

# YEAR IN REVIEW – CANADA

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### Introduction and Apology

It is noted that there was no “year in review” presentation concerning Canada at the Association’s 2006 seminar, so I have taken the liberty of discussing in this paper developments in Canada some of which are more than 12 months old.

That said, I have the pleasure to review below more-or-less recent developments in the maritime law of Canada which have tended to be controversial and which it is hoped will be of some interest to seminar participants.

### 1. Marine Pollution - Bill C-15

In Canada, the primary statute regulating penal responsibility for ship-source pollution is the *Canada Shipping Act 2001*<sup>1</sup>, which as a general statement reflects obligations and responsibilities arising under MARPOL 73/78 and its various Annexes. There are however other statutes with other primary purposes, which collaterally impose penalties, and establish investigative and enforcement regimes, for pollution of the marine environment. Examples include the *Arctic Waters Pollution Prevention Act*<sup>2</sup> (which stipulates, among other things, construction standards for ships navigating north of 60°N and which prohibits discharges of pollutants in such waters); the *Fisheries Act*<sup>3</sup> (which regulates the Canadian fishing industry and which prohibits discharges of deleterious substances into waters frequented by fish); and the *Canada-Newfoundland Atlantic Accord Implementation Act*<sup>4</sup> and the *Canada-Nova Scotia Offshore Petroleum Accord Implementation Act*<sup>5</sup>, which regulate offshore hydrocarbon exploration and development off Canada’s Atlantic coast, and which prohibit “spills” of hydrocarbons from related offshore facilities. Another such statute is the curiously-named *Migratory Birds Convention Act 1994*<sup>6</sup>, which implements a bilateral treaty between Canada and the United States the primary purpose of which is regulating the hunting of birds which migrate between the two nations and, collaterally, protection of such birds’ habitat in both nations. Until the adoption in 2005 of the amendments discussed below, this legislation’s only effect in marine

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<sup>1</sup> SC 2001 c. 26

<sup>2</sup> RSC 1985 c. A-12

<sup>3</sup> RSC 1985 c. F-14

<sup>4</sup> SC 1987 c. 3

<sup>5</sup> SC 1988 c. 28

<sup>6</sup> SC 1994 c. 22

pollution was a subordinate generally-applicable regulation which prohibited discharge of substances harmful to migratory birds into their habitat.

Bill C-15<sup>7</sup>, which came into force on 28 June, 2005, was legislation amending the *Migratory Birds Convention Act 1994* and the *Canadian Environmental Protection Act 1999*<sup>8</sup> (which latter statute, among other things, implements the Anti-Dumping Convention in Canadian domestic law). Though highly controversial on its merits within the Canadian maritime transportation industry, particularly given its coincidence in time with concerns for the fair treatment of seafarers arising from, among other things, the *PRESTIGE* casualty, the Bill was adopted with essentially all-party support in the Canadian Parliament. The amendments, substantively, create a statutory prohibition against any person or vessel “depositing a substance that is harmful to migratory birds ... in waters ... frequented by migratory birds or in a place from which the substance may enter such waters ...”. They impose personal penal obligations on (specifically) every master, chief engineer, owner and operator of a vessel, and also on every officer and director of a corporation which is the owner or operator, to ensure compliance by the vessel and by all persons on board the vessel. Maximum penalties are fines up to CAD1 million on indictment or CAD300,000 on summary conviction or imprisonment of up to three years on indictment or six months on summary conviction; and in the case of ships over 5,000 DWT, there are minimum fines of CAD500,000 on indictment or CAD100,000 on summary conviction. Maximum fines are doubled in case of a second or subsequent conviction. There have to date been no prosecutions commenced in Canada under any of these provisions since the coming into force of the amendments.

Despite the Draconian substance of the amendments summarised above (which must be acknowledged to be not dissimilar to marine anti-pollution laws of many other advanced coastal States), that is not the element of this Bill which it is desired to discuss in this paper. Of greater concern to Canadian maritime practitioners are the extensive powers (as-yet unused and so untested) given to officials to order to deviate, and to detain, ships in transit through the Exclusive Economic Zone.

Enforcement officers, who will likely be officials of the Canadian Environment Department, are empowered to “stop” or “move”, and to detain “for a reasonable time” for the purpose of inspection, any ship. They are empowered also to board and inspect, without warrant, any ship in Canada’s territorial sea or EEZ if the ship is believed to have on board “any thing to which this Act or the Regulations apply or any document, record or data relating to the administration of this Act ...”. The boarding and inspection powers will be exercisable in respect of foreign-flag vessels in the EEZ only with the consent of the Minister of the Environment. Officers will have, in addition, the power to direct a ship into port and to issue detention orders against the ship if they have reasonable grounds to believe that the ship has committed, or has been used in, an offence. The power to deviate and/or detain may only be exercised in respect of a ship in the EEZ if the officer believes that the offence “will cause major damage to the environment, or an actual threat of major damage to the environment”. Finally, this deviation/detention power will be exercisable in respect of foreign-flag ships in the EEZ only with the consent of the Attorney-General of Canada.

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<sup>7</sup> Enacted as SC 2005 c. 23

<sup>8</sup> SC 1999 c. 33

Canada's east coast EEZ includes portions of the great circle route between the eastern seaboard of the United States and northwestern Europe – among the globe's busiest commercial shipping lanes and one transited literally daily by ships which have, and have had, no business in and no connection with Canada. The EEZ is overflowed regularly by Canadian patrol aircraft searching for, among other things, oil films; if one is detected Canadian officials have an unfortunate propensity to conclude that it must have originated from whichever ship the stern of which the aircraft observes to be closest to the film. The practical concern, and at the moment the great unknown, is what advice one will give to owners of a ship which is, on one of these occasions, ordered into a Canadian port for investigation while on an otherwise innocent passage through the Canadian EEZ.

