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Canadian Maritime Law Update: 2009

A. William Moreira,* Richard F. Southcott,** David G. Henley*** and Kimberley A. Walsh****

I
INTRODUCTION

The Canadian Maritime Law Update has appeared annually or bi-annually since 1992. This article reviews legislative and case law developments in 2009.

II
LEGISLATION

A. Bill C-9: An Act to amend the Transportation of Dangerous Goods Act, 1992

Amendments to the *Transportation of Dangerous Goods Act, 1992*[1] were given Royal Assent on May 14, 2009, and came into force on June 16, 2009.[2] The newly amended legislation focuses on preventing incidents while offering for transport, handling, and importing dangerous goods, and creates a prevention program and "response capability" for the Government of Canada in the event of security incidents involving dangerous goods. Most

*Partner, Stewart McKelvey (Halifax, Nova Scotia), B.A. Saint Mary's University; LL.B., Dalhousie University; Past President Canadian Maritime Law Association.

**Partner, Stewart McKelvey (Halifax, Nova Scotia). B.Sc., St. Francis Xavier University; LL.B., Dalhousie University; B.C.L., Oxford University. Member of the Editorial Board of the Journal of Maritime Law and Commerce.

***Partner, Stewart McKelvey (Halifax, Nova Scotia). B.B.A. and LL.B., University of New Brunswick. LL.M., Dalhousie University.

****Partner, Stewart McKelvey (St. John's, Newfoundland and Labrador). B.A., Memorial University of Newfoundland; LL.B., Dalhousie University.

[1] *Transportation of Dangerous Goods Act, 1992,* 1992, c-34, s. 2.

[2] See the background and legislative summary of Bill C-9 as found at <http://www.parl.gc.ca> (visited 06/08/10).

of the new amendments fall under one of two categories: safety amendments and new security requirements.

The definition of "safety requirement" was amended to include a "requirement that must be met by persons engaged in designing, manufacturing, repairing, testing, or equipping a means of containment used or intended to be used in importing, offering for transport, handling, or transporting dangerous goods."[3] The new amendments provide that a person named in a shipping record accompanying dangerous goods (or a containment) on entry into Canada as the person to whom the goods or container is being delivered is deemed the person who is importing the goods or the container.[4] Bill C-9 confirms that the Act applies to vessels outside Canada that are registered in Canada.[5]

The amendments prohibit anyone from importing, offering for transport, handling, or transporting dangerous goods in a prescribed quantity or concentration unless that person has a transportation security clearance.[6] The amendments also strengthen Emergency Response Assistance Plans ("ERAP"), and require their implementation in certain cases of "anticipated" release of dangerous goods.[7] The ERAP must outline a response to an actual or anticipated release of dangerous goods in the course of their handling which endangers or has the potential to endanger public safety.[8]

The amendments also introduce Security Plans and Transport Security Clearances to the legislation. Security Plans must provide for measures to prevent the theft of or unlawful interference with dangerous goods while they are being imported, offered for transport, handled, or transported.[9] Certain prescribed persons must hold Transportation Security Clearances before transporting dangerous goods.[10] The Act also establishes a regulatory authority in respect of appeals and reviews of the granting of these clearances.

This Bill added new powers with regards to inspectors[11] and prescribes the inspector's powers and duties to act on his or her reasonable belief, to open up anything that was sealed or closed,[12] and to remove any means of containment used to handle or to transport dangerous goods.[13] Changes were

[3]Supra, note 1, s.2.
[4]Ibid, s. 2.1, which is intended to clarify the definition of "importer" under the Act.
[5]S.3(2) of the former Act, and Clause 3 of Bill C-9.
[6]Ibid., s5.2.
[7]Ibid, s.18.
[8]Ibid, s.7(1).
[9]Ibid, s.7.3.
[10]Ibid, ss. 5.2(1) and (2).
[11]Ibid, s. 13(2).
[12]Ibid, s. 16.1(1).
[13]Ibid, s.17(1).

also made to offences and punishments under the Act which expressly states that any contravention of the Act, a direction under the Act, the regulations, a security measure, or an interim order is an "offense" under the Act.[14]

B. Bill C-16: An Act to amend certain Acts that relate to the environment and to enact provisions respecting the enforcement of certain Acts that relate to the environment

Bill C-16 received Royal Assent on June 18, 2009, but has not yet come into force.[15] It amends nine environmental statutes administered by Environment Canada and Parks Canada, some of which impact upon maritime law (*Antarctic Environmental Protection Act,*[16] *Canada National Marine Conversation Areas Act, 1999,*[17] *Canadian Environmental Protection Act,*[18] and the *Migratory Birds Convention Act*[19]), and creates the *Environmental Violations Administrative Monetary Penalties Act* ("the EVAMP Act"). The intent of Bill C-16 was to update fine structures in light of the understanding of the damage that environmental offenses can cause, and the concern that current fines are too low.[20]

During the consultation stage, there was concern from the shipping industry that this Bill would conflict with the *United Nations Convention on the Law of the Sea* and on the *International Convention on Civil Liability on Oil Pollution Damage, 1992*. In response, the Senate Standing Committee on Energy, the Environment, and Natural Resources stated that "prosecutions under respective Acts will not proceed if such prosecutions would contravene any treaty or international convention to which Canada is a signatory."[21]

Bill C-16 provides for new minimum penalties, increases in maximum penalties, and different levels and types of penalties for different classes of offenders. The Bill also sets out the procedure for enforcing orders for recovery of costs from the offender, and changes the limitation period for summary proceedings under the Act. Amendments are also made to the

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[14]Ibid, s.33(1).

[15]See the background and legislative summary of Bill C-16 as found at <http://www.parl.gc.ca> (visited 06/08/10).

[16]S.C. 2003, c.20.

[17]S.C. 2002, c.18.

[18]S.C. 1999, c.33.

[19]S.C. 1994, c.22.

[20]The Senate Standing Committee on Energy, the Environment, and Natural Resources, *Eighth Report,* 2nd Session, 40th Parliament, 11 June 2009.

[21]Senate Standing Committee on Energy, the Environment, and Natural Resources, Eighth Report, 2nd Session, 40th Parliament, 11 June 2009.

Antarctic Environmental Protection Act[22] and the *Canadian Environmental Protection Act*.[23]

The crux of this amendment pertains to the sentencing of environmental offenders. New sentences, such as orders for the disgorgement of benefits,[24] orders for a corporation to notify its shareholders and others of offenses,[25] orders for cumulative fines, and orders for surrendering license provisions are added. Judges are given broader powers to impose diverse punishments for environmental offenders, depending on the nature of the offending corporation, entity, or individual, and the offense.[26] The Bill introduces additional provisions pertaining to a conveyance or vessel. Bill C-16 gives officers the power to direct a route and in what matter a conveyance or vessel shall be moved for inspection, and extends liability for environmental offenses to masters, owners, operators, and chief engineers of vessels.

