

Canadian Maritime Law Association

Update on the Canadian Law and Practice of Ship Arrest

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I. INTRODUCTION

The recent financial crisis has greatly increased all types of unpaid marine claims. As cheques bounce around the world for cargo damage, charter hire, and goods and services provided to ships, this difficult phase of the economic cycle raises questions of how creditors can collect those claims.

Ships are unique because they may quickly arrive; cause great damage through accident, delivering damaged cargo, or using unpaid services; then, leave the jurisdiction never to return.

If security for the claim is not posted then there is a great risk that a judgment eventually obtained will not be paid, frustrating the court process.

To overcome the problem of collection, security is often obtained by arresting, or threatening to arrest, a ship, cargo or freight, and receiving, for example, a reputable P&I Club letter of undertaking to pay the claim regardless of any defences the P&I Club has to a claim by its member. With security in place, the claimant can relax knowing that a future judgment will be paid.

Clients world-wide are increasingly asking lawyers how to get security for claims. This raises questions about the scope of arrest in Canada. Arrest is also a topic of current interest because of Transport Canada's pending proposed amendment to section 43(8) of the *Federal Courts Act*, to correct the English version of Canadian sistership law to be, at long last, consistent with the French.

Ship arrest is a time honoured practice in many legal systems. The modern practice of fast, efficient arrest and release of the ship by posting security was developed to reflect the fact that ships are unique chattels which must be mobile to earn income, while at the same time protecting the ships' creditors.

II. BASIC LAW OF MARITIME ARREST IN CANADA

Canada's maritime arrest law is unique among countries, but has roots in English admiralty practice. Many countries, including the U.K. but not Canada, ratified the International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships, May 10, 1952 (the "1952 Arrest Convention"). The International Convention on Arrest of Ships, 1999 has had almost no international support (seven accessions or ratifications, but not Canada), and would allow arrest under somewhat different circumstances than the 1952 Arrest Convention.

In Canada, arrest is allowed only when the statutory requirements are met. In general terms, the arresting party must have either a maritime lien, or a statutory right *in rem* for a claim in a category specified in Section 22(2) of the *Federal Courts Act*. The right to arrest depends on nuances of ownership of the arrested property at specified times.

As pointed out by Marceau, J.A. in a leading Canadian decision on arrest, *Mount Royal/Walsh Inc. v. Jensen Star (The)* (C.A.), [1990] 1 F.C. 199, 99 N.R. 42 (F.C.A.) (the "*Jensen Star*") the right to arrest for a maritime lien arises from the commission of the act giving rise to the lien (for

example salvage, personal injury or death, wages, or collision) and subsequent changes of ownership are irrelevant.

In contrast to a maritime lien, the statutory right *in rem* is sustainable only if the shipowner is personally liable, and the beneficial owner of the ship was the same at two times: when the cause of action arose and also when the action was commenced. This requirement for continuous beneficial ownership arises from Section 43(3) of the *Federal Courts Act* which creates the statutory right *in rem*, as follows:

43(3) ... the jurisdiction conferred on the Court by section 22 shall not be exercised *in rem* with respect to a claim mentioned in paragraph 22(2)(e), (f), (g), (h), (i), (k), (m), (n), (p), (r) [i.e., the statutory rights *in rem*] unless, at the time of the commencement of the action, the ship, aircraft or other property that is the subject of the action is beneficially owned by the person who was the beneficial owner at the time when the cause of action arose.

Some commonly encountered statutory *in rem* claims include cargo damage, charterparty debts, towage, and necessities including ship repairs.

In the *Jensen Star* (at paragraph 28), Marceau, J.A. also pointed out that an *in rem* judgment can be rendered without being accompanied by a judgment *in personam* against the owner.

One issue in the *Jensen Star* was that the ship was sold, but neither the previous, nor the new, owner gave notice of the change to the plaintiff ship repairer who worked on the ship before, and after, that sale. The new owner immediately demise chartered the ship back to the previous owner, also without notice to the repairer. Marceau, J.A. (at paragraph 29) found that the act of the new owner, in continuing business without notifying the repairer of the change, was sufficient to tacitly authorize the previous owner to contract on the credit of the vessel and to engage the new owner's personal liability and, thus, the liability of the ship *in rem*. There is a rebuttable presumption that necessities supplied to a ship are supplied on the credit of the ship and its owner (*Jensen Star*, at paragraph 30).

