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MARI-TIMES NEWSLETTER
Canadian Maritime Law from Coast-to-Coast

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WORLD-CLASS TANKER SAFETY SYSTEM

The Tanker Safety Expert Panel (the "Panel") concluded Phase II of their review, which focused on spill preparedness and response requirements for the Arctic as well as hazardous and noxious substances ("HNS") nationally. Although the Phase II report has not been released by the Panel, Transport Canada published a synopsis of the key issues explored, and provided information on stakeholders, sites visited, and submissions received.

The Panel's review of spill preparedness and response requirements for the Arctic involved considering waters north of 60° north latitude including the Mackenzie River and Delta, as well as Great Slave Lake, Hudson Bay, James Bay, and Ungava Bay. The review did not consider preparedness and response to spills that may result from oil and gas exploration or drilling. Many of the questions posed by the Panel attempted to isolate issues specific to the Artic and its unique environment that make it difficult to effectively prepare for and respond to spills. The Panel's questions fell into one of the following six Lines of Inquiry: the arctic environment, prevention, existing response capacities, preparedness and response, roles, responsibilities and legal framework and research and development. It was noted that Lines of Inquiry did not limit the breadth of the discussions, but merely provided a general framework when speaking with stakeholders.

Since Canada has signalled its intent to ratify the 2010 HNS Convention, which outlines a comprehensive liability and compensation scheme, the Panel's review of hazardous and noxious substances focused on preparedness and response for ship-source HNS incidents. Vegetable and animal oils, liquefied natural gas and liquefied petroleum gas, among many other substances were deemed HNS for the purpose of the Panel's review. As a result of the International Maritime Organization's adoption of the Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances, 2000 (OPRC-HNS Protocol), it was noted the Panel's review will likely influence the Government's decision regarding accession to the OPRC-HNS Protocol. As a result, many of the questions asked by the Panel contained reference to a potential national Ship-source HNS Incident Preparedness and Response regime. The Panel employed the following Lines of Inquiry: coverage, prevention, existing response capabilities, preparedness and response, roles, responsibilities and legal framework and research and development.

IN THIS ISSUE

ENFORCEMENT UPDATE: ASIAN GYPSY MOTH PROTECTION POLICY

In August 2014, the Canadian Food Inspection Agency (CFIA) and the United States Department of Agriculture (USDA) together issued a joint bulletin that confirms a harmonized approach to suppression of Asian Gypsy Moth ("AGM") in North America. In Canada, commencing on January 1, 2015, any vessel that enters Canada without the required documentation will incur an automatic penalty. Specifically, non-compliant vessels will be issued an administrative warning under section 7 of the *Agriculture and Agri-Food Administrative Monetary Penalty Act*, SC 1995, c-40 ("AMP Act") and may be subject to further regulatory action under the AMP Act or the *Plant Protection Act*, SC 1990, c-22 ("PPA").

The bulletin does not make any substantive changes to the *Plant Protection Policy for Marine Vessels Arriving in Canada from Areas Regulated for Asian Gypsy Moths*, D-95-03 (the "Policy") but reminds shipping lines and agents of the potentially serious (and now automatic) consequences of non-compliance. It also reiterates that certification and reporting requirements are mandatory during the relevant AGM risk period.

ENVIRONMENTAL IMPACT OF ASIAN GYPSY MOTHS

AGM are prevalent in temperate and subtropical parts of the world, including China, Korea, and Japan. They have no known predators in Canada. AGM are known to proliferate quickly in cold climates and defoliate a wide range of plant and tree species, putting forestry, horticulture, and agricultural industries at significant risk. As a result of the environmental risks of transmission, AGM has been deemed a "pest" under the PPA. Consequently, the admission into Canada of anything (including vessels) that contains AGM is prohibited under section 7 of the PPA.

Ships are at particular risk for infestation because AGM are nocturnal and are attracted to the lights aboard vessels and in port areas. Once eggs are laid on a vessel or ship's cargo, they can easily survive an ocean crossing and are tolerant of extremes of both temperature and moisture.

When an infested vessel enters Canada, AGM can be discharged along with the cargo or dispersed onto surrounding vegetation through a process called "ballooning", through which larvae can travel long distances on air currents. This makes eradication difficult, and past incursions in Canada and the United States have necessitated costly and intensive eradication efforts.

VESSEL ENTRY REQUIREMENTS UNDER THE POLICY

The Policy applies to any marine vessel entering Canada during the risk period that has called on a port in a regulated area during the last two years. The risk period in Western Canada runs from March 1 to September 15 of each year. Thus far in 2014, 15 vessels have been found with AGM, with the majority of occurrences taking place on the West Coast. The regulated area is comprised of all ports in China north of Shanghai, all ports in North and South Korea, various ports throughout Japan, and ports in far-East Russia.

The Policy requires all regulated vessels to obtain a certificate declaring them to be free of AGM, and to notify and provide the CFIA with certain documents four days prior to arrival in Canadian waters. Certification and travel records are not required for ships entering Canada outside the risk period but vessels will still be subject to inspection and will be considered non-compliant if AGM life forms (larvae, pupae, or adults) are

discovered. Likewise, vessels that have not called at a regulated port remain subject to inspection and will be found non-compliant if infested with AGM.

Certification

Regulated vessels must obtain a phytosanitary certificate or other recognized certification prior to departure from their final port of call in a regulated area during the risk period. To satisfy the Policy, the certificate must state that the vessel was inspected and found free of AGM and must be available for review upon request. In Russia, Korea, and China, only a single certification agency may undertake the inspection, making it crucial for shipping lines to plan ahead to prevent delays.

Certification should take place as close to the vessel's departure date as possible, as the risk of re-infestation is high when inspections are conducted too early. This is a particularly important precaution given that certified vessels that are found to be infested with AGM are considered non-compliant, and are subject to expulsion from Canadian waters and administrative fines.

A failure to obtain certification will render a vessel non-compliant and will lead to mandatory inspection at a designated offshore site. Only if an inspector is satisfied that the vessel is free from AGM will it then be allowed to proceed to a Canadian port. If the vessel is permitted entry, it must depart promptly after unloading, and its movements will be monitored by the CFIA.