As noted above, the grant of the detention/deviation power is subject to the proviso that it may be exercised only if "major damage" is caused or threatened, the concept "major damage" is not defined and can be expected to be a significant source of controversy in practice. In particular, there is provision for consideration of the "cumulative or aggregate" effect of discharges, causing concern that relatively small individual spills will be alleged to contribute to "major" cumulative damage, and so support exercise of the detention power.

Of principal concern is the apparent inconsistency between the provisions summarised above and the provisions of UNCLOS 1982, to which Canada (finally) acceded in November, 2003. In particular reference is made to UNCLOS Art. 220, paragraphs (3), (5) and (6), and their hierarchical scheme of investigation and enforcement powers in cases of pollution by ships navigating in the EEZ of a coastal State:

- Where there are "clear grounds for believing" such a ship has committed a violation, the coastal State may require the ship to give information regarding its identity, port of registry, its last and next ports of call, and other relevant information (Art. 220(3))
- Where there are "clear grounds for believing" that such a ship has committed a violation "resulting in a substantial discharge causing or threatening significant pollution", the State may undertake physical inspection of the ship "if the vessel has refused to give information or if the information supplied by the vessel is manifestly at variance with the evident factual situation" (Art. 220(5)); and
- Where there is "clear objective evidence" that such a ship has committed a violation "resulting in a discharge causing major damage or threat of major damage to the coastline or related interests of the coastal State, or to any resources of its territorial sea or exclusive economic zone", the State may institute proceedings including detention (Art. 220(6)).

It is submitted that the inspection, deviation and detention powers for which Bill C-15 provides are clearly inadequate to comply with Canada's obligations under UNCLOS:

- There is no primary requirement that information be requested from the suspect ship, and therefore the international law precondition to the exercise of an inspection power is not required to be satisfied;

- The Canadian inspectors' powers of inspection may be exercised even in the absence of "a substantial discharge causing or threatening significant pollution";
- The Canadian inspectors' powers of inspection are exercisable based on "reasonable grounds to believe" that the violation has been committed, despite UNCLOS' requirement for "clear grounds";
- The Canadian inspectors' powers of detention are likewise exercisable based on "reasonable grounds to believe", despite UNCLOS' more stringent requirement that there be "clear objective evidence";
- The Canadian inspectors' detention power may be exercised in cases of "major damage to the environment, in Canada or in the exclusive economic zone", which it is suggested is broader than UNCLOS' requirement of "major damage to the coastline or to any resources"; and
- The Canadian statute's empowerment of inspectors to take into account the "cumulative or aggregate effect" of discharges by others is not provided for in UNCLOS at all.

As will be seen later in this paper, Canadian courts give effect to the plain meaning of Canadian statutes even if they are inconsistent with Canada's international law obligations arising under treaties to which Canada is party. Therefore there is substantial concern among Canadian practitioners that compliance with Canadian domestic law may require ships in transit through the EEZ, the subject of mere suspicion of pollution discharge, to enter port if so ordered and to be subject to detention following arrival.

## **2. Port State Control – the *LANTAU PEAK* Litigation**

The facts were these. *LANTAU PEAK*, built in 1978, was a Malaysian-flag Capesize bulk carrier. Her owner at the time of relevant events had acquired her in September, 1996. As of April, 1997, she was classed with a member of IACS, was entered for P&I risks with a member of the International Group, held valid Class and statutory certificates, and had within the preceding six months been inspected, with satisfactory results, by all of P&I, Class, time charterers and Australian Port State Control authorities.

In April, 1997, while bound in ballast from Japan to Vancouver, the crew discovered and reported detached hull frames in holds 3 and 9. Owners made arrangements for these to be repaired on arrival at Vancouver. On arrival at Vancouver on 5 April, 1997, *LANTAU PEAK* was boarded by two Canadian government inspectors for what was believed to be a routine Port State Control inspection. Owners had informed the inspectors of the detached frames and the intention to have them repaired at Vancouver. The inspectors immediately issued a detention order which required, among other things, that all vertical frames in all holds "with sections exceeding 17% wastage" be cropped and renewed. As a general statement, the relevant Class requirement was not more than 25% wastage.

On 10 April, flag state authorities formally requested Canada to release the ship. On 11 April, owners wrote to Canadian authorities indicating their willingness to perform the ordered repairs, but their preference to have same done at Shanghai rather than Vancouver, at substantial cost

savings. On 15 April, Class issued a Seaworthiness Certificate for the ship; on 18 April and again on 3 June Class confirmed to the Canadian government their allowance for up to 25% frame corrosion. On 21 April and again on 5 May, Class issued further survey reports confirming that the ship was within Class requirements. Most critically, on 23 April owners' solicitors initiated a statutory appeal of the detention to the inspectors' superiors at Ottawa, requesting that Port State Control authorities accept Class' requirements for frame wastage. On 23 June, flag state authorities wrote directly to senior Canadian authorities requesting that Class standards be accepted. Finally, on 18 July, the chief of the Canadian inspection service issued a decision in owners' appeal of the detention order under which the wastage criterion was raised from 17% to 25%, and *LANTAU PEAK* would be permitted to proceed in ballast to Shanghai for repairs, subject to immediate repairs to the certain frames being performed at Vancouver. Those immediate repairs were performed at Vancouver between 18 July and 11 August, and on 12 August the ship was released from detention. Ultimately, owners repaired at Shanghai, in compliance with conditions of release imposed by the Canadian authorities, more than 600 frame sections which neither Class nor the flag state would have considered violations. From the initial detention until completion of the repairs, the ship was off hire for 187 days. Owners sued the Canadian government, claiming compensation for (a) negligently detaining the ship; (b) negligently delaying issuance of the appeal decision; and (c) in that appeal decision, negligently imposing unreasonable conditions of release.

