Fernandes Hearn LLP
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Particular and General Average and Canadian Courts Today - Comparison to Other Jurisdictions

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How Courts View Average Adjusters

Given the extent of the profession's involvement in the settlement of general average and hull & machinery claims, it is surprising how rarely the roll of average adjusting is mentioned in court cases. Where average adjusters are mentioned, it appears they are always viewed in complimentary terms.

In the U.S.A. Justice Mackinnon in 1935 described an average adjuster in these words:

> "Your profession is a singular one - not merely because the vast majority of your fellow-citizens have not the remotest idea what your duties are; but because, above any other profession that is not actually legal, you are required to have, and in fact possess, a very exact knowledge of a very special branch of the law. "

In Canada in 2002 Prothonotary Hargrave of the Federal Court of Canada had this to day:

> "While an average adjuster's report has no legal force, *per se*, such statements are rarely questioned by the courts: indeed, courts generally look upon average statements as *prima facie* evidence of the details, of the computations contained and of the allocation of average. This is because the profession of average adjusting is both old and honourable, with established rules of practice which are of great assistance in ascertaining how claims ought to be determined …Further, an average adjuster's report is neutral, for unlike a lawyer, an average adjuster is not, or ought not, to be an advocate. To achieve this an average adjuster must and invariably does, like an

> arbitrator, strive to be impartial. This has certainly been the case for at least the last 130 years, going back to when the Association of Average Adjusters was founded in England in 1873 and beyond."

Courts Becoming More Conservative

Judges are becoming more conservative and less inclined to create new law, leaving it to government.

Recently, our newest nominee to the Supreme Court of Canada stated: "We're not another Parliament," "It's not up to us to say this is not a good law, it ought to be changed." – Justice Marc Nadon (during his nomination hearings in 2013).

Cases Showing Freedom of Contract Trend

We have seen a trend in the last two years with Canadian judges enforcing contracts between parties whether the terms appear reasonable or not. This trend towards true freedom of contract originated with a 2010 decision of Canada's highest court, the Supreme Court of Canada, in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)* [2010] 1 SCR 69.

Tercon dealt with a request for proposals (RFP) for the design and construction of a highway. The RFP included an exclusion of liability clause that stated that "no proponent shall have any claim for compensation of any kind whatsoever, as a result of participating in this RFP". The Province accepted a bid that breached the express provisions of the tendering contract. A losing proponent, Tercon, sued the Province for damages. The trial judge held that the Province's breach was fundamental and that it was not fair or reasonable to enforce the exclusion clause in light of this breach.

The Supreme Court of Canada put the doctrine of fundamental breach to rest. On this issue the Court stated:

> On this occasion we should again attempt to shut the coffin on the jargon associated with "fundamental breach". Categorizing a contract breach as "fundamental" or "immense" or "colossal" is not particularly helpful. Rather, <u>the principle is that a court has no discretion to refuse to enforce a valid and applicable contractual exclusion clause</u> unless the plaintiff (here the appellant Tercon) can point to some paramount consideration of public policy sufficient to override the public interest in freedom of contact and defeat what would otherwise be the contractual rights of the parties. [Empahsis added]

In dealing with how a court should decide when to reject or give effect to an exclusion clause in a contract, the Court held:

> The following analysis should be applied when a plaintiff seeks to escape the effect of an exclusion clause or other contractual terms to which it had previously agreed. The first issue is whether, as a matter of interpretation, the exclusion clause even applies to the circumstances established in evidence. This will depend on the court's interpretation of

> the intention of the parties as expressed in the contract. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable and thus invalid at the time the contract was made. If the exclusion clause is held to be valid at the time of contract formation and applicable to the facts of the case, a third enquiry may be raised as to whether the court should nevertheless refuse to enforce the exclusion clause because of an overriding public policy. The burden of persuasion lies on the party seeking to avoid enforcement of the clause to demonstrate an abuse of the freedom of contract that outweighs the very strong public interest in their enforcement. Conduct approaching serious criminality or egregious fraud are but examples of well-accepted considerations of public policy that are substantially incontestable and may override the public policy of freedom to contract and disable the defendant from relying upon the exclusion clause.

This freedom of contract trend has made its way into other decisions in Canada in various modes of transportation. Albeit, there are a couple of cases where exceptions to this trend have been carved out.

Kruger Decision

In 2010 warehouse liability law was put into a state of uncertainty with a decision out of British Columbia Canada. That uncertainty has now been reduced by a British Columbia Court of Appeal unanimous decision which may have wider implications for transportation law in general.

In the trial decision of *Kruger Products Limited v. First Choice Logistics Inc.*, 2010 BCSC 1242, Justice Burnyeat had to deal with responsibility for a fire at a warehouse involving multiple parties. Kruger Products Limited was the owner of paper products stored at a warehouse operated by First Choice Logistics Inc. The origin of the fire was a forklift operated by Terrance Bodnar. The forklift was manufactured by Toyota and leased to the warehouse by Mason Forklift Ltd. After a twenty day trial, First Choice was found to be fully liable for the large loss to Kruger Products. First Choice appealed to the British Columbia Court of Appeal. Their decision was released in mid January of this year and it too has wide ramifications for the warehouse industry as well as the transportation and insurance industry. It is a landmark decision.

At the Original Trial

Prior to the original trial before Justice Burnyeat, and subsequent to a settlement agreement, the claimant Kruger Products discontinued its actions against Toyota and Mason. The fire destroyed a number of large paper rolls stored at the warehouse. The forklift was powered by propane. An original propane forklift used at the warehouse was noticed to overheat due to paper debris being sucked up into the body of the vehicle by the operation of the radiator cooling fan. Operators also noticed that they could smell paper smouldering within the machine. They were forced to stop the forklift and allow it to cool before cleaning it and putting it back into service. First Choice sought the assistance of Mason regarding these problems. As a result of discussions, an air compressor was obtained to "blow out" the forklift at various intervals and to have the exhaust pipe wrapped with fibreglass insulation in order to shield paper and debris from the hot surface of the exhaust pipe. The number of "problems" was reduced.

In mid July 2001, the original forklift was damaged and taken in for repair. Mason was asked to

find a replacement unit during the repair period. Mason did not install venting and did not wrap the exhaust pipes of the forklift with fibreglass prior to delivering the forklift to First Choice. First Choice did not request the modifications and Kruger was not consulted regarding the use of the forklift without the modifications.