Marceau, J. A. also ruled in the *Jensen Star* that a demise charterer is not a "beneficial owner" for the purpose of engaging the ship's liability. At paragraph 13, Marceau, J.A. reasoned that Parliament's intention in using the word "beneficially" to modify ownership, was an instruction to look beyond the registered owner in searching for the relevant person, but that a demise charterer was not a beneficial owner because a demise charterer has no equitable or proprietary interest in the ship and could not burden the ship with any *in rem* claim.

This ruling has great practical significance because commercial ships often operate under demise charter. A court would generally take the practical approach used by the Federal Court of Appeal in the *Jensen Star*, and find that a demise charterer who was operating the vessel was impliedly contracting on the credit of the registered owner for the purpose of binding the credit of the ship, unless notice was given by the ship's owner to potential claimants that the owner will not be liable for claims against the ship. However, the issue often arises in practice of whether that notice was reasonably given by the owner to potential claimants. This is a trap for unwary suppliers to ships, who may find that their assumed *in rem* claims are unenforceable and therefore unpaid.

III. RECENT DECISIONS ON MARITIME ARREST

1. *The Swift Fortune* – What is the “Subject of the Action”?

The recent drop in commodity prices and charter hire rates has caused many disputes about charterparties, including claims against cargo interests for breach of charterparties. Can these claims be secured by maritime arrest of cargo?

Canadian law on the arrest of cargo was recently clarified and improved by the Supreme Court of Canada’s decision in *Phoenix Bulk Carriers Ltd. v. M/V Swift Fortune (The)*, [2007] SCC 13 (the “*Swift Fortune*”), which overruled the problematic decision of *Paramount Enterprises International Inc. v. An Xin Jiang (The)*, 2000 F.C.J. No. 2066 (F.C.A.).

The issue in both *Paramount* and *Swift Fortune* was whether failure to deliver cargo to a nominated vessel justified the arrest of the intended cargo by the owner of the nominated vessel. The central facts are that a cargo of coal was arrested on board the defendant ship, the plaintiff alleging that the plaintiff was contractually entitled to carry that same cargo on the plaintiff’s ship.

The arrest of a ship, cargo, freight or other property, for a maritime lien or statutory *in rem* claim is allowed if the requirements of *Federal Courts Act* section 43(2) and (3) are met:

(2) Subject to subsection (3), the jurisdiction conferred on the Federal Court by section 22 may be exercised *in rem* against the ship, aircraft or other property **that is the subject of the action**, or against any proceeds from its sale that have been paid into court.

...

(3) Despite subsection (2), the jurisdiction conferred on the Federal Court by section 22 shall not be exercised *in rem* with respect to a claim mentioned in paragraph 22(2) ...**unless, at the time of the commencement of the action, the ship, aircraft or other property that is the subject of the action is beneficially owned by the person who was the beneficial owner at the time when the cause of action arose.**

(emphasis added)

In *Paramount*, the Federal Court of Appeal gave a very narrow and unwieldy interpretation of the words “subject of the action” in subsection 43(2). *Paramount* never went to the Supreme Court of Canada, so that problematic decision was the law from 2000 until 2007 when it was overruled by the Supreme Court of Canada in the *Swift Fortune*.

The intricate test in *Paramount* would allow arrest only if the property arrested was the “subject of the action”, which was interpreted to mean that the property must be the “cause of” the action. No arrest was allowed because the “cause of” the action was the breach of the charterparty, not the cargo itself.

The facts in *Paramount* and *Swift Fortune* were indistinguishable. In the *Swift Fortune*, the Federal Court of Appeal considered itself bound to follow the decision in *Paramount*, even though it felt that the *Paramount* decision using the “physical nexus” test, was wrong.

In the *Swift Fortune*, the Supreme Court of Canada adopted the reasons for judgment of Nadon, J.A. in the *Swift Fortune* decision of the Federal Court of Appeal, 2007 FCA 1, at paragraph 47, as follows:

[47] I am therefore of the view that subsection 43(2) does not require a physical nexus between the cargo and the vessel in order to give rise to *in rem* rights. **Rather, subsection 43(2) proposes identifiability of the property as the controlling factor so as to ensure that the scope of the *in rem* proceedings is not unduly enlarged. In other words, the action *in rem* must relate to the specific property contemplated in the contract at issue. To the extent that the cargo can be clearly identified as being the one contemplated under the contract, the breach of which is alleged by Phoenix in its Statement of Claim (as was alleged by Paramount in Paramount, supra), the cargo under arrest is the “subject of the action”.**

(Emphasis added)

The *Swift Fortune* decision is a welcome simplification of the law. The principle in the *Swift Fortune* applies to any maritime arrest, not just the arrest of cargo. There will likely be more decisions in the near future expounding Canadian law on the arrest of cargo, freight and other property.