At trial<sup>9</sup>, the Court awarded substantial damages against the Canadian government on all three bases. The trial Court's reasoning may be summarised:

The *Canada Shipping Act*<sup>10</sup> is the primary statute regulating both Canadian-flag ships and foreign-flag ships in Canadian waters. Section 310 of that Act requires a Canadian government inspector to detain a ship which he considers unsafe, and also gives the inspector discretion to detain any ship which is not in compliance with any provision of the *Canada Shipping Act*. The Court commenced its legal analysis by concluding that the detention power for which that section provides is available only in respect of either a Canadian flag ship, or a foreign flag ship licensed to engage in the coasting trade in Canada. *LANTAU PEAK* was neither of these things, and so the statutory detention power was inapplicable in the case of that ship.

However, the Court decided, Canada possessed under international instruments a power to inspect and detain foreign flag vessels, including *LANTAU PEAK*, in certain circumstances. Specifically, the court determined that Canada possessed powers, but also owed obligations of care, under relevant articles of SOLAS 1974 and under the Tokyo MoU. In particular, the Court emphasised SOLAS 1974 Regulation 19(f):

(f) When exercising control under this regulation all possible efforts shall be made to avoid a ship being unduly detained or delayed. If a ship is thereby unduly detained or delayed it shall be entitled to compensation for any loss or damage suffered.

and Tokyo MoU Art. 3.12:

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<sup>9</sup> *Budisukma v. Canada* 2004 FC 501 (CanLII)

<sup>10</sup> As then enacted, RSC 1985 c. S-9

3.12 When exercising control under the Memorandum, the Authorities will make all possible efforts to avoid unduly detaining or delaying a ship. Nothing in the Memorandum affects rights created by provisions of relevant instruments relating to compensation for undue detention or delay.

None of these specific provisions of SOLAS or of the MoU have been adopted into Canadian legislation. However, the Court found that because the Canadian government as a matter of domestic general law is liable for the “negligent” conduct of its servants, the relevance of these international instruments is to set the standard of conduct which Canada must observe: detentions of ships shall not be “undue”.

The Court in particular concluded in this aspect of its reasons:

I find that the MOU is the principal feature which establishes proximity. The agreement to establish a Port State Control process creates a close causal connection between an inspection and any harm that results from an inspection. Under the MOU, with particular reference to Regulation 19(f) of SOLAS, the parties have an expectation that inspections will be conducted in such a way so as not to cause undue detention or delay. In addition, by Regulation 19(b), "clear grounds" are required to go beyond valid certificates to initiate detailed inspections. These expectations impose an obligation on inspectors to take specific care in carrying out inspections.

The Court held that if an inspector disagreed with Class “good grounds based on solid evidence would need to be produced to establish that the decision is unacceptable, otherwise a detention could be considered to be undue”:

... It should be possible to give reasons for detaining a ship against whatever Class standard and make it stick, if the reasons are well supported. The fact that it might be difficult to state the necessary reasons is no answer to avoiding doing so.

Further, and in many respects more significantly, the court asserted “no doubt” that the government owes a duty of care to the shipowner “for expeditious decision making”. The evidence showed that the owners’ 23 April appeal letter was received in Ottawa on 24 April, and the appeal decision was not issued until 18 July. The court concluded that three months and 13 days (from the initial detention) was “undue delay”, that it “was outside what would be considered reasonable and prudent of officials in charge of the administration of the MoU”. The court further concluded that the government’s failure to offer an explanation for the delay meant that that explanation, if given, would have been consistent with negligence on the part of the government officials.

As to amount of compensation, Class would have required a much smaller number of frames to be renewed, and would have permitted all repairs to be performed at Shanghai at lower cost. In this, the Court found, the Class decision was the relevant one, and the government was responsible for the incremental cost of having these frames repaired at Vancouver instead of at Shanghai and for cost of renewal of frames which Class would not have required. Regarding the 187 days that the ship was off-hire, the Court held that the first 16 days, 5 to 21 April, were owners’ own responsibility because this would have been a reasonable time to perform repairs to the detached frames, which were required in any event. Further, because 47 out of 671 frames repaired at Shanghai did not meet Class standards, the court held that 47/671 of off-hire time



following 21 April was owners' responsibility. The remaining losses of hire were ordered compensated to owners by the Canadian government. In addition to the above, the government was ordered to compensate owners for port disbursements incurred and bunkers consumed during the delay periods which were found to have been caused by officials' negligence. Total damages awarded against the government, excluding interest, were approximately USD3.3 million.

Not surprisingly, the case was appealed. In the result, the Federal Court of Appeal<sup>11</sup> allowed the appeal and exonerated the government from any liability to owners. The reasoning which led the Court to this result may be briefly summarised.