Mr. Bodnar was aware that the replacement forklift was not wrapped with fibreglass tape. His supervisor advised him to proceed to use the forklift but to adhere to the procedure of “blowing down” the machine with compressed air as required. Justice Burnyeat held that the forklift was blown down with compressed air approximately 10 to 15 minutes prior to the fire. While passing an electric forklift at the warehouse, Mr. Bodnar did not see any large pieces of paper in the aisle ahead of him. The operator of an electric forklift noticed a piece of paper about 2 to 3 feed long in the vicinity of the exhaust grill of Mr. Bodnar's forklift. The paper was on fire and drifted away from the back of the forklift landing at the base of a stack of rolls. The fire spread within the warehouse causing ~~a~~ total destruction of the building and its entire contents.

Kruger Products claimed against the warehouse under a partly written and partly oral contract. It claimed that First Choice breached its contract to take reasonable care of the warehouse, failure to train employees etc. In addition, it claimed that First Choice breached its duties at common law and as a warehouser under the *Warehouse Receipts Act* of B.C. The losses amounted to $16,000,000.

First Choice and Mr. Bodnar defended on the basis of an agreement set out in a February 1, 2000 Warehouse Management Agreement accepted by Kruger Products through its conduct (as opposed to a proposal as alleged by Kruger Products). The Warehouse Management Agreement included a provision requiring Kruger Products to obtain insurance on the inventory in the warehouse and naming First Choice as an additional insured. Kruger Products was therefore barred and estopped from claiming against First Choice to the extent of the indemnity which would have been provided by such insurance. First Choice also relied on an appendix to the Agreement which excluded or limited the liability of First Choice. The appendix was developed by the International Warehouse Logistics Association and its "Canadian Standard Contract Terms and Conditions for Merchandise Warehouse."

First Choice also pleaded that Kruger Products was negligent by ordering the warehouse to stack the rolls higher than normal (creating a fire hazard) and by failing to wrap the rolls in order to avoid paper sloughing off the rolls creating a housekeeping issue and fire hazard.

The judge found that the paper debris came into contact with the unwrapped exhaust system of the forklift and caused the fire. Other possible causes of the fire were rejected.

The judge reviewed the discussions and correspondence between the parties regarding the Warehouse Management Agreement (“Agreement”). The Kruger Products representative died shortly after the fire and his recollections of the discussion were not available for trial. The judge heard the evidence of the First Choice representative who stated that he explained the Agreement and left the Agreement with the Kruger Products representative and that "it was his expectation that [the Kruger representative] would eventually get back to him with affirmation that the proposed terms were acceptable or, alternatively, would raise any concerns so that the parties could then negotiate further”.

The judge then reviewed the formation of the Agreement and the appendix which had an effective date of February 1 2000. During the spring of 2000, the warehouse was operated by First Choice and Kruger Products continued to forward product to the warehouse. First Choice followed up with the Kruger Products representative on numerous occasions to obtain the Agreement. A number of excuses were provided as to why no comments were being forwarded. No agreement was signed. The judge found that the Agreement had many deficiencies stating, "Some of the drafting is incomprehensible." However, the judge was satisfied that the Agreement and the appendix accurately reflected the contract that existed between the two parties.

Justice Burnyeat then proceeded to go through the Agreement and appendix in detail. He found that:

a) First Choice did not "maintain the warehouse in food grade condition and cleanliness at all times" in accordance with the contract requirement. It failed to maintain the warehouse in a condition that met or exceeded professional warehousing management practices - housekeeping was poor;

b) First Choice breached its contract to "properly and safely maintain, and keep in sanitary, neat and orderly condition, all goods and products" by failing to wrap the exhaust of the forklift.

c) First Choice owed Kruger Products a duty of care under the common law and pursuant to the provisions of the *Warehouse Receipts Act*. First Choice failed to meet the standard of care and the breaches caused the fire and the damages. The court found that the duty was as described in the *Warehouse Receipts Act* - as a "careful and vigilant owner." The court also found that section 2(4)(a) of the Act provides that any attempt by contract between the parties to reduce the care and diligence cannot prevail. The onus is a reverse onus - on the warehouse to show that it did not breach the duty of care, not on the owner of the goods to show that the warehouse breached such a duty. The court found that First Choice failed to take adequate preparations regarding dealing with fires, including a duty not to allow paper debris to build up.

> "A careful and vigilant warehouseman in the position of First would have taken steps to sweep up the paper debris not only in the aisles but also at the base of the stacked parent rolls on a regular basis and not just after each shift. I find that these failures amount to a breach of the duties owed by First to [Kruger] [p. 116]… I also find that the failure to wrap the exhaust system of the Forklift was a breach of the duty owed by First to [Kruger]"[p.117]

d) The Toyota defendants and the Mason defendant were not liable for the damages.

e) Kruger Products was not contributorily negligent for the fire. The "unwrapped" rolls were not inherently dangerous. Stacking at a height over the recommended height was not contributory negligence.

f) A warehouser may limit its liability but not if it lowers the statutory duty of care. The paragraph in the Agreement dealing with any loss of profit or special, indirect or consequential damages was so poorly drafted that the judge refused to rectify the paragraph as "I cannot conclude that there would have been an agreement between the parties [on this issue]."

g) Paragraphs in the Agreement stating that goods were stored at the owner's risk of loss damage or delay caused by certain events were found contrary to other paragraphs in the Agreement and contrary to the duty to properly and safely maintain the goods.

h) There was a conflict in the warehouse receipt being used and in the Agreement (including the clause relating to indemnification). The warehouse receipt was also not signed. In addition the reverse side of the receipt was not provided to Kruger Products. As a result, the wording in the receipt allowing First Choice to limit liability was of no effect.

Having found that First Choice could not limit its liability under the Agreement, the judge then had to decide what the limitation would be, should he be found incorrect in his decision. The question to be determined was what constituted a "package or stored unit" for the purposes of limitation. First Choice took the position that a "unit" was a pallet or lift, given how the warehouse dealt with the product. Kruger Products took the position that the "unit" measure was a case, given how customers ordered the product. The court found that the limitation amount (if he was incorrect in his determination that there was no limitation) was the lesser of the monetary amount of the damage incurred or twenty five times the monthly storage rate on any "case" (not pallet or lift).

i) The court rejected the position of First Choice that the Agreement required Kruger Products to obtain insurance for the inventory and to name First Choice as an additional insured. First Choice did not have an insurable interest in the goods. First Choice had a lien on the goods and that was the extent of its interest. The court also found that First Choice's position would result in an impairment of the duty of care owed by First Choice to Kruger Products and thus would be contrary to the *Warehouse Receipts Act*. It was this last ruling that formed a major part of the appeal to the British Columbia Court of Appeal.

British Columbia Court of Appeal

Madam Justice Newbury wrote the unanimous decision of the Court of Appeal. The decision is found at 2013 BCCA 3 (CanLII).

