seaworthy for one last voyage, find cargo to carry overseas, and then sell the Ship for scrap in Turkey. He anticipated that this plan would result in a profit of over $1,000,000. To put this plan into motion, Pasinli entered into various contracts in order to finance and repair the ship.

In the end, the Phoenix Sun was never rendered seaworthy. Pasinli's funds ran out and a number of creditors made claimed for recovery from the proceeds of the sale of the Ship, which ended up being for far less than what Pasinli had intended. In this case, the Federal Court had to determine the ranking of these various creditors' interests, which included securities, liens and mortgages. The principal amount of the creditors' claims was over $3 million, against a fund of only $682,500 raised through the sale of the Ship. Amongst those creditors was the plaintiff in this action, Ballantrae Holdings Inc. ("Ballantrae"). Ballantrae had entered into a security agreement with Pasinli to provide him with the funds to purchase the Ship. However, the mortgage was registered under the *Ontario Personal Property Security Act* ("PPSA") rather than registered in a ship registry, as would normally be the case in maritime matters.

Pasinli also contracted with various other parties to help repair the ship, resulting in a number of claims being made against the proceeds of the sale. These claims included: Marshal's fees and disbursements for bringing the ship to sale; Ballantrae's costs for selling the vessel; Ballantrae's claim for the amount due under the mortgage; unpaid wages under employment contracts; the city of Sorel's claim for berthage and supply costs; claims of necessaries claiming a lien under section 139 of the *Marine Liability Act* (the "Act"); Ian Hamilton, a lender, who also claimed a lien under *s*. 139 of the Act; and Skylane Worldwide "Skylane"), who asserted a registered Panamanian mortgage. The Federal Court had to determine the ranking of these various claims.

In his reasons, Harrington J. began by outlining the traditional principles of priority. Generally, the first ranking creditor should be the Marshal's claim for fees and costs associated with bringing the vessel to sale. Next are maritime and statutory liens, which

enjoy the same status. Next would be mortgages. Lastly, the remaining creditors, which consisted of alleged equitable charges, would be paid.

The Court acknowledged that "on occasion where the interests of justice so require, our court in the exercise of its admiralty and equitable jurisdiction may alter the traditional ranking." With this in mind, Harrington J. went through the creditors' claims and determined their ranking. The first ranking creditor was that of the marshal's expenses, which had already been paid out by court order prior to this proceeding. Next, the Court held that Ballantrae's claim for the costs it incurred in selling the ship, for which Ballantrae claimed $42,419.37 on a solicitor-client basis. However, the Court stated that it saw "no reason" to not apply the default provision of Tariff B, Column III, mid-range costs, rather than solicitor-client costs and reduced the award to $12,830.46.

The next ranking claim was that of the Master and crew for wages and benefits, which for the most part the Court claimed was "beyond doubt." With respect to the claim of Sorel, the Court held that the city's claim did not fall within section 139 of the Act and therefore they did not benefit from a lien against the Ship. However, in the interest of equity, the Court varied Sorel's ranking, stating that it was "plain and obvious that the mass of creditors have benefitted from the supply of electricity" provided by Sorel to the Ship. As a result, Sorel's claim, though not a lien under *s*. 139 of the Act, ranked above the claims of the suppliers of necessaries.

Next, the Court discussed the issue of Ballantrae's unregistered mortgage, which was challenged because, while registered under the PPSA, it was not registered in a ship registry. A competing creditor vigorously challenged the validity of the registration on the basis that Canadian maritime law is federal law, not provincial law, and is uniform throughout Canada. Therefore, the Federal Court may only apply such provincial law as is "incidentally relevant" and because the Ontario PPSA is a provincial statute of general application that creates security interests in property, it could "hardly be considered incidental." Harrington J. acknowledged that the Ship was never in Ontario at any relevant time and was never intended to be brought into Ontario and that in order for the perfection and priorities provisions of the Act to apply, the Ship must have been in Ontario. However, the Court acknowledged, after a review of relevant caselaw, that the application of "incidental" provincial law in the maritime context is much broader than thought. As a result, Harrington J. concluded that the Federal Court could "take cognizance of the Ontario PPSA" and recognize Ballantrae's security interest in the ship, which entitled Ballangtrae to the balance of the sale proceeds, which amounted to $415,649.52.

With respect to the remaining creditors, Hamilton's claim ranked after Ballantrae's, resulting in him receiving none of the sale proceeds. Skylane's claim was struck because Skylane had “prevented the orderly and timely development of this case” by frequently missing deadlines and failing to provide evidence with respect to its mortgage claim.

***Canadian National Railway Company v. Louis Dreyfus Commodities Canada Ltd.,* 2016 FC 1190**

Canadian National Railway Company v. Louis Dreyfus Commodities Canada Ltd., 2016 FC 1190 involved an application for judicial review of an arbitrator's decision concerning a contract dispute between the applicant Canadian National Railway Company ("CN")

and the respondent Louis Dreyfus Commodities Canada Ltd. ("LDC"), a seller and shipper of grain. The parties were unable to agree on contractual terms for the 2015-2016 crop year with respect to the number of rail cars CN would provide LDC per week[1]. In particular, LDC disagreed with CN's claim that it was entitled to ration the number of cars it provided LDC during periods of peak demand and inclement weather and requested arbitration with the Canadian Transportation Authority.

The arbitrator acknowledged that s.169.37 of the Canada Transportation Act, SC 1996, c 10, requires the arbitrator to consider a number of factors concerning the practical business limitations and realities faced by the railway and the shipper, such as the railway's obligations to other shippers, the availability of alternative transportation means to the shipper, and the railway and shippers' operational requirements and restrictions.

In deciding with LDC, the arbitrator noted that CN is the sole service provider to LDC; that trucking is not a feasible alternative; and that interswitching with the Canadian Pacific Railways was not feasible. The arbitrator rejected CN's proposal that LDC's request be subject to CN's rationing methodology, which involves allocating railcars on a pro rata basis based on data from previous years. It also rejected CN's request to consider its obligations to other shippers, which sometimes required CN to limit its allocation of cars to individual shipping companies, because allocating cars is not a zero sum game, and rationing is not a normal business practice but should be reserved only for exceptional circumstances. Finally, the arbitrator held that CN should be able to meet both LDC's request and its obligation to other shippers given that because overall grain yields have been declining in recent years, CN should have enough railcars to meet LDC's and other shippers' demands.