2. The *Maersk Defender* – Can a Prospective Owner Create *In Rem* Liability?

The narrow scope of Canadian maritime arrest rights under *Federal Courts Act* section 43(3), requiring continuous beneficial ownership (when there is no maritime lien) was illustrated by the Federal Court of Appeal’s decision in *Maritima de Ecologia, S.A. de C.V. v. The Maersk Defender*, 2007 FCA 194 (the “*Maersk Defender*”). The issue in that case was whether a ship could be arrested to secure a claim for breach of a charterparty involving that ship, when the ship was never owned by any defendant shipowner.

The plaintiff had a charter agreement under which the defendant ship was to be purchased by the defendant prospective shipowner for the purpose of performing the charterparty. In breach of that agreement, the prospective owner arranged for the ship to be sold to a different company and chartered by that company to someone other than the plaintiff. Nadon, J. A. of the Federal Court of Appeal set aside the arrest on two grounds:

- (a) The sale of the ship to a shipowner different from the intended owner under the charterparty, was a change in beneficial owner which defeated the claimant’s right to arrest under section 43(3). That very sale was the wrongful act causing the inevitable breach of the charterparty. Ironically, the wrongful act of the defendant simultaneously

made it impossible for the plaintiff to arrest to get security for the claim arising from the wrongful act. (*Maersk Defender*, paragraph 31)

- (b) Even if there was a similar beneficial ownership at relevant times, the prospective shipowner who was now breaching the charterparty had never become the owner of the ship. Therefore, the requirement for the owner's personal liability to justify an *in rem* claim and arrest had not been met (*Maersk Defender*, paragraph 36).

3. F.C. Yachts - Can a Mortgagee and Prospective Owner Create *In Rem* Liability?

Continuous beneficial ownership is a necessary condition for asserting a statutory right *in rem*. However, it is not of itself a sufficient condition.

An interesting permutation of the usual ship arrest situation arose in *F.C. Yachts Ltd. v. Splash Holdings Ltd.* [2007] F.C. 1275; 289 D.L.R. 4th 167, where Harrington, J. held that a shipowner could not arrest its own ship in order to secure its claim against a recorded mortgage holder. In that case, the plaintiff shipyard was the owner of a ship under construction. The ultimate purchaser had a mortgage against the ship to protect its interest, such as construction progress payments. If the payments had all been made as planned, the purchaser / mortgagee would have become the owner. Payment was in default. Following the principle in the *Jensen Star* that a statutory right *in rem*, unaccompanied by a maritime lien, does not lie unless the personal liability of the shipowner is engaged, Harrington, J. vacated the arrest because the mortgagee in default was not the beneficial owner of the ship.

4. The *Atchafalaya* - Can an Undisclosed Shipowner Create *In Rem* Liability?

The requirement for *in personam* liability of the owner to justify arrest tempts ship operators (who are not owners) to allow arms-length parties to mistakenly believe that they are contracting with the owner. When claims arise, the true owner surfaces to dispute the *in rem* claims. This was considered in *Dragage Verreault Inc. v. "Atchafalaya" (The)*, 2009 FC 273.

In this recent (March 17, 2009) decision, Prothonotary Morneau considered whether the requirement for personal liability on the part of the shipowner to support an action *in rem* applies in a case where a defendant contracted to provide a ship for dredging services to the plaintiff. When a claim was made for failure to perform those services, the registered owner disputed *in rem* jurisdiction on the basis that it was not personally liable, and that the only liable party was the contracting defendant. The purported real owner moved to strike out the *in rem* claim on the basis that it was "plain and obvious that the claim would fail".

An individual had provided documents that were consistent with the contracting defendant being the owner, although under the scrutiny of litigation some of the documents were ambiguous. For example, a contract quote from the contracting defendant referred to "... our Hopper Dredge 'Atchafalaya'". Prothonotary Morneau did not strike out the claim, on the basis that the conduct of a person expressly or impliedly authorized by a person in possession or control of the ship may have been granted to contract on the credit of the ship, as happened in the *Jensen Star*, *supra*.

The lesson learned from the *Atchafalaya* is that marine contracting parties are well advised to include a term stating that the party contracting for the ship has authority to bind the ship to *in rem* claims.

IV. SISTERSHIP ARREST IN CANADA, FEDERAL COURTS ACT, S.43(8)

Canadian sistership arrest law is so uncertain that foreign litigants seeking a reasonable forum to arrest, upon learning the law, prefer to arrest in other jurisdictions where possible, in order to avoid being drawn into expensive, lengthy, appeals about the extent of sistership arrest in Canada.