One of the most significant amendments is an "Environmental Protection Compliance Order," used when dealing with contraventions in progress, or anticipated contraventions. An enforcement officer may direct a person to take action, refrain from doing something, comply with the Act, stop an activity, work for a period, or any other measure that the officer deems necessary. Bill C-16 extends this order and the accompanying review procedure to the nine different pieces of legislation.

The EVAMP Act establishes a system of penalties for enforcing the nine acts amended by Bill C-16. The purpose of this new act is to "provide an alternative to the penal system and to supplement existing measures to enforce environmental Acts"[27] through a fair an efficient administrative monetary penalties system. Prosecuting an offense under the EVAMP Act precludes prosecuting the same offense under another Act.[28] This Act establishes a regime of vicarious liability (to employees, agents, mandataries, crew members, and persons on board the ship or vessel) for certain violations under the Act.[29]

To proceed with an EVAMP Act violation, a person authorized by the Minister who reasonably believes that a person, ship, or vessel failed to comply with a designated requirement must serve a notice on that person, ship, or vessel, which sets out the administrative monetary penalty for the contravention. The Act extends liability to a director, officer, agent or man-

[22]Section 2(1).
[23]Section 280.3.
[24]See, for example, the *Antarctic Environmental Protection Act*, supra, adding a new s.50.8.
[25]See, for example, the *Canadian Environmental Protection Act*, supra, adding a new s.274.2.
[26]See, for example, the *Canada National Marine Conservation Areas Act*, adding a new s.27(1)(g).
[27]Supra, note 21.
[28]S.C. 2002, c.32.
[29]Ibid, section 9.

datary of a corporation involved, and to owners, operators, masters or chief engineers or the ship or vessel, if that person was involved in the violation.

The EVAMP Act imposes new minimum fines and increases maximum fines. The maximum penalty level under the EVAMP Act is currently $5,000 for an individual, and $25,000 for any other accused. Notably, due diligence is not a defense to offenses under the Act.[30] The Act contains other procedural provisions, such as a legislated limitation period of two years,[31] and a presumption that an accused committed a violation if he or she or it pays an administrative monetary penalty.

C. Bill C-7: An Act to Amend the Marine Liability Act and the Federal Courts Act and to make consequential amendments to other Acts

Bill C-7 received Royal Assent on June 23, 2009. The majority of the Bill came into force on September 21, 2009, while the sections which deal with oil pollution came into force on January 2, 2010.[32] The former *Marine Liability Act*[33] dealt with the liability of shipowners and operators for damage to passengers, cargo, pollution, and property. The new Act is the result of the *Maritime Law Reform Discussion Paper*[34] and consultations with stakeholders in various sectors of the marine community that followed.

The first objective of the amendment was to address current industry needs. At the time of the consultations, liability for marine adventure tourism was an issue of concern.[35] Following the limits of liability which were introduced in 2001, liability insurance was often unavailable to tourism operators, as these operators were treated the same as commercial passenger vessels. The 2001 regime also invalidated "waivers of liability" which were often used in adventure tourism."[36]

In response to these concerns, Part 4 of the Bill (which sets out liability for carriers of passengers by water) was amended so that it does not apply to a "marine adventure tourism activity"[37] and to sail trainees and persons of

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[30]Ibid, section 11.

[31]Ibid, section 14.

[32]See the background and legislative summary of Bill C-7 as found at <http://www.parl.gc.ca> (visited 06/08/10).

[33]*Marine Liability Act*, S.C. 2001, c.6.

[34]Released by Transport Canada in May 2005, and discussed in a previous issue.

[35]Christopher Giaschi and Sonja J. Mills, Bill C-7 Amendments to the Marine Liability Act, p.3.

[36]Canada's Government Takes Action to Protect Environment with Changes to the Marine Liability Act, Press Release, Transport Canada, accessible at <http://www.tc.gc.ca> visited on 06/08/10.

[37]Ibid, s.37.1.

a prescribed class.[38] Further, the definition of "ship"[39] was amended to exclude a vessel which is manually propelled by oars or paddles. The amendments also allow the Governor in Council to increase or decrease limit of liability insurance through regulation, allowing the legislation to be up-to-date without requiring significant amendment.[40]

Interestingly, the definition of "passenger"[41] was amended to include a "participant in a marine adventure tourism activity, a person carried on board a vessel propelled manually by paddles or oars and operated for a commercial or public purpose, and a sail trainee," thus imposing upon adventure tourism operators the global limits of liability applicable to all passenger carriers found in section 28 of the Act. As a result, where a single participant/passenger is injured, most adventure tourism operators are no longer able to limit their liability to 175,000 Special Drawing Rights (about $290,000.00 CDN). Instead, only the global limit of liability (approximately $3,300,000.00 CDN) applies.

Another objective of the Bill was to ratify marine international oil pollution conventions. The amended Part 6 incorporates, by reference and gives the force of law to, the *International Convention on Civil Liability for Oil Pollution Damage, 1992* (amended by the Resolution of 2000);[42] *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992* (as amended by the Resolution of 2000);[43] Protocol of 2003 to the *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992*;[44] and *International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001*.[45]

The *Supplementary Fund Protocol of 2003* to the *International Oil Pollution Compensation Fund* provides a third level of compensation beyond the shipowner's limitation of liability and funds available through the *International Oil Pollution Compensation Fund* and the Ship-source Oil Pollution Fund (the domestic fund which compensates for oil damage) for damages resulting from the spill of "persistent oil" from tankers. Canada's ratification of this convention results in an increase of the current level of compensation available for oil pollution damage caused by tankers in Canada from $500 to roughly $1.5 billion per incident.[46]

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[38]Ibid, s. 39(d).
[39]Supra note 44, s. 36(3).
[40]Bill C-7 clause 3, amending section 31.
[41]Supra note 44, s.24.
[42]Supra note 44, ss. 48-56.
[43]Ibid, ss. 57-62.
[44]Ibid, ss. 63-68.
[45]Ibid, ss. 69-73.
[46]backgrounder.

The *International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001*, pertains to oil pollution from the bunkers of all ships. Bunker fuel is involved in pollution incidents more frequently than spills from oil tankers. This Convention requires ships over 1,000 gross tons to maintain insurance, or some other form of financial security, and renders the shipowner (including the registered owner, bareboat charterer, manager and operator) liable under the Convention for pollution.[47] As a result of its ratification of this Convention, Canada may rely on the Convention's compulsory insurance provisions to ensure that the shipowner has the necessary coverage in the event of a bunker oil spill.[48]

This Bill also introduces significant amendments to administration and enforcement of the Act. Clause 11 of the Bill states that $100,000 is the maximum fine for designated offenses under the Act.[49] The Bill sets out the jurisdiction of the Canadian courts to try these offenses, prescribes offenses related to the Ship-source Oil Pollution Fund, enhances the administration of the Ship-Source Oil Pollution Fund, and sets out procedural requirements under the Act.

These amendments to the *Marine Liability Act* also purport to modernize Canadian maritime law by creating a general, catch-all limitation period of three years for initiating any proceeding, unless the limitation period is already covered in a federal statute.[50] The amendment does not contain provisions to deal with such issues as when the limitation period commences to run, and whether the limitation period can be suspended, abridged or extended.

