

## Canadian Maritime Law

*William Tetley\**

### CASES

#### *Addo v. OT Africa Line*<sup>1</sup>

*Carriage of goods – damage in transit at stopover port – jurisdiction – cause of action and solicitor’s own affidavit*

The plaintiff, George Addo, brought an action in Canada for breach of contract and negligence against the defendant, Hesse Noord, and four other defendants, after his cargo which was being shipped from Canada to Ghana, was damaged during a stopover in Belgium at a terminal operated by the defendant and it arrived several months late. The defendant responded by filing a Motion for order made by his own solicitor, striking out a statement of claim on the grounds that there was no reasonable cause of action and that Belgian courts, not Canadian, had jurisdiction over the matter. The defendant also filed a Motion for security for costs. The plaintiff then brought a Cross-motion for order striking out the affidavit made by the defendant’s solicitor.

*Decision:* Motion to strike out plaintiff’s action denied. Motion to strike out affidavit and motion for security for costs granted.

*Held:* The Court identified three issues: the question of its jurisdiction over the plaintiff’s claim against the defendant; whether the Statement of Claim disclosed a cause of action against the defendant; and finally whether the Court should refuse leave to admit the affidavit made by the defendant’s own solicitor. First of all, as regards the jurisdiction of the Federal Court over the plaintiff’s claim against the defendant, the Court relying on s. 22 of the *Federal Courts Act*<sup>2</sup>, came to the conclusion that the defendant’s terminal activity was “integrally connected” to Maritime matters and Canada, and that it was not “plain and obvious” that the foreign location of a cause of action excluded the Federal Court from taking jurisdiction. The defendant failed to convince the Court that Belgium would be a more appropriate forum to hear the dispute. It held that to do so would lead to excessive costs and efforts for the plaintiff to recover a comparatively low amount. On the second point, the Court found that it was not “plain and obvious” that the defendant’s Statement of Claim disclosed no reasonable cause of

---

\* QC, Professor of Law, McGill University; Distinguished Visiting Professor of Maritime and Commercial Law, Tulane University; counsel to Langlois Kronström Desjardins of Montreal (email: [william.tetley@mcgill.ca](mailto:william.tetley@mcgill.ca)). The author is indebted to Robert C Wilkins; Jerome Dickinson and Mariya Azbel, recent graduates., all of the Faculty of Law of McGill University; as well as to Russell Merifield, Trade Commissioner, Department of Foreign Affairs and International Trade; Francois Marier, Senior Policy Advisor – International Marine Policy (ACFI), Transport Canada; Mark AM Gautier, Senior Counsel, Transport Legal Services, Department of Justice of Canada, for their assistance in the preparation and correction of the text. In addition, the assistance of the Wainwright Fund is gratefully acknowledged.

<sup>1</sup> 2006 FC 1099 (Can FC: M.M. Teitelbaum J.)

<sup>2</sup> R.S.C. 1985, c. F-7

action and thus refused to strike it. On the last issue, the Court struck the affidavit made by the defendant's lawyer for being in violation of R. 82 of the *Federal Court Rules*<sup>3</sup>, which prohibits solicitors from the same law firm from supporting their arguments with their own affidavits. However, the Court allowed the defendant's application for security for costs in the amount of \$5,000 on the grounds that the plaintiff had submitted a factually inaccurate affidavit (which he later retracted), on a range of issues, most notably the plaintiff's alleged ownership of a Toyota truck in the cargo which turned out not to belong to him.

***AGF M.A.T. v. Ocean Masters Inc.***<sup>4</sup>

*Marine insurance - legality – actions - navigation and trading limits - disclosures and representations*

A fishing vessel owned by Ocean Masters was lost at sea due to fire. The insurer AGF M.A.T. denied coverage on the basis that a warranty of the insurance policy had been breached. The insurance policy contained a warranty that the vessel must be Canada Shipping Inspection Agency ("CSI") certified. The Ocean Masters' CSI certificate was only valid for voyages restricted to not more than 120 miles offshore; in fact, the vessel was fishing crab in an area further than 120 miles offshore. The vessel caught fire and sank when returning to port approximately 40 miles offshore, inside the limits specified in the certificate. Ocean Masters' action against the insurer for payment of claim was allowed by the trial judge who concluded that the voyage to the fishing grounds was illegal in its entirety based on the definition of "voyage" in s. 2 of the *Canada Shipping Act*<sup>5</sup>, under which voyage commences when a vessel begins to undock and leaves port and ends when the vessel returns to port and docks. Nevertheless, the trial judge found that the continued existence of illegality was not material to the loss; the warranty with respect to the vessel being CSI certified was one which was descriptive of the risk and was not an absolute warranty. Disclosing the operation beyond 120 mile limit was not material to the insurer in accepting the risk or setting the premium. The trial judge allowed Ocean Masters' claim. The insurer appealed.

*Decision:* Appeal dismissed.