On the appeal, First Choice challenged only two substantive conclusions reached by the trial judge: (1) his finding of fact that Kruger's losses and damages were caused by negligence on the part of First Choice; and (2) his conclusion of law that Kruger's claim against First Choice (which the Court was told was a subrogated claim) was not barred by the application of certain insurance provisions in the Warehouse Management Agreement.

The Court of Appeal dismissed First Choice's argument that the judge erred in finding that Kruger's losses and damages were caused by the negligence of First Choice. Justice Newbury noted that there was substantial evidence that the fire began, as fires or near-fires had on previous occasions known to Toyota, when paper came into contact with the extremely hot exhaust system of the forklift. She concluded that "First Choice was also aware of this problem which, in combination with the fact that paper debris was all around the warehouse, created a 'perfect storm' of dangerous conditions."

The real crux and importance of the Court of Appeal decision deals with the second basis of the appeal: that the subrogated claim of Kruger was barred by paragraph 17 of the Warehouse

Management Agreement. The ruling has wide implications for any contract that contains an insurance clause. Most contracts today contain such a clause.

Clause 17 of the Warehouse Management Agreement contained covenants on the part of both parties with respect to insurance. Clause 17 [Kruger is referred to as Scott] stated:

> INSURANCE
>
> A. Liability Insurance
>
> The Contractor [FCL] will maintain, throughout the Term of this Agreement, and any Extension Term, comprehensive general liability insurance and industry standard warehouseman's legal liability insurance. Scott will maintain general liability insurance, tenant's legal liability insurance, and insurance of its inventory and property within the warehouse.
>
> All insurance shall name Scott or the Contractor as applicable as an additional insured against all liability for bodily and/or personal injury and property damage, arising from the insured's fault or negligence, or the fault or negligence of any of its or their shareholders, directors, officers, employees, servants and agents, its and their affiliated, related, parent and subsidiary companies, and its and their appointees, successors and assigns, in connection with the Management Services hereunder.
>
> If the comprehensive general liability policy contains a general aggregate, that aggregate limit shall apply separately, per location, so that the Warehouse will have its own aggregate limit. All insurance policies contemplated hereunder shall constitute and respond as primary coverage to any insurance otherwise available Scott and any of its shareholders, directors, officers, employees, servants and agents, its affiliated, related, parent and subsidiary companies, or its and their appointees, successors and assigns.
>
> ...
>
> B. Insurance on Building Contents
>
> Scott shall, at its own costs and expense, insure and keep insured any of its own property in, on or about the Warehouse, in which Scott itself has an insurable interest, including, without limitation, Scott'[s] inventory, furniture, fixtures, and equipment.
>
> D. Warehouseman's Legal Liability Insurance
>
> The Contractor shall obtain and maintain industry standard Warehouseman's Legal Liability Insurance that covers against risk of loss of inventory and property belonging to Scott or its divisions, subsidiaries, affiliated or related corporations, and arising from or relating to the Contractor's gross negligence, which insurance shall be in the amount of (Cdn.) five million dollars. Damaged or lost inventory and products insured hereunder will be valued at Scott'[s] selling price to the trade.
>
> The Contractor will add both the Landlord and Scott as additional insureds. The Contractor will obtain and pay the premiums for such insurance coverage as an

Allowable Operating Expense.

E. Notice of Loss or Damage to Goods

The Contractor agrees to notify Scott promptly in writing of any loss or damage of any kind to any product or goods stored or handled under the terms of this Agreement. [Emphasis added by the Court.]

(Paragraph 17 contained no section "C".)

The Court was advised that the Kruger claim was a subrogated claim – Kruger's property insurer had paid the claim and now sought to recover the amounts it paid to Kruger from First Choice.

The Court reviewed the Supreme Court of Canada's "trilogy" of cases dealing with the requirement in a contract to obtain insurance and the issue of subrogation being barred: *Agnew-Surpass Shoe Stores Ltd. v. Cummer-Yonge Investments Ltd.* [1976] 2 S.C.R. 221, *Ross Southward Tire Ltd. v. Pyrotech Products Ltd.* [1976] 2 S.C.R. 35, and *T. Eaton Co. v. Smith* [1978] 2 S.C.R. 749. The cases dealt with landlord - tenant contracts. Justice Newbury did not dwell on these decisions but rather quoted the Ontario Court of Appeal for a summary of the law after the trilogy of the cases in the Supreme Court of Canada. She referred to the relevant passage of Justice Carey's decision in *Madison Developments Ltd. v. Plan Electric Co.* (1997) 36 O.R. (3d) 80 (Ont. C.A.):

> ... The law is now clear that in a landlord-tenant relationship, where the landlord covenants to obtain insurance against the damage to the premises by fire, the landlord cannot sue the tenant for a loss by fire caused by the tenant's negligence. A contractual undertaking by the one party to secure property insurance operates in effect as an assumption by that party of the risk of loss or damage caused by the peril to be insured against. This is so notwithstanding a covenant by the tenant to repair which, without the landlord's covenant to insure, would obligate the tenant to indemnify for such a loss. This is a matter of contractual law, not insurance law, but, of course, the insurer can be in no better position than the landlord on a subrogated claim. The rationale for this conclusion is that the covenant to insure is a contractual benefit accorded to the tenant, which, on its face, covers fires with or without negligence by any person. There would be no benefit to the tenant from the covenant if it did not apply to a fire caused by the tenant's negligence. [At 84; emphasis added.]

The Court then examined the trial judge's decision and his reasons for not allowing First Choice's position on this issue.

The trial judge had reasoned that the language of the type seen at clause 17 of the Warehouse Management Contract simply meant that the bailee does not accept risk of loss to goods which may arise other than as a result of its own fault, citing *Rose v. Borisko Brothers Ltd.* (1981) 33 O.R. (2d) 685, aff'd (1983) 41 O.R (2d) 606 (Ont. C.A.).

On a policy level, the trial judge was also of the view that barring the subrogated action would impair the duty of care owned by First Choice to Kruger, contrary to s. 2(4)(b) of the *Warehouse Receipt Act*. He noted that there were no Canadian cases on point, but that in two American decisions, *Brown v. Sloan's Moving & Storage Co.*, 296 SW2d 20 (S.C. Mo., 1956) and *Kimberley-*

Clark Corporation v. Lake Erie Warehouse, Division of Lake Erie Rolling Mill Inc. 375 NYS2d 918, 49 A 2d 492 (S.C., App. Div.), the courts had declined to give effect to clauses requiring a bailor to obtain its own insurance, on the basis that the bailee should not be exempted from its contractual or statutory duties of care.