On appeal, the Federal Court held this decision to be unreasonable. It considered previous Agency decisions, as well as the Federal Court of Appeal's decision in *Canadian National Railway Company v. Dreyfus*, 2016 FCA 232 (which concerned an earlier LDC service complaint), and held that they established general governing principles about car rationing: rationing should be a last resort for dealing with unexpected demand surges; rationing should be temporary, for as short a period as possible, with normal service returning as soon as reasonably possible; and rationing should be fair consistent and transparent.

The court stated that these principles accorded with the Supreme Court of Canada's decision in *Patchett & Sons Ltd. v. Pacific Great Eastern Railway Co.*, [1959] SCR 271, which determined that a railway carrier is not bound to provide cars at all times to meet to meet all shippers' demands as long as the railway carrier adheres to its duty to be reasonable in all it does, which is a determination that is fact-dependent in each circumstance.

Applied to this case, it was unreasonable for the arbitrator to effectively eliminate CN's ability to ration its cars in appropriate circumstances, such as adapting to harsh winter conditions, because that would force CN to ignore its obligations to other shippers and its operational restrictions, both of which it has a statutory obligation to consider. The court held that because reasonableness of service is a factual question, it was premature of the arbitrator to prohibit CN from rationing its supply, even in exigent circumstances. The decision was overturned and referred back to another arbitrator.

ContainerWest Manufacturing Ltd. v. Canada (Border Services Agency), 2016 FCA 110

In *ContainerWest Manufacturing Ltd. v. Canada (Border Services Agency)*, the Federal Court of Appeal considered an appeal from the decision of the Canadian International Trade Tribunal ("CITT") involving the interpretation of the *Customs Tariff, S.C.* 1997, c. 36 and the *General Preferential Tariff* and *Least Developed Country Rules of Origin Regulations*, SOR/2013-165.

ContainerWest Manufacturing Ltd. ("ContainerWest") purchased 1,678 containers of various sizes from Rich Glory (Hong Kong) Limited. The containers were made in China and in order to ship them to Canada, some of them were shipped with goods of third parties inside and others were temporarily welded together with smaller containers nested inside. When the containers were shipped, ContainerWest did not obtain through bills of lading or any other shipping documents.

ContainerWest claimed that the containers qualified for the General Preferential Tariff (the "GPT") under the *Customs Tariff*. However, the Canadian Border Services Agency (the "CBSA") determined that the containers did not qualify for GPT treatment because they were not shipped to Canada on a through bill of lading. The CITT reviewed the CBSA's decision and considered the language used in the relevant statutory provisions to determine whether a through bill of lading is required in order to qualify for the GPT.

Section 4(1) of the *GPT Regulations* states that "[g]oods are entitled to the General Preferential Tariff only if the goods are shipped directly to Canada, with or without transhipment, from a beneficiary country." Section 17 of the *Customs Tariff* provides that "[f]or the purposes of this Act, goods are shipped directly to Canada from another country when the goods are conveyed to Canada from that other country on a through bill of lading to a consignee in Canada." After reviewing these provisions, the CITT determined that GPT treatment would only be available "if the containers would have been shipped from China to Canada on a through bill of lading," which they had not been. ContainerWest appealed this decision.

The issue to be decided by the Federal Court of Appeal was whether the CITT erred by reading-in to section 4(1) of the *GPT Regulations* a "strict requirement for a through bill of lading to obtain GPT treatment." J.A. Webb began his analysis by confirming that the appropriate standard of review for the CITT's decision is reasonableness. Further, appeals to the Federal Court of Appeal are restricted to questions of law. Therefore, none of the findings of fact made by the CITT were subject to appeal.

ContainerWest argued that the *Customs Tariff* should not be interpreted as imposing a strict requirement for a through bill of lading in order to grant GPT treatment. Its reasoning for this argument was that "through bills of lading" are only used in shipments where there are multiple carriers. Section 4(1) refers to the GPT treatment applying to goods that are shipped "with or without transshipment". The definition of "transshipment" was not in dispute — it refers to the transfer of goods from one mode of transportation to another. Therefore, ContainerWest submitted that a strict requirement for through bills of lading would be inconsistent with the language of the Act because requiring a through bill of lading would deny GPT treatment to goods that are shipped only using one carrier, as bills of lading do not apply to these shipments.

The Court did not agree with ContainerWest's reasoning. In his decision, J.A. Webb stated that ContainerWest's argument was flawed because it was based on its misunderstanding that the CITT had accepted its proposed definition of a "through bill of lading." ContainerWest submitted that a "through bill of lading" creates a presumption of a direct shipment. However, the CITT did not accept this reasoning and stated that "ContainerWest submitted no evidence of commercial practice that could show that an importer... could not obtain a through bill of lading in various factual situations, including those where there is no transshipment or where a single carrier or mode of transportation is used..." The Federal Court of Appeal cited two other GPT-related regulations (the *Haiti Deemed Direct Shipment Regulation* and the *Mexico Deemed Direct Shipment Regulation*), both of which interpret a through bill of lading as applying to shipments involving only one carrier or mode of transport.

The Federal Court of Appeal determined that the CITT's decision that a "through bill of lading" is required for goods to benefit from the GPT treatment was reasonable, as it was based on the principles of statutory interpretation set out by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27. The appeal was dismissed with costs.

***Transport Desgagnés v. Wärtsilä Canada Inc.,* 2015 QCCS 5514**

In *Transport Desgagnés v. Wärtsilä Canada Inc*., 2015 QCCS 5514, the Québec Superior Court considered whether the sale of a marine engine was governed by Canadian Maritime Law or Québec Civil Law. The plaintiffs, Transport Desgagnes inc., Desgagnes Transarctik Inc. and Nagicatino Desagnes Inc. ("TDI") operated a fleet of vessels in the Canadian arctic, on the St. Lawrence River and on international waters. The defendant, Wärtsilä Canada Inc., was a manufacturer and supplier of marine engines and propulsion systems. In February 2007, the defendant supplied the plaintiff with a new bedplate and reconditioned crankshaft to use on one of its ships, the Camilla Desgagnes. In October, 2009, the crankshaft sustained a catastrophic failure, resulting in a loss of over $5 million. TDI made a claim against Wärtsilä to recover this amount.