The Appeal Court first rejected the trial court's conclusion that s. 310 of the *Canada Shipping Act* does not apply to grant a detention power in the case of any foreign-flagged ship in Canadian waters. The statutory language on its face applied to any ship, and the trial judge's interpretation of a subordinate regulation as exempting foreign-flagged ships was not only a misinterpretation, the regulation-making power expressed in the statute does not authorize regulations exempting any ships from compliance with safety requirements. The Court therefore concluded, on these points, that the statute, and neither SOLAS nor the MoU, provided the legal authority for the detention order. The Canadian statute does not qualify the inspectors' detention power nor limit the period during which a detention order may remain in force; therefore that power is not circumscribed by the international instruments' mandate to avoid "undue" delay.

The Appeal Court went on to find that shipowners' claim for damages was unsupportable because owners, if dissatisfied with the appeal decision they received and with which they ultimately complied, had a statutory right of further appeal to the Minister, which they failed to pursue. The tort claim, the Court held, could not be used to collaterally attack administrative decisions (both of the inspectors and of the Chairman on first-level appeal), and so the validity of those decisions must be assessed by the standard (reasonableness *simpliciter*) which would have applied had judicial review proceedings, rather than a damages claim, been instituted. The Court found both levels of administrative decision to have been "reasonable". In the course of so concluding, the Court had occasion to comment as follows on the role of, and the respect due to, Class:

[Owners] have suggested that Canadian port inspection authorities should defer to the classification societies in such circumstances. This submission is problematic. There are many classification societies in operation, and, although there are a small number of larger ones such as Class NK which are acknowledged as reputable, their standards are not uniform. Although Canadian authorities cooperate with the classification societies, they must and do retain final responsibility for the assessment of the safety of ships within Canadian waters.

The Appeal Court did not address the claim based on excessive delay issuing the decision in the administrative appeal. This is unfortunate, because of the potential in ship detention cases for purely bureaucratic delay to unnecessarily extend detention and so substantially increase related financial losses to ship's interests. Of course, there is risk that if private liability results from

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<sup>11</sup> *Canada v. Budisukma* 2005 FCA 267 (CanLII)

delayed decision-making, officials will be motivated to simply make prompt decisions confirming the detention, which it is suggested would be equally unsatisfactory to the economic interests of owners and charterers.

It is unfortunate also that the Appeal Court's decision leaves little practical scope for negotiation in those cases in which there is substantial disagreement between port state control officials and Class (or for that matter, the flag state) on technical safety assurance issues. In Canada at least, it appears that port state requirements trump both Class and flag state requirements, potentially exposing owners to significant incremental cost based only on the fortuity of where the ship's next commercial fixture may take her.

### **3. Choice of Forum – The OT Africa Line Saga**

This litigation was a claim by subrogated cargo underwriters, seeking recovery of a CAD30,000 payout for short delivery of a containerised cargo of consumer merchandise. Carriers opposed Canadian litigation founded on a domestic statute which establishes a local jurisdiction regime modelled on the Hamburg Rules. The case went to the Courts of Appeal in Canada and in England, and would have gone higher had the House of Lords not declined a request for leave for further appeal.

Ocean carriage was from New York to Le Havre, where the subject container was transhipped to Liberia. The Bill of Lading was issued at Toronto, Canada where the ocean freight was payable (and was paid) and where the ocean carrier, OT Africa Line, maintained an agency office. The cargo insurance was placed on the Toronto market, and was underwritten by Canadian insurers. On outturn at destination, as noted, the cargo was short 99 out of 170 cartons. The Bill of Lading contained an unremarkable choice of law and choice of exclusive forum clause, as follows:

Any claim or dispute whatsoever arising in connection with the carriage under the Bill of Lading shall exclusively be governed by English law and determined by the High Court of London.

Underwriters, having paid the loss, brought action in the Canadian Admiralty court seeking recovery. In doing so, they relied on s. 46(1)(b) and (c) of the Canadian *Marine Liability Act*<sup>12</sup>, which provides:

46(1) If a contract for the carriage of goods by water to which the Hamburg Rules do not apply provides for the adjudication or arbitration of claims arising under the contract in a place other than Canada, a claimant may institute judicial or arbitral proceedings in a court or arbitral tribunal in Canada that would be competent to determine the claim if the contract had referred the claim to Canada, where

(a) the actual port of loading or discharge, or the intended port of loading or discharge under the contract, is in Canada;

(b) the person against whom the claim is made resides or has a place of business, branch or agency in Canada; or

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<sup>12</sup> SC 2001 c. 6



(c) the contract was made in Canada.

The judicial events which followed are summarised below in the order in which they occurred.

Subrogated cargo underwriters commenced action in Canada in the names of shippers and consignees, naming as defendants *in personam* carriers OT Africa Line and *in rem* the two ships, on **1 August, 2003**. Carriers' representatives in Canada were served 11 August, 2003.

On **3 September, 2003** OT Africa Line commenced action in the High Court in London, seeking principally declaratory judgment to the effect that carriers were not liable for cargo interests' losses. Defendants in that action were Magic Sportswear Corp. and Blue Banana, respectively shipper and consignee of the cargo and the two named plaintiffs in the Canadian litigation.

On **8 September, 2003**, OT Africa Line obtained *ex parte* from the High Court in London an anti-suit injunction restraining cargo interests from proceeding with the Canadian litigation. It is not reported when the London proceedings, or the anti-suit injunction, were served, but cargo interests on 28 October, 2003 filed in that Court an acknowledgement of service which stated cargo interests' intention to contest jurisdiction of the High Court. That contestation, as will appear, never occurred.