As well, the trial judge said, disallowing the subrogated claim in this instance would "make meaningless" the indemnification provisions at clause 12 of the Warehouse Management Agreement, under which each of Kruger and First Choice had covenanted to hold the other harmless from all losses and claims arising, inter alia, from property damage 'related to' the negligence of the other. Given the policy implications of barring a party from enforcing its rights to indemnity, he suggested that very clear and specific language would be required for that purpose.

The trial judge had also distinguished bailment situations from landlord – tenant situations holding the First Choice did not have an insurable interest in the goods.

On this last note, Justice Newbury found that the trial judge was incorrect. First Choice had an insurable interest in the property that was destroyed by the fire. The warehouser was subject to the "possibility of liability" under the Warehouse Management Agreement. The goods were "entrusted" to the warehouse. She stated (at paragraph 52):

> It seems to me that this question was answered by the Supreme Court of Canada in Commonwealth. As seen above, de Grandpré J. for the Court observed that in the field of bailment "in the widest sense", persons other than the owner have been held to have insurable interests in the subject property "because of their special relationship with the property entailing [the] possibility of liability."

Justice Newbury then dealt with the trial judge's concerns regarding the warehouser's obligation to indemnify Kruger for negligent acts. Specifically, the trial judge was concerned there was a conflict between the obligation to indemnify and the insurance provisions. The Court of Appeal disagreed, stating that "…indeed one may see insurance covenants as a means of strengthening indemnification obligations, which alone are only as strong as the indemnifier's particular financial situation."

Justice Newbury added (at paras. 56-57):

> "Furthermore, the obligation of a negligent warehouser to indemnify its bailor for breaches of its duty of care arises even without a provision such as para. 12 [a general covenant to indemnify]. It would make no commercial sense to permit an indemnity provision to overwhelm or supersede an insurance provision such as para. 17A. …Nor can I agree on a more general level that the application of the "covenant to insure" defence in the case at bar would "make meaningless" the warehouser's obligation to maintain the warehouse premises to the standard specified in the Warehouse Receipt Act, or "impair" the duty of care owed to [Kruger] as the owner of the goods.

The Court of Appeal did comment, in *obiter*, regarding limitation of liability clauses in contracts and the effect of such a clause on the duties under the legislation or the contract to provide the required standard of care. In dealing with the insurance clause and the duty of the warehouse under the *Warehouse Receipts Act*, Justice Newbury used a limitation clause as an example of

why the insurance clause and the legislation could co-exist. She noted that the Supreme Court of Canada in *Evans Products v. Crest Warehousing* [1980] 1 S.C.R. 83 found valid a clause in a contract limiting the warehouser's liability to $50 per package unless a higher value was declared by the owner. The Supreme Court of Canada rejected the argument that giving effect to the limitation clause would "engender carelessness" on the warehouser's part, thus contravening what was then s. 3(4) of the *Warehouse Receipts Act.* She rejected American authorities on this issue.

The Court of Appeal also rejected the trial judge's decision that an insurance clause was "simply a means of stipulating that the warehouse does not accept the risk of loss to goods which may arise other than as a result of its own fault."

The Court of Appeal dismissed Kruger's case on the basis that the subrogation action was barred by the insurance clause in the Warehouse Management Agreement.

In summary, this decision is important and wide reaching for the transportation industry.

1. The Court affirmed that a properly drafted insurance clause in a storage contract supercedes and does not impinge on the standards of conduct in legislation such as the *Warehouse Receipts Act.* This same principle can be applied to freight forwarding contracts, logistics contracts and carrier contracts.

2. In comparing the application of the insurance clause to a limitation clause the Court of Appeal affirmed that a properly drafted limitation clause in a contract will protect the warehouser from large liabilities. The risk can be capped. This same principle can be applied to other transportation contracts.

The lesson learned is that risk can be managed and claims reduced by properly drafted and signed contracts. Courts will enforce what parties have agreed to in a contract. Freedom of contract does exist and is alive and well in Canada.

Siemens Decision

On August 30th, the Federal Court of Appeal released its reasons in *Siemens Canada Limited v. J.D. Irving, Ltd.* 2012 FCA 225. Justice Nadon, a former maritime practicing lawyer and the senior maritime judge on the bench, wrote the decision. Justices Mainville and Dawson concurred. The appeal was from a decision of Justice Heneghan released the previous June.

The appeal arose from events which occurred on October 15, 2008 at the port of Saint John, New Brunswick, where, in the course of being loaded upon a barge, two valuable steam turbine rotors worth forty million dollars fell into the waters of Saint John harbour.

On April 7th, 2010, J.D. Irving Ltd. commenced an action in the Federal Court seeking a declaration that it was entitled to limit its liability to the sum of $500,000 and to set up a limitation fund pursuant to the *Marine Liability Act*. On April 8th, 2010, Siemens Canada Limited commenced proceedings in the Ontario Superior Court of Justice against J.D. Irving, Ltd. and others, for recovery of its loss.

Siemens brought an application in the Federal Court for a stay of the Federal Court action. Justice Heneghan dismissed Siemens' application and she enjoined Siemens and others from commencing or continuing proceedings against Irving before any court or tribunal other than the Federal Court. Siemens appealed to the Federal Court of Appeal.

A central issue to Siemens' appeal was that Justice Heneghan erred in use of the legal test used to stay the Ontario action. Siemens argued that the proper test applicable to an application to enjoin proceedings before another court or tribunal was a tripartite test in *RJR-MacDonald Inc. v. Canada (Attorney General)*, set out by the Supreme Court of Canada in 1995 and the anti-suit injunction test enunciated by the Supreme Court of Canada in *Amchem Products Inc. v. B.C. (Workers Compensation Board)*, [1993] 1 S.C.R. 897. The test in *RJR-MacDonald* allows the granting of an interlocutory injunction only where there is a serious issue to be tried, where the failure to grant the injunction will result in irreparable harm to the moving party, and where the balance of convenience favours the moving party. Siemens argued that J.D. Irving failed on this test. The test in *Amchem* says that an injunction will only be granted in rare circumstances, i.e. when five criteria are met: (i) a foreign proceeding is pending; (ii) an application for a stay in the foreign court has failed; (iii) the domestic court is alleged to be and is potentially an appropriate forum; (iv) the foreign court could not reasonably have assumed jurisdiction on a basis consistent with the principles of *forum non conveniens*; and (v) that granting the injunction will not deprive the plaintiff of legitimate personal or juridical advantages in the foreign forum of which it would be unjust to deprive him or her. Siemens argued that J.D. Irving failed on both tests.