*Held:* During the time when the vessel was not more than 120 miles offshore, it had a valid CSI certificate. The fact that the vessel was, for part of the time, outside the 120 mile zone without a valid certificate for that area did not alter this conclusion. The period the vessel was not in compliance with the CSI certification "warranty" did not void insurance. Failure to have a Class I CSI certificate when fishing more than 120 miles offshore was a breach that occurred prior to loss. When the loss occurred, the vessel had returned to within 120 miles offshore and was properly certified for that area. It followed that the implied warranty under s. 34 of *Maritime Insurance Act* ("MIA")<sup>6</sup> was satisfied.

---

<sup>3</sup> 1998, SOR/98-106

<sup>4</sup> 2007 AMC 1386 (Newfoundland and Labrador Court of Appeal, 2007: Welsh, J.A., Wells C.J.N.L. and Roberts, J.A.)

<sup>5</sup> R.S.C. 1985, c. S-9

<sup>6</sup> S.C. 1993, c. 22

The trial judge was correct that failure to have a Class I CSI certificate when the vessel was more than 120 miles offshore had no bearing whatsoever on the loss of vessel. The condition regarding CSI certification constituted a limitation of risk insured against and was not a warranty. Accordingly, s. 30 of MIA did not apply. The plaintiff's failure to disclose that the vessel was used in an area for which it had no CSI certificate was immaterial to the loss and could not be relied upon to release the defendant from liability under the policy.

***566935 B.C. Ltd. v. Allianz Insurance Co. of Canada***<sup>7</sup>

*Marine insurance – contracts - s. 53(2) of the Insurance (Marine) Act - “all risk” policy - “perils of the sea”*

A wooden barge sank while it was being moored in calm waters. Maintenance of the barge's hull had been minimal over the years and the deterioration of the hull had led to the progressive ingress of water which, in turn, led to the infestation of worms into some of its planking. Several devices and pumps were fitted onboard to minimize these negative effects on the already worn-out hull. Eventually, after the pumps had temporarily ceased to operate, the barge sank. At trial, the court found that the cause of the sinking was the ingress of sea water into the hull from leakage and the failure of the barge's stern rake directly attributable to the presence of shipworms as well as the plaintiff's own failure to use anti-fouling paint to halt the infestation. Accordingly, this was an ordinary case of wear and tear or loss caused by the infestation of shipworms and the insurer was therefore exempted by the provisions of s. 53(2) of the *Insurance (Marine) Act*<sup>8</sup>, because the loss was not caused by a peril of the sea. The insured subsequently appealed to the British Columbia Court of Appeal.

*Decision:* Appeal dismissed.

*Held:* The question before the Court of Appeal was whether the loss resulting from the sinking of a barge while it was being moored in calm waters was caused by a “peril of the sea”. The Court agreed with the trial judge that there was no accidental ingress of seawater. To constitute a peril of the sea, the loss had to be fortuitous in the sense that it would not have occurred but for an unusual event not normally expected. The real cause of the loss was the deterioration of the hull which was not a peril of the sea. Deterioration could have easily been avoided through the effective use of anti-fouling paint. Furthermore, while the Court acknowledged that the interruption of power to the bilge pump which evacuated the water was probably instrumental to the loss, the policy was not “all risk” and did not cover power loss but perils of the sea and could not act as guarantee against the negligent interruption of life support pumps. The alleged negligence of the insured's crew was merely a circumstance which aggravated and precipitated the incident, the vessel being “all the time in the grip of the casualty”.

<sup>7</sup> 2006 BCCA 469, 58 B.C.L.R. (4<sup>th</sup>) 52, [2006] B.C.W.L.D. 6304, [2006] B.C.W.L.D. 6255, [2006] B.C.W.L.D. 6308, [2006] B.C. W.L.D. 6309, [2006] 12 W.W.R. 577, 43 C.C.L.I. (4<sup>th</sup>) 1, 231 B.C.A.C. 272, 381 W.A.C. 272, 275 D.L.R. (4<sup>th</sup>) 748; (BCCA: Finch C.J.B.C., Smith, Lowry J.J.A.).

<sup>8</sup> R.S.B.C. 1979, c. 203

***Gearbulk Pool Ltd. V. Seaboard Shipping Co.***<sup>9</sup>*Transportation - contract of carriage - exemption of carrier's liability clause in bills of lading – breach of duty*

The respondent, Seaboard Shipping Co., who was a shipping agent, entered into contract with one of the appellants, the carrier Gearbulk Pool Ltd., for lumber transportation, establishing the respective responsibilities for variances between the parties. An estimation of the volume of lumber stored on-deck and under-deck was carried out by the carrier's supercargo upon loading and handed out in the form of receipt. On the basis of the receipt, the carrier issued one bill of lading indicating the volume of the cargo stored on-deck, whereas the shipping agent issued two bills of lading, one for on-deck transportation and the other for under-deck storage. The bills of ladings stated that the carrier was not liable for damage to the on-deck cargo. The on-deck lumber cargo eventually became contaminated by soda ash dust and both the carrier and vessel owner were found liable by the trial judge for the damage despite the exemption clause contained in the bills of lading<sup>10</sup>. The carrier and vessel owner appealed and sought to obtain indemnity for breach of effective liability exemption contained in the bills of lading.