On **9 September, 2003**, carriers brought motion in the Canadian court seeking a stay of the Canadian action. The motion was heard 15 December by Prothonotary Milczynski and was dismissed by her on **22 December, 2003**<sup>13</sup>. She held:

- Section 46(1)(b) and (c) were satisfied on the facts, such that cargo had the statutory right to initiate proceedings in the Canadian court.
- Section 46 “removes the determining or binding effect of a forum selection clause in a Bill of Lading”, but does not displace the Court’s discretionary jurisdiction to stay proceedings commenced before it, including on grounds of *forum non conveniens*.
- On the facts of the case, given that witnesses were neither in London nor Canada, that the true plaintiffs were Canadian companies, that the defendants have a place of business in Canada, and that the value of the claim militated against incurring the cost of London litigation, carriers had not discharged their burden to demonstrate some other, more appropriate, forum.

Accordingly carriers' motion for a stay of the Canadian proceedings was refused.

Carriers filed notice of appeal of the Prothonotary's decision on the same date, **22 December, 2003**. In accordance with practice in the Canadian Admiralty Court, that appeal took the form of a re-hearing before a Justice of the Canadian Federal Court. The appeal was heard by Mr. Justice O'Keefe on **23 February, 2004**, and he reserved his decision, ultimately for some months.

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<sup>13</sup> 2003 FC 1513 (CanLII)

Meantime on **4 April, 2004**, carriers sought and obtained leave in the London High Court to add cargo underwriters by name in their pending declaratory litigation before that Court and to serve those underwriters *ex juris*.

Justice O’Keefe in the Canadian court issued his decision on **23 August, 2004**<sup>14</sup>, dismissing the appeal from Prothonotary Milczynski and refusing to stay the Canadian action. He held:

- Section 46(1) of the *Marine Liability Act* grants the Court jurisdiction *simpliciter* to hear a claim if any of the statutory conditions are met, despite a forum selection clause which provides otherwise. While the section denies the Court discretion to stay based only on a forum selection clause as a jurisdiction *simpliciter* issue, it remains for the Court to determine whether it is the most convenient forum.
- The Prothonotary correctly considered the relevant factors in the *forum conveniens* analysis, and correctly concluded, based on all those factors, that the Canadian court is the most appropriate for determination of cargo interests’ claim.

Carriers on **9 September, 2004** filed Notice of Appeal of Mr. Justice O’Keefe’s decision to the [Canadian] Federal Court of Appeal. Hearing of that appeal, as will be seen, was considerably delayed.

Cross-motions were brought (filing date is not given) in the London proceedings: motion by cargo requesting discharge of the anti-suit injunction and stay of the High Court litigation; and motion by carriers seeking to extend the anti-suit injunction so as to additionally enjoin the cargo underwriters. Those motions were heard by Mr. Justice Langley on 20 October, 2004 and decided by him on **3 November, 2004**<sup>15</sup>. In the result, the London proceedings were not stayed, and the anti-suit injunction was maintained and extended to include the cargo underwriters. Justice Langley held:

- There is no dispute that the contract is governed by English law. Under that law, parties’ choice of forum clauses are enforced, including by way of anti-suit injunction, unless the party opposing enforcement of the clause shows “strong reasons” not to do so.
- On the facts of this case, no such “strong reasons” or “exceptional justification” is shown. The Canadian court is not an appropriate forum in a dispute between American, British and Liberian parties, in which neither the goods nor the carriage had any connection with Canada. The Canadian statute founds jurisdiction because the contract was made in Canada, the freight was paid in Canada, and the carrier has an office in Canada. None of these matters are of any relevance to the dispute.
- The existence of the Canadian statute, giving permissive but not mandatory jurisdiction to the Canadian court, is not sufficient “strong reason” to enable or require the English court to override the exclusive jurisdiction clause. Furthermore, the potential “clash of

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<sup>14</sup> 2004 FC 1165 (CanLII)

<sup>15</sup> [2004] EWHC 2441 (Comm) (Bailii)

jurisdictions” between English and Canadian courts seized of the same dispute is insufficient “strong reason”.

- Therefore, despite section 46, English law clearly supports the issuance of an anti-suit injunction to ensure that the parties abide by the agreement they have made.

Cargo interests appealed Langley J’s decision to the England and Wales Court of Appeal. Dates of filing of the Notice of Appeal and of the hearing are not known, but the appeal decision was issued **13 June, 2005**<sup>16</sup>, with concurring reasons by Longmore and Rix LJJ. The appeal was dismissed and the anti-suit injunction upheld. Lord Justice Longmore held:

- Resolution of the dispute depends upon the effect to be given to the forum selection clause under the proper law of the contract. That law being English law, the ordinary resolution would be to enforce the clause unless there is strong reason to do otherwise and, in the discretion of the English court, to support that enforceability with injunctive relief. “It is not now a controversial question” whether, in a normal case, an anti-suit injunction should be granted against a litigant which begins proceedings in a jurisdiction other than the one to which it agreed in an exclusive jurisdiction agreement.
- The true role of comity is to ensure that the parties’ agreement is respected. “Whatever country it is to the courts of which the parties have agreed to submit their disputes is the country to which comity is due”.
- The party which initiates proceedings in some other court than the one to which it agreed is acting in breach of contract. It is neither disrespectful of nor an interference with the Canadian courts or the Canadian legislature to restrain that breach in the face of the enactment in Canada of s. 46. Despite that section’s similarity to Art. 21 of the Hamburg Rules, neither the UK nor Canada have adopted those Rules into their domestic laws. Unless and until they do so, the parties’ freedom to stipulate the exclusive forum in which they will resolve their disputes remains of paramount importance.