If a vessel arrives in Canada without appropriate certification a second time, it may be refused entry for up to two years during the risk period.

Reporting

The Policy mandates that during the risk period, a regulated vessel (or its agent) must provide the CFIA with ninety-six hours advance notice of the vessel's arrival and must supply a summary of the ports that the vessel has called on in the past two years. Only upon the master of a vessel receiving CFIA confirmation of receipt of the appropriate documents may the vessel enter Canadian waters.

Inspection

All vessels, regardless of certification, port of call history, or time of year, are subject to inspection for AGM and are responsible for paying the associated regulatory fees.[1] Vessels traveling from Japan and certain ports in Siberia and those that have been infested with AGM in the past are considered "high-risk" and are more likely to be inspected.

If AGM life forms are discovered, the CFIA has the discretion to permit the vessel to conduct a thorough cleaning in international waters or ten kilometres from shore, then return for re-inspection. If the inspector is satisfied that the risk of AGM transmission has been sufficiently mitigated, the ship may proceed to port, but will be monitored by the CFIA for the duration of its stay in Canada. If the inspector determines that the risk of AGM persists, the vessel will be ordered out of Canada and refused entry during the remainder of the risk period or until the Policy requirements are fulfilled.

In recognition of the harmonization of American and Canadian policies regarding AGM, vessels that hold valid certification and have been inspected in the United States following their departure from the regulated area are exempt from inspection in Canada, provided they produce confirmation from American authorities that the vessel is free from AGM.

The CFIA recommends that in addition to compliance with the certification and reporting requirements, vessels conduct a thorough self-inspection prior to arrival. Given the economic consequences associated with delays and the substantial risk of re-infestation, it is of utmost importance that crews, vessel masters, and shipping lines consider implementing this strategy.

CONSEQUENCES OF NON-COMPLIANCE

Any vessel that is found to be non-compliant is subject to administrative penalties under the AMP Act as well as prosecution under the PPA. While the CFIA retains discretion to impose penalties, it has signalled that fines will be more likely when a vessel is non-compliant due to failure to abide by pre-arrival requirements of the Policy.

Available penalties under the AMP Act range from administrative warnings pursuant to section 7 to $10,000 fines pursuant to section 5 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, SOR/2000-187. Increased fines may be imposed for repeated offences, intent or negligence, or in regards to potential harm. As of January 2014, administrative warnings will be automatically issued by the Canadian Border Services Agency to all non-compliant vessels. If prosecution is commenced under section 48 the

[1] The CFIA has the power to determine the frequency and location of inspections, but provides vessels with advance notice. The frequency of inspections should be expected to remain high in 2014, due to the CFIA's notice regarding the prevalence of AGM this year.

PPA, financial penalties are more severe, ranging from $50,000 under summary conviction to $250,000 for indictable offences.

In addition to these direct financial consequences of non-compliance, the CFIA has cautioned that rerouting and inspections can cause significant delays in cargo unloading, routine clearance and shipping schedules, which may result in substantial economic losses to shipping lines.

CONCLUSION

The bulletin issued by the USDA and the CFIA reaffirms the commitment of both agencies to the suppression of AGM in North America and strengthens the enforcement component of the Canadian regime. In order to avoid monetary penalties and costly delays, shipping lines should ensure that the certification and reporting requirements are strictly followed, and that self-inspections are performed prior to arrival in Canada to mitigate the risk of non-compliance.

KEY LEGISLATIVE UPDATES

Bill C-22

Bill C-22, the *Energy Safety and Security Act*, modifies the civil liability regimes in the offshore oil and gas and nuclear energy industries. Bill C-22 brings about a number of notable changes to offshore legislation including explicitly adding the "polluter pays" principle, and raising the financial capacity requirements for drilling, production and development to $1 billion. Furthermore, the amendments proposed by the bill would increase absolute liability for oil and gas companies operating in the Atlantic offshore from $30 million to $1 billion and in the Arctic from $40 million to $1 billion. In an effort to efficiently and effectively address problems, Bill C-22 provides regulators access to funds for each project to assist with managing any issues that may arise. Lastly, spill treating agents, including chemical dispersants, are permitted under the bill, when the agents would achieve a net environmental benefit.

The House of Commons debated Bill C-22 at Third Reading on September 15th, 2014, and November 7th, 2014. During the debates, the NDP criticized the bill for failing to uphold the "polluter pays" principle in the nuclear part of the bill, as well as failing to create an inclusive consultation process for projects. Furthermore, the NDP noted that the bill would reduce the minister's accountability by permitting the minister to be subject to lobbying.

Nevertheless, Bill C-22 passed Third Reading in the House of Commons and was transferred to the Senate. After completing First Reading on November 18th, 2014, Bill C-22 is currently undergoing debates at Second Reading in the Senate.

Bill C-3

Bill C-3 is a comprehensive bill, entitled *Safeguarding Canada's Seas and Skies Act*, that seeks to amend various legislation related to both maritime and aviation law. Part 4 of Bill C-3 modifies the *Marine Liability Act* (the "MLA") and makes Canada a State Party to the 2010 HNS Convention. A number of notable amendments to the MLA proposed by Bill C-3 are highlighted below:

- The Admiralty Court is given jurisdiction for disputes regarding compensation by a ship owner for HNS damage under the HNS convention;
- All ships are required to hold a certificate confirming insurance for pollution caused by a HNS incident;
- The HNS Fund created by the 2010 HNS Convention is given the status of a natural person and the Administrator is appointed representative of the HNS Fund in Canada; and
- The Ship-source Oil Pollution Fund assumes liability for damage caused by a ship-source oil spill, and will provide compensation for damages caused by oil pollution from a ship owner under the 2010 HNS Convention.

Part 5 of Bill C-3 amends the *Canada Shipping Act* (the "CSA"). Noteworthy amendments to the CSA provided by Bill C-3 are summarized below:

- Marine safety inspectors are given authority to carry out inspections regarding pollution prevention;
- Operators of oil handling facilities are required to submit to the Minister oil pollution prevention and emergency plans that satisfy the requirements of the regulations;
- Minister is given authority to direct oil handling facilities to update their oil spill prevention or emergency plans and take measures to remedy, minimize or prevent pollution damage; and
- Justices of the peace are given authority to issue warrants for marine safety inspectors to legally enter living quarters after consideration is given to how necessary the entrance is and whether entry is likely to be refused.