*Decision:* Appeal dismissed.

*Held:* The British Columbia Court of Appeal agreed with the trial judge that there was no breach of duty on the part of the respondent shipping agent and took the view that the exemption clause did not protect the appellants because the proportion of on-deck and under-deck cargo stated in the bills of lading was inaccurate due to the carrier's failure to use cargo checkers. Liability could not be attributed therefore to the agent's acts or omissions characterized as at variance between the shipper's and carrier's respective bills of ladings, and thus no right of indemnity could arise. The court rejected the appellants' submission that their method of identifying value was sufficient to adequately determine cargo quantities to satisfy the requirements of the Hague/Visby Rules<sup>11</sup> and noted that it was the inadequate description of the cargo that led to a significantly lower on-deck cargo estimate.

***Isen v. Simms***<sup>12</sup>

---

<sup>9</sup> 2006 BCCA 552, 61 B.C.L.R. (4th) 256, [2007] B.C.W.L.D. 1026, 386 W.A.C. 223, 233 B.C.A.C. 223 (BCCA: Prowse, Hall, Mackenzie JJ.A.)

<sup>10</sup> Article III, section 8 of the Hague/Visby Rules prohibiting the exemption from liability for damage to "goods" through the fault of the carrier, is now contained in Schedule 3 of the *Marine Liability Act*, R.S.C. 2001, c. 6, s. 131 (1). This definition, however, excludes on-deck cargo which leaves the door open to exemption from cargo liability such as in the present case where part of the cargo was on-deck.

<sup>11</sup> Article I(c) on "goods".

<sup>12</sup> [2006] 2 S.C.R. 349, 2006 SCC 41, 2006 A.M.C. 2502, 273 D.L.R. (4th) 752, 2004 FC 227, [2004] 4 F.C.R. D-34; (SCC: Rothstein, J., McLachlin, C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron, JJ.).

*Jurisdiction - damage on land - yachts and pleasure boating - provincial law versus federal law - limitation of liability*

The appellant, Simms, suffered personal injury after being struck in the eye by a bungee cord with which the respondent, Isen, was attempting to secure the engine cover of his 17-foot pleasure craft. The boat had a gross tonnage of less than 300 tons and was regularly transported by land, towed by a vehicle. The dispute before the Federal Court and Federal Court of Appeal had concentrated around two issues. First, whether the Federal Court, which has jurisdiction in matters of maritime law, had jurisdiction over the respondent's negligent acts resulting in injuries, rather than provincial law. Second, if the respondent's negligent acts did fall within the ambit of maritime law, whether he could benefit from the \$1,000,000 limitation of liability under s. 577 of the *Canada Shipping Act*<sup>13</sup>, which governs claims involving ships of less than 300 tons. This depended on the direct connection between the appellant's claim and the operation of the ship<sup>14</sup>. Both the Federal Court and the Federal Court of Appeal held that the incident, which had occurred on land, was sufficiently connected to pleasure craft navigation to be brought within the ambit of Canadian maritime law.

*Decision:* Appeal allowed.

*Held:* The Supreme Court of Canada disagreed with the Federal Court of Appeal that the negligent act was in direct connection with the operation of the craft and held that Parliament did not systematically have jurisdiction over pleasure craft *per se*. Relying on s. 2 and s. 22 of the *Federal Courts Act*<sup>15</sup>, it decided that the question of whether a claim fell within the ambit of federal maritime law, involved an examination of the facts of the claim, in this case, the negligent act of the respondent, which according to Rothstein, J., “*had nothing to do with navigation of the boat on water and everything to do with preparing the boat to be transported on Ontario’s highways...The accident occurred on land. The injury was caused on land by a person who was neither on the boat nor in the water*”. Therefore, the Supreme Court held that Provincial law rather than Federal law applied.

***Mazda Canada Inc. v. Mitsui O.S.K. Lines Co. Ltd., et al.***<sup>16</sup>

*Bills of lading - choice of law and forum provisions in the bill of lading - s. 46(1) of the Canadian Maritime Liability Act – forum non conveniens*

A cargo of automobiles to be carried to New Westminster, B.C., Canada was damaged during carriage and subsequently discharged in Portland, U.S. Clause 28 in the bill of lading specified: “The contract evidenced by or contained in this Bill of Lading shall be governed by Japanese law... Unless otherwise agreed, any action against the Carrier thereunder must be brought exclusively before the Tokyo District Court of Japan.

<sup>13</sup> R.S.C. 1985, c. S-9 (as amended by S.C. 1998, c.6) (now s. 28(1)(a) of the *Marine Liability Act*, S.C. 2001, c. 6)

<sup>14</sup> Part I of Schedule VI of the *Canada Shipping Act*

<sup>15</sup> R.S.C. 1985, c. F-7

<sup>16</sup> 2007 AMC 2243; 2007 FC 916 (Can FC: S. Harrington, J.)