In *F.C. Yachts Ltd. v. Splash Holdings Ltd.* [2007] F.C. 1275; 289 D.L.R. 4th 167, Harrington J. referred to Prothonotary Hargrave's decision in *Norcan*, below, and described the difference between the French and English versions of section 43(8) as a "vexing" problem which he did not need to decide in order to decide the *F.C. Yachts* case before him.

Canada's first sistership legislation was created by a 1992 amendment to the *Federal Court Act*. The present wording of section 43(8) of the *Federal Courts Act* is:

(8) The jurisdiction conferred on the Federal Court by section 22 may be exercised <i>in rem</i> against any ship that, at the time the action is brought, is beneficially owned by the person who is the owner of the ship that is the subject of the action.	(8) La compétence de la Cour fédérale peut, aux termes de l'article 22, être exercée en matière réelle à l'égard de tout navire qui, au moment où l'action est intentée, appartient au véritable propriétaire du navire en cause dans l'action.
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The difference between the English and French versions is the reversal of the concepts of "ownership" and "beneficial ownership" in the links to the wrongdoing ship and the arrested ship.

A line of cases about sistership arrest has been decided under this linguistic inconsistency. In light of the decisions, the effect of Transport Canada's proposed correction of the English version to coincide with the French is not trivial.

The diagram below is based on the interpretation of the English version of section 43(8) in *Hollandsche Aanneming Maatschappij v. Ryan Leet (The)* (1997), 135 F.T.R. 67 (Fed. T.D.) (the "*Ryan Leet*") in which the Honourable Justice Rothstein, then in the Federal Court Trial Division, held that the distinction between the terms "beneficially owned" and "owner" in the English version indicates legislative intent to distinguish the terms, and to limit the meaning of "owner" to the "registered" owner. The *Ryan Leet* arrest was vacated because the facts did not meet the test in the English version of s.43(8). Surprisingly, in the *Ryan Leet*, the difference between the French and English versions of section 43(8) was not raised or considered, even though on its facts, the *Ryan Leet* arrest may well have been valid under the French wording.

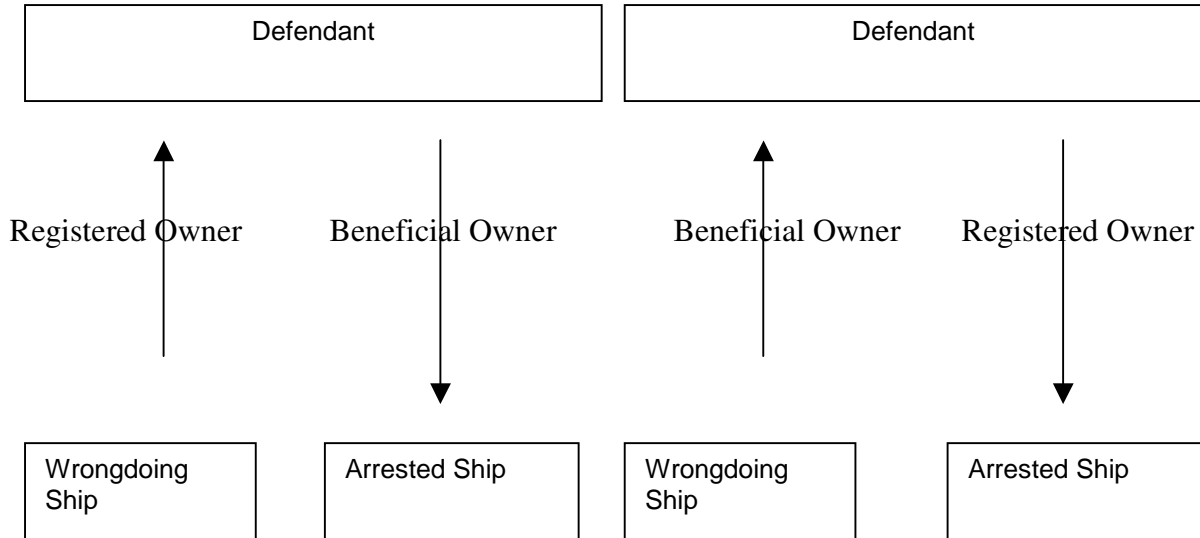
Diagrammed below are both versions, including the proposed amendment to the English version of section 43(8) which is identical to the translation from French used by Prothonotary Hargrave in *Norcan Electrical Systems Inc. v. Feeding Systems A/S*, 2003 FCT 702 "*Norcan*"). The two tests allow sistership arrest if, at the time the action is brought, the arrested ship:

[English Version]

...is beneficially owned by the person who is the owner of the ship that is the subject of the action.