TDI argued that the defendant, as the manufacturer and seller of the crankshaft, was liable for the resulting damage. The defendant denied that there was a latent defect to the crankshaft and also argued that the six-month warranty provided in the contract of sale had expired long before the defect occurred. TDI argued that the limitation clause in the contract was not enforceable because, under Québec Civil law, a seller is "bound to warrant the buyer that the property and its accessories are, at the time of the sale, free of latent defects which render it unfit for the use for which it was intended or which so diminish its usefulness that the buyer would not have bought it or paid so high a price if he had been aware of them". In response, the defendant argued that such a limitation clause is enforceable in Canadian maritime law and that Canadian maritime law should apply rather than Québec civil law. The Court had to determine which law applied to the facts at bar and ultimately determined that Québec civil law should apply and that the defendant was liable for the damage caused by the crankshaft.

The Court described Canadian maritime law as a body of federal law that encompass the principles of English maritime law as they were developed and applied in the Admiralty Court of England. The *Constitution Act, 1867* provides that federal Parliament governs matters of navigation and shipping and provincial governments have jurisdiction over property and civil rights. With respect to navigation and shipping, the

Court stated that "matters relating to the framework of the legal relationships arising out of shipping activities" or relating to the "infrastructure of navigation and shipping activities are, in pith and substance, within the federal jurisdiction. For these matters, an "encroachment" of the provincial power over property and civil rights is justified and federal laws, such as Canadian maritime law, will apply.

The test to be applied when determining whether something falls under the Navigation and Shipping power is whether "the activity at stage is so integrally connected to maritime matters such that it is practically necessary for Parliament to have jurisdiction over same, in order to properly exercise its legislative power over navigation and shipping."

The Court applied this test to the sale of the crankshaft to determine whether to apply Canadian maritime law or Québec civil law and determined that Québec civil law should apply. First the Court stated that "the single fact that a ship or maritime undertakings are involved does not automatically trigger the application of Canadian maritime law" and that for Canadian maritime law to apply, the matter must be "integrally connected to maritime matters."

The issues relating to the sale of a marine engine were not considered to be integrally connected to the pith and substance of the navigation and shipping power. For example, contracts for the sale of a marine engine do not engage issues of safe carriage of goods, movement of goods on or off a ship, seaworthiness of a ship or good seamanship. Furthermore, there is no “practical necessity” for uniform federal laws to govern this type of contract or sale. The Court held that, although related to maritime activity, the sale of a marine engine does not, in pith and substance, fall within the jurisdiction of Canadian maritime law.

After determining that Québec civil law applied, the Court examined the contractual obligations between the parties and held the defendant liable to the plaintiff for $5,661,830.33. This decision has been appealed to the Québec Court of Appeal.

J.D. Irving Limited v. Siemens Canada Limited, 2016 FC 69

In *J.D. Irving Limited v. Siemens Canada Limited,* 2016 FC 69, J.D. Irving Limited ("JDI") entered into a contract with Siemens Canada Limited ("Siemens") to transport heavy equipment (the "Cargo") by road and sea (the "Contract"). The Contract also set out other services related to the transport of the cargo, including the provision by JDI of all necessary equipment, personnel, tugs and barges. Also included in the Contract were Siemens' standard terms and conditions. To carry out its work under the Contract, JDI retained Maritime Marine Consultants ("MMC") to provide naval architectural and consulting services.

In October 2008, while loading the Cargo onto a barge, some Cargo fell over and off the barge into the Saint John Harbour. Siemens commenced numerous actions in the Ontario Superior Court of Justice against JDI, MMC and other individuals and subcontractors alleging breach of contract, negligent misrepresentation, negligence and/or gross negligence and failure to warn. These claims amounted to $45,000,000. In response to these claims, JDI filed this limitation action pursuant to sections 29(6), 29.1 and 32(5) of the *Marine Liability Act* (the "Act") seeking to limit its liability to $500,000 in

all claims related to the incident. MMC also filed a Statement of Claim in Federal Court also seeking to limit its liability under the Act.

Section 29(6) of the Act states that the "maximum liability for maritime claims that arise on any distinct occasion involving a ship of less than 300 gross tonnage, other than claims referred to in section 28" is $500,000 in any claim other than one in respect of the loss of life or personal injury. It was not in dispute that JDI was a shipowner as defined in section 25(11) (a) of the Act and therefore was entitled to limit its liability under the *Convention on Limitation of Liability for Maritime Claims, 1976* and the *Protocol of 1996 to amend the Convention on Limitation of Liability for Marine Claims,* 1976 (collectively, the "*Limitation Convention*"). Further, it was not in dispute that the tonnage of the barge in question was less than 300 tons and that, therefore, the amount of the limitation, if applicable, would be $500,000. What was in dispute was whether JDI was barred by its conduct from limiting its liability, pursuant to Article 4 of the *Limitation Convention*, which states that "[a] person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result."

Siemens argued that JDI and MMC acted recklessly and with knowledge that loss of the cargo would probably result, and therefore they should not be able to rely on the limitation set out in section 29(6) of the Act. In particular, Siemens argued that JDI knew that the barge was too small and was unsuited for task of transporting the Cargo.

In response, JDI argued that Article 4 of the *Limitation Convention* requires Siemens to prove that JDI was reckless and that JDI knew that the loss would probably result from its recklessness. According to JDI, Siemens failed to prove the actual cause of the incident or that a proven cause was recklessness.

In her reasons, Justice Strickland stated that based on the evidence presented at trial, that she was satisfied that JDI thought the barge in question would be suitable for the job. Further, despite an error in the stability calculations and loadout plan prepared by MMC, expert evidence indicated that the barge was suitable for its intended purpose. Ultimately, the Court determined that the loss was the result of a number of factors, which may have included an off centre load and reduced stability due to the free surface effect on the barge's metacentric height ("GM").