Lord Justice Rix supplemented these reasons with concurring reasons of his own. He held:

- On whether an anti-suit injunction is appropriate, it is necessary to resolve the apparent conflict between English law which favours the parties’ freedom to bargain, and Canadian law which permits proceedings to be brought in Canada (which he later described as an effect which “amounts to a rewriting of the parties’ contract”).
- Under English law, a party is entitled to secure compliance with an exclusive jurisdiction clause unless its opponent can show “strong reasons” for suing in some other forum.
- Under English, and it appears Canadian, rules of private international law the issue is to be resolved according to the proper law of the contract, which here is stipulated to be English law. Under English law, the enactment of s. 46(1) cannot provide a strong reason for departing from the rule that gives *prima facie* effect to the parties’ choice of forum.

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<sup>16</sup> [2005] EWCA Civ 710 (Bailii)

- Considerations of comity are necessarily engaged by the Court’s exercise of its discretion whether to grant an anti-suit injunction. The injunction must therefore be necessary both to support the ends of justice and to protect the applicant’s “legitimate interest in English proceedings”. Where, however, the *forum conveniens* analysis turns not on any allegation of unfairness or inadequacy of the foreign court, but rather on the respondent’s promise not to sue there, the issuance of the anti-suit injunction cannot reasonably be characterised as an attack on or an interference with the exercise by that Court of its own jurisdiction.
- It involves no breach of comity to grant in England an injunction against Canadian litigants who “sought to disregard their contractual obligations ... on the basis of a jurisdiction available to them in Canada under a Canadian statute which exceptionally did not recognise the foreign jurisdiction clause”. The injunction redresses a perceived injustice in the conduct of litigants, and does not interfere with the jurisdiction of the Canadian courts. Thus, there is no sufficient reason shown to disregard the exclusive jurisdiction clause.

The previously-filed appeal to the Canadian Federal Court of Appeal was apparently held in abeyance pending the petition for leave to appeal to the House of Lords. It was reported to the Canadian court on 15 December, 2005 that leave had been refused, and so the Canadian appeal was heard 21 June, 2006. The appeal was allowed, and a stay entered of the Canadian litigation, by decision issued **23 August, 2006**<sup>17</sup>. Mr. Justice Evans, writing for the Court, held:

- Section 46(1), where it applies, permits institution of proceedings in Canada but neither requires the Canadian Court to exercise that jurisdiction nor removes the Court’s discretion to stay such proceedings where, *inter alia*, the claim is being proceeded with in another jurisdiction or otherwise “in the interest of justice”. Particularly, the Court retains discretion to determine whether some other court is the more convenient forum.
- Cargo interests failed to contest within the time permitted the jurisdiction of the English Court, and so as a matter of English law (as proved in the Canadian proceedings by affidavit of a London solicitor) cargo interests were deemed to have attorned to the jurisdiction of that Court. The Canadian courts below were therefore in error by failing to consider, in their *forum conveniens* analyses, the judgments of the English courts including the existence of the anti-suit injunctions issued in those Courts. That error permitted the Canadian appeal court to consider the *forum conveniens* issue *de novo*.
- The English judgments are but one of many factors required to be taken into consideration in determining how “the interests of justice, practicality and efficiency” are best served.
- The “critical facts” in the case are that none of the shipper, the consignee, the goods, the load port or the discharge port have any connection with Canada. It is relevant to consider whether respect for the English judgments, in the context of a *forum conveniens* analysis, would “frustrate the policy underlying section 46”. That policy is protection of

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<sup>17</sup> 2006 FCA 284 (CanLII)

the interests of Canadian exporters and importers, and their insurers, by diminishing or eliminating the legal effect of a contractual clause requiring them to litigate disputes in a foreign forum. The legislative record does not suggest that Parliament was also concerned to protect the interests of Canadian insurers when insuring non-Canadian goods shipped from and to ports outside Canada by non-Canadian shippers. Although it is unnecessary to decide in the present case whether choice of forum clauses should be regarded as relevant or conclusive, or given weight, when the shippers, the consignees or the goods are Canadian, “I am inclined to think that they should not, since that would permit litigants to frustrate the policy of section 46”.

- Considering *de novo* all factors relevant to the *forum conveniens* analysis, those connecting the dispute with Canada are “minor”, while those connecting it with England “cumulatively much more significant”. Those latter cumulative factors include, desire to avoid parallel proceedings; potential difficulty whether plaintiffs, if successful in Canada, could persuade the English courts to recognise a judgment against OT Africa Line (which is headquartered in London) granted in the face of the anti-suit injunction; the parties’ contractual choice of forum, recognition of which though not determinative promotes commercial certainty and does not frustrate the policy objectives of section 46; and the general convenience of litigating a dispute in the forum whose law governs the dispute.

By way of comment on these decisions, it was never made clear why P&I interests chose to challenge s. 46 in such a low-value case, nor on these particular facts. There has been, both before and since the initiation of the OT Africa Line litigation, much cargo litigation commenced in Canada in spite of contractual choice of forum clauses, without carriers’ interests making similar attempts to resist same.