Any action by the Carrier to enforce any provision of this Bill of lading may be brought before any court of competent jurisdiction at the option of the Carrier.” U.S. cargo owners sued in Portland, Oregon, U.S.A. where the forum clause was enforced. Canadian cargo owners sued for loss and damage to Canadian cargo *in rem* against the ship and *in personam* against her owner and the time charterer in the Federal Court of Canada (F.C.) in Ottawa. The defendant shipowner and time charterer moved in Canada to have the Canadian action stayed in favour of Japanese jurisdiction. The Federal Court of Canada distinguished *OT Africa Line Ltd. v. Magic Sportswear Corp.*<sup>17</sup> and denied the stay of proceedings.

*Decision:* Motion to stay action dismissed.

*Held:* The Federal Court of Canada held that the Canadian *Marine Liability Act*, s. 46(1), which confers jurisdiction on Canadian courts over claims arising from contracts of carriage where the actual or intended port of loading or discharge under the contract is in Canada, (despite provisions in the contract requiring jurisdiction to be in another country), does not preclude a Canadian court having jurisdiction based on s. 46(1) from staying an action based on principles of *forum non conveniens*, provided by s. 50(1) of the *Federal Courts Act*. The Court found that the case had a real and substantial connection with Canada because New Westminster, Canada was the intended port of discharge. S. 46(1) did not render the Japanese jurisdiction clause null and void, and it could not be ignored. Nevertheless, little weight could be given to it in the light of Canada’s public policy as enunciated in s. 46. On the facts, it had not been clearly established that Japan would be a more appropriate forum. The Canadian forum was more convenient and the motion to stay the action in the Federal Court of Canada was dismissed with costs.

### ***Nanaimo Harbour Link Corp. v. Abakhan & Associates Inc.***<sup>18</sup>

*Maritime and admiralty law – Ships – Maritime liens – Miscellaneous Bankruptcy and insolvency – Practice and procedure in courts – Stay of proceedings*

Nanaimo Harbour Link Company (the Company) operated a passenger ferry between Nanaimo and Vancouver, British Columbia, Canada. The company hired contractors to complete extensive repairs on its vessel *Harbourlynx*. After the vessel returned to service, its engine failed for reasons unrelated to any work performed by contractors. The Company did not have funds to repair the vessel and eventually declared bankruptcy. The crew and captain of the vessel were not paid their wages. Contractors were not paid for the repairs and brought an action against the Company for money owed in relation to repairs. Trustee in bankruptcy, Abakhan & Associates, declared stay of all proceedings against the Company pending status of bankruptcy under s. 69.3. Canadian *Bankruptcy and Insolvency Act*<sup>19</sup>. The contractors filed proofs of claim as unsecured creditors but

---

<sup>17</sup> 2006 A.M.C. 2201, [2007] 1 Lloyd’s Rep. 85, 273 D.L.R. (4th) 302, [2007] 1 Lloyd’s Rep. 85, [2007] 2 F.C.R. 733 (F.C.A. 2006)

<sup>18</sup> 2007 BCSC 109, 2007 AMC 619 (BCSC: N. Garson J.). This case cites Prof. Tetley *Maritime Liens and Claims*, 2 Ed., 1998 at p.638, para. 9; pp. 640-643, paras. 14-22.

<sup>19</sup> R.S.C. 1985, c. B-3

proceeds from sale of vessel were insufficient to cover claims of secured creditors, contractors' claims and other unsecured claims. The contractors made an application for an order that the statutory stay of proceedings in s. 69.3 of the Canadian *Bankruptcy and Insolvency Act* did not apply to Federal Court of Canada proceedings commenced by them, on the grounds that their claims were maritime liens (or equivalent to maritime liens) for goods and services provided to the vessel *Harbourlynx*.

*Decision:* Application granted.

*Held:* Although the ferry operated only within the waters of the Province of British Columbia, the wage claims of seamen and the claims of contractors were in pith and substance related to the operation and navigation of the ship, and were thus not debt claimed solely within the provincial jurisdiction. If proven, seamen's wages were maritime liens under Canadian maritime law, and the contracting repairers' claims were statutory liens that the contractors had the right to argue improved the value of the ship so as to rank with maritime liens. Hence, British Columbia Supreme Court adjourned the mortgagee's application requesting the claims be declared to be unsecured in bankruptcy, and lifted its statutory stay so that claimants might pursue their federal court actions to determine the ranking and proof of the maritime claims under Canadian maritime law.