Clause 12 creates a broad maritime lien against foreign vessels as security for amounts owing suppliers operating within Canada.[51] There is no restriction as to the types of goods, materials and services to which the lien will attach, apart from the requirement that the suppliers must carry on business in Canada.[52] Thus the suppliers' maritime lien exists only in respect of foreign ships (which by definition excludes pleasure craft, wherever registered), and it exists in respect of any contract for goods, materials or services for the ship's operation or maintenance, and for repair or equipping of the ship. The maritime lien is a priority right of payment, superior to a mortgage over the ship, and although specific to the ship, remains enforceable following the sale of the ship. A similar suppliers' maritime lien is available under

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[47]Frequently Asked Questions – Civil Liability Insurance for Marine Pollution, Press Release, Transport Canada, accessible at <http://www.tc.gc.ca> visited on 06/08/10.

[48]Backgrounder: Amendments to the Marine Liability Act, Press Release, Transport Canada, accessible at <http://www.tc.gc.ca> visited on 06/08/10.

[49]Ibid, ss. 131-138.

[50]Ibid, s. 140.

[51]Ibid, s. 139.

[52]Giaschi, p.8.

the laws of the United States. It is noteworthy that several countries, including the United Kingdom, refuse to enforce it against ships arrested in their courts. While Canadian courts will apply and enforce the Canadian lien, it is possible that the Canadian lien will receive no more favourable treatment elsewhere in the world than the United States lien presently does.

A further amendment to the *Marine Liability Act* harmonizes the French version of section 43(8) of the *Federal Courts Act* (providing a right of sistership arrest) with the English version.

D. Bill C-3: An Act to amend the Arctic Waters Pollution Prevention Act

Bill C-3, An Act to amend the Arctic Waters Pollution Prevention Act, came into force on August 1, 2009. At the time of the introduction of this Bill, there was a great deal of international attention on issues in the arctic, and in particular, to arctic sovereignty.[53] Bill C-3 was the result of Canada's strategy to strengthen its claims to the Arctic.

As a result of the faster melting of ice in the arctic due to climate change, the Northwest Passage[54] is expected to be more navigable in the future. This would significantly shorten routes from, for example, Asia to North America, decreasing time and transportation costs significantly. The rise in commodity prices also contributes to resource development in the Arctic in the coming years. Canada claims sovereignty over the Northwest Passage on the basis that the waters around the Arctic Archipelago are "internal Canadian waters."[55] Canada would not be opposed to international traffic within its internal waters, but would regulate, impose, and enforce Canadian safety and marine standards in order to protect Canadian interests.

The *Arctic Waters Pollution Prevention Act* ("AWPPA") is part of Canada's Integrated Northern Strategy, and has the goal of development of and transport through the Arctic in a way which protects the inhabitants of Canada's Arctic and the delicate ecology. The AWPPA regulates and enforces the deposit of waste in arctic waters or on land where the waste may enter arctic waters. The Governor in Council may require anyone who carries out work in the arctic which may result in waste entering arctic waters to submit work plans for review. The AWPPA also provides for "ship-

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[53]See the background and legislative summary of Bill C-3 as found at <http://www.parl.gc.ca> (visited 06/08/10).

[54]The "Northwest Passage" collectively refers to several alternative sea routes through the Canadian arctic archipelago between the Atlantic and Pacific Oceans, as per the Library of Parliament's "Legisinfo," Ibid.

[55]*Oceans Act*, S.C. 1996, c.31, s.6 and *Territorial Sea Geographical Coordinates (Area 7) Order*, S.O.R./85-872.

ping safety control zones" and regulations for ships which seek to navigate within those zones. The AWPPA also creates enforcement provisions for offenses under the Act. Bill C-3, in furtherance of Canada's Integrated Northern Strategy, amended the definition of "arctic waters" under the Act by extending the boundary from 100 to 200 nautical miles offshore (the full extent of the exclusive economic zone). This extension is consistent with other Canadian legislation, including the *Oceans Act* and the *Canadian Environmental Protection Act, 1999*.

III
CONSTITUTIONAL ISSUES

A. Provincial Occupational Health and Safety Regulations Can Apply to Safety at Sea

In *Jim Pattison Enterprises Ltd. v. British Columbia* and *Osprey Marine Ltd. v. British Columbia*,[56] two owners of commercial fishing vessels, in separate proceedings, challenged the validity of administrative orders made under the authority of provincial occupational health and safety legislation which obliged owners, among other things, to inform and train all crew members regarding vessel stability issues. Owners' position was that they were compliant with stability documentation and training requirements under federal law (i.e. the *Canada Shipping Act 2001*[57] and its subordinate regulations) and that the incremental requirements imposed provincially were both unconstitutional and dangerous, insofar as they required vessel stability issues to be addressed by crew members who were not competent to do so.

There was evidence of an agreement between Canada and the Province of British Columbia, under which provincial authorities assumed responsibility for "the business of fishing," including particularly regulation of the activities of crews and operations of their vessels and gear "while fishing in BC waters," and the federal authorities assumed jurisdiction over "shipping and navigation operations," including crew certification and application of vessel construction standards. It is interesting to note that the federal authorities, although served with notice of the resulting constitutional questions, did not appear in these proceedings. However, the federal government

[56]2009 BCSC 88.
[57]S.C. 2001, c.26.

apparently made known its position that provinces have jurisdiction over occupational health and safety on fishing vessels.[58]

As regards the process of its constitutional analysis, the Court affirmed the well-recognized principle that one begins with characterization of the "pith and substance" of the challenged provision – the true nature of the law and the matter to which it essentially relates. The Court further noted that the "interjurisdictional immunity" principle, though valid, runs against the dominant tide of constitutional jurisprudence and is to be applied with restraint and only where one level of government trespasses on some "core competence" of the other. Similarly, the "federal paramountcy" principle applies to permit federal legislation to prevail only where provincial law has an operational incompatibility with the federal law, i.e. that it is impossible to comply with both laws at the same time, or that to apply the provincial law would frustrate the purpose of the federal law. Finally, the Court affirmed, in the specific context of maritime law, the necessity for a nationally uniform body of federal law governing (in a broad sense) navigation and shipping.

As to pith and substance of the impugned provincial law, the Court was satisfied it dealt with the prevention of risks to the health and safety of British Columbian workers on fishing boats, and so was valid provincial law despite incidental effect on matters beyond provincial jurisdiction. Applying the doctrine of federal paramountcy, the Court held it permissible for provincial legislation to "add to" federal requirements. On the specific law in question, the Court held that, despite overlap, confusion and compliance cost, it was not the case that "one law forbids what the other law requires," and therefore no incompatibility between the two was established. Furthermore, because the Court found that the federal purpose in the *Canada Shipping Act* and its subordinate regulations was not to "create a comprehensive scheme or a complete code for ship and crew member safety," the provincial law did not undermine the purpose of the federal legislation. For both these reasons, the federal paramountcy doctrine did not require a declaration of invalidity of the challenged provincial orders.