Bill C-3 completed Second Reading in the Senate on October 8th, 2014, and has been passed to the Standing Senate Committee on Transport and Communications for their report. During Second Reading debates, it was noted that despite the bill's various positive attributes, it does fail to address issues such as the capacity of spill responders to effectively respond to spills and funding for sufficient and thorough inspections.

Regulations Amending the *Martine Transportation Security Regulations*

The *Marine Transportation Security Regulations* were amended on June 19th, 2014, with a number of significant changes. The amendments were brought about to respond to Canada's international obligations, alter Canada's regulatory regime to correspond with that of the United States, reduce the regulatory and compliance burden imposed by the regime, and address gaps and inconsistencies. Specifically, the amendments include:

- Adding new suspension and cancellation provisions regarding marine security documents issued to marine facility operators and port administrations;
- Requiring the master of a vessel to submit specific pre-arrival information reporting data prior to entering Canadian waters;
- Allowing Canadian-flagged vessels, while on domestic voyages, to interface with non-regulated ports and facilities;
- In response to change to the International Convention on Standards of Training, Certification and Watchkeeping for seafarers, adding obligations that all seafarers, including those without security responsibilities, be properly trained and educated and hold a certificate of proficiency;
- Expanding the definition of "Certain Dangerous Cargoes" to be aligned with that of the United States;
- Expanding the flexibility for Canada to enter into alternative security arrangements with other countries when it is agreed that the requirements of the International Ship and Port Facility Security Code are too onerous for that specific region;
- Addressing interpretation issues that were raised during consultation with both Government and industry stakeholders such as ensuring all definitions are located within the Interpretation section of the regulations; and
- Addressing regulatory gaps which align the marine security regulatory framework with international requirements and security practices currently implemented by industry stakeholders.

MARITIME LAW – KEY JUDGMENTS – 2014

2014 has seen the usual variety of important Canadian maritime law decisions. The following is a sampling of those of greater significance that have arisen in various areas of admiralty practice.

Peracomo v. Telus Communication, 2014 SCC 29

In a much awaited decision, the Supreme Court of Canada examined the standard of fault constituting conduct barring limitation under Article 4 of the *Convention on Limitation of Liability for Maritime Claims, 1976* ("Limitation Convention") and whether the same behavior constitutes wilful misconduct voiding insurance coverage under the *Marine Insurance Act*.

Mr. Vallée is a crab fisherman from the lower St-Lawrence River. A fibre-optic submarine cable became entangled with his fishing gear. He raised the cable to the deck of his ship and proceeded to cut the cable with a chain saw. He was under the mistaken belief that the fibre-optic cable was not in use. That belief was based on a handwritten note on some sort of map that he had briefly seen in a museum. The marine charts of the area indicated the presence of a live cable. The result was $1 million of damage. As the trial judge put it, Mr. Vallée was a good man who did a very stupid thing.

The *Marine Liability Act* gives force of law in Canada to the Limitation Convention. It also provides that the limitation of liability of ships with less than 300 gross tonnage, such as this fishing boat, is of CAD $500,000.

The cable owner argued that the fisherman was not entitled to limit his liability. Intentionally cutting the submarine cable constituted conduct barring limitation under Article 4 of the Limitation Convention as it was done recklessly with knowledge that the loss would probably result. To compound Mr. Vallée's problems, his insurers claimed that the same behavior also constituted willful misconduct which voids the insurer's obligation to indemnify. Both issues turned on the fisherman's degree of fault.

All the Justices agreed that the behaviour in question did not meet the threshold of conduct barring limitation under the Limitation Convention. It was insufficient that the person liable intended to perform the act, namely cutting the cable. Rather, in order to break limitation, it must be proven that the person intended to cause the loss that actually resulted or had knowledge that the loss would probably occur, namely stopping fiber-optic traffic.

The Court examined a number of decisions interpreting the Limitation Convention, including the "Leerort", as well as the Warsaw Convention on carriage by air which inspired Article 4. The Court pointed out that Article 4 focuses on an intention to cause the loss while the right to limit under the Convention relates more generally to the claim. The limitation is expressed in broad and generic terms, while the intention required to break the limitation relates to specific consequences of the conduct of the person liable.

The fisherman held the sincere, though mistaken, belief that the cable was useless. Although that belief was based on inadequate information, in cutting the cable, he did not intend to cause a loss, nor did he know the probable consequences of his actions.

On the other hand, the majority of the Court held that the standard under section 53 of the *Marine Insurance Act* of "willful misconduct" was a lower benchmark. A clear distinction was drawn between the purpose and text of Article 4 of the Limitation Convention and section 53 of the *Marine Insurance Act*. The standard of fault is not the same.

The fisherman clearly had a duty to be aware of the cable and he failed miserably in that regard. His acts were so far outside the range of conduct to be expected in the circumstances as to constitute misconduct. The issue was whether that misconduct was wilful.

For the majority of the Court, willful misconduct includes not only intentional wrongdoing but also conduct exhibiting reckless indifference in the face of a duty to know. The fisherman's misconduct was willful in that he knew he was cutting the submarine cable. It is not necessary that he should have known that the harm would result. It is sufficient that he ran an

unreasonable risk with subjective knowledge of that risk and indifference as to the consequences. To hold otherwise is to "conflate recklessness with intention". As the Court put it, those "who take unreasonable risks of which they are subjectively aware often wrongly believe that the risk which they decide to take will not result in harm". That is the essence of recklessness.

For insurance purposes, the fact that the fisherman believed that the cable was not in use is beside the point. He knew that he was cutting a submarine cable. He adverted to the risk that it could be in use but failed to make further inquiries in order to confirm or dispel his belief that the cable was abandoned. Willful misconduct does not require either intention to cause a loss or subjective knowledge that the loss would probably occur.