After considering the evidence of whether or not JDI was reckless, the Court broke down the requirements of breaking a limitation under Article 4. A party seeking to break a limitation must establish that the loss resulted from: i) the personal act or omission of the person seeking to limit his liability; ii) committed recklessly; iii) with knowledge; iv) that such loss; v) would probably result. Further, the Court confirmed that there is a presumptive right of limitation and that recklessness should be assessed on a subjective standard.

Based on the evidence presented at trial, the Court concluded that JDI and MMC personnel did not act recklessly and with the knowledge that, by conducting the Cargo move using that particular barge or continuing with its loadout plan, the loss would probably result. Selecting the barge was not reckless, as its suitability and stability were established by MMC's calculations. The fact that JDI would have preferred to use a larger barge had one been available was not enough to indicate that they were reckless

in choosing the barge that they did. To prove recklessness, Siemens would have to prove JDI had actual knowledge that the loss of the Cargo would probably result. The Court held that Siemens did not establish that JDI possessed actual knowledge and therefore JDI was entitled to limit its liability under the Act.

J.D. Irving Limited v. Siemens Canada Limited, 2016 FC 287

In a related action, *J.D. Irving Limited v. Siemens Canada Limited,* 2016 FC 287, the Federal Court provided supplemental reasons and judgment with respect to a claim made by MMC and Jon Bremner, the principal and owner of MMC ("Bremner"), pursuant to Article 1(4) of the *Limitation Convention*.

Bremner and MMC claimed that they were also entitled to benefit from the limitation pursuant to Article 1(4), which states that “[i]f any claims set out in Article 2 are made against any person for whose act, neglect or default the shipowner or salvor is responsible, such person shall be entitled to avail himself of the limitation of liability provided for in this Convention.” Bremner and MMC argued that JDI, the shipowner, was responsible for the loss and therefore they, as independent contractors, should also be entitled to limit their liability.

The main issue in determining whether MMC and Bremner were entitled to limit their liability was whether the scope of Article 1(4) extended to the liability of independent contractors. After examining various texts that discuss Article 1(4), the Court determined that the wording of the Article was ambiguous and therefore it was necessary to examine *The Travaux Préparatoires of the LLMC Convention 1976 and of the Protocol of 1996* (the "travaux"), as compiled by the Comité Maritime International ("CMI"), in order to ascertain the intention of the Member States as regard Article 1(4) within the context and purpose of the *Limitation Convention.*

In her reasons, Justice Strickland stated that although the travaux provided no definite answers, it was clear that there was no explicit intention to extend the category of persons who are entitled to limit their liability pursuant to Article 1(4) to include independent contractors. JDI, as the shipowner, was not vicariously liable for the acts, neglect or default of its independent contractor. Therefore, the Court held that MMC and Bremner were not entitled to limit their liability pursuant to the *Limitation Convention*.

Offshore Interiors Inc. v. Worldspan Marine Inc., 2016 FC 27

In the 2013 edition of the *Mari-Times Newsletter*, we reported on the ongoing litigation between *Offshore Interiors Inc.* and *Worldspan Marine Inc.* The relevant facts for this 2016 decision are the following. Worldspan Marine Inc. ("Worldspan") agreed to build a yacht (the “Vessel”) for Mr. Harry Sargeant III under a Vessel Construction Agreement ("VCA"). The VCA stipulated that Sargeant (through its bank Comerica, collectively "Sargeant") was to make periodic advances to Worldspan to finance the construction of the Vessel for which Worldspan granted Sargeant a Builder's Mortgage.

Disputes thereafter arose, construction halted, and the plaintiff, Offshore Interiors Inc. ("Offshore"), a trade creditor, arrested the Vessel and obtained a default judgment against Worldspan. Shortly thereafter, Worldspan sought creditor protection in the British Columbia Supreme Court ("BCSC") under the *companies creditor' Arrangement Act* ("CCAA"). The BCSC issued a claims process but permitted in rem claims against

the Vessel to proceed in Federal Court. The Federal Court subsequently set out an *in rem* claims process, inviting affidavit proof of claims with respect to the Vessel.

Sargeant filed an affidavit asserting a $20 million *in rem* claim based on the Builder's Mortgage it was granted by Worldspan for advances Sargeant had made to Worldspan. Worldspan likewise filed an affidavit asserting a $5 million *in rem* claim on the basis that $5 million in advances remains due and owing to it under the VCA. The Vessel was eventually sold for $5 million, and the Court had to deal with two applications concerning the proceeds of sale. In the first application (the "Worldspan Motion"), Worldspan sought a declaration that the amounts Sargeant owed to it under the VCA take priority over Sargeant's security interest. In the second application (the "Sargeant Motion"), Sargeant sought an order that the *in personam* claims between the parties be settled in BCSC and the *in rem* claim, and any claims under *s* .22(2)(n) of the *Federal courts Act*, be settled in Federal Court.

In the Worldspan Motion, Worldspan argued that the amounts owed to it under the VCA take priority over Sargeant's mortgage interest on the basis of section 12.1 of the VCA, which provided that the Builder's Mortgage "shall be subordinate to Owner's obligations under the Contract Documents including Builder's right to receive payments pursuant this Agreement" (the "Clause"). Worldspan claimed this represented an agreement between the parties that Sargeant would first have to pay Worldspan the full amount owed to it before Sargeant could exercise its rights under the Builder's Mortgage.

In response, Sargeant first argued the Worldspan Motion should be dismissed due to, issue estoppel, and/or abuse of process, because the Court had previously considered, in an earlier motion, whether the Clause gave Worldspan a priority right. Prothonotary Lafreniere dismissed that application, which was upheld by Justice Lemieux on appeal (the "Priority Decision").

The Court rejected Sargeant's arguments. Concerning the claim for *res judicata*, although the question the Court considered in the Priority Decision was, on its face, the same question before the Court in this case, the issue the Court considered in the Priority Decision was different since it was based on the conclusion that Worldspan cannot have an *in rem* claim against its own property. In this case, the Court is being asked to determine whether the Clause represents an agreement between the parties that provides Worldspan a defence to Sargeant's *in rem* claim, which is an issue the Court in the Priority Decision did not have to consider.