Regarding interjurisdictional immunity, the Court characterized the issue as not whether the provincial legislation "may affect" navigation and shipping, but whether it "impairs the core of federal competence" over that subject. The Court concluded on this point that there was no such impairment present: "The federal legislation is directed at ship safety; the provincial legislation at the health and safety of the crew."

[58]Citing Nova Scotia v. Mersey Seafoods Ltd. 2008 NSCA 67.

In the result, the Court declared all of the impugned provincial orders to be valid.

B. Workers Compensation Act Bar of Action Inapplicable to Death at Sea

In *Ryan Estate v. Universal Marine,*[59] the Court overruled the Newfoundland and Labrador Workplace Health, Safety and Compensation Commission and held that the families of two deceased fishermen were entitled to sue the designer, builder and inspector for the negligent design, construction and inspection of the fishing vessel "Ryan's Commander" which capsized causing the deaths.

Provincial workers' compensation schemes generally provide modest compensation to injured workers (or the dependents of deceased workers) on a no-fault basis, while barring absolutely workers' and dependants' rights of action against not only the worker's own employer, but any other employer subject to the scheme. In prior jurisprudence, these provincial laws, including the bar of private action, have been found to be constitutional and to apply to federal undertakings. However this case is the first to have considered the bar in a maritime casualty following enactment in 2001 of the federal *Marine Liability Act,*[60] Part 1 of which grants an unqualified right of action to injured persons, or the dependents of deceased persons, when a remedy is available under Canadian maritime law.

The Court held that the bar of action in the Newfoundland and Labrador *Workplace Health, Safety and Compensation Act*[61] (the "*WHSCC Act*") impaired the right of injured parties to bring a civil action under the *Marine Liability Act*. The Court decided that liability in a marine context fell within federal jurisdiction and found that the *Marine Liability Act* created a "federal right" to bring such an action. The Court further held that the statutory bar impaired the federal power to sue, which is "a core feature of federal legislation governing navigation and shipping" and "an essential element of the requirement for uniformity of legal rights in navigation and shipping situations." The Court read down the *WHSCC Act*, holding that, in the circumstances, the statutory bar was rendered inoperative.

This decision has significant implications for any business involved in shipping, the fishery and offshore oil and gas, and could potentially have repercussions in other industries in the federal domain.

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[59] 2009 NLTD 120.

[60] S.C. 2001, c. 6.

[61] R.S.N.L. 1990, c. W-11.

We understand this decision is under appeal to the Newfoundland and Labrador Court of Appeal.

C. Provincial Statute of Limitations Inapplicable to Death in Boating Accident

The defendant in *Frugoli v. Services Aeriens de Canton de L'Est Inc.*[62] operated an air transfer service into remote lakes and also owned and operated small boats in which customers were transported from the aircraft to lakeside lodges. The plaintiffs were families of two deceased customers drowned when their boat capsized on Lac Louis on August 29, 2002. They commenced proceedings in Quebec Superior Court on April 26, 2005, within the prescription period for which provincial law provided but later than expiry of the two-year prescription period contained in Part 1 of the federal *Marine Liability Act*. The defendants applied for, and obtained, dismissal of the actions on grounds that they were out of time.

There was evidence that Lac Louis is 20 km in length and 1.6 km wide, that the defendant operated float planes and 16-foot motorboats on it, and that it was not otherwise used by commercial shipping. The Quebec Court of Appeal, upholding the decision of the Quebec Superior Court, held the deaths resulted from navigation on the lake, the "domain of federal maritime negligence law." It was held to be irrelevant that the lake is in an isolated area and that there may be no commercial shipping on it. Therefore, the federal *Marine Liability Act* governed the claims including time prescription.

The *Marine Liability Act*, s. 23(2), grants the Court discretionary power to extend the prescription period in collision cases. In *Frugoli*, the plaintiffs requested the Court to so extend time in their case. The Court declined this request, saying that s. 23(2) "has no application . . . because the deaths and alleged damages did not occur as a result of the collision of boats" and as a matter of interpretation Canadian statutory maritime law gives no other authority to the Court to extend limitation periods.

D. Federal Court Accepts Jurisdiction in Matrimonial Property Dispute

Ricci v. Tully[63] is a particularly unusual case in that it was heard in the Federal Court but deals with matrimonial property involved in divorce proceedings in the Ontario Superior Court of Justice. The Federal Court application surrounded a dispute over the ownership of a sailboat, ironically

[62]2009 QCA 1246.
[63]2009 FC 493.

named "FOREVER LOST." The wife claimed that she was the equitable owner of the sailboat because she had provided all of the purchase funds by taking out a mortgage on her home. The husband claimed ownership by way of gift and contribution in kind through his repair and restoration of the sailboat. Ultimately, the Court concluded that "the sailboat is indeed forever lost to Claudia and John and must be sold."

This case is interesting jurisprudentially because of the question of the jurisdiction of the Federal Court to deal with the matter. The Court recognized that the vessel, in itself, fell within the maritime jurisdiction governed by section 22 of the *Federal Court Act*.[64] However, it noted that "the Federal Court should not become a surrogate divorce court for warring spouses to engage in a battle over family assets when the proceeding should probably be brought in the Provincial Family Courts." The husband's counsel raised the concern that the Court would become a "backdoor divorce court over family owned boats and for one embittered spouse to seek an illegitimate juridical advantage over the other by proceeding in this Court to obtain possession or sale of a family asset."

The Court concluded that its jurisdiction could operate so as not to infringe upon that of Provincial Family Courts, finding as follows:

> In my view, that is not the case here. This is a case where there is clear evidence that the sailboat while in the sole possession of John is in jeopardy from fire, seizure by creditors or other danger. This Court has the jurisdiction and powers to prevent further deterioration of the sailboat or to ensure that it is not put in jeopardy to third party creditors.
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> John's counsel points to the multiplicity of proceedings and additional costs which result from concurrent proceedings in two courts. There may be separate proceedings but that, in and of itself, is insufficient for this Court to concede jurisdiction to the Provincial Court in this case. This Court can focus on the issues relating only to the sailboat without being encumbered by the sometimes complex matrimonial and emotional issues permeating family law proceedings.

The Court was not concerned about any inconsistent findings between the Courts, noting that the proceeds of sale would have to be accounted for in any overall financial settlement in matrimonial proceedings and that the Federal Court was acting for the purposes of preserving the asset or its proceeds rather than engaging in a determination of issues in the matrimonial proceedings.

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[64] R.S.C. 1985, c. F-7.

E. Cruise Line Calling at Canadian Ports has no Place of Business in Canada

Nicolazzo v. Princess Cruises[65] involved an appeal from the Small Claims Court of Ontario. The plaintiffs booked a Mediterranean cruise through a travel agency in Hamilton, Ontario, boarded the defendant's ship in Italy and disembarked in the UK, and while on board were the victims of a theft from their in-cabin safe. They sued in Ontario for recovery of their loss.

The *Athens Convention*, as adopted in Canadian law,[66] permits suit in, among other States, the domicile of the plaintiff or the State where the contract of carriage was made (Canada on both counts, on the facts) provided in either case that the defendant "has a place of business and is subject to jurisdiction in that State." The issue was whether Princess Cruise Lines Ltd., which apparently was the other party to the contract of carriage, had such a place of business in Canada.