One of the Justices of the Supreme Court dissented on the issue of willful misconduct. Justice Wagner focused on the word "willful". In his view, the fact that a reasonable person ought to have known or that a person had a duty to know, does not suffice to characterize the misconduct as willful. It is also necessary to establish that the person intended to cause a loss, or to prove gross negligence or misconduct in which there is a very marked departure from the conduct of a reasonable person.

The decision reaffirms the almost unbreakable nature of the limitations under the Limitation Convention while distinguishing between conduct barring limitation and willful misconduct in a marine insurance context.

Even if the behaviour of an insured is not so egregious as to meet the fault standard of Article 4 of the Limitation Convention, it may nevertheless constitute willful misconduct allowing the insurer to deny coverage. Conversely, this decision may cause concern to ship owners who, much like this fisherman, may find themselves able to limit liability but unable to look to their insurers to constitute that limitation fund.

Westshore Terminals Limited v. Leo Ocean S.A. (The Cape Apricot), 2014 FC 132; 2014 FC 136; 2014 FCA 231

In this case, the defendant Capt. McDonald, a pilot with the Pacific Pilotage Authority, was piloting the defendant ship in a compulsory pilotage area along the British Columbia coast on Dec. 7, 2012, when the vessel struck a causeway belonging to plaintiff Westshore Terminals Limited ("Westshore"), causing extensive damage.

Immediately following the collision, Westshore commenced an action in the Federal Court seeking damages in excess of $60 million and arrested the defendant vessel. Counsel for the plaintiff and the defendant shipowner entered into negotiations for the release of the vessel from arrest. Initially, the shipowner offered to provide a Letter of Undertaking ("LOU") in the amount of US$24 million as security in exchange for the release of the vessel from arrest. Westshore's counsel questioned the availability of sister ships in the name of the vessel to increase the security to $100 million. The shipowner advised the plaintiff that the basis for the arrest of sister ships was weak and that those ships were likely mortgaged to their value. It further refused consent to move the vessel from Westshore's Berth until the issue of security was settled.

The plaintiff's counsel ultimately accepted a LOU for US$26 million, which contained a provision that Westshore would refrain from arresting any sister ships.

In the motion for a preliminary determination of points of law (2014 FC 132), the shipowner alleged that Capt. McDonald was no longer a "licensed pilot" on the date of the incident, because his certificate of competency had expired and had not yet been renewed as of that date, and that he was therefore not entitled to benefit from the $1,000 limitation of liability of licensed pilots under subsection 40(1) the *Pilotage Act*. In contending that Capt. McDonald was not a "licensed pilot" on Dec. 7, 2012, the shipowner sought to benefit from the common law defence of compulsory pilotage, thereby avoiding liability for the damage to the causeway caused by its vessel. The shipowner sought preliminary determinations on these questions of law under Rule 220 of the *Federal Courts Rules*.

Heneghan J. agreed that the modern approach to statutory interpretation required that ambiguities in drafting be resolved by reference, not only to the ordinary meaning of the statutory language concerned, but also by considering the context and purpose of the enactment in question. She found, however, that there was no ambiguity in this case, so that application of this "purposive method" of construction was unnecessary, the ordinary meaning of the statutory terms being sufficient to decide the issues.

Following an extensive analysis of the relevant provisions of the *Pilotage Act*, the *General Pilotage Regulations* and the *Pacific Pilotage Regulations*, Justice Heneghan found that Capt. McDonald continued to be a "licensed pilot" within the meaning of the *Pilotage Act* on Dec. 7, 2012, notwithstanding the fact that his competency certificate had not yet been renewed as of that date. His medical certificate was valid and in force as at that time, and he also held a Master 500 Gross Tonnage, Near Coastal certificate of competency issued in 1994, which was a prerequisite for the issuance to him of his pilot's license from the Pacific Pilotage Authority. As the regulations required, Capt. McDonald had also completed, as of the date of the incident, a course in simulated electronic navigation, level 2, and a course in Automated Radar Piloting Aids.

As provided by subsection 22(4) of the *Pilotage Act*, Capt. McDonald's pilot's license remained in force as long as he was "able to meet the qualifications prescribed by the regulations for a holder of that class of licence", there being no "temporal limit" on the validity of the licence once issued. Nothing in the Act or regulations indicated that a pilot was no longer able to meet the necessary qualification for a licence upon the expiration of his certificate of competency. The purpose of the licensing (ensuring the safety of navigation in compulsory pilotage areas) was met by establishing standards of expertise and monitoring the physical and mental fitness of pilots. The health and training certification requirements of the regulations therefore applied to both "applicants" for and "holders" of pilot's licences. The same did not apply, however, to certificates of competency of "holders" of such licences, and extending to those documents the requirement that they be valid at any or all times would require reading words into the statute and the regulations. Accordingly, Capt. McDonald, having still been a "licensed pilot" on the date of the collision in question, was entitled to the $1,000 liability limitation of the *Pilotage Act* with respect to the damages done to the causeway in question by the ship he was then piloting.

Heneghan J. further explained the old common law defence of compulsory pilotage, which exempted shipowners from responsibility for damages caused by their vessels when those ships were under the control of pilots in compulsory pilotage areas, provided that the damages were caused solely by the pilot's negligence. Heneghan J. noted that that common law defence had been abolished in Canada by section 41 of the *Pilotage Act*, in cases where the ship concerned was under the control of a "licensed pilot", such as Capt. McDonald in this case. The defence was therefore unavailable to the shipowner in this case.

Accordingly, the shipowner's motion for determination of points of law was dismissed.

In a second motion before the Federal Court (2014 FC 136), Westshore claimed that their "agreement" to accept the original LOU was not binding upon them because it was based on mistake and coercion. As such, they are able to arrest multiple sister ships to obtain the security amount for the total value of the claim. Westshore submitted that there was a common mistake regarding the ability to arrest multiple sister ships and that they were subject to economic duress in agreeing to accept the LOU.

The Federal Court was tasked with answering whether there was a binding agreement in place, under which Westshore agreed to waive its rights to arrest sister ships, and whether subsection 43(8) of the *Federal Courts Act*, a plaintiff can arrest an offending ship and a sister ship.