With respect to the abuse of process claim, the Court noted that the Priority Decision was brought by Offshore, not by Worldspan. Moreover, Worldspan could not have been expected to raise arguments on the interpretation of the clause in that case. To hold otherwise would be contrary to the purpose of earlier determinations in *in rem* proceedings, which can eliminate the necessity for litigation of other issues. At the Priority Decision stage, had the Court accepted Offshore's application, it would have eliminated the need to litigate over the proper interpretation of the clause.

The Court considered Worldspan's claim that the Clause represents an agreement between the parties that Sargeant's Builder's Mortgage is subordinate to Worldspan first being paid the full amount owed to it by Sargeant under the VCA. In response, Sargeant argued that the Clause operated to give Worldspan a contractual set-off whereby any amount Sargeant owes Worldspan under the VCA can be deducted from the amount

Sargeant is entitled to under the Builder's Mortgage. Citing contract interpretation principles, the Court considered the contractual scheme as a whole and sided with Sargeant. It noted that the VCA provided several mechanisms where, in case of default or termination or similar situations, formulae would be used to bring about a reconciliation of accounts between the parties. These remedy provisions do not prevent Sargeant from enforcing its Builder's Mortgage until Worldspan has been fully paid; rather, the provisions merely make such repayments subject to any required adjustments. Worldspan's Motion was therefore appealed.

In the Sargeant Motion, Sargeant applied for an order that the *in personam* claims be settled in the BCSC while the *in rem* claims and any other claims under s.22(2)(n) of the *Federal Courts Act* be settled in the Federal Court. Sargeant argued that such an order would be consistent with the principle that a party is entitled to decide, absent substantive contrary reasons, in which jurisdiction to advance its claims. In addition, Sargeant claimed that to have concurrent proceedings would create a "procedural fog," would invite inconsistent decisions between courts, and be contrary to principles of comity.

Worldspan, on the hand, argued that to have the BCSC settle the *in personam* claim would violate the principle that the Federal Court's *in rem* jurisdiction must be founded upon *in personam* liability on the part of the ship's owner. It further argued that Sargeant was attempting to have the BCSC decide the *in personam* claim in order to then have the decision recognized by the Federal Court and in turn converted into *in rem* claims.

The Court rejected Worldspan's argument that Sargeant was attempting to proceed with an *in rem* claim without an adequate *in personam* foundation, noting that Sargeant is not disputing the need for an underlying *in personam* claim in seeking the matter to be resolved in a different jurisdiction. The Court also acknowledged that, in general, parties can choose their forum. However, the Court ultimately decided with Worldspan and dismissed Sargeant's claim. Although multiple proceedings run the risk of inconsistent results, there was insufficient evidence to assess the level of that risk in this case. The Court stated that Sargeant presented no precedence for the Federal Court declining to allow the owner of a vessel that had been arrested and sold through Federal Court proceedings to defend *in rem* proceedings. In addition, were the BCSC to settle the *in personam* claims, the *in rem* claims of not only Sargeant but also the other creditors would be on hold pending conclusion of the BCSC litigation.

In dismissing Sargeant's claim, the Court emphasized that the decision does not mean the *in personam* claim must be commenced in Federal Court, but merely that the Court's *in rem* jurisdiction includes whatever determinations are necessary to adjudication the *in rem* claims, including determination of the underlying *in personam* claims. Finally, in closing, the Court noted the importance of comity between the Federal Court and the BCSC, stating that this decision aimed to be consistent with the BCSC order and respectful of the jurisdiction of the BCSC.

Legislation and Key Policy Updates — 2016

We provide below a brief summary of legislation and key policy updates of interest.

(a) Ocean Protection Plan

On November 7, 2016, the federal government announced Canada's Oceans Protection Plan (the "Plan"). Over the next five years, Canada will spend $1.5 billion to develop a world-leading marine safety system aimed at preventing and improving responses to marine pollution incidents in Canada's oceans and along its coastlines. If implemented, the Plan will have far-reaching effects on Canada's maritime industry.

The Plan will improve and expand Canada's marine information infrastructure in a number of ways, including the creation of new information-sharing systems and platforms to allow coastal groups and mariners to have real-time information on shipping activities. Eight new radar stations will be built, including six on B.C.'s coast, and no longer will "black-out" periods be permitted among Canada's Marine Communication and Traffic Services Centres. In addition, the Canadian Hydrographic Service will increase surveys and more frequently produce higher quality navigational charts, and a project will be implemented to provide more up-to-date marine weather services.

Ecologically sensitive regions will be identified and mapped, and Environment and Climate Change Canada ("ECCC") will develop platforms for synchronizing information regarding sensitive ecological areas to be used when responding to marine spills. The ECCC will increase its staff levels on all three coasts and improve communication and enforcement responsiveness. Environmental monitoring will also improve through the development of monitoring programs in six high-use marine areas, and in general environmental data collection will be expanded in order to better understand the cumulative effect of shipping in order to make ongoing improvements to Canada's maritime practices wherever necessary.

A number of wildlife protection initiatives will also be developed, including a fund to protect and restore sensitive ecological areas and a whale protections program that will set baseline standards for marine noise with corresponding compliance methods.

Canada will increase research funding in a number of areas, in order to develop more environmentally safe and efficient clean-up technologies and to better understand how petroleum products behave in Canada's waters. Funds will also be set aside to research how Canada can improve its responses to marine pollution incidents.

Significantly, the Plan will result in amendments to the Ship-Source Oil Pollution Fund (the "Fund") in order to better implement the polluter-pay principle. Whereas the Fund currently has a per-incident limit of liability, amendments will make industry liability unlimited for cleaning up marine-based oil spills. In addition, were the Fund ever to be depleted, Canada would implement a levy on oil shippers in order to compensate for any expenses the government incurs to remedy an oil spill. The polluter-pay principle will also be expanded with respect to shipwrecks, with prohibitions to be implemented that ensure owners do not abandon their vessels and otherwise pay for any necessary salvage costs.

New regulatory tools will be created to provide means for Indigenous and coastal communities to influence regulations that cater to particular regional marine traffic concerns. The Plan also calls for the government to review the *Pilotage Act* next year to determine ways it can be amended to ensure safer and more efficient pilot services.

The Plan will result in Canada taking a greater leadership role internationally in order to continue improving standards developed by the International Maritime Organization and other international maritime groups.