***OT Africa Line Ltd., OT Africa Line, and the Owners and Charterers and all others interested in the Ship "Mathilde Maersk" and in the ship "Suzanne Delams" v. Magic Sportswear Corp. and Blue Banana***<sup>20</sup>

*Conflict of laws - jurisdiction - forum non conveniens - s. 46(1) of Canadian Maritime Liability Act*

The claim involved the short delivery of a shipment from New York to Monrovia, Liberia. The New York shipper, through its agent in Toronto, arranged the shipment in Toronto, to the Liberian consignee. The carrier, an English company, through its Toronto office, negotiated and issued its bill of lading in Toronto to the shipper's agent. The insurance was entered into in Toronto and the insurers and the shipper had offices in Toronto. The freight was collected in Toronto. The English Court relied on clause 25 in the bill of lading, which stipulated "Any claim or dispute ... shall exclusively be governed by English law and determined by the High Court of London." Para two of the clause, however, recognized "In the event that anything herein contained is inconsistent with any applicable international convention or national law which cannot be departed for private contract, the provisions hereof shall to the extent of such inconsistency but no further be null and void." The Canadian Federal Court relied on the closest and most real connection and the Canadian *Marine Liability Act*<sup>21</sup>, a national law that, at s. 46(1), compulsorily accords jurisdiction to the Federal Court of Canada, at the cargo claimant's option, where the defendant has a place of business, branch or agency in Canada (s. 46(1)(b)) or where the contract of carriage is made in Canada (sect. 46(1)(c)). The

<sup>20</sup> 2006 A.M.C. 2201, [2007] 1 Lloyd's Rep. 85, 273 D.L.R. (4th) 302, [2007] 1 Lloyd's Rep. 85, [2007] 2 F.C.R. 733 (F.C.A. 2006); (Fed CA: Décarv, Evans and Sharlow JJ.A.);

<sup>21</sup> S.C. 2001, c. 6

*Federal Courts Act*<sup>22</sup>, at sect. 50(1), also allows the Federal Court of Canada to exercise *forum non conveniens*. The UK court issued an injunction against the plaintiffs in the Canadian Court, enjoining them from proceeding further. The carriers appealed to the Federal Court of Appeal.

*Decision:* Appeal allowed.

*Held:* The Federal Court of Appeal allowed the appeal from the judgment of the Federal Court in *Magic Sportswear Corp. v OT Africa Line Ltd*<sup>23</sup> and found that: (1) s. 46(1) of the *Marine Liability Act* did not deprive the Federal Court of its discretion to grant a stay on *forum non conveniens* grounds. (2) s. 46 did not oust the principles of international comity previously applied by Canadian courts, including affording respect to foreign judgments. It would not frustrate Parliament's purpose to take the English judgments into account in the course of determining the more convenient forum. The principal policy objective of s. 46 was the protection of the interests of Canadian exporters and importers and their insurers by diminishing or eliminating the legal effect of a contractual clause requiring them to litigate any dispute in a foreign forum. Parliament was not also concerned with protecting the interests of Canadian insurers when insuring non-Canadian goods shipped from and to ports outside Canada by non-Canadian shippers. Accordingly, weight would be given to the English judgments and also to the exclusive jurisdiction clause. (3) On the facts, the Federal Court was a less convenient forum than the English court and the shippers' action would be stayed<sup>24</sup>.

### ***Phoenix Bulk Carriers Limited v. Kremikovtzi Trade***<sup>25</sup>

*Arrest of cargo – two contracts of affreightment – two ships – jurisdiction - Federal Courts Act, R.S.C. 1985, c. F-7, s. 43(2)*

A cargo of coal was arrested *in rem* on a ship in Canada as security for an arbitration in London. The arbitration arose from a breach of contract of affreightment by Kremikovtzi

<sup>22</sup> R.S.C. 1985, c. F-7

<sup>23</sup> 2005 A.M.C. 275, 264 F.T.R. 1, [2005] 2 F.C.R. 236 (F.C. 2004)

<sup>24</sup> *Note of William Tetley:*

In criticizing the position taken in the United Kingdom over *O.T. Africa Line v. Magic Sportswear*, I wish to emphasize that British solicitors and barristers and P & I Clubs are entitled to vigorously try to protect London jurisdiction and the legal services provided there.

*O.T. Africa Line v. Magic Sportswear*, however, does not seem to be the court case to take a stand or to try to establish a precedent. In particular, the defendants themselves had negotiated the carriage terms, issued the bill of lading, and collected the freight in Toronto, Canada, where the insurance had also been negotiated and issued.

A preemptive anti-suit injunction by default in London after suit had already been taken in the clearly more convenient forum in Canada, where the facts had the closest and most real connection to its jurisdiction, is hardly the test case to overcome the terms of a Canadian statute similar to the national laws of the Nordic countries, New Zealand, Australia, South Africa, China and 29 Hamburg Convention countries.

I believe, rather, that in the light of the facts in this case, the Canadian Courts (being Milczynski, Prothonotary of the Federal Court of Canada), 2003 FC 1513, and O'Keefe J. of the Federal Court of Canada; [2005] 2 F.C.R. 236, (2004) 264 F.T.R. 1, 2005 AMC 275, [2004] FC 1165) were both correct.

<sup>25</sup> [2007] 1 S.C.R. 588, 2007 AMC 990, 278 D.L.R. (4th) 628, [2007] 1 S.C.R. 588 (SCC: McLachlin C.J. and Bastarache, Binnie, Deschamps, Fish, Abella, Charron and Rothstein JJ.).