Heneghan J. dismissed Westshore's motion, holding that there was a binding agreement in place between the plaintiff and the shipowners, whereby Westshore agreed to waive its rights to arrest sister ships of the vessel. Further, Heneghan J. concluded that no, pursuant to subsection 43(8) of the *Federal Courts Act*, a plaintiff cannot arrest both an offending ship and a sister ship.

In her reasons, Heneghan J. stated that a contract can be avoided by factors including mistake or duress. The plaintiffs alleged the mistake that would avoid the agreement was the mistaken advice of the defendant's counsel that the right to arrest the sister ships was weak, and the plaintiff's mistaken reliance

on this advice. Heneghan J. concluded that the defendant's counsel has a primary duty to his client, not to the plaintiff, and that the plaintiff's counsel's lack of experience and expertise in maritime law was not an excuse for relying on the mistake.

The second mistake alleged by the plaintiff, that the shipowner's counsel advised them that the limit of the security was the value of the vessel, was also rejected by Heneghan J. Relying on the decision of *Norcan Electrical Systems Inc. v. F.B. XIX (The)* (2003), 235 F.T.R. 237, she found that this was not a mistake, as the general rule is that a plaintiff is entitled to bail in an amount sufficient to cover his or her reasonably arguable best case, limited by the value of the wrongdoing vessel.

With regards to the arguments of duress, Heneghan J. also found them ill founded. To find duress, a plaintiff must establish the pressure must amount to coercion of the will; the pressure must be illegitimate; and, the party seeking relief must have taken steps to avoid the act complained of. In this case, the "pressure" was the shipowner's refusal to allow the vessel to be moved before security was in place, but this did not amount to coercion of the will. Further, this pressure was legitimate.

Finally, with respect to the availability of multiple sister ship arrests, Heneghan J. found that subsection 43(8) of the *Federal Courts Act* does not allow for multiple arrests. The singular "ship" stated in the provisions suggests a singular meaning. There was no evidence that Parliament intended to provide a right to multiple arrests in the domestic domain, and the Court was not prepared to find that Parliament intended to introduce a radical change in the matter of multiple arrests, without a clear expression of that indication.

The appeal of this decision was dismissed at the Federal Court of Appeal (2014 FCA 231). In the reasons for judgment, the Court held that Heneghan J. made no error with regards to the LOU being binding and they agreed with her reasoning. In dismissing the appeal, the court concluded that the right to arrest a ship is a procedural device. It should not be used to allow claimants to obtain security that exceeds the value of the offending ship, or the value of the sister ship arrested in lieu of the offending ship.

Brookfield Multiplex Ltd v. Owners Corporation Strata Plan 61288, [2014] HCA 36

In this Australian case, which will arguably apply to marine cases, the Australia High Court overruled the Supreme Court of Canada Winnipeg Condominium decision, and denied recovery for pure economic loss arising from defective goods.

The facts of the case before the Australia High Court involved a strata property built by Brookfield. Brookfield made contractual representations to the owner of the land on which the building was built, who in turn made contractual representations to the future tenants of the strata property. The strata corporation later sued Brookfield for the cost of rectifying alleged defects in the construction of the building.

The Australia High Court expressly rejected La Forest J.'s *obiter* comment about recovery for pure economic loss arising from defective goods in the Supreme Court of Canada decision *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85 ["Winnipeg Condominium"]. In Winnipeg Condominium, the Supreme Court of Canada held that losses are recoverable where it is reasonably foreseeable that subsequent purchasers of a building might suffer personal injury or damage to property due to negligent construction, and these losses include pure economic losses in the form of costs of repair.

The Australia High Court preferred UK case law which has generally denied recovery for pure economic loss arising out of defective goods. After concluding that the Winnipeg Condominium approach has not been followed in Australia, the Australia High Court held at paragraph 161:

> The approach in Winnipeg Condominium is attended by the practical difficulty that "the existence of the duty will not be known until after the defects have occurred and they can be confidently categorised as dangerous" (*Fangrove Pty Ltd v Tod Group Holdings Pty Ltd* [1999] 2 Qd R 236 at 248). More importantly, in point of principle the approach in Winnipeg Condominium is driven by the assumption that the cost of repair or diminution in market value of a building is a reflex of the liability for physical damage to person or property which may occur if the defect is not repaired. Quite apart from

> the haphazard nature of this notion of equivalence of damage, this approach is flawed in that it detaches the duty not to inflict harm from the harm which is the gist of the cause of action.

The La Forest J. *obiter* in Winnipeg Condominium may now be seen as incorrect at least insofar as it leaves open the possibility of recovery for non-dangerous defects. It is possible that even the availability of recovery for economic loss caused by dangerous goods may soon be overturned.

AK Steel Corporation v. Acelormittal Canada Inc., 2014 FC 118

As always, the real cause of cargo damage must often be determined in order to assign the liability to the correct party in resulting litigation. Harrington J.'s judgment in the following case serves as a recent illustration of that trite principle. The case involved a wintertime shipment of iron ore pellets that had been stockpiled outdoors in cold and snowy conditions prior to loading, and which arrived at destination frozen, causing major discharge problems and unexpected costs.

AK Steel bought iron ore pellets from defendant Acelormittal Mines Canada Inc. (then known as Quebec Cartier Mining – "QCM") and voyage chartered a Canada Steamship Lines ("CSL") vessel to carry the cargo from Port-Cartier, Quebec, to Toledo, Ohio, pursuant to AK Steel's five-year contract of affreightment ("COA") with CSL. QCM also acted as ship's agent for CSL. In that capacity, QCM signed, for the master of the carrying CSL ship, a bill of lading showing QCM as shipper and AK Steel as consignee of the cargo. The bill of lading incorporated by reference the terms of the COA between AK Steel and CSL. When the cargo reached its destination, a significant proportion of the pellets were frozen into large clumps, entailing additional difficulties and costs for discharging, demurrage and repairing certain damages done to the ship during the discharging process. The cargo was found to have a moisture content exceeding the maximum provided for in the sales contract. AK Steel fully indemnified CSL for these extra expenses, as its COA with that company required it to do so, and then sued QCM under its new name (Acelormittal) in an indemnity action, to recover what it had paid, alleging that QCM had breached its contract by providing a cargo unsuitable for carriage. Both the bill of lading and the COA provided for New York law and New York arbitration, but the parties had tacitly waived the arbitral provision, so that the action was heard by the Federal Court, but with New York law as the proper law.