One question is the precedent value of OT Africa Line, at least in Canadian jurisprudence. The Canadian Federal Court of Appeal expressly reserved consideration of the weight, and even of the relevance, of choice of forum clauses in a *forum conveniens* analysis in cases where “the shippers, the consignees or the goods” are Canadian. This reservation appears to invite renewal of the controversy, and of the potential confrontation between courts, in a future case in which the relevant “Canadian connections” are stronger on the facts, or perhaps where the “British connections”, aside from the choice of forum clause, are less strong.

Even where there is no such Canadian connection, it is apparent that the Canadian court is willing to consider the choice of forum clause as one of the factors relevant to the *forum conveniens* analysis, but not necessarily as the conclusive factor.

#### **4. Carriage of Passengers – The “Adventure Tourism” Controversy**

Canada in 2001 adopted as its domestic law regulating liability for the carriage of passengers<sup>18</sup> the 1974 Athens Convention as amended by the 1990 protocol (one of very few States to have done so). As a practical matter, the principal substantive difference between Canadian domestic law and that which prevails in most maritime States under the 1974 Convention is that Canada has higher liability limits for passenger injury or death. However, in Canada, the regime applies

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<sup>18</sup> *Marine Liability Act*, SC 2001 c. 6, Part 4

to both domestic and international carriage, and also applies to any waterborne carriage on any form of craft, regardless of means or lack of propulsion. The Canadian statute also empowers the making of regulations requiring that carriers of passengers in Canada carry insurance against these liabilities. To date, no such regulations have been made. It was principally in the context of consultations during 2002, preparatory to making compulsory insurance regulations, that the “adventure tourism” industry in Canada rose in protest.

The label “adventure tourism”, in this context, generally captures commercial owners and operators of small craft such as whitewater rafts, river or sea kayaks, or tour vessels supporting whale watching or similar excursions. Operators of manually-propelled craft typically, and operators of tour vessels in some cases, insured themselves against third party liability under standard commercial general liability policies, usually placed with domestic non-marine underwriters and not specifically written for maritime risks. In that market, liability coverage for these operators generally requires, among other risk management techniques, that customers must sign waivers of liability prior to undertaking the subject activity. Such waivers, of course, offend, and are declared invalid by, Art. 18 of the Athens Convention. The result was that “adventure tourism” operators considered themselves insurable, if at all, only at prohibitive premium cost.

The protests caused extensive and extended further consultations, most recent of which concluded in March, 2007, concerning proposals for legislative reform to address the concerns of this industry. Proposals generally favour a complete exclusion for the industry from application of the Athens-based Canadian liability regime, with ongoing controversy surrounding scope of that exclusion and resulting definition of the excluded craft and activities. Proposals have ranged from exclusion of any craft carrying less than a specified number of passengers (12 was proposed), through exclusion of manually-propelled craft and inflatable hull or rigid-hull inflatable craft (or some combination of these parameters), to exclusions based on customers’ exposure to risks which are incremental to or different than maritime risks to which traditional seaborne passengers are exposed. At conclusion of the last consultations, officials advised that policy recommendations would be made to the national government, which if accepted would lead in due course to the introduction of legislation to implement the recommended reform. It is generally the case, and is expected to be the case with these proposals, that because of Cabinet confidentiality concerns the substance of the proposed reform will not be publicly known until a Bill is actually introduced in Parliament, which may yet be some years in the future.

Regardless the substance and the timing of an eventual legislative proposal to address these issues the maritime law community in Canada continues to have concerns over the regulation of liability of “marine adventure tourism” operators. These include:

- During the hiatus awaiting reform, which as noted may be years in duration, there remains uncertainty whether the industry is adequately insurable against its liabilities to its customers;
- Also during the hiatus, there will remain uncertainty over legal effect of customer waivers, with potential for litigation of this issue on a case-specific basis and increased cost and delay of claims administration;



- If the legislative solution is an exemption of some scope (as seems probable) the exempted activities and craft will operate in an essentially unregulated liability regime, subject to the (presumed) continued availability to operators of the overall LLMC-based limitation of third party liability of (for small craft) CAD1 million per vessel in the case of personal injury or death; and
- In the absence of any regime of compulsory liability insurance, even the availability of this relatively high limited liability may be of little practical value to injured participants in the subject activities.

## 5. Scope of Canadian Maritime Law – the *Isen v. Simms* Decision

This, arguably, from the file of hard facts which make bad law.

Isen owned a small power boat, which he kept at a lake in Ontario and transported to other lakes on a road trailer. His friend Dr. Simms was a dentist who accompanied him on a boating excursion in such an other lake in 1999. After the boating excursion, the trailer was backed down a ramp into the lake, the boat was partially secured to the trailer, the trailer and boat were towed out of the lake and a short distance onward into an onshore parking area, where securing of the boat for road transport was to be completed. In the course of that further securing, a bungee cord which was being used to fasten down an engine cowl slipped from Isen’s hand and struck Simms, blinding him in one eye. Simms sued for substantial damages in Ontario provincial court. Isen commenced declaratory proceedings in Federal Court (the Admiralty Court in Canada) seeking limitation of liability to the CAD1 million for which the LLMC Convention, as adopted in Canadian law, provides for vessels of less than 300 grt.