Trade, who had entered into the contract with carrier Phoenix Bulk Carriers Ltd., but then loaded the cargo on the ship of Phoenix's competitor. The motion judge dismissed Kremikovtzi Trade's motion to set aside the warrant of arrest. The Federal Court of Appeal allowed the Appeal, but unanimously indicated that it would have reached a different result<sup>26</sup>, but for the Federal Court of Appeal's earlier decision in *Paramount Enterprises International, Inc. v. An Xin Jiang (The)*<sup>27</sup>.

*Decision:* Appeal allowed.

*Held:* The Supreme Court of Canada agreed with Nadon J.A. that s. 43(2) of the *Federal Courts Act*<sup>28</sup>, which provides that the jurisdiction conferred on the Federal Court of Canada in matters of maritime law "may be exercised *in rem* against the ship... or other property that is subject to the action," does not require that cargo be loaded on board the ship, originally contracted for, nor that it be carried or that there be in existence a maritime or possessory lien before the court can exercise its *in rem* jurisdiction. The narrow "physical nexus" interpretation of s. 43(2) should be rejected in favour of an "identifiability" test that only asks whether the cargo is the cargo designated in the contract of affreightment alleged to be breached. Applying the "identifiability" test, the court concluded that s. 43(2) had been satisfied in this case and allowed the appeal on this point, remitting the matter to the Federal Court of Appeal for consideration of the two remaining issues.

### ***Russell, et al. v. MacKay***<sup>29</sup>

*Personal injury - issue of jurisdiction - federal or provincial - limitation period for action - extension of limitation period versus time-barred action - Article 16(3) of Athens Convention*

In August 2003, the plaintiff, Patricia Mackay suffered personal injury during a whale-watching excursion onboard the defendants' ship. The plaintiff stumbled over a moveable cooler which had been placed just outside the washroom and broke her leg. The plaintiff's lawyer initially believed that the limitation period was six years in accordance with s. 9 of the New Brunswick's *Limitation of Actions Act*<sup>30</sup>. Various written, telephone and fax exchanges between both parties' lawyers and insurance agents occurred over the ensuing months concerning the possible reimbursement of medical expenses supported by receipts and documentation. Before long, the second anniversary of the plaintiff's fall passed without any legal action being filed. In April 2006, the plaintiff's lawyer finally wrote to the solicitors of the defendants' insurer asking whether they should "initiate settlement discussions" or "proceed with litigation". The insurer's solicitors responded shortly after by letter that they were "not prepared to initiate settlement discussions" on the grounds that the two-year limitation period under s. 37 (1) of the *Marine Liability*

---

<sup>26</sup> [2006] 3 F.C.R. 475, 2006 (Nadon J.A.)

<sup>27</sup> [2001] 2 F.C. 551

<sup>28</sup> R.S.C. 1985, c. F-7

<sup>29</sup> 2007 AMC 1672; 2007 NBCA 55; 2006 NBQB 350 (NBCA: Drapeau C.J. and Turnbull and Robertson JJ.)

<sup>30</sup> R.S.N.B. 1973, c. L-8

*Act*<sup>31</sup> giving force of law in Canada to Article 16 (1) of the *Athens Convention*<sup>32</sup>, had expired. The plaintiff soon after commenced an action against the defendants claiming damages in contract, nuisance and negligence. She submitted that the subject-matter of her action fell within the exclusive provincial jurisdiction over “Property and Civil Rights” (s. 92 (13) of the *Constitution Act, 1867*<sup>33</sup> and New Brunswick’s *Limitation of Actions Act*. The defendants argued that the claim was subject to federal law and that the action was time-barred as it had been commenced beyond the two-year limitation period. At trial, the judge found that Article 16(1) of the Athens Convention embodied by federal law in the Marine Liability Act, applied. Citing the most recent Supreme Court of Canada decision in maritime and navigation, *Isen v. Simms*, the judge reaffirmed the exclusive jurisdiction of federal law over maritime and navigation cases as opposed to other local concerns involving property and civil rights, not so integrally related to maritime matters and within provincial powers. On the facts, the judge concluded that the action was, in pith and substance, related to maritime matters due to the plaintiff’s right “*as a passenger to move to and from the washroom of a vessel at sea in the course of navigation and the safe stowage aboard of items*”. While the plaintiff’s action was commenced more than two years after the incident, it was filed within three years as referred to in Article 16(3) of the Convention. Relying on Article 16(3) on the premise that it was the legislative successor of s. 572 of the now repealed *Canada Shipping Act*<sup>34</sup>, the trial judge extended the two-year limit so as to benefit the plaintiff. The defendants appealed.

*Decision:* Appeal allowed.

*Held:* The New Brunswick Court of Appeal had to address two issues. First, whether federal law, by virtue of s. 37 of the *Marine Liability Act*, and which gives force of law in Canada to Article 16(1) of the *Athens Convention*, governed the present situation. And second, if federal law did apply, whether the judge could, at his own discretion, extend the limitation period. On the first point, the Court concurred with all of the trial judge’s above arguments on the exclusive applicability of Canadian maritime law in the present case but came to the opposite conclusion concerning the second point, namely that the judge lacked the authority to extend the limitation in order to benefit the respondent. As the result, the action was deemed time-barred.