Harrington J. first held that the claim fell within the admiralty jurisdiction of the Federal Court of Canada under sections 2 and 22 of the *Federal Courts Act*, because the moisture content of the iron ore was directly relevant to the fitness of that cargo for shipment. In addition, the case against QCM (that it had supplied iron ore unsuitable for transport) was taken by AK Steel, in its capacity as shipper of that cargo and as voyage charterer of the carrying vessel, rather than as buyer of the ore. Finding this situation analogous to that in *Monk Corp. v. Island Fertilizer Ltd.*, [1991] 1 S.C.R. 779, Harrington J. therefore determined that the claim had the necessary integral connection with shipping to be a matter of Canadian maritime law falling within the admiralty jurisdiction of the Federal Court.

As regards the claim proper, the Federal Court agreed with QCM that the shipment was subject to the *Hague-Visby Rules*, noting that the issue was whether CSL has complied with its obligations under those Rules (article III(2)) to properly load, carry, care for and discharge the cargo. AK Steel argued that QCM had failed to provide a cargo suitable for carriage. However, QCM contended that AK Steel was barred from recovery because under the applicable law of New York, it had failed to give notice of the breach of contract to QCM within a reasonable time and had allowed for "spoliation of evidence" by failing to invite QCM to a joint survey of the carrying ship. AK Steel replied that notice did not have to be given in this case, because QCM had been well aware of its own breach of contract before the ship reached Toledo and, in any event, that notice was, in fact, given within a reasonable time, and that, under the circumstances, it was incumbent on QCM (rather than on AK Steel) to call for a joint survey if it wished the ship inspected.

After reviewing the evidence as to the loading, carriage and discharge of the cargo, Harrington J. concluded that the freezing of the pellets arose from their pre-loading condition, when the cargo had been stockpiled outdoors at Port-Cartier, exposed to the elements, for at least one month and a half prior to loading. Although the pellets were free-flowing during

loading, a goodly portion of them refroze during the voyage, causing the discharge problems in Toledo and the resulting extra costs. Various arguments advanced by QCM contesting its liability and attempting to shift the blame to AK Steel were dismissed.

Facing contradictory opinions on New York law, Harrington J. accepted the expert testimony of two lawyers from that jurisdiction who testified that the knowledge that QCM had of its own breach of contract, more than 10 days before it admitted same to AK Steel, made it unnecessary (in New York) for AK Steel to give notice of the breach to QCM. In any event, a telephone conversation between representatives of AK Steel and CSL two days after completion of discharge sufficed to constitute such notice within a reasonable time, as required by the New York *Uniform Commercial Code*. Nor had there occurred any spoliation of evidence resulting from AK Steel's failure to invite QCM to a joint survey. QCM was on notice of its own breach and was in a position to call for a joint survey if it had desired one. Nor was there evidence that QCM had been prejudiced by not inspecting the ship prior to her repair, or that CSL may have benefited by repairing pre-existing damage. Nor was it necessary to consider whether the cargo could have been considered dangerous.

The Court therefore allowed the action, condemning Acelormittal to pay AK Steel $224,321.97, plus interest.

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

In this case, the defendant, Livestock Express BV, is a ship charterer which operated the M/V "Orient I" (the "vessel"), a specialized livestock carrier. The plaintiff, Comtois International Export Inc., is a trader and exporter of cattle. The plaintiff chartered the vessel to perform a voyage between either Becancour, Quebec or Saint John, New Brunswick and Russia. The booking note was issued in Belgium and contained an ice clause, which gave the option of loading the cargo in Saint John if Becancour was not in ice-free condition. The booking note incorporated an arbitration clause referring any dispute arising out of the carriage of the cargo to arbitration in England, governed by English law.

On December 12, 2012, the defendant opted to proceed to Saint John to load the cargo because of forecasted ice conditions in Becancour. The plaintiff disagreed with this election and took issue with the "ice clause" in the booking note. Loading the cargo in Saint John increased the plaintiff's shipping costs by $250,000.

On December 14, 2012, the plaintiff obtained a warrant for the arrest of the vessel and filed an action for damages for the additional shipping costs, naming the defendants, along with the owners and managers of the ship, as *in personam* defendants and the vessel as *in rem* defendant.

In April 2013, the defendant filed a motion for a stay of proceedings in the Federal Court, in favour of arbitration in England. The defendants held that the arbitration clause contained on the booking should be enforced.

On December 10, 2013, Prothonotary Morneau dismissed the defendant's motion for a stay of proceedings, relying on s. 50(1)(b) of the *Federal Courts Act* ("FCA"). In his reasons (2013 FC 1239), Prothonotary Morneau determined that section 46 of the *Marine Liability Act*, SC 201, c 6 ("MLA") did not apply to the booking note pursuant to the Federal Court of Appeal decision of *Canada Moon Shipping Co. Ltd. v. Companhia Siderurgica Paulista-Cosipa*, 2012 FCA 284. In that decision the Federal Court of Appeal found that charter-parties are not covered by contracts for the carriage of goods by water in section 46 of the MLA. Prothonotary Morneau held that the Court had discretion under s. 50 of the FCA to grant a stay of proceedings and submit disputes to a foreign court or arbitration, and that s. 50 of the FCA superseded *Commercial Arbitration Code* (the "Code"), set out in the schedule to the *Commercial Arbitration Act*, RSB 1985, c 17 (2nd Supp). The defendants appealed this order.

In the appeal at bar, the defendant sought to dismiss the order made by Prothonotary Morneau and to halt the proceedings in the Federal Court in favour of arbitration in England. The Court was tasked with determining three issues: 1) whether the issues raised in the motion for a stay of proceedings were vital to the final issue of the case, or was Prothonotary Morneau's order clearly wrong, such that the Court could proceed to a *de novo* review; 2) whether Prothonotary Morneau was correct in his determination that s. 50 of the FCA superseded the Code, giving the Court discretion to allow a plaintiff to pursue legal action in Canada despite the existence of the arbitration clause; and, 3) if the answer to question 2 is yes, whether the plaintiff demonstrated that "strong reasons" exist to allow the action to continue in Canada, notwithstanding the arbitration agreement.