The Small Claims Court had decided in the plaintiffs' favour, on the basis of its own research showing that Princess Cruise Lines Ltd. is a subsidiary of Carnival Corporation and that Carnival Corporation indeed has a place of business in Canada. The Divisional Court on appeal overturned this particular element of the decision, holding that no basis was shown on which to "lift the corporate veil."

On the issue whether Princess itself had such a place of business, the plaintiffs relied on evidence that Princess Cruise Lines Ltd. has ships that call at Canadian ports from time to time. The Court held that this evidence shows, at most, that Princess does business in Canada from time to time and that it was plain and obvious that Princess had no place of business in Canada. The Court in the result dismissed the action.

F. Shareholder Dispute Not Within Federal Court's Maritime Jurisdiction

Despite some complexity in the facts, the material point in *Morecorp Holdings Ltd. v. Island Tug & Barge Ltd.*[67] appears to be that a share purchase agreement included a term to the effect that the company the shares of which were being transferred, and an affiliate of the selling shareholder, would use best efforts to enter an agreement under which the affiliate's ship would be employed for a three-year period. That agreement was never entered, and the company soon after discontinued employing the former shareholder's affiliate's ship, and commenced using instead the remaining

[65] 2009 Carswell Ont 3185 (Div Ct.).
[66] *Marine Liability Act*, S.C. 2001 c.6, s.37, Schedule 2.
[67] 2009 BCSC 1614.

shareholder's own ship. The plaintiff, the selling shareholder, attempted to sue *in rem* and arrest that substitute ship.

It should be noted that the plaintiff was self-represented. There were five discrete points of claim in the plaintiff's action: commissions allegedly owing under the share agreement; allegedly improper arrest by the defendants of a different ship in a different action; wrongful termination of the negotiations which would have led to the agreement for employment of the affiliate's ship; interference with the plaintiff's business by raising prices to certain customers; and breach of an alleged agreement to employ the selling shareholder's principal as a consultant.

The Court disposed of the attempted arrest by noting that the claims summarized above were not maritime in nature or, even if maritime, did not involve the *in rem* defendant ship as their subject.

IV
COLLISION

A. Collision Damages Reduced due to Betterment

Laichkwiltach Enterprises Ltd. v. Pacific Faith[68] was an appeal from an assessment of damages, following trial in which the *Pacific Faith* was found entirely at fault in a collision in which *Western Prince* was damaged. The trial judge had reduced proven repair costs by a factor of 67% due to betterment. The trial judge also allowed, as damages, recovery of survey fees incurred following the casualty.

The Court of Appeal rejected as outdated certain old authorities which allowed collision damages on a "without allowance new-for-old" basis and stated the modern position to require, where appropriate, both a deduction reflecting improvement of the plaintiff's property and compensation to the plaintiff for being required to prematurely pay to obtain that betterment. In the face of what the Court described as lack of precision in the evidence on these points, but apparently on the basis that the damaged equipment on *Western Prince* would have had some remaining life but for the collision damage, the Court reduced the betterment allowance from 67% to 33%.

The award of survey fees was disputed on appeal on the basis that the surveyors had inspected and reported on things that were found not to have been damaged in the collision. The Court held that fact not to be determina-

[68] 2009 BCCA 157.

tive. The Court accepted *Western Prince* interests' expert evidence that the surveyor's scope of investigation was reasonable, despite no additional found damage, and therefore was a cost reasonably incurred as a natural and probable consequence of the tort. In the result, the survey fees were recovered in full.

V
CARRIAGE OF GOODS AND PASSENGERS

A. Deck Cargo Exclusion Clause Protects Multiple Beneficiaries

The appeal decision in *Timberwest Forest Corp. v. Pacific Link Ocean Services Corporation*[69] resulted from a loss of logs which were being transported from British Columbia to California on the deck of a barge. The legal issue was whether the insurer was precluded from asserting a subrogated claim against the time charterer of the barge and the tug, the owner of the barge and its employees, and the owner of the tug and its employees. The trial judge had concluded that all the parties were protected from a subrogated claim.

The contract of carriage stated that Pacific Link would supply a barge, the *Ocean Oregon*, to deliver logs from the Fraser River to Eureka. The contract of carriage was in the form of a letter which stated that the "Standard Towing Terms and Conditions are attached." One of those conditions referenced Pacific Link's standard form Bill of Lading. This standard form Bill of Lading, in bold type on the first page, stated "ALL GOODS ARE CARRIED ON DECK AT SHIPPER'S RISK." Further, the standard form Bill of Lading stated:

> DECK CARGO. All cargo is carried on deck unless otherwise expressly stated in this Bill of Lading. Cargo carried on deck is carried at the sole risk of the owner thereof. In no event shall the Carrier be liable for any loss or damage in respect of cargo carried on deck, howsoever caused, and without limiting the generality of the foregoing, even though resulting from unseaworthiness or from the negligence, gross negligence, default, error or omission of the Carrier or of the servants or agents of the Carrier, including without limiting the foregoing, all persons described in clause 14 herein.

Clause 14 of standard form Bill of Lading outlined the beneficiaries of the contract:

[69] 2009 FCA 119.

> 14. BENEFICIARY OF CONTRACT. Every employee, agent and independent contractor of the Carrier, and the owner, operator, manager, charterer, master, officers and crew members of any other vessels owned or operated by related or unrelated companies, and stevedores, longshoremen, terminal operators and others used and employed by the Carrier in the performance of its work and services shall be beneficiaries of this Bill of Lading and shall be entitled to all defences, exemptions and immunities from and limitations of liability which the Carrier has under the provisions of this Bill of Lading and, in entering into this contract, the Carrier to the extent of those provisions, does so not only on its own behalf but also as agent and trustee for each of the persons and companies described herein, all of whom shall be deemed parties to the contract evidenced by this Bill of Lading.

At trial, the Court concluded that all relevant parties were bound by this Bill of Lading. The cargo insurer had also named Pacific Link as an insured party under the insurance contract and agreed to waive its rights of subrogation against Pacific Link with respect to the shipment of logs. This waiver of subrogation was effected by a specific endorsement to the policy.

The plaintiff, Timberwest, was aware that the logs would be carried on deck. In November of 2003, the load of logs was lost during a voyage with a loss of approximately $1 million. The insurer paid Timberwest's claim with respect to the logs and pursued a subrogated action against Pacific Link and the other respondents. The Court considered whether the waiver of subrogation in favour of Pacific Link was invalidated by the *Hague-Visby Rules*, as enacted in the *Marine Liability Act*[70] and, if not, whether the other respondents were also entitled to the benefit of a waiver of subrogation. The trial judge found that the contract of carriage was not covered by the *Hague-Visby Rules* because the statutory definition of "goods" excluded cargo which by contract of carriage was stated as being carried on deck and is so carried. Timberwest argued on appeal that the Standard Towing Terms and Conditions indicated an intention that the *Hague-Visby Rules* would apply, but the Court concluded that the trial judge made no error of law in finding that no contractual terms were inconsistent with the term that the cargo would be carried on deck and that all parties knew this would necessarily be the case. Because the *Hague-Visby Rules* did not apply, the waiver of subrogation clause in the contract of insurance was not invalidated.