The Canadian Coast Guard's (the "Coast Guard") will be given greater power to directly intervene in cases where mariners or operators are complacent in the face of a marine accident. In addition, the Coast Guard's command systems will be improved to better respond to marine emergencies, including through developing dedicated 24/7 emergency management capacity and the ability to deploy on-site mobile command posts. Better training of personnel will also occur in order to improve the Coast Guard's ability to better respond to marine spills and vessels in distress, along with new Coast Guard auxiliary support chapters that will be developed in B.C. and the Arctic. The Plan also calls for the development of a standardized on-site management system (the Incident Command System).

The Coast Guard's equipment — such as its booms, small vessels, and clean-up technology — will be upgraded, six new lifeboat stations will be built (four on the West coast and two in Newfoundland and Labrador), and Canada plans to lease two new vessels that can tow large commercial vessel to operate in high-risk areas. In addition, the Plan calls for a new logistics depot to be built along B.C.'s central coast in order to improve response times to spills. Regional response plans catering to local condition, and a new emergency response plan in northern British Columbia, will also be created.

More generally, the Plan calls for collaboration with and meaningful consultation from Indigenous and coastal community groups to develop localized pollution prevention and response systems, environmental restoration priorities, and training programs that will increase Indigenous employment in marine safety industries. Canada hopes to establish new national Indigenous Auxiliary supports chapters on both the Pacific and Arctic coast, as well as provide more support for Arctic communities by building more Arctic marine installations that support the loading, unloading, and resupplying of ships, as well as provide the Arctic region with eight incident-response vessel. Finally, Indigenous groups and the Coast Guard will collaborate to develop Indigenous Community Response Teams.

(b) Federal Moratorium on Crude Oil Tanker Traffic along the North Coast

Despite its comprehensiveness, the Ocean Protection Plan did not mention the proposed moratorium on crude oil tanker traffic along the B.C. North Coast. The federal government has promised a moratorium since it was first elected in Fall, 2015. In his November 13, 2015, mandate letter to the Minister of Transport, Prime Minister Justin Trudeau stated that it is a priority to formalize a moratorium on crude oil tanker traffic on British Columbia's North Coast. As part of the order, the Honourable Marc Garneau, Minister of Transport, was to work in collaboration with the Minister of Fisheries, Oceans and the Canadian Coast Guard, the Minister of Natural Resources, and the Minister of Environment and Climate Change to develop a West Coast crude oil shipping ban.

The ban faces some potential legal hurdles, including that a ban could interfere with the international right of "innocent passage" that allows vessels from other countries to pass Canada's territorial waters; Provincial governments could potentially challenge the ban on constitutional grounds; and, Enbridge may have the option of suing the government

for effectively blocking its pipeline on the basis that the ban singles it out and lacks general application.

Since the mandate was given, the federal government has been quiet on details and given few progress updates, generating speculation that the government may be vacillating in its commitment. However, Mr. Garneau recently clarified the government's plan in September, 2016, stating that the federal government is consulting with First Nations and local communities to ensure any ban would not interfere with their access to fuel and other necessities, and that the federal government plans to formalize the moratorium in a packaged announcement with other measures aimed at improving shipping safety and marine spill response, including designation of new marine protected areas, regulation changes to improve the handling of fuels and waste-dumping, and improved measures to deal with shipwrecks that cause pollution and safety problems (for example, see the proposed amendment of the *Canada Shipping Act, 2001*, described below).

In November, 2016, Mr. Garneau repeated the government's pledge to enact an official moratorium on North Coast crude oil tanker traffic, stating the moratorium will be released by the end of the year to coincide with the federal cabinet's decision on the Kinder Morgan pipeline, scheduled to be announced by December 19, 2016.

It remains to be seen what the scope of the ban will be, if any exceptions will be made, and what effect it will have on maritime industries. A moratorium on tanker traffic on the North Coast would present a serious impediment to the Northern Gateway pipeline but could leave the door open for governmental approval of the twinning of the Kinder Morgan pipeline. If the latter occurs, maritime traffic along B.C.'s South Coast can be expected to increase significantly.

Look for an update in this space in the coming weeks following the government's decision, which is scheduled to be rendered by December 19, 2016.

(c) *Canada Shipping Act, 2001* Amendment

On February 4, 2016, the government introduced Bill C-219, An *Act* to amend the *Canada Shipping Act, 2001 (wreck)*, in the House of Commons for First Reading. The purpose of the legislation is to resolve the ambiguity over who has responsibility for ships that have sunk or are anticipated to sink. As it is, jurisdiction over these vessels depends on a variety of factors (such as whether they are causing environmental harm or are a hazard to navigation), the result being a tendency for governmental departments and ship-owners to abdicate responsibility over the wrecks. This legislation intends to resolve this uncertainty by making the Canada Coast Guard primarily responsible for dealing with shipwrecks.

Specifically, the enactment would amend the *Canada Shipping Act, 2001,* S.C. 2001, c. 26 (the "Shipping Act") by strengthening the remediation obligations relating to wrecks through establishing measures that must to be taken for their removal, disposition, or destruction. The amendment would designate the Canadian Coast Guard as a "receiver" of wrecks for the purposes of Part 7 of the Act (dealing with remediation of derelict ships) and states that receivers "shall" (replacing "may") take reasonable steps to determine and locate the wreck's owner, or take or direct others to take measures to

remove, dispose, or destroy wrecks. Finally, the amendment would require the Minister of Transport to review the operation of Part 7 of the Shipping Act every five years.

(d) Ballast Water

The *International Convention for the Control and Management of Ships' Ballast Water and Sediments* (the "BWM Convention") required 30 countries constituting 35% of world merchant tonnage to submit their documents of accession with the International Maritime Organization in order to come-into-force. This threshold was finally met when Finland submitted its documents on September 8, 2016, some 12 years after the BWM Convention was first adopted, with the result being that the BWM Convention will come into force in September 8, 2017.

The BWM Convention was adopted to address the serious ecological, economic, and health problems that can result from harmful marine organisms being transposed from region to region through discharged ballast water. The BWM Convention will require all ships to contain ballast water management and treatment systems, carry a Ballast Water Record Book and an International Ballast Water Management Certificate, and adhere to ballast water management standards. The BWM Convention creates a water ballast standard outlining the allowable concentration levels of organisms transported in ballast water.