The Federal Court of Appeal reviewed the language of the *Marine Liability Act* (the "MLA"). Subsection 33(1) of the MLA provides that the Federal Court "... may take any steps it considers appropriate, including:... (c) enjoining any person from commencing or continuing proceedings in any court, tribunal or authority other than the Admiralty Court in relation to the same subject matter". Justice Nadon confirmed that the test is one of "appropriateness" and not the tests set out in *RJR* or *Amchem*. Justice Nadon found that the tests were inconsistent with the relevant provisions of the *Marine Liability Act*.

Justice Nadon stated at paragraph 107:

> This test is, no doubt, a broad and discretionary one. The words of the provision could not be clearer in that Parliament has directed the Federal Court to make an order of enjoinment where it is of the view that it would be appropriate to make such an order. Thus, I am of the view that the Court may enjoin if, in all of the circumstances, that is the appropriate order to make. The judge, after performing that exercise, was satisfied that an order enjoining Siemens and others was appropriate. Not only do I see no error in her reasons, such an order was the correct one to make when all of the circumstances of the case are taken into consideration.

Justice Nadon added at paragraph 120:

> With respect to the tests proposed by Siemens, I am of the view that those are inconsistent with the relevant provisions of the MLA. It is clear that the power to enjoin given to the Federal Court by the MLA does not arise under either common law or equity. It results from a specific grant of power by Parliament to that court. In my view,

> as I indicated earlier, the basis upon which the Federal Court is to exercise its power to enjoin could not have been made clearer by Parliament when it enacted subsection 33(1) of the MLA. Further, not only is the view taken by Siemens inconsistent with the clear language of section 33, but it is also inconsistent with the nature and purpose of section 33 and the international limitation of liability regime to which Canada adhered to when it adopted the Convention and the Protocol, in that the power granted to the Federal Court by paragraph 33(1)(c) of the MLA is, without doubt, to give effect to international maritime policy and that this power cannot be analogized to a court's ability to grant anti-suit injunctions in the context of whether the court of one country or the other should accept jurisdiction over a given matter. One cannot avoid the reality that subsection 33(1) can only be properly understood in light of the current limitation of liability regime as set out in the Convention, of which Articles 1 to 15 and 18 are given force of law pursuant to subsection 26(1) of the MLA.

Siemens also argued that the Ontario court action was broader, the rights of discovery larger and that in the Ontario court a jury was available [which was not available in Federal Court]. The Federal Court of Appeal agreed with the analysis of the judge below in dealing with all the issues. Justice Nadon looked at the issues in a pragmatic way, stating at paragraph 94:

> It is also obvious to me that the true issue which arises from both the Ontario proceedings and those in the Federal Court is whether Irving and MMC can limit their liability. If both can limit their liability, the case against them will likely go away upon payment by them of the limitation amount of $500,000 plus interest. If both or one of Irving and MMC are not entitled to limit their liability, then the proceedings in Ontario will proceed against the party or parties not entitled to limitation and again, in my respectful view, the likelihood of settlement is very high. In effect, a judge of the Federal Court will have concluded that the loss resulted from intent or recklessness within the meaning of Article 4 of the Convention or, in the case of MMC, that it does not fall under the protection of paragraph 4 of Article 1 of the Convention. In other words, the fundamental issue between the parties is not liability nor damages, but the right to limit liability. Once the right to limit liability has been determined, the debate between the parties will most likely be at an end.

In discussing limitation of liability generally the Court of Appeal reaffirmed earlier decisions of the Federal Court that breaking limitation is very difficult. The *Marine Liability Act* incorporates the 1976 Limitation Convention. The Court highlighted the fact that under the 1976 Convention the limits had increased greatly. In exchange the burden of proof was not on the claimant and not on the shipowner. The purposes of the 1976 Convention was to establish a right to limit liability that was almost "indisputable."

At paragraph 102 the Court affirmed that:

> [O]ne of the goals of the Convention was to reduce the amount of litigation as far as actions for limitations of liability were concerned, explaining that to achieve that goal, the signatories to the Convention had agreed to increase the limitation fund and to create "a virtually unbreakable right to limit liability".

It is interesting to note that in dealing with issue of the lack of a jury in the Federal Court, the

court was of the view that [at paragraph 93]:

> In other words, that issue is not one which a jury in Ontario would be faced with in the context of the Ontario proceedings commenced by Siemens. That jury would, no doubt, hear evidence regarding liability and damages but, in my respectful view, the issue pertaining to the right to limit is not one which an Ontario judge would put to it, by reason of the Federal Court being properly seized of that issue pursuant to subsection 33(1) of the MLA.
>
> In dismissing Siemens' appeal the Federal Court of Appeal confirmed that J.D. Irving, Ltd. had the right to bring an application to determine if it could limit liability. To allow Siemens to pursue its action before the Ontario Superior Court prior to that determination would not be reasonable. There was no prejudice to Siemens in temporarily preventing it from continuing it action in Ontario and by forcing it to proceed in the Federal Court to resolve the limitation issue.

The Federal Court of Appeal reaffirmed in the strongest words possible the jurisdiction of the Federal Court to determine limitation of liability in a marine matter and the right of a shipowner to bring an application to the Federal Court for such a determination. At paragraph 115 Justice Nadon concluded that:

> In my respectful view, Siemens' attempt to pursue the matter in the Ontario Superior Court is the result of its belief that it stands a better chance of succeeding on intent and recklessness before a jury as opposed to a judge. Whether or not there is some basis for this view is, in my opinion, an irrelevant consideration. Further, as I have indicated on a number of occasions, the issue pertaining to the right to limit is now a matter for the Federal Court only because of the choice made by Irving and MMC to have that issue determined, pursuant to subsection 32(2) of the MLA, by that Court. That choice, in my respectful opinion, cannot be overridden by the courts, either the Federal Court or the Ontario Superior Court.

In this decision Justice Nadon also pointed out that although the Federal Court does not have exclusive jurisdiction regarding the issue of limitation of liability, it does, for all practical purposes, have that exclusive jurisdiction, adding [at paragraph 116]:

> I am of this view because first, subsection 32(2) allows a shipowner to choose the forum in which he will assert his right to limit his liability. Second, the Federal Court is the only court which has jurisdiction with regard to the constitution and distribution of a limitation fund. Thus, save in exceptional circumstances, shipowners will almost invariably choose to assert their right to limit liability in the court which has exclusive jurisdiction with respect to the constitution of the limitation fund. To this, I would add that the Federal Court is the court which has the expertise in admiralty matters and that that fact is well known to the shipping community here in Canada and internationally.