Annis J. allowed the defendant's appeal and grated an order for a stay of the action in the Federal Court in favour of arbitration proceedings in England.

In his reasons, Annis J. held that with respect to the standard of review, Prothonotary Morneau's decision to refuse the defendant's motion for a stay of proceedings was a discretionary order vital to the final issues in the action. Prothonotary Morneau applied the wrong principle in failing to consider the Federal Court of Appeal case of *Nanisivik Mines Ltd. v. FCRS Shipping Ltd.* [1994] 2 FC 662 (FCA) ["Nanisivik"]. As such, the appeal should be heard *de novo*.

Annis J. held that Prothonotary Morneau was correct in his determination that s. 46 of the MLA did not apply to the booking note because the contract in question was a charter-party. However, he erred in determining that the Court had discretion under s. 50 of the FCA to refuse the motion for a stay despite the Code. Prothonotary Morneau's determination was irreconcilable with the Federal Court of Appeal decision in Nanisivik. Annis J. noted that in Nanisivik, the Court concluded that stays involving arbitration clauses are mandatory under section 8 of the Code, which removed any of the Court's discretion to grant such a stay.

Because the Court concluded that it is bound by the decision in Nanisivik, the Court did not consider the argument that Prothonotary Moreau wrongfully exercised his discretion under s. 50 of the FCA.

Capitaines Propriétaires de la Gaspésie (A.C.P.G.) Inc. v. Pêcheries Guy Laflamme Inc., 2014 FC 456

In this case, the fishing boat, the "Myrana I" (the "vessel"), was damaged while it was being moved by a portal crane in a dry dock. A mechanical problem occurred with the crane, causing a chain to break, and the vessel to fall into the water. 800 feet of cable from the crane fell onto the vessel. The vessel sustained damages in excess of $550,000.

The owner of the vessel, Pêcheries Guy Laflamme Inc. ("Pêcheries"), demanded payment for the damage to the vessel from Capitaines Propriétaires de la Gaspésie (A.C.P.G.) Inc. ("Capitaines"), the owner of the portal crane. Capitaines and the employee operating the crane refused to pay and denied liability on the basis of the exclusion of liability clause contained in the boat handling contract.

The exclusion of liability clause in the boat handling contract provided that the owner "accepts liability for any risk resulting from the towage, docking, wintering and/or launching of this vessel, and I release the Owner of this dry dock and its Operator from any civil liability resulting from these associated operations or handling."

Capitaines, its employee, and its insurance company commenced the action at bar, in which they sought a declaratory judgment that they were not liable to Pêcheries. Pêcheries, the defendants in the action, brought a counterclaim against Capitaines and its insurance company claiming damages in excess of $408,000.

Harrington J. allowed the plaintiff's action and granted a declaratory judgment that they were not liable to Pêcheries. Pêcheries counterclaim was dismissed.

In his reasons, Harrington J. concluded that the cause of the incident was unknown. The onus is on the plaintiffs, as bailees, to prove that the loss was not caused by a breach of their duty of reasonable care. While the plaintiffs were unable to rebut the presumption of negligence, the exclusions clause in the boat handling contract limits their liability. Harrington J. held that the exclusion clause, on its plain wording, was broad enough in scope to cover any negligence, be it in contract or in tort. Relying on *Tercon Contractors*

Ltd. v. British Columbia (Transportation and Highways), 2010 SCC 4, Harrington J. held that Canadian courts have increasingly distanced themselves from the presumption that it would be unreasonable for one party to the contract to waive its right to institute an action in damages for harm caused by the negligence of the other party. The exclusions clause in the boat handling contract was sufficiently broad to exempt Capitaines and its employee operating the crane from any liability resulting from negligence.

With regards to the argument that the vessel owner had not been made aware of the exclusion clause, Harrington J. noted that Capitaines' boat handling contracts were not new contracts to the vessel owner. He had signed multiple boat handling contracts in the past and frequently dealt with such documents. In this case, the underlying contractual principle is that parties are bound by a contract on the basis of what is objectively observed by a third party. It is therefore presumed that a party that signs a contract is bound by the terms of said contract. Harrington J. concluded that the exclusion clause was not abusive or draconian, and that risk-allocation clauses are typical of business today.

Toney v. Canada, 2014 ABQB 585

Readers of previous editions will be familiar with the facts in *Toney v. Canada*, 2014, ABQB 585. This case arose from a boating accident, in which the federal defendant, the Royal Canadian Mounted Police, and the provincial defendant, the Alberta Fish & Wildlife Office, undertook a marine search and rescue operation. On September 27, 2008, the plaintiffs, the Toney family, were out on their boat when the steering equipment malfunctioned. In the course of the rescue operation, the defendant's rescue vessel capsized. The rescue team and the Toney family hung onto the capsized vessel for several hours. The Toney family's 5 year old daughter was pinned under the capsized vessel and died of drowning.

On September 26, 2011, nearly three years following the accident, the plaintiff parents and siblings commenced an action in the Federal Court against Canada and Alberta for damages for their own personal injuries and for the grief associated with the child's death. The action was brought under the *Marine Liability Act*, SC 2001, c 6, ("MLA").

In September 2013, the Federal Court dismissed the plaintiffs' action against Alberta on the grounds that the Federal Court did not have jurisdiction over Alberta. In October 2013, the Federal Court ordered the action to be stayed to permit Canada to commence third party proceedings against Alberta in the Alberta Court of Queen's Bench.

On November 20, 2013, the plaintiffs commenced an action in the Alberta Court of Queen's Bench. This claim was virtually identical to the claim filed in the Federal Court, but with the additional claim for grief under the *Alberta Fatal Accidents Act*, RSA 2000, c F-8 ("FAA"). By virtue of subsections 50.1(2) and (3) of the *Federal Courts Act*, RSC 1985, c F-7 ("FCA"), the action against Canada was deemed to have been filed on September 26, 2011, the original filing date in the Federal Court. This provision did not apply to Alberta.