Much of the BWM Convention has been in force already in Canada. In 2006, Canada enacted the *Ballast Water Control and Management Regulations,* SOR/2011-237 (the "Ballast Regulations"). Although the government specifically chose not to incorporate wholesale the BWM Convention into its regulations, the Ballast Regulations are harmonized as much as possible with the standards and procedures set out in the BWM Convention.

An area that will present an adjustment for ships under Canadian jurisdictions as the BWM Convention comes into force concerns ballast water management.

The Ballast Regulations permitted several ballast water management methods, including ballast water exchange, treatment using a ballast water management system, transfer to a reception facility, or retention on board the ship. Ballast water exchange, moreover, was permitted to occur within 200 nautical miles of the Canada's coast. While the BWM Convention is phased in, ships will be permitted to exchange ballast water mid-ocean, but this option will be phased out all-to-together and ships will be required to install on-board ballast water treatment systems.

(e) Marine Liability and Information Return Regulations (proposed)

On June 11, 2016, the *Marine Liability and Information Return Regulations* was published in the *Canada Gazette*, Part 1. The proposed regulations would create an annual reporting regime for receivers of bulk hazardous and noxious substances ("HNS") cargo, as well as reorganize and replace the existing *Marine Liability Regulations*. The proposed regulation is expected to come into force on January 1, 2017.

The regulations implement an important component of Canada's obligations as a party to the *2010 Protocol to the International Convention on Liability and Compensation for*

Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (the "Convention"), which regular readers of the *Annual Review* will remember was implemented in December, 2014 through amendments to the *Marine Liability Act.* The Convention creates a liability regime to compensate claimants for damage resulting from accidents at sea that involve the carriage of bulk hazardous and noxious substances ("HNS") cargo, and parties to the Convention must submit information concerning bulk shipments of HNS to the International Maritime Organization ("IMO") and the Hazardous and Noxious Substances Fund ("HNS Fund").

Parts 1 and 2 of the new regulations — concerning, respectively, levy amounts to be paid to the Ship-source Oil Pollution Fund and reporting requirements for the International Oil Pollution Compensation Funds — would basically retain the existing requirements under the current *Marine Liability Regulations*.

Substances Fund," contains the new proposed HNS reporting requirements, which is applicable to approximately 2,900 HNS substances. The provisions require Canadians to annually report to the government total amounts of bulk HNS cargo received whenever the total amount received in a calendar exceeds:

- over 17 000 tonnes of non-persistent oils;
- over 17 000 tons of liquidfied petroleum gas;
- over 17 000 tonnes of any other bulk HNS cargo; or
- any quantity of liquefied natural gas cargo.

The proposed regulations provide that one must report in cases where a person and an "associated person" each separately import amounts of HNS in a category that individually are less than but collectively are greater than the threshold reporting amount. Part 3 also sets out the details concerning what information is required when reporting, such as contact information (including principals, in the case of agents), details concerning the HNS cargo, and contact information of the receiver. Those who receiver non-oil HNS must report the information to the Minister of Transport, while receivers of oil-based HNS report to the Administrator of the Ship-source Oil Pollution Fund. The deadline for filing reports is February 28 of the following year, and failure to do so can result in a summary conviction and fines of up to $1,000 for each day of default, with $100,000 fines available against those who interfere with or fail to allow investigations concerning suspected failures to report.

(f) Regulations Amending the Vessel Operation Restriction Regulations

On October 7, 2016, the *Regulations Amending the Vessel Operation Restriction Regulations*, SOR/2016-268 came into force. The regulations implement a year-round restriction on the operation of power-driven vessels on the main channel of the upper Columbia River and its tributaries (between 1.6 km northwest of Fairmont Hot Springs and Donald Station) in British Columbia. Vessels with motors 15 kW (20 hp) or less will be exempt from this restriction.The purpose of the amendments is to decrease conflicts among vessels by prohibiting the type and use of vessels, both commercial and recreational, that may operate on the Columbia River. It is hoped that the new regulations will help prevent damage to the Columbia Wetland complex caused by power-driven vessels.

The amendments are a result of a consultation process involving stakeholders, including marine industry representatives, led by Transport Canada Marine Safety and Security and Environment Canada Wildlife Services. There has been wide agreement to the proposal and the government expects the Regulations will result in minimal cost to industry.

(g) Vessel Fire Safety Regulations Amending the Vessel Regulations

On February 6, 2016, the *Vessel Fire Safety Regulations* was published in the *Canada Gazette,* Part 1. The proposed amendments would update the current regulatory regime to bring it in line with international fire safety requirements in place under the International Convention for the Safety of Life at Sea ("SOLAS Convention"), which was last updated by the International Maritime Organization in 2002.

The proposed Regulations will strengthen requirements for:

- structural fire protection systems (including provisions relating to fire diversion and ventilation);
- active fire suppression systems (such as hydrants, fire pumps, and fire-extinguishing systems);
- detection and alarm systems; and
- systems providing readily accessible means of escape for crew and passengers in the event of a fire.

The SOLAS Convention permits some requirements to be decided by each country in accordance with their unique needs. To that end, the proposed Regulations include certain Canadian-tailored requirements, such as particular equipment requirements suitable for our climate, and accommodations for seasonal vessels and ships that operate along our shorelines. Performance-based alternatives to certain SOLAS Convention requirements are also included.

The regulations would apply to Canadian vessels that are of more than 15 gross tonnage and vessels of less than 15 gross tonnage that are carrying more than 12 passengers. Once passed, the regulations would come into force after a 1-year phase-in period. Certain grandfathering provisions are also included, including (among others) that existing vessels are exempt from the construction, systems, and equipment requirements relating to fire safety but will have to adopt the operational, maintenance, and procedural requirements.

(h) Regulations Amending the Transportation of Dangerous Goods Regulations (Reporting Requirements and International Restrictions on Lithium Batteries)

On June 1, 2016, *Regulations Amending the Transportation of Dangerous Goods Regulations (Reporting Requirements and International Restrictions on Lithium Batteries)*, SOR/2016-95 came into force. The *Transportation of Dangerous Goods Act, 1992*, S.C. 1992, c. 34 (the "TDG Act") outlines the reporting requirements of those who handle or transport dangerous goods, especially with respect to releases or anticipated releases. These update the regulations by including new security provisions, modify existing reporting requirements, and specify what data is to be made available for risk analysis purposes.