However, the Court went on to address whether or not the named respondents, other than Pacific Link, were entitled to the benefit of the waiver of subrogation. Recognizing that it is normal in a contract of marine insurance to name in a specific waiver of subrogation clause all parties against whom the insurer knows it cannot pursue a subrogated claim, the Court noted that

[70] S.C. 2001, c.6, Schedule 3.

this does not mean that a person who is not so named cannot benefit from a general waiver of subrogation, if one appears in the contract of insurance. Such a general waiver of subrogation was found in the contract of insurance. The Court then addressed the question of the parties against which Timberwest waived a right of recovery. The answer was found in the definition of Carrier in the standard form Bill of Lading. "Carrier" was defined to include "the ship, shipowner, operator, manager, charterer, master, officers, crew, stevedores and all others concerned in the carriage of the goods." Then recognizing the breadth of clause 14 (Beneficiary of Contract), the Court held that all persons within the definition of "Carrier" were entitled to all defences, exemptions and immunities from and limitations of liability which the Carrier had under the provisions of the Bill of Lading. The Court found that it was sufficiently clear that Timberwest had waived the right to make a claim against all the named respondents and dismissed the appeal with costs.

B. Limitation Period Precludes Counterclaim for Damage to Goods

Hapag-Lloyd Container Line GmbH v. Moo Transport & Commodities Inc.[71] involved a motion for summary judgment brought by the plaintiff Hapag-Lloyd to dismiss certain parts of the counterclaim of the defendant on the grounds that the claim was brought outside the limitation period within the Bill of Lading. The case related to the shipment of 17 containers of beef lungs and hearts from various ports in the United States to Jakarta, Indonesia in 2004. The Indonesian government had placed a ban on the importation of American beef products while the containers were in the process of being shipped. 14 of the 17 containers were detained by the Indonesian authorities at the Port of Jakarta and the remaining 3 were stopped in Singapore. A new purchaser was found for 9 of the 17 containers and the remaining 8 were ultimately destroyed. The original claim was for terminal and demurrage charges for the 9 containers detained and for terminal, demurrage and destruction charges with respect to the remainder. A counterclaim was brought with respect to damage to and loss of the cargo. Hapag-Lloyd brought a motion to exclude the counterclaim on the basis that it was out of time under the Bill of Lading and because certain components of the claim were for consequential damages. Ultimately, the question of timeliness was definitive and the second issue was not addressed.

While the Bill of Lading provided for application of the *Hague-Visby Rules* to the contract of carriage, since the *Rules* only apply "tackle to tackle," the Court determined that it was the terms contained in the Bill of

[71]2009 FC 201.

Lading which must govern. The Court noted the following provisions as relevant:

> 5(b) The Carrier shall be under no liability whatsoever for loss of or damage to the Goods howsoever occurring, if such loss or damage arises prior to loading on or subsequent to the discharge from the vessel. Notwithstanding the above, in the event that the applicable compulsory law provides the contrary, the Carrier shall have the benefit of every right, defence, limitation and liberty in the Hague-Visby Rules or the Hague Rules, notwithstanding that the loss or damage did not occur at sea. In the event that the Bill of Lading covers a shipment to or from the United States or territories where COGSA is applicable, however, the Carriage of Goods by Sea Act (COGSA) shall be applicable before the Goods are loaded on or after they are discharged from the vessel.
>
> ...
>
> 6. Time for Suit
>
> In any event, the Carrier shall be discharged from all liability in respect of loss of or damage to the Goods, non-delivery, misdelivery, delay or any other loss or damage connected or related to the Carriage unless suit is brought within one (1) year after delivery of the Goods or the date when the Goods should have been delivered.
>
> 7. Sundry Liability Provisions
>
> ...
>
> (6) Scope of Application and Exclusions
>
> (a) The rights, defenses, limitations and liberties of whatsoever nature provided for in this Bill of Lading shall apply in any action against the Carrier for loss or damage or delay, howsoever occurring and whether the action be founded in contract or in tort.
>
> (b) Save as otherwise provided herein, the Carrier shall in no circumstances whatsoever and howsoever arising be liable for direct or indirect or consequential loss or damage or loss of profits.

The counterclaim was filed on June 24, 2005, approximately three weeks after the expiry of the one-year period. The Court reviewed the applicable jurisprudence and concluded that a limitation period, such as the one in clause 6 of the Bill of Lading, was not a mere prescription period or limitation of the right of action but is rather an exclusion or forfeiture of any right or cause of action whatsoever. In considering an argument by the respondents that they could not know the amount and extent of their loss until the contents of the 8 containers had actually been destroyed, the Court found that the fundamental basis of their claim was founded on the fact that the containers were not delivered when they should have been.

Ultimately, the Court concluded that the counterclaim in respect of the contents of the containers which were destroyed was filed out of time and that the moving party was entitled to judgment dismissing that part of the counterclaim.

C. Contract Concluded by Email Exchange Does Not Include Bill of Lading Printed Terms

Wepruk v. Great Canadian Van Lines Ltd.[72] is both a road transport case and a consumer transaction, making its precedent value in commercial and/or maritime cases questionable.

The plaintiff moved house from Ottawa to Burnaby, BC, and contracted with defendant, a road carrier, to collect furniture from three separate locations in Ontario and transport them to her new home. One of the locations was a house formerly owned by friends of the plaintiff where she stored a piano, the new owners of which had been promised it would be removed. That house was some distance from the driver's route, and he failed to arrive as arranged to collect the piano. The house owners were said to have lost patience waiting and to have destroyed the piano. The plaintiff sued the road carrier for its value.

Concerning formation of the contract, following telephone discussion between the carrier and the plaintiff, the carrier issued by email a "moving proposal" which stipulated the three pick-up locations and date ranges and an estimated price. The plaintiff emailed her acceptance of that proposal. On arrival of the truck and its contents at the plaintiff's new home, the absence of the piano was noticed and complained of, and the driver told the plaintiff he would collect and deliver the piano on his next westbound trip. On delivery of the other goods the plaintiff was requested to, and did, sign a document headed "Bill of Lading" on which were printed terms including a limitation of the carrier's liability. In the eventual small claims court litigation claiming the value of the lost piano, the carrier relied on the limitation clause. The Court disallowed that reliance, holding that the contract was complete on the earlier exchange of emails and that, despite plaintiff's signature, the Bill of Lading printed terms formed no part of that contract, not having been brought to plaintiff's attention until after the contract had been not only formed but already breached. The plaintiff was awarded the value of the piano, based on an assessment of what it would cost her to go out into the market and replace the antique piano with one of comparable age and condition.

[72] 2009 BCPC 0183.