The Heidberg Decision (France) Cour D'Appel De Bordeaux, January 14 2013

Prior to this appeal decision, the French jurisdiction was known as "claimant friendly" in its approach to maritime claims and its failure to recognize shipowners' limitation of liability found in the 1976 London Convention.

The case involved a German flagged vessel in the port of Bordeaux-Bassens that hit and damaged Shell's pier resulting in an explosion and fire. Cargo was also damaged. After 20 years of litigation the Court of Appeal found that the shipowner could limit liability. The accident resulted from an error in navigation. The Court found, as had the Criminal Appeals court, that the ship owners had conformed to the requisite regulations and that they had met the necessary qualifications with regard to the ship's crew. The Court held, in this case, that the shipowners could not have reasonably imagined that an experienced captain would decide, at night, navigating in a dangerous zone of an estuary, and in close proximity to gas and petrol installations, to leave the ship's bridge, leave it piloted alone, and go to the engine room to engage in certain ballast operations without anyone on watch on the ship's bridge.

There is still one more appeal route on this case.

Peracomo Decision

Peracomo Inc. v. Societe Telus Communications [2012] FCA 199: This is an appeal from the judgment of Justice Harrington who found liability upon the operator of a vessel that snagged one of the submarine cables belonging to the Telus company while fishing. The operator had cut the cable with a saw believing that it was not in use. A few days later, he snagged the cable a second time and did the same thing. Justice Harrington held that the sole cause of the loss was the intentional and deliberate act of the operator of the vessel. To avoid the limitation of liability, the plaintiff was required to prove a personal act or omission of the defendant was committed either "with intent to cause such loss" or "recklessly and with knowledge that such loss would probably result". The trial Judge held, for the first time in Canada, that this test had been met and the defendants were not entitled to limit liability.

On Appeal, the Federal of Appeal agreed with the trial Judge on the issue of liability finding, amongst other things, that the defendants ought to have used up-to-date charts that disclosed the existence of the cable. The Court also looked at a liability issue raised on appeal that does not appear to have been raised at trial. This issue was whether the individual defendant could be jointly and severally liable with the corporate defendant. The individual defendant argued that he should not be liable as his acts were those of the corporation. However, the Federal Court of Appeal held that employees, officers and directors will be held personally liable for tortious conduct causing property damage even when their actions are pursuant to their duties to the corporation. Concerning the limitation issue, the Appeal Court also agreed with the trial Judge finding that the defendants intended to physically damage the cable and that it did not matter whether the defendants were aware of the actual loss that would result.

The appeal also dealt with the insurance issue. Royal and SunAlliance Insurance Company of Canada insured the vessel and the operator for liability. Royal denied coverage on the basis of section 53(2) of the *Marine Insurance Act*, S.C. 1993, which provides that an insurer is not liable for any loss attributable to willful misconduct. The trial Judge had found that the operator's

conduct was a "marked departure from the norm and thus misconduct". The owner and operator lost their insurance coverage. The Federal Court of Appeal was not persuaded that the trial Judge had made an error and agreed that this misconduct was the proximate cause of the loss.

The appeal was dismissed in total.

The Supreme Court of Canada has agreed to hear the appeal in this case.

Ryan's Commander Decision

On August 2nd, 2013, the Supreme Court of Canada ("SCC") issued the long anticipated decision in *Maritime Services International Ltd. v. Ryan Estate* [2] with far reaching consequences for Canadian maritime workplace injury claims. The decision, commonly referred to as the "Ryan's Commander" case, should stem the rising tide of maritime workplace injury lawsuits that have been commenced since the decision of the Newfoundland and Labrador Court of Appeal in 2011. That decision held that the province's workers' compensation law did not bar maritime workers' lawsuits because maritime negligence is a federal matter with which the provincial laws may not interfere.

In the "Ryan's Commander", the estates of the two Ryan brothers commenced action against the designer and builder of the vessel "Ryan's Commander", as well as the Attorney General of Canada, alleging negligence in the inspection of the vessel by Transport Canada after the vessel and the Ryan brothers were lost at sea while fishing. The Ryan brothers died when their ship, the *Ryan's Commander*, capsized while returning from a fishing expedition off the coast of Newfoundland and Labrador. The Newfoundland Workplace Health, Safety and Compensation Commission determined that the Ryan brothers were employees for the purposes of the provincial W*orkplace Health, Safety and Compensation Act (WHSCA)*, and as such, their dependents were barred by the *WHSCA* from suing for damages.

Under the Canadian *Constitution Act, 1867* the federal government has legislative authority under section 91 to make laws for the Peace, Order and good Government of Canada in relation to all matters not coming within the exclusive jurisdiction of the legislature of the provinces. In addition, the federal government is given exclusive legislation in relation to enumerated classes of subjects, including in sub paragraph 10, navigation and shipping. The federal *Marine Liability Act*, S.C. 2001, c. 6 provides for dependant's compensation for death in a marine accident.

As early as 1986 the Supreme Court of Canada in *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.,* [1986] 1 S.C.R. 752 made it clear that Canadian maritime law is uniform throughout Canada. It is the maritime law of England that has been incorporated into Canadian law and not the law of any province.

In *Ordon Estate v. Grail* [1998] 3 S.C.R. 437 the Court had to consider when provincial statutes of general application apply to maritime negligence claims. Specifically the Court had to consider:

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[2] 2013 SCC 44

a) Did the provisions of the *Ontario Family Law Act* allowing claims for loss of care, guidance and companionship by dependants (including common law spouses and siblings) apply to vessel accidents?

b) Did the provisions of the *Ontario Trustee Act* allowing the estate of a deceased person to bring an action for damages apply to vessel accidents?

The Supreme Court of Canada held that a provincial statute can be applicable to a maritime negligence action where, through a four part test, the court is satisfied that the provincial laws do not go to the core of the federal jurisdiction. If they do, those provincial laws will be "read down".

The Supreme Court of Canada in 2007 refined the division of power test in a non-transportation case (although it made comments regarding other cases including transportation cases). In *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 at issue was the application of certain licensing provisions of the *Alberta Insurance Act* to federally regulated banks selling insurance products as authorized by the federal *Bank Act*. The Supreme Court detailed the proper approach to and analysis to be applied to division of powers disputes.

The Court began with a brief discussion of the principles of federalism noting that the division of powers in the Constitution was designed to uphold diversity within a single nation. The reconciliation of unity with diversity was said to be the fundamental objective of federalism. This was achieved through the division of powers in the Constitution; however, the Court noted that, as with any constitution, the interpretation of those powers must continually evolve and be tailored "to the changing political and cultural realities of Canadian society." The various constitutional doctrines that have been developed by the courts must be designed to further the "guiding principles of our constitutional order," to reconcile diversity with unity and to facilitate "co-operative federalism."