In the present application, the defendants applied to strike the plaintiffs' claim in the Alberta Court of Queen's Bench on the basis that it was a dependant's relief claim and was statute barred because the limitation period had expired.

In their application to strike the plaintiffs' claim, the defendants argued that the plaintiffs' claim is solely for dependants' relief and as such, the claim was captured by section 6 of the MLA. They submitted that since the claim was brought more than 2 years after the date of death, the limitation period had expired pursuant to subsection 14(2) of the MLA.

The plaintiffs submitted that their claim was not a dependents' relief claim under section 6 of the MLA, but rather, a claim for their own direct personal injuries arising from the defendants' negligence. The MLA includes provisions dealing with liability for carriage of passengers by water, and incorporates by reference the *Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974* (the "Athens Convention"). Article 16 of the Athens Convention provides for a two year limitation period for damages arising out of death or personal injury to a passenger.

The plaintiffs further submitted that they were not subject to the 2 year limitation period for claims for personal injury to passengers under the Athens Convention, because they were not "passengers" pursuant to

its statutory definition. Instead, they argued that their claim for personal injuries was subject to the 3 year catch-all limitation period in section 140 of the MLA.

The Court concluded that the plaintiffs' claim against Canada should not be struck; the claim against Alberta should be struck; and, the claim for grief under the FAA should be struck.

A claim will be struck where it is plain and obvious the claim cannot succeed or the claim has no reasonable prospect of success.

With regards to the claim against Canada, the Court held that the plaintiffs' claim under the MLA was not for dependants' relief. The plaintiffs clearly alleged direct, personal, independent injury arising from the defendant's negligence. While section 6 of the MLA is the dependant's relief provision, it does not restrict a plaintiff's action for his or her own personal injuries.

The Court confirmed that the plaintiffs' personal injuries for nervous shock were compensable under Canadian maritime law. However, the Court held that it was not clear whether the plaintiffs fell under the 2 year limitation period provided under the Article 16 of the Athens Convention. This uncertainty arises from section 37 of the MLA, which restricts the applicability Article 16 to certain types of passengers only. Article 16 does not apply to a person carried on board a ship in pursuance of the obligation on the master to carry shipwrecked, distressed, or other persons. Therefore, if Article 16 applied to the plaintiffs, they would not be subject to the 2 year limitation period under the Athens Convention. Rather, the 3 year catch-all limitation period under section 140 of the MLA would apply. Since it was not plain and obvious that Article 16 applied to the plaintiffs, and because their claim was filed within 3 years from the date of the accident, the Court concluded that the plaintiffs' claim against Canada should not be struck.

With regards to the claim against Alberta, the Court held that the limitation period had expired and as such, the claim had no reasonable prospect of success. Because the claim against Alberta did not benefit from the deeming provision in section 50.1 of the FCA, it was filed beyond the 3 year limitation period provided under section 140 of the MLA. The Court found that the plaintiffs discovered their claim the day of the accident, and that in the circumstances, there was no postponement of the limitation period.

The Court also struck the FAA claim on the basis that the limitation period had expired. The FAA, being a provincial statute governed by the Alberta *Limitations Act*, RSA 2000, c L-12, requires a claimant to seek a remedial order within 2 years after the claimant knew, or ought to have known, that the injury occurred. Because the plaintiffs knew of the child's death when it occurred, and knew, or ought to have known, the death was attributable to the conduct of the defendants, the 2 year limitation period expired on September 28, 2010. As such, the claim made under the FAA against Canada and Alberta was out of time and must be struck.

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

This application for judicial review is a continuation of the long-standing dispute between Adventure Tours Inc. ("ATI") and the St. John's Port Authority (the "Port"). Those familiar with the facts of this case know that the Applicant, ATI, conducted tour boat operations out of the Port of St. John's until 2005. In 2006, the Port enacted a policy that restricted the number of tour boat operators in the Port of St. John's to three. ATI was not included in this number.

In 2011, ATI inquired with the Port whether a special licence would be required for the 2012 season. In response, the Port advised ATI that it was not seeking or accepting proposals for additional operators. ATI subsequently filed an application for judicial review to set aside the Port's decision. In March 2012, the Port successfully applied to have the application for judicial review struck on the grounds that ATI's inquiry and the Port's conduct did not amount to conduct that could be the subject to judicial review (2012 FC 305). ATI unsuccessfully appealed the decision in January 2013 (2013 FC 55).

In March 2013, ATI made an official request for a licence to resume its tour boat operations for the 2013 season, which was again declined by the Port. As a result of this second denial, ATI filed a second application for judicial review to set aside the Port's decision.

In this application, the Federal Court was tasked with determining whether or not the Port has the legal authority to licence and regulate commercial tour boat operators on and from federal real property managed by the Port.

Strickland J. concluded that pursuant to the *Canada Marine Act* and the Port's letters patent, the Port has the power to licence and regulate tour boat operations relating to the carriage of passengers. Consequently, the Court denied ATI's application for judicial review.

In her reasons, Strickland J. held that section 62 of the *Canada Marine Act* clarifies that Parliament intended port authorities to have effective management and control over port operations. Further, section 23 of the *Port Authorities Operations Regulations* provides that a person may conduct an activity described in the regulations if authorized to do so in writing under a contract or lease entered into, or a licence granted by, the port authority. This section, along with the letters patent, stipulates that a tour boat operator service in support of local tourism on federal real property be conducted pursuant to a leasing or licencing arrangement. Therefore, any agreement to operate such a service must be done by way of a licence; the issuance of which is at the discretion of the port authority acting fairly and reasonably.

Further, the Court held that the Port's decision pursuant to the *Canada Marine Act* was not *ultra vires* on the basis that it is an infringement on the public right of navigation. The common law public right of navigation is not unrestricted. Parliament has the authority to enact legislation concerning matters of shipping and navigation, but this authority is not limited to one single statute. While the *Canada Shipping Act, 2001* is the primary piece of legislation regarding shipping and navigation in Canada, other aspects of navigation and shipping are addressed in other legislation, such as the *Canada Marine Act*.

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