Under the division of powers provisions in the Canadian constitution, exclusive legislative jurisdiction in respect of (among other things) “navigation and shipping” is assigned to the federal Parliament. In a series of leading decisions between the 1970s and the 1990s, the Supreme Court of Canada identified Canadian maritime law as a body of federal law, both statutory and otherwise, which is uniform throughout Canada and which applies to all subjects coming within the scope of Parliament’s constitutional jurisdiction over “navigation and shipping”. In particular, in a case decided in 1986<sup>19</sup> concerning post-discharge theft of cargo from a shoreside warehouse, the Court held that Canadian maritime law applies to any subject “so integrally connected to maritime matters as to be ... within federal legislative competence” and includes, substantively, the common law of contract and tort; and in a case decided in 1998<sup>20</sup> involving a fatal pleasure boating accident in which plaintiffs relied upon relatively more generous provincial statute law, the Court held, generally speaking, that provincial law does not apply to maritime matters which are governed, substantively, by Canadian maritime law. These cases were generally accepted by Canadian practitioners to mean that when the subject-matter of a transaction, or of the facts which give rise to a dispute, was a ship or watercraft of any kind, Canadian maritime law applies and provincial law does not.

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<sup>19</sup> *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.* [1986] 1 SCR 752

<sup>20</sup> *Ordon Estate v. Grail* [1998] 3 SCR 437

In *Isen v. Simms*, both the Federal Court<sup>21</sup> at first instance, and the Federal Court of Appeal<sup>22</sup> on initial appeal, held the LLMC Convention to apply and issued declarations limiting Isen’s liability, if any, to CAD1 million. The case went on further appeal to the Supreme Court of Canada, which on 5 October 2006 issued a decision<sup>23</sup> allowing the appeal and denying the right to limit liability. Mr. Justice Rothstein (himself a former Justice of the Federal Court) writing for a unanimous Supreme Court held:

- A distinction is made between commercial shipping and pleasure boating, the former being “traditionally viewed as within the scope of Parliament’s jurisdiction over navigation and shipping”. In contrast, Parliament’s has jurisdiction as a “practical necessity” over tortious liability of pleasure craft for negligent navigation on Canadian waterways, because commercial ships and pleasure craft share the same navigational network.
- *Parliament does not have jurisdiction over pleasure craft per se* (emphasis added), and the mere involvement of a pleasure craft in an incident is not sufficient to ground Parliament’s jurisdiction.
- The Court must look at the allegedly negligent acts and determine whether that activity is integrally connected to the act of navigating the pleasure craft on Canadian waterways such that it is practically necessary for Parliament to have jurisdiction over the matter.
- Applying these tests to the facts at bar, though removing the boat from the lake was within Parliament’s jurisdiction over navigation, once that removal was completed and the actions became those of preparing the boat to be transported on the highway (including the securing of the cowl with the bungee cord) the activity became subject to provincial law which does not include the right to limit liability under the LLMC. Because that activity is outside Parliament’s jurisdiction Parliament may not purport to regulate liability, or limitation of liability, arising from that activity.

It is submitted to be unfortunate that the Supreme Court saw fit to permit, conceptually, exceptions to the general proposition that Canadian maritime law applies equally to all elements of waterborne activity and of maritime property, depending whether the activity or the property is commercial or recreational in nature. It is suggested that the Court, had it wished, could have achieved the same result in *Isen v. Simms* by determining that the activity, and the injury, in question occurred in the context of highway transport, which is unquestionably within provincial jurisdiction, without need to differentiate between commercial and recreational shipping. By doing the latter, it is submitted, the Court invites future litigation seeking recognition of exceptions in other “maritime” contexts.

If it can be argued that Canadian maritime law does not apply to pleasure craft beyond regulating their navigation (and the Court’s language in *Isen v. Simms* certainly appears to permit this interpretation) then great uncertainty exists in respect of what law regulates a wide range of

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<sup>21</sup> 2004 FC 227 (CanLII)

<sup>22</sup> 2005 FCA 161 (CanLII)

<sup>23</sup> [2006] 2 SCR 349

commerce and activity involving pleasure craft, such as secured lending, occupiers' liability, insurance, repair and other contracts, unsecured creditors' rights and potentially many other concerns. It is predicted that this uncertainty will in future cases spawn litigation and cost, largely unrelated to the resolution of disputes on their merits.

One is concerned, furthermore, whether Canadian maritime law applies “as a matter of practical necessity” to navigation of pleasure craft on waters which are unquestionably non-navigable by commercial vessels. One considers the example of whitewater rivers, discussed above in the context of “adventure tourism” liabilities. Is it not equally likely that an injured customer of a whitewater excursion will seek to avoid limitation of the operator's liability, in the same manner that Dr. Simms successfully avoided it in the case of the trailered motorboat? What assurance that the Court would not similarly find it “practically unnecessary” to apply the Athens Convention (or the LLMC Convention) to the whitewater tour operator?

### **Conclusion**

It is one of the defining, and highly satisfying, features of the practise of maritime law that we largely apply the same body of law for the benefit of a largely common community of clients no matter where in the world each of us happens to live and work. Perhaps what is controversial, and the ways in which controversy has been addressed, in one jurisdiction may offer some guidance to practitioners in another jurisdiction in which similar controversy may arise. Additionally, and as may be a disturbing trend, the substantial uniformity of law which our profession has historically enjoyed is occasionally undermined as specific jurisdictions give effect in their laws to domestic political or economic imperatives, and perhaps even to local prejudices, such that it assists practitioners to be aware of local anomalies elsewhere.

For whatever combination of these reasons, it is hoped that at least some aspect of the above review of what has been new, controversial or domestically compelling in Canada over the past two years will be of interest, and perhaps even instructive, to an antipodean audience. It has certainly given the author great pleasure to prepare it.