The Court examined the constitutional doctrines and the interplay between them. These doctrines are pith and substance, inter-jurisdictional immunity and paramountcy.

Pith and Substance

The Court noted that every "division of powers" case must begin with an analysis of the pith and substance of the impugned legislation. It involves "an inquiry into the true nature of the law in question for the purpose of identifying the matter to which it essentially relates". If the pith and substance can be related to a subject matter within the legislative competence of the enacting legislature, then the law is constitutional and valid. However, if the statute relates to a matter over which the other level of government has exclusive jurisdiction, then the statute is unconstitutional and invalid or void in its entirety.

A determination of the pith and substance of a law involves a consideration of both "the purpose of the enacting body and the legal effect of the law." The pith and substance doctrine recognizes and accepts that there may be incidental intrusions into areas within the constitutional jurisdiction of the other legislature. These are acceptable and do not render a law ultra vires provided its dominant purpose is valid. Incidental effects are effects that are collateral

and secondary to the mandate of the enacting legislature. The pith and substance doctrine also recognizes that it is almost impossible to avoid incidentally affecting matters within the jurisdiction of the other legislature. The doctrine accepts that some matters have both provincial and federal aspects, are impossible to categorize under a single head of power, and that both levels of government can legislate in relation to such matters. This is known as the "double" or "dual aspect" doctrine. The double aspect doctrine ensures that the policies of elected legislators of both Parliament and the provincial legislatures can be adopted as valid legislation on a single subject, depending upon the perspective from which the legislation is considered of the various aspects of the matter in question. However, the Court also recognized that the scale of incidental effects could "put a law in a different light so as to put it in another constitutional head of power." In such a case, the statute could be read down. The Court acknowledged that there were circumstances where it was necessary to protect the powers of one level of government from intrusions by the other. For this purpose, the courts have developed the doctrines of "inter-jurisdictional immunity" and "paramountcy".

Inter-jurisdictional Immunity

This doctrine recognizes that the Canadian Constitution is based on an allocation of exclusive powers to both levels of government, not concurrent powers, although these powers are bound to interact. The Court held that it is a doctrine of limited application that should be restricted to its proper limit. This means, in practice, the doctrine will be largely reserved for those heads of power that deal with federal things, persons or undertakings, or where in the past its application has been considered absolutely indispensable or necessary to enable Parliament or a provincial legislature to achieve the purpose for which the exclusive legislative jurisdiction was conferred. The Court referred to the case of *Bell Canada v Quebec*, [1988] 1 S.C.R. 749, the leading case on inter-jurisdictional immunity, and noted that the doctrine is based upon the premise that each of the classes of subjects in sections 91 and 92 of the *Constitution Act, 1867* have a "basic, minimum and unassailable content" that is immune from intrusion by the other level of government.

The Court next proceeded to criticize the inter-jurisdictional immunity doctrine. The Court then developed a more restricted approach to inter-jurisdictional immunity.

> "For all these reasons, although the doctrine of inter-jurisdictional immunity has a proper part to play in appropriate circumstances, we intend now to make it clear that the Court does not favour an intensive reliance on the doctrine, nor should we accept the invitation of the appellants to turn it into a doctrine of first recourse in a division of powers dispute." [paragraph 47]

The limitations imposed by the Court on the doctrine of inter-jurisdictional immunity are:

(1) There must be actual "impairment" (without necessarily "sterilizing" or "paralyzing") of the "core" competence of the other level of government before the doctrine can be applied. The difference between "affects" and "impairs" is that "impairs" implies adverse consequences. Merely "affecting" the core is not sufficient; and

(2) The "core" of a legislative power should not be given too wide a scope. The "core" is what is "vital or essential", something "absolutely indispensable or necessary". It is not co-extensive

with every element of an undertaking. The Court then reviewed the jurisprudence to facilitate an understanding of the limited scope of the inter-jurisdictional immunity doctrine. The court then proceeded to review a number of cases including transportation cases.

Paramountcy

The Court then turned to the doctrine of paramountcy, which comes into play when the operational effects of provincial legislation are incompatible with federal legislation. Where the paramountcy doctrine applies, the federal law prevails and the provincial law is inoperative to the extent of the incompatibility. This doctrine was said to be "much better suited to contemporary Canadian federalism."

The Court recognized that the degree of incompatibility required to invoke the doctrine of paramountcy has been a source of difficulty. Before this doctrine can be applied, there must be "actual conflict" or "operational conflict" between the provincial and federal law in the sense that one says "yes" and the other "no". This requires more than a "duplication of norms" and recognizes that a provincial law may supplement federal law. In addition, the doctrine will apply where the provincial law frustrates the purpose of a federal law even though there is no direct violation of the federal law. This requires more than that the field be "occupied." There must be an incompatible federal legislative intent and, when looking for this intent,

> "the courts must never lose sight of the fundamental rule of constitutional interpretation that, 'when a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes' " [paragraph 75]

Order of Application of the Doctrines

The Court discussed the proper order of the application of the doctrines. Specifically, the order begins with the "pith and substance" analysis and then proceeds to the "paramountcy" analysis. The inter-jurisdictional immunity analysis is, in general, reserved for situations already covered by precedent.

> "Although our colleague Bastarache J. takes a different view on this point, we do not think it appropriate to always begin by considering the doctrine of inter-jurisdictional immunity. To do so could mire the Court in a rather abstract discussion of "cores" and "vital and essential" parts to little practical effect. As we have already noted, inter-jurisdictional immunity is of limited application and should in general be reserved for situations already covered by precedent. This means, in practice, that it will be largely reserved for those heads of power that deal with federal things, persons or undertakings, or where in the past its application has been considered absolutely indispensable or necessary to enable Parliament or a provincial legislature to achieve the purpose for which exclusive legislative jurisdiction was conferred, as discerned from the constitutional division of powers as a whole, or what is absolutely indispensable or necessary to enable an undertaking to carry out its mandate in what makes it specifically of federal (or provincial) jurisdiction. If a case can be resolved by the application of a

> pith and substance analysis, and federal paramountcy where necessary, it would be preferable to take that approach, as this Court did in *Mangat*. In the result, while in theory a consideration of inter-jurisdictional immunity is apt for consideration after the pith and substance analysis, in practice the absence of prior case law favouring its application to the subject matter at hand will generally justify a court proceeding directly to the consideration of federal paramountcy." [paragraphs 77 and 78].