[French Version translated to English]

...is owned by the beneficial owner of the ship that is the subject of the action.



V. **SISTERSHIP ARREST UNDER THE LINGUISTICALLY INCONSISTENT VERSIONS OF S.43(8)**

Canadian sistership arrest law is strange, to say the least. The main problem arises from the inconsistent definitions of sistership arrest in the French and English versions. When the two equally authoritative wordings are read together and given a collective “purposive reading” to determine parliament’s intent, as required in such circumstances (*Beothuk Data Systems v. Dean (1997)*, [1998] 1 F.C. 433 (Fed. C.A.)), the result is a sistership arrest right that is arguably broader than either language’s version alone, extending to all ships under common beneficial ownership.

The only decision directly on point, *Norcan*, involved unusual facts where sistership arrest was allowed under the French version of section 43(8) but not under the English version. The defendants moved to strike the statement of claim. After considering the law about the purposive reading principle, Prothonotary Hargrave said:

22 In the present instance the French and English versions of section 43(8) of the *Federal Court Act* do not share a meaning, other than to allow some form of sistership arrest.

23 The English version, as considered in “*Ryan Leet*”, allows the arrest of a second vessel which is in the same ownership as what I will call the wrongdoing vessel. “*Ryan Leet*” properly reflects the English version of section 43(8), however the English version of section 43(8) is contrary to the 1952 Arrest Convention, which extends arrest by way of beneficiary ownership, bringing home a claim to a ship directly owned by someone who is also a beneficial owner, of the wrongdoing vessel. This is also the effect of the British legislation, which is modelled on the 1952 Arrest Convention sistership provision. This, if one looks at history of the sistership concept, is what was intended. In addition to extending the rights of claimants to claim against ships under common beneficial ownership, another purpose of the legislation is to allow those with claims against a wrongdoing ship to attach the assets of the de facto economic power behind that ship.

24 The plain wording of the French version of section 43(8) allows an arresting party to invoke the concept of beneficial ownership in a meaningful way. Thus, were the French version of 43(8) of the *Federal Court Act* to be applied to the present situation, the Plaintiff has at least a substantial and reasonable arguable case that the *FB XIX* and *FB XX*, being vessels owned by Feeding Systems A/S, are liable as sisterships because Feeding Systems A/S has beneficial ownership of the wrongdoing vessels, *FB XXII* and *FB XXIII*, by way of ownership of the shares of Feeding Systems Chile, which is the owner of the latter two vessels.

(Emphasis added)

Surprisingly few decisions have considered sistership arrest in Canada after the *Norcan* decision in 2003. *Norcan* settled before any appeal was argued.

In an earlier case, the *Nel*, [2001] 1 F.C. 408, 189 F.T.R. 230, Prothonotary Hargrave commented at paragraph 113 that, regarding the *Ryan Leet* and Section 43(8) of the *Federal Courts Act*:

In the result the right of sistership arrest can only be invoked where the ship sought to be arrested is beneficially owned by the registered owner of the ship that gave rise to the obligation that is the cause of the action. Here I would note that the effect of this is that an owner may defeat the whole idea of sistership arrest by placing each ship in a separate company, even though each separate company is owned by the same parent company. This I think is contrary to the intention of parliament, that sistership legislation not be so easily defeated. ...

Prothonotary Hargrave went on to find, on the facts of the *Nel*, that the series of one ship companies with a common owner was a sham transaction, which would allow sistership arrest. (Para. 117)

After *Norcan*, in *Royal Bank of Scotland plc v. "Golden Trinity" (The)*, May 31, 2004, 2004 FC 795 Prothonotary Hargrave said, in *obiter dicta*, on sistership arrest at paragraph 82:

The plain wording of the sistership provision in section 43(8) of the *Federal Court Act*, in the French version, sets out the sistership concept in a meaningful way in that it allows a plaintiff to exercise *in rem* jurisdiction against a ship which, at the time the action is brought, is owned by the beneficial owner of the ship that is the subject of the action.

Prothonotary Hargrave also commented in the *Golden Trinity* (paragraph 80) that the French version was "similar in form and effect to" the 1952 Arrest Convention. At paragraph 96 Prothonotary Hargrave distinguished the *Ryan Leet* on the ground that it was based on the English version only. Ultimately, in the *Golden Trinity*, Prothonotary Hargrave, following the principle in the *Ryan Leet*, held that ships were not sisterships if they had some common, but not identical, beneficial owners.