The Court also awarded, in addition to the value of the lost piano, $8,000 as aggravated damages for mental distress. The plaintiff's evidence was that the non-delivered, and now destroyed, piano was a family heirloom, the loss of which caused her much trauma and embarrassment with her family. The Court noted that law related to damages in contract for mental distress is comparatively new and rapidly developing and generally is confined to cases in which the benefit of the contract is or includes "pleasure, relaxation or peace of mind." The Court was satisfied, on the evidence, that this plaintiff had impressed on this carrier, at time of formation of the contract, her concern that this family treasure be handled carefully and skilfully, thus introducing the necessary "peace of mind" element into the contract and justifying an award of aggravated damages for its breach.

A further claim for punitive damages was dismissed on the basis that the carrier "was inept and insensitive but not malicious or oppressive."

D. Demurrage Recoverable Even in the Absence of Contract

Railink Canada Ltd. v. Fedmar Limited[73] involved an appeal from the Small Claims Court of Ontario. The plaintiff Railink operated a railway, and the defendant Fedmar operated a marine terminal which included rail sidings. No written contract existed between the two, and the Court made no finding of the existence of any other contract. Typically Fedmar contracted with a shipper to provide stevedoring services, and Railink contracted with, or was a subcontractor to, the main-line rail carrier who had contracted with the shipper for transportation of goods to the marine terminal. Also, typically Railink advised Fedmar when goods were ready for delivery to the terminal, and Fedmar, with a view to scheduling of its own work, instructed Railink when to position the car carrying the goods on the terminal siding. Railink's published tariff, knowledge of which Fedmar admitted, provided for demurrage fees in the event of retention of the car for more than two days for unloading. On the facts of the case, application of the tariff resulted in a demurrage claim of $5,471, for which Railink sued Fedmar.

The Court ordered the demurrage paid. Interestingly, if did not appear to do so on the basis of a finding of a contractual relationship (orally expressed, or even implied) between the parties. The Court found it apparent that there was a "distinct business relationship" and a "common understanding" between the parties "whether there is a paper contract or not." Although the Court relied on the 1959 decision of the Supreme Court of Canada in *Northwest Elevators Association v. CPR* to find an "implied understanding"

[73]Ontario Superior Court Docket DC-08-031.

that demurrage is payable for unreasonably long detention of equipment, on the facts of that case the Supreme Court was considering only the scope of regulatory powers of the Canadian Transportation Commission.

The case can perhaps be seen as authority, albeit of questionable weight, for the existence of a "demurrage" exception to the exclusion against recovery of pure economic loss in negligence.

E. Frustrated Air Passenger Denied General and Aggravated Damages

Lukacs v. United Airlines Inc.[74] is an air carriage case, consideration of which prompts reflection which of us has not contemplated a claim of this nature when frustrated in our efforts to reach a business destination.

The plaintiff, a university professor on his way to an academic conference, had his flight cancelled because of an aircraft mechanical failure. His fare was refunded in full. Despite the refund he sued in Small Claims Court for special damages (taxi fare to/from the airport), for general damages (loss of research and learning opportunities) and aggravated damages (inconvenience and mental anguish). Representing himself, he took his case all the way to an application for leave to appeal to the Manitoba Court of Appeal.

At trial, the plaintiff was awarded only the taxi fare, on grounds that Art. 19 of the *Montreal Convention* permits recovery, as damages for delay, only of special damages. Leave to appeal this ruling was, in the result, dismissed. The Court adopted and applied Canadian and American jurisprudence to the effect that inconvenience and mental anguish are not compensable under the *Montreal Convention*. In the case of lost opportunity, there was said to be no evidence of resulting lost income and, if present, was offset by the fact the plaintiff had not had to pay the conference registration fee. The alleged impact on future academic promotion was said to be speculative and not supported by the evidence.

The award of trial costs against the plaintiff was affirmed, to which was added an order that he pay costs of the unsuccessful motion for leave to appeal.

[74] 2009 MBCA 111.

VI
PRACTICE

A. Public Policy Invalidity of Exclusion Clauses is a Triable Issue

In *656925 British Columbia Ltd. v. Cullen Diesel Power Ltd.*[75] the plaintiff alleged the defendant's failure to competently perform an overhaul of a vessel's main engines, causing failure of one of the engines and substantial losses. The defendant alleged its contract contained a parts and workmanship warranty which expired six months following performance of the work, and which excluded all other liability to the shipowner. The failure occurred some two years following completion of the work. The defendant brought a preliminary motion seeking dismissal of the action on the basis of this exclusion of liability. The Court declined to dismiss the action.

The Court was not satisfied that the case could be disposed of in the defendant's favour without other evidence. The Court considered appellate authority in the British Columbia Court to the effect that exclusion clauses might not survive "fundamental breach" of the contract, where it would be "unconscionable, unfair, unreasonable or contrary to public policy" to so permit, and that this position may apply even where the parties are of relatively equal bargaining power. Despite the rarity with which this result is reached even in a commercial case, the Court requires an evidentiary context in which to apply the exclusion clause, and so summary pre-trial dismissal was refused.

B. Request for Confidentiality of Infant Settlements Rejected

McDonald v. Queen of the North[76] was one of many lawsuits arising out of the sinking, with loss of life, of the BC ferry *Queen of the North* on March 22, 2006. This decision involved proceedings to approve a settlement proposed for the benefit of infant dependents of one of the deceased passengers. Solicitors for the infant plaintiffs requested either that the approval hearing be held *in camera* or that the supporting file material be sealed, all in the interests of protecting the plaintiffs' interest in the confidentiality of the settlement. Somewhat surprisingly, shipowners' counsel did not similarly seek a confidentiality order (as might have been expected with a view to future settlements of other claims). The grounds for the plaintiffs' counsel's request

[75] 2009 BCSC 260.
[76] 2009 BCSC 646.

was said to be that the public including the infant plaintiffs' school mates should not know the amount of the settlement.

The Court rejected the confidentiality request. It noted the courts' unwillingness to withhold any judicial business from public scrutiny except in the most compelling of circumstances and held that, in the case of approval of infant settlements, it is the interest of transparency to the public that is compelling. In general the law requires public scrutiny of infant settlements so that the public may be satisfied that the best interests of infant plaintiffs have been reasonably protected. That general concern for openness is heightened where, as in this case, there is intense public interest in the case.

VII
JUDICIAL REVIEW

A. Challenge to Foreign Vessel Clearance Denied

Living Ocean Society v. Minister of Fisheries and Oceans[77] involved an application for an interim order under section 18.2 under the *Federal Court Act* and Rule 373 of the *Federal Court Rules* staying a foreign vessel clearance issued by the Minister of Foreign Affairs and the United States Department of State, with respect to the research vessel *Marcus G. Langseth*, a marine scientific research vessel intended to conduct a seismic survey off Vancouver Island in 2009. The survey was to be conducted by Columbia University to obtain data with respect to the predictability of earthquakes and to research species living in the Endeavour Hydrothermal Vents Marine Protected Area. The Department of Fisheries and Oceans required the respondent, Columbia University, to substantially increase mitigation measures to protect marine mammals in the Endeavour Marine Protected Area. The Minister of Foreign Affairs issued a foreign vessel clearance under the *Coasting Trade Act*.[78]

In response to the application to stay the issuance of this clearance, the respondent Ministers filed an affidavit of the regional director of the Oceans Habitat and Enhancement Branch for the Pacific Region of the Department of Fisheries and Oceans. Her affidavit deposed that they had received an opinion from an expert that the mitigation measures proposed by the respondent, Columbia University, were sufficient to prevent harm and disturbance in marine mammals. The Court was satisfied with this evidence and, despite

[77]2009 FC 848.