The new regulations provide that an emergency report must be submitted to local authorities responsible for responding to emergencies whenever a release or anticipated release of dangerous goods occurs while they are being handled, transported, or offered to be transported by ship, in cases where the release or anticipated release exceed specified amounts or otherwise could endanger public safety. The reporting requirement is triggered for spills that are greater than 30L if the dangerous good is a:

- Class 3 Flammable Liquids;
- Class 4 Flammable Solids, Substances Liable to Spontaneous Combustion, and Water-reactive Substances;
- Class 5 Oxidizing Substances and Organic Peroxides;
- Class 6.1 Toxic Substances; or
- Class 8 Corrosives.

A spill of any other dangerous good requires a report no matter the quantity involved.

A release or anticipated release report is also required where the spill or anticipated spill causes a person to die or suffer injuries requiring immediate medical attention, an evacuation, or a closure of a facility, road, main railway, or main waterway, a means of containment was compromised, or if the centre or stub sill of a tank car cracked. In addition, a follow up report containing largely the same information must be submitted to the Director General of the Transportation of Dangerous Goods Directorate within 30 days of the release or anticipated release report being made.

The amendments also include new reporting requirements where specified quantities of dangerous goods with identified potential security risks are lost or stolen, as well as provide new reporting requirements when unlawful interfere with dangerous goods occur.

Finally, the new regulations clarify the definition of a "release" and "anticipated release," which replace the previous distinction between "accidental release" and "imminent accidental release." A "release" covers accidental as well as voluntary releases, whereas the previous definitions only covered accidental releases. An "anticipated release" includes (but isn't limited to) damage or stress occurring to means of containment, as well as to accidents where structural damage is likely (for example, where dangerous goods are lost in navigable waters).

(i) Regulations Amending the Atlantic Pilotage Authority Regulations

The Atlantic Pilotage Authority amended the Atlantic Pilotage Authority Regulations to permit those applying for a pilotage certificate to complete a modified familiarity program by the Authority in lieu of having to meet the conventional experience at sea qualifications. The program applies to candidates operating in low traffic areas where it is too difficult to meet the trip requirements due to the lack of callers to those ports. Under the new regulations, the Authority can develop a familiarly program based on the particular navigational requirements of the pilotage area, the candidate's level of experience, and the type of vessel, among other factors. Options available to the Authority include trips with licenced pilots and simulation training. The practical effect of the new regulations is that a candidate now has more options and opportunities available to qualify for a pilotage certificate.

The amendment came about as a result of concerns raised by shipping industry stakeholders over the lack of a familiarity program available for candidates operating at small ports, as a familiarly program has been available to candidates at large ports, with great success, since 2014. The amendment will benefit industry at the affected ports by reducing the regulatory hurdle in licencing pilots, while not reducing the safety or efficiency of the pilotage service.

The regulations apply to the following areas:

- the Miramichi or Restigouche compulsory pilotage area in New Brunswick;
- the Bay of Exploits, Voisey's Bay, Humber Arm or Stephenville compulsory pilotage area in Newfoundland and Labrador; and
- the Pugwash compulsory pilotage area in Nova Scotia.

(j) Regulations Amending the Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations

On April 2, 2016, the *Regulations Amending the Export and Import of Hazardous Waste and Hazardous Recyclable Material Regulations* was published in the *Canada Gazette*, Part 1. The proposed amendments update regulations that originally came into force in 2005 in order for Canada to meet its obligations under the *United Nations Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal* (the "Basel Convention") through the creation of a permit system to control and monitor international movement of hazardous waste and hazardous recyclable material. The proposed amendments are necessary for Canada to better meet its obligations under the Basel Convention. The amendments would expand the definitions of "hazardous waste" and "hazardous recyclable material" to include materials considered hazardous or prohibited to be imported by importing countries, or is defined as such by the Basel Convention and the country of import is a party to the Basel Convention.

The proposed amendments would establish clearer rules where an importing country has refused to accept hazardous goods, as well in cases where an exporter has a permit, and permission from the importing country, to export hazardous material, but the shipment could not be completed. In such cases, the proposed amendments creates a 90-day period during which such goods must be shipped back to Canada or alternative arrangements be made that are consistent with requirements under the Basel Convention.

In addition, the proposed regulations will require Canadian exporters to receive confirmation from the Minister of the Environment that the country of import or transit has approved an alternative facility, while also removing the requirement that Canadians must inform other countries when a shipment is refused.

The regulations will specifically affect carriers by requiring them to complete movement documents to track their shipments. The proposed regulations otherwise is not expected to add significant costs to transboundary carriers of hazardous goods.

(k) Amendments to International Convention for the Safety of Life at Sea

On July 1, 2016, the International Maritime Organization adopted amendments to the *International Convention for the Safety of Life at Sea* ("SOLAS") Chapter VI, regulation 2. The regulation was amended to require shippers of a packed container to provide the container's verified gross mass ("VGM") in a signed shipping document. Canadian shippers of cargo must comply with these regulations pursuant to the *Cargo, Fumigation and Tackle Regulations* (the "Cargo Regulations") under the *Canada Shipping Act*, 2001.

Because the Cargo Regulations already require Canadian shippers to comply with SOLAS, Transport Canada, Marine Safety and Security merely released two methods available to determine VGM:

- Method 1: The shipper or a third party weighs the container after it is packed and sealed.
- Method 2: The shipper or a third party weighs each item of cargo, dunnage, and any material being used to secure the material inside the container to determine their collective weight. The sum of these weights is then added to the tare mass of the container.

Unless the master or the master's representative, and a terminal representative, have received the shipping documents with the container's VGM, or have determined the VGM using either of the two methods outlined above, the container may not be loaded upon the ship.

Transport Canada permits a 5% VGM variation for loaded containers weighing less than 500 kilograms. Anything beyond 5% variation can attract penalties.

[1] The specifics have been redacted from the public judgment because the contract was confidential.

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