To summarize the comments of Prothonotary Hargrave in the 3 decisions above, *Norcan*, the *Nel* and the *Golden Trinity*: the French version of s.43(8) is close to parliament's intention, which was to create a sistership arrest right allowing the assets beneficially owned by the true economic power behind the wrongdoing ship to be arrested. That right resembles, but is not identical to the 1952 Arrest Convention and the U.K. ship arrest law.

Before considering sistership arrest further, below are some extracts from the 1952 Arrest Convention and U.K. sistership arrest law.

1952 Arrest Convention

The 1952 Arrest Convention, which Canada never ratified or adopted, allows sistership arrest, as follows:

Article 3(1)

... a claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship ...

Article 3(2)

Ships shall be deemed to be in the same ownership when all the shares therein are owned by the same person or persons.

...

Article 3(4)

When in the case of a charter by demise of a ship the charterer and not the registered owner is liable in respect of a maritime claim relating to that ship, the claimant may arrest such ship or any other ship in the ownership of the charterer by demise, ...

The provisions of this paragraph shall apply to any case in which a person other than the registered owner of a ship is liable in respect of a maritime claim relating to that ship.

U.K. Sistership Arrest Legislation

In contrast to Canadian law, a charterer can bind the ship to *in rem* claims. In the U.K., the *Supreme Court Act*, 1981, section 21(4)(b) allows sistership arrest, pursuant to the 1952 Arrest Convention, which the U.K. has ratified, although some differences exist between the U.K. arrest rule and the 1952 Arrest Convention. The claimant may arrest either the wrongdoing ship or a sistership where:

21(4)(b) the person who would be liable on the claim in an action in personam (“the relevant person”) was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship, an action *in rem* may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against:

- (i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise; or
- (ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.

Obviously, Prothonotary Hargrave’s decision in *Norcan* has not had the effect of bringing all of the above U.K. law and the 1952 Arrest Convention into Canadian law. However, the author submits that it would be an improvement over the present law.

VI. THE EFFECT OF AMENDING THE ENGLISH VERSION OF S.43(8) TO BE CONSISTENT WITH THE FRENCH VERSION

It is submitted that correcting the linguistic difference will substantively change the law from what is said in paragraph 23 of Prothonotary Hargrave’s decision in *Norcan*; i.e. the right to arrest ships under common beneficial ownership. The proposed amendment may arguably cause at least two possible results.

One possible outcome is that, following Prothonotary Hargrave’s reasoning that the French version of s.43(8) gives broader sistership rights than the English version, the amendment will be interpreted as allowing the arrest of any ships under common beneficial ownership.

On the other hand, the amendment would remove the linguistic inconsistency that led Prothonotary Hargrave, in *Norcan*, to broadly interpret sistership arrest using the “purposive reading” approach. Applying the *Ryan Leet* reasoning (differentiating “owner” from “beneficial

owner”) to the new linguistically consistent French version of s.43(8) may result in a narrow right to arrest only ships of which the registered owner is also the beneficial owner of the wrongdoing ship.

If sistership arrest law is amended as now proposed by Transport Canada, changing the English version to coincide with the French version, and then narrowly construed by a Court, there may be few circumstances in which sistership arrest is allowed in Canada. This would be unfortunate. The right would be narrower than under the 1952 Arrest Convention, or the laws of the U.K., South Africa, and other arrest-friendly jurisdictions.

VII. POSSIBLE SOLUTION TO THE CANADIAN SISTERSHIP ARREST PROBLEM

Canada’s general need for strong sistership arrest rights was explained by Prothonotary Hargrave in the *Nel* at paragraph 103 where, regretting being forced to conclude that under Canadian law, foreign maritime liens against one ship could not be enforced against a sistership, he said:

... it is perhaps an unfortunate result because it decreases the usefulness of our sistership procedure, not overall a good thing as Canada, as a nation, is not an owner of ships, but depends upon foreign bottoms for its international trade.

A recent (April 14, 2009) submission of CMLA to Transport Canada (part of CMLA’s comments on many changes to maritime law in Bill C-7, *An Act to amend the Marine Liability Act*) reluctantly agreed to approve the correction of the English language version of s.43(8) as in Bill C-7. However, CMLA reiterated its recommendation, first made to the government on December 12, 2005, to introduce the concept of “affiliated” entities, as that concept is already used in the *Canada Business Corporations Act*. CMLA recommends amending Section 43(8) of the *Federal Courts Act* as follows:

43(8) The jurisdiction conferred on the Federal Court by section 22 may be exercised *in rem* against any ship that, at the time the action is brought, is owned by the beneficial owner of the ship that is the subject of the action, or by any person, corporation or other legal entity with which the beneficial owner is affiliated within the meaning of section 2 of the *Canada Business Corporations Act*.