### ***Maritima de Ecologia, S.A. de C.V. v. “Maersk Defender” (The)***<sup>35</sup>

*Sale of ship – repudiation of contract – in rem and in personam proceedings – arrest of ship – interim security for costs - parallel arbitration proceedings*

A dispute arose between the appellant, Maritima de Ecologia, and one of the respondents, Secunda Marine Services Ltd., over the sale of the vessel “Maersk Defender”. The respondent company had initially entered into a binding contract pursuant to which it, or one of its subsidiaries, was to purchase the “Maersk Defender” in order to charter the

<sup>31</sup> S.C. 2001, c. 6.

<sup>32</sup> *Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974*

<sup>33</sup> (U.K.), 30 & 31 Vict., c. 3

<sup>34</sup> R.S.C. 1985, c. S-9

<sup>35</sup> 2007 FCA 194, 366 N.R. 162 (FCA: A. Desjardins J.A., M. Nadon J.A., M. Noël J.A.)

vessel specifically to the appellant for a fixed period. The appellant entered into a charter party with Atlantic, for the ship to be delivered to the appellants. Shortly after, however, Atlantic obtained information which led it believe that the Mexican authorities would not issue a navigation permit to the Maersk Defender for a period over two years. This prompted Atlantic and the respondent company, to frustrate the contract on the basis of *force majeure*. Instead, the vessel was bought by yet another respondent, I.S. Pacific Corporation. As a result, the appellant invoked the London Arbitration clause of the charter party and delivered notice to Atlantic of its intention to arbitrate, and calling upon Atlantic to appoint an arbitrator within 14 days. Before that date, however, the appellant commenced two actions before the Federal Court against the owners and all those interested in the ship in order to obtain interim security for costs, specific performance of the charter party and delivery of the vessel. The vessel was arrested in Vancouver. The respondents filed motions in both actions seeking the dismissal of the *in rem* portion of the Statement of Claims, the release from arrest of the ship and the dismissal of the *in personam* portion of the Statement of Claims. The judge concluded that, with respect to the *in rem* proceedings, the Federal Court could not exercise its jurisdiction against the ship because the requirements of s.43 (3) of the *Federal Courts Act*<sup>36</sup> had not been satisfied and that the vessel was not “the subject of the action” as required by s. 43(2)<sup>37</sup>. Consequently, the judge struck the *in rem* proceedings and ordered the release from arrest of the ship. As for the *in personam* proceedings in both actions, the trial judge stayed them on the basis of s. 50 of the *Federal Courts Act* and the London Arbitration clause. The appellant subsequently appealed on both the *in rem* and *in personam* proceedings of the judge’s order. The cross-appellants for their part, the respondents Secunda and Pacific, challenged only the *in personam* portion of the judge’s order. By the time the case reached the Federal Court of Appeal, the appellant no longer sought specific performance of the charter party but solely damages against Atlantic.

*Decision:* Appeal dismissed and cross-appeal allowed.

*Held:* Relying on the recent Supreme Court of Canada decision in the *M/V Swift Fortune*<sup>38</sup>, the Federal Court of Appeal determined that the vessel was, in fact, the subject of the action, but found that the appellant was not entitled to commence *in rem* proceedings against the vessel and obtain its arrest on the basis of the exception clause contained in s. 43(3), which stipulates that the Court’s *in rem* jurisdiction can only be exercised when it is demonstrated that the beneficial owner of the vessel was the same at the time the cause of action arose and when the action was commenced. Moreover, the Court’s *in rem* jurisdiction could only be exercised against a ship where the owner’s *in personam* liability was engaged beforehand. Finally, the Court highlighted that the only claim asserted by the appellants was in London arbitration against Atlantic and in respect of which they had commenced actions in the Federal Court to obtain interim protection. Atlantic had never been the owner of the vessel because the ownership had been transferred directly from the original owner to Pacific. For these reasons, the Court

---

<sup>36</sup> R.S.C. 1985, c. F-7

<sup>37</sup> See the Federal Court of Canada’s decision in *Paramount Enterprises International Inc. v. “An Xin Jiang” (The)*, [2000] F.C.J. No. 2066 (Fed. C.A.). Since then, *Paramount* has been overturned by the Supreme Court of Canada in its recent decision of *M/V Swift Fortune* 2007 SCC 13, holding that identifiability of property was determinative of *in rem* proceedings.

<sup>38</sup> *M/V Swift Fortune* 2007 SCC 13, *Supra*

dismissed the appeal. On the issue of *in personam* proceedings the Court allowed the respondents' cross-appeal, holding that the appellants were not entitled to interim relief in order to support a foreign arbitration against third parties and dismissing outright the *in personam* proceedings against Secunda and Pacific.