In *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, [2010] 2 S.C.R. 536 added to the case law on the division of powers. At para. 27, Chief Justice McLachlin enunciated a two-pronged test that must be met to trigger the application of the doctrine of interjurisdictional immunity:

> The first step is to determine whether the provincial law — s. 26 of the Act — *trenches on the protected "core" of a federal competence*. If it does, the second step is to determine whether the provincial law's effect on the exercise of the protected federal power is *sufficiently serious* to invoke the doctrine of interjurisdictional immunity. [Emphasis in original.]

In the "Ryan's Commander" the Supreme Court further refined its analysis of the division of powers. The Court started with an analysis of the "pith and substance" of the impugned legislation. The analysis of the pith and substance consists of "an inquiry into the true nature of the law in question for the purpose of identifying the 'matter' to which it essentially relates"[3] . The validity of the *WHSCA* in this case was not contested and the full pith and substance analysis was not required.

The Supreme Court looked at interjurisdictional immunity. It held that interjurisdictional immunity did not apply in the case at bar. The first prong of the test was met that the provincial law "trenched" on the protected cores of a federal competence, but not the second part of the test. The provincial law's effect on the exercise of the protected federal power was not sufficiently serious to invoke the doctrine of interjurisdictional immunity. The Court held that intrusion of the *WHSCA "*is not significant or serious when one considers the breadth of the federal power over navigation and shipping, the absence of an impact on the uniformity of Canadian maritime law, and the historical application of workers' compensation schemes in the maritime context"[4].

The Supreme Court looked at the third division of powers test, the doctrine of federal paramountcy. It held that[5]:

> Federal paramountcy applies where there is an inconsistency between a valid federal legislative enactment and a valid provincial legislative enactment. The doctrine does not apply to an inconsistency between the common law and a valid legislative enactment. This is unlike interjurisdictional immunity, which protects the core of the "exclusive classes of subject" created by ss. 91 and 92 of the *Constitution Act, 1867* even

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[3] *Canadian Western Bank v. Alberta* 2007 SCC 22, at para. 26.
[4] at para. 64.

[5] at para. 66.

if the relevant legislative authority has yet to be exercised: *Canadian Western Bank*, at para. 34. The Chief Justice contrasted the two doctrines in *COPA*:

> Unlike interjurisdictional immunity, which is concerned with the *scope* of the federal power, paramountcy deals with the way in which that power is *exercised*. Paramountcy is relevant where there is conflicting federal and provincial legislation. [para. 62; emphasis in original.]

The Court held that federal paramountcy did not apply in this case under a proper interpretation of the *Marine Liability Act.* The Court held that section 6(2) of the *Marine Liability Act* read "in light of the broader statutory context, makes room for the operation of provincial workers' compensation schemes. The *WHSCA* and the *Marine Liability Act* can operate side by side without conflict.

In conclusion, the Supreme Court of Canada held that the provincial statute barring claims for workplace maritime injuries was valid.

Interestingly, the Attorney General of Canada intervened in the "Ryan's Commander" action and submitted that interjurisdictional immunity applied. It took that position that "maritime negligence law, which is part of the federal jurisdiction over navigation and shipping, includes rules relating to who can be compensated for death and injury resulting from a maritime accident. The statutory bar in s. 44 of the *WHSCA* sterilizes the right of dependants to sue for wrongful death pursuant to s. 6(2) of the *MLA.* There is no higher form of impairment[6]. Given that the interjurisdictional immunity argument did not succeed, will the Federal government pass amendments to s. 6(2) the *Marine Liability Act* to remove the "room for the operation of provincial workers' compensation schemes" and bring paramountcy into play? Only time will tell.

Feuiltault Decision

In *Feuiltault Solution Systems Inc. v. Zurich Canada*, 2011 FC 260; affirmed 2012 FCA 215; leave to S.C.C. refused December 20, 2012 book binding machines were shipped to Germany in three containers. On arrival they were rusted.

The Policy Terms were all risks [ICC(A)]

The Federal Court held the corrosion damage was due to heavy condensation within the containers from high moisture content in the treated lumber.

Court could not infer that the loss was due to a fortuity. However, the Court concluded, after considering all of the evidence, that the packing and preparation of the cargo were insufficient. The Court dismissed Feuiltault's claim against Zurich stating:

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[6]) at para. 21.

> "The conclusion is consistent with the general purpose of marine insurance, which is to indemnify against the risks incident to a maritime voyage, and not to guarantee the skill and workmanship of the insured in preparing the cargo for such a voyage"

Universal Sales Decision

Universal Sales, Limited v. Edinburgh Assurance Co. Ltd., 2012 FC 418

On 7 September 1970, the Irving Whale, under tow of the tug Irving Maple, set sail from Halifax, Nova Scotia, bound for Bathurst, New Brunswick with 4,270 metric tons of Bunker C fuel oil. She never arrived. She sank that day in the Gulf of St. Lawrence where she lay 37 fathoms below the surface for 26 years, until the Government raised her.

The Irving Group claimed under policies written in 1970, for sums paid to the Canadian government in 2000 in settlement of an action for the cost of refloating the tank-barge Irving Whale and her cargo in 1996, for the cost of defending that action, and for sue and labouring expenses allegedly incurred on underwriters' behalf.

The claim as broken down by the Irving Group had three components: sue and labour, liability and defence costs. The sums claimed, were as follows:

- a. Sue and labour: $3,602,458.83;
- b. Liability: $4,705,792.67; and
- c. Defence costs: $1,800,000 (approximately)

The Court had to deal with multiple insurers, various heads of damages, allocation of risk and quantum.

With respect to the claim for sue and labour expenses, the trial Judge denied this claim on the basis that the expenses did not diminish or avert a loss under the policy. This was so because the estimated costs at the time the expenses were incurred were in excess of $21 million but the policy limit was only $5 million. Thus, the sue and labour expenses could not possibly have benefited the underwriter. With respect to the settlement payment, the trial Judge held that he was satisfied that the plaintiffs would have been held liable to the Crown in nuisance if the settlement payment had not been made. With respect to the claim for defence costs, the trial Judge was of the view that these should be apportioned between the plaintiffs and underwriters on the grounds that both benefited from these costs. He somewhat arbitrarily apportioned these defence costs 25% to underwriters and 75% to the plaintiffs.

The Court commented on the role of the average adjuster, stating:

> It would have been helpful to the Court to have had the opinion of an average adjuster. These professionals deal on a daily basis with such matters as losses spread over several years and several policies, general average, particular average, particular charges, deductibles, sue and labour, underinsurance, excess insurance, double insurance, and reinsurance. In the *Pointe Levy*, above, seven average adjustors testified. In this case, however, as Mr. Jamieson testified, no adjustment was done.