The relevant definitions in section 2 of the *Canada Business Corporation Act* read:

- 2) For the purposes of this Act,
 - (a) one body corporate is affiliated with another body corporate if one of them is the subsidiary of the other or both are subsidiaries of the same body corporate or each of them is controlled by the same person; and
 - (b) if two bodies corporate are affiliated with the same body corporate at the same time, they are deemed to be affiliated with each other.

Control

(3) For the purposes of this Act, a body corporate is controlled by a person or by two or more bodies corporate if

(a) securities of the body corporate to which are attached more than fifty per cent of the votes that may be cast to elect directors of the body corporate are held, other than by way of security only, by or for the benefit of that person or by or for the benefit of those bodies corporate; and

(b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the body corporate. [Future effect]

The author's personal view is that the best solution to the problem of the narrow scope of Canadian sistership arrest is to change Canadian law as recommended above by CMLA, or alternatively, to reasonably coincide with the law of either the U.K., South Africa or other arrest-friendly jurisdictions. CMLA's recommendation has been opposed by the ocean carriers and P&I Clubs, who seek to reduce the number of ship arrests, and as a result of accommodating those views by some of its members, CMLA's efforts in that regard have been weakened by controversy.

VIII. RECENT DECISION OF THE SUPREME COURT OF BRITISH COLUMBIA TO READ CAUTIOUSLY: *THE TRINITY*

With great respect to the Supreme Court of British Columbia, the author must report a regrettable recent decision of that court which would adversely affect maritime law, if followed.

In *Hansen v. The Trinity (Ship)*, 2007 BCSC 225 (the "*Trinity*") (February 16, 2007) the SCBC set aside the arrest of a ship under that Court's Rule 55 "Admiralty Jurisdiction", which closely resembles the Federal Court's arrest rule. The rules of the two courts are not identical. For example, the British Columbia statutory form of Affidavit to Lead Warrant does not provide for stating the ship's beneficial ownership, needed for sistership arrest, which is required by Federal Courts Rule 481(2)(c).

The *Trinity* decision held that, under SCBC Rule 55, the evidence supporting an *ex parte* application for an arrest warrant must go far beyond the simple requirements listed in that Rule (SCBC Rules, list contained in form 109 "Affidavit to Lead Warrant") and instead give, at least, the full and frank disclosure required when seeking a *Mareva* injunction. (The *Trinity* at paragraph 27) The general requirements for a *Mareva* injunction are:

1. make full and frank disclosure of all material circumstances, including facts in favour of the defendants;
2. provide particulars of the claim;
3. show that the defendant has an asset within the jurisdiction;

4. show grounds for believing that there is a risk that the asset will be removed; and
5. give an undertaking in damages for wrongful arrest.

The SCBC set aside an *ex parte* order for an arrest warrant on the ground that the plaintiffs did not make full and frank disclosure, when they failed to advise the court of a previous unsuccessful application for a *Mareva* injunction against the defendants in parallel proceedings in the SCBC.

The SCBC Judge deciding the *Trinity* relied heavily on comments about the nature of arrest in a Federal Court of Appeal decision about wrongful arrest of cargo, *Armada Lines Ltd. v. Chaleur Fertilizers Ltd.* (1994), [1995] 1 F.C. 3 (Fed. C.A.); in particular, after referring to the principles of a *Mareva* injunction described in the case of *Third Chandris Shipping Corporation*, the SCBC Judge said:

33. Rule 1003 [now Rule 481] of the *Federal Court Rules* sets out the criteria necessary for the granting of a warrant for the arrest of property in an action *in rem*. In my view, the guidelines set out in the *Third Chandris* case are consistent with the criteria established by Rule 1003. In each instance, the onus is undoubtedly cast upon the plaintiff to show that the arrest requested is necessary for the protection of its rights. Requirement (v) in the *Third Chandris* case, the undertaking in damages, clearly demonstrates that the plaintiff, who seeks the arrest, must carry the risk and burden of an illegal arrest, and the consequences flowing therefrom. While Rule 1003 does not specifically require an undertaking as to damages for wrongful arrest, I think it to be a necessary inference that the plaintiff assumes the consequences of such an arrest. The English authorities support the view that damages are payable where the arrest is without a proper legal foundation. In my view, when a plaintiff seeks to arrest a ship or its cargo pursuant to Rule 1003, the plaintiff carries the burden of showing that the arrest was lawfully carried out.