## LEGISLATION

### **C-42 An Act to amend the Quarantine Act (Quarantine Act 2006), Statutes of Canada, c. 27<sup>39</sup>**

On 22 June 2007, an amendment to the Quarantine Act received Royal assent and entered into force, thus completing the modernization of existing legislation which dates back to 1872 in respect to urgent responses to the spread of communicable diseases in Canada and abroad. The amendment in section 34 applies to watercraft and aircraft used to carry persons or cargo and requires conveyance operators to report their suspicions of communicable diseases onboard these crafts directly to quarantine officers as soon as possible before the conveyance arrives in Canada. The Act in itself provides precious new tools to deal with outbreaks such as the ability to divert aircraft, designate facilities anywhere in Canada, and prevent entry into Canada of travelers who represent an imminent and severe risk to public health. More specifically, the Act creates Environmental Health Officers and Screening Officers to assist Quarantine Officers in the screening, assessment and detention of people, transport vessels, goods and cargoes coming in and out of Canada and who represent a public health risk.

### **An Act respecting shipping and navigation and to amend the Shipping Conferences Exemption Act, 1987 and other Acts (Canada Shipping Act, 2001), Statutes of Canada c. 26<sup>40</sup>**

The Canada Shipping Act 2001 (CSA 2001) received Royal Assent on 1 November 2001, but only came into force 1 July 2007 owing to a long regulatory reform process, thus repealing the old Canada Shipping Act. The aim of the CSA 2001 is to promote safety and economic performance of the Canadian maritime industry as well as to ensure the safety of users, crews, passengers and vessels, and to protect the marine environment from damage arising from navigation and shipping activities.

## LAW REFORM

### **C-23 An Act to amend the Canada Marine Act, the Canada Transportation Act, the Pilotage Act and other Acts in consequence**

---

<sup>39</sup> Formerly Bill C-42

<sup>40</sup> Formerly Bill C-14

On 16 November 2007, amendments to the Canada Marine Act were introduced in first reading and a Committee Report was submitted on 11 February 2008. These amendments will strengthen the operating framework for Canada Port Authorities (CPAs) by modifying the current borrowing regime, providing for access to contribution funding, and clarifying some aspects of governance. The amendments would also include provisions regarding amalgamation of CPAs and introduce new provisions to make the enforcement of minor violations easier to manage.

#### **C-4 An Act to Amend the Pilotage Act**

Marine pilotage is an important element of safe marine navigation in Canada. The original Pilotage Act requires the four pilotage authorities to be financially self-sustaining. The purpose is to operate and administer, in the interest of safety, an efficient pilotage service in their respective regions. The Act governs how pilotage authorities hire and license pilots, either as employees or through service contracts with pilot corporations (whose purpose is to provide pilot services to pilotage authorities), and imposes a regulatory review process additional to the government's standard process, all of which can impinge upon an authority's financial sustainability. The proposed amendments which were introduced in first reading on October 26, 2007 would help to further ensure the financial self-sufficiency of these pilotage authorities while maintaining high levels of safety and enable them to hire both employee pilots and contracted corporate pilots with a pilot corporation for provision of pilots, simultaneously. Finally, the amendments address the conduct of investigations with respect to objections concerning regulatory amendments governing the qualification of pilots or compulsory pilotage areas.

#### **C-32 An Act respecting the sustainable development of Canada's seacoast and inland fisheries (Fisheries Act 2007)**

Bill C-32, was introduced in first reading on 29 November 2007 and set itself to overhaul the ageing 1868 Fisheries Act. The *Fisheries Act* primarily deals with the proper management and control of fisheries, the conservation and protection of fish, the protection of fish habitat and the prevention of pollution. The law reform would modernize fisheries management and conservation measures that protect aquatic ecosystems to ensure long-term sustainability of Canadian communities that depend on fishing such as commercial, aboriginal or recreational fishers. In particular, the bill enables the Minister of Fisheries and Oceans to enter into a variety of legally binding Management Fisheries Agreements with various resource users, thus increasing their role in the management of coastal fisheries (shared stewardship). This latest bill replaces Bill C-45 which died on Order of Paper with Prorogation of Parliament on 14 September 2007 and requires the government to take into account all the various stakeholders as well as the conservation of fishing resources in licensing and allocation decisions. Important new provisions include the creation of the Canada Fisheries Tribunal.

## **INTERNATIONAL TREATIES**

Canada will ratify shortly the Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims of 1976 signed by Canada. Legislation to implement the protocol has been in force since 1998 and is now included in the Marine Liability Act 2001, c. 6, Part 3, but with Canadian amendments and limits. Under the new policy on treaties in Parliament, two additional conventions are now tabled. As they are not controversial, legislation to bring them into effect will likely be introduced by May 2008. Following the passage of the legislation, Canada will ratify the International Convention on Civil Liability for Bunker Oil Pollution Damage of 2001, and will accede to the Protocol of 2003 establishing an International Oil Pollution Compensation Supplementary Fund, and whose purpose it is to supplement compensation available under the 1992 Civil Liability and Fund Conventions.

March 31, 2008

WT: Summary of Canadian Legislation and Decisions 2006-2007