[78]S.C. 1992, c. 31.

the fact that no affidavit was filed by the actual expert, the Court declined to draw an adverse inference from the failure to provide evidence of persons having personal knowledge and accepted the affidavit on the basis of information and belief. While the applicant submitted evidence from the United States about the impact of proposed seismic testing and potential incidental harassment to marine mammals, the Court found this insufficient to demonstrate probably irreparable harm on the basis that it was based on different acoustic levels and that the respondent's evidence was unequivocal, up to date and from a Canadian expert familiar with the area. The application for an interim order staying the foreign vessel clearance was dismissed.

B. Challenge to Fisheries Allocation Denied

Mainville v. Canada (Attorney General)[79] arose from a 2007 decision of the Federal Court dismissing an application for judicial review with respect to a decision of the Minister of Fisheries and Oceans allocating total allowable catch for snow crab. The Minister announced in 2006 a snow crab fishing plan for a particular region in New Brunswick, allocating the total allowable catch to two fishing associations, neither of which included the appellants. The Court followed the 1997 decision of the Supreme Court of Canada in *Comeau's Sea Foods Ltd. v. Canada (Ministry of Fisheries and Oceans)* that the discretion conferred upon the Minister by section 7 of the *Fisheries Act* is restricted only by the requirement of natural justice, which require the Minister to base his decision on relevant considerations, avoid arbitrariness and act in good faith. The Court found that the appellants had expressly chosen to operate in a different aspect of the fishery and could not therefore complain of unfair treatment when they were not included in the new allocation of this snow crab quota. In a brief decision, the Federal Court of Appeal upheld the dismissal, noting that the appellants were seeking to have the Court exercise the Minister's discretion but in a different manner. The Court of Appeal found that the fishing plan was the sole responsibility of the Minister and an integral part of his discretion. The Court of Appeal agreed that there was no bad faith, reliance on irrelevant considerations, arbitrariness or breach of natural justice.

[79] 2009 FCA 196.

VIII
PENAL PROCEEDINGS

A. Transportation Appeal Tribunal of Canada - Continuing Violations

In *Atlantic Towing Limited v. Minister of Transport*,[80] the statutory inspection certificate for the applicants' harbour tug expired on November 29 and a renewal was not issued until December 10. On eight of the intervening ten days, the tug left her berth to provide routine berthing/unberthing services. The Department of Transport issued notice of eight violations (one for each of the eight days), each substantively alleging the failure of the ship's authorized representative to ensure that the vessel was inspected for the purpose of obtaining a Canadian maritime document, and assessed in respect of each an administrative monetary penalty ("AMP") of $6,000 (total $48,000). It is noteworthy that the separate regulatory offence, departing berth without a valid certificate, is not one to which the AMP regime applies, and the Department had seen fit in the circumstances not to prosecute criminally for that offence.

The authorized representative sought review by the Transportation Appeal Tribunal of Canada of the penalty assessments, primarily (and ultimately unsuccessfully) on grounds that the alleged violation had not occurred on the facts, and secondarily (and successfully) on the basis that the violation was committed, if at all, once only and that only one AMP should be payable.

The Tribunal was satisfied that departure from berth was not an element of the alleged violation, only the failure of the authorized representative to ensure the inspection. Although an inspection had been made on October 29, there was untimely follow-up on vessel interests' part, resulting in delay in renewal. On its analysis of the facts, the Tribunal determined that the inspection had not been satisfactorily finalized, and that this was sufficient proof of that element of the offence. After consideration of criminal law jurisprudence distinguishing between continuing and separate offences, the Tribunal concluded that the subject violation was "primarily a passive violation" and, on the authorities, was to be treated as a continuing single violation.

Despite the applicable regulations not prescribing this particular inspection omission to be one in respect of which a separate offence is committed on each day on which it continues, the Tribunal did not decide the matter on that narrow basis. All of this therefore leaves open the possibility that a mul-

[80] 2009 TATCE 31.

tiple-day "active" violation may give rise to multiple AMPs, even if not among the few specific violations for which the Regulations so provide.

In the result, the Tribunal upheld the assessment of one AMP assessment only and imposed a penalty of $6,000. It is finally noteworthy that the AMP regulations impose in respect of this particular violation a penalty range of $1,250 to $25,000. In this case, the authorized representative contended the penalty should be reduced to $1, on the basis of the technical nature of the omission. However, despite the applicable statute permitting the Tribunal to substitute its determination as to penalty amount, the Tribunal held itself bound by the lower (and presumably also upper) limits of the range prescribed by the Regulations. On the merits, the Tribunal saw fit not to interfere with the $6,000 single AMP assessed by the Department.

B. Transportation Appeal Tribunal of Canada - Penalty in a Pollution Case

Florence M v. Minister of Transport[81] is noteworthy, and to date unusual, because it engages the AMP regime in a ship-source pollution case. It is believed to have been the first time that the Department of Transport has declined to prosecute a polluter criminally, where evidence to support a prosecution apparently exists. Maximum (and even typical) fines on conviction in a pollution prosecution are very substantially greater than the maximum penalties for which the AMP Regulations provide.

It was alleged that the ship discharged a prescribed pollutant near Kingston, Ontario, and the Department assessed an AMP in the amount of $25,000, which is the maximum for which the AMP Regulations provide. A spill of diesel fuel occurred during transfer from vessel tanks and was duly reported by the ship's master. The quantity spilled was on the hearing agreed to be 1,720 litres. There were alleged deficiencies in the initial response made by owners and their response contractor, but the spill was contained and largely cleaned within three days.

In argument before the Tribunal, the Department contended for the maximum penalty on grounds that it was substantially less than fines typically imposed by criminal courts in similar circumstances. This was described as a "test case on pollution" before the Tribunal. The Tribunal noted the absence of any past history of pollution violations by this shipowner and commented that under the AMP regulations the general penalty model in high-gravity violations (such as this) is $6,000 for a first violation by a corporation and $12,000 for a second violation. The Tribunal further comment-

[81] 2009 TATCE 34.

ed that $6,000 was not appropriate on the facts of this case, with substantial quantity and severe if short-term environmental damage, but neither was the maximum appropriate in view of mitigating factors such as timely reporting and the incurring of considerable remedial cost by the owners. The Tribunal determined, and ordered, that the AMP be reduced to $10,000.

By way of comment, if (as is understood to be a matter of policy) the Department seeks substantial increase in the economic cost to polluters in Canada, this case may be likely to cause a return to the more traditional criminal prosecution in maritime pollution cases. It is not known that any subsequent pollution cases in Canada have been made the subject of AMP proceedings.