It is submitted that the SCBC judge in the *Trinity* misinterpreted the Federal Court of Appeal's decision in *Armada Lines* by misconstruing the Federal Court of Appeal's description of some similarities between arrest and a *Mareva* injunction, as an authoritative decision making equal the procedural requirements for obtaining those two different remedies. In fact, those remedies remain very different, and the related procedures should remain different.

Significantly, the SCBC judge in the *Trinity* noted that the Supreme Court of Canada overturned the Federal Court of Appeal's decision in *Armada Lines*, [1997] 2 S.C.R. 617, holding that damages for wrongful arrest will only be allowed if there is bad faith or gross negligence. The Supreme Court of Canada did not overrule the comments of the Federal Court of Appeal about the similarity between the practical result of an arrest and a *Mareva* injunction. In fact, the Supreme Court of Canada (at paragraphs 23 and 24) noted the different requirements for the two remedies, and at paragraph 26, held that any change to that law would be for the legislature to carry out. The SCBC judge referred to the Supreme Court of Canada's decision in *Armada Lines*, and also to some recent authorities on the Federal Court practice, but nevertheless

concluded that full and frank disclosure is required for an arrest warrant under the British Columbia admiralty jurisdiction rule.

The *Trinity* decision is contrary to the practice in the Federal Court, in which an arrest warrant is routinely issued as long as the minimal evidence required specified in *Federal Courts Rule* 481(2) is provided. Federal Court practice has never required detailed evidence of facts, and certainly not the full and frank disclosure needed for a *Mareva* injunction. See *Magnolia Ocean Shipping v. The Soledad Maria* [1982], 1 F.C. 205 holding that an affidavit to lead warrant need only state what is specifically required by the arrest rule.

Counsel for the plaintiff in *Trinity* advises that an appeal was launched to the B.C. Court of Appeal, but abandoned. Therefore, it is unlikely that the law in the *Trinity* will change in the foreseeable future.

If the *Trinity* is extended to apply to arrest in the Federal Court, it is submitted, a significant restriction on arrest will result, frustrating the fast, simple procedure needed to obtain security. This could have far reaching negative consequences for Canadian maritime law practice, and claimants. The practice should be that the evidence stipulated in that rule for an affidavit to lead warrant is all that is required. For all these reasons it is submitted that the SCBC decision in the *Trinity* should be distinguished on its facts, or simply considered an anomalous decision. We need a new Canadian decision doing so.

IX. STATISTICAL TRENDS IN ARREST IN THE FEDERAL COURT

The Federal Court registry kindly gave the author some statistics about the number of arrest warrants issued at its registries from 1989 up to May 21, 2009, from which the author prepared Schedule “A” to this paper, a table of warrants from selected registries – Halifax, Montreal, St. John’s, Toronto and Vancouver, from 1989 up until mid-May, 2009. An arrest warrant can be issued for claims involving a trivial amount, or millions of dollars, so one should not read too much into these numbers. However, the statistical sample of 1,832 warrants is large enough to justify some conclusions.

The total of all five registries issued about 55 warrants per year from 1990 to 1993, followed by a golden age of arrest from 1994 to 1998. The highest was 161 in 1996. More recently, the number dwindled to 50 or 60 per year until 2008 when they crept up to 88. In 2009, up to May, the total was 22.

One would expect the present financial crisis to cause more arrests. The statistics may also show trends in different types of business – for example, fishing fleets are consolidating from many small boats to a few large ones, which would tend to reduce the number of arrests in a similar financial circumstance. Nevertheless, the number of arrests seems to be on the wane for the last decade. This may be due to the technical legal problems of arrest, but this would be hard to prove.

X. CONCLUSIONS

Canadian sistership arrest law, which was never broad, may remain narrow and to some extent, uncertain, even after correcting the linguistic inconsistency between French and English in Section 43(8). This uncertainty has adversely affected the collection of maritime claims in Canada.

The author's experience is that, when clients seeking to arrest learn about the uncertainty of Canadian law, they generally prefer to arrest elsewhere than Canada, where they feel it is more likely that effective remedies exist, like sistership arrest. We should change this by letting the world know about Canada's improving arrest law.

With increasing amounts of unpaid claims, the current financial crisis may cause a surge in cases exploring the limits of Canadian maritime arrest.

Douglas G. Schmitt

May 26, 2009