Federal Court  Cour fédérale

Date: 20170127

Dockets: T-901-11
T-1149-12

Citation: 2017 FC 105

Ottawa, Ontario, January 27, 2017

PRESENT: The Honourable Mr. Justice Harrington

Docket: T-901-11

FEDERAL COURT
ACTION IN PERSONAM

BETWEEN:

ADVENTURER OWNER LTD
DOCKENDALE HOUSE, WEST BAY STREET
P.O. BOX CB-13048, NASSAU, BAHAMAS

Plaintiff

AND

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

Docket: T-1149-12

FEDERAL COURT
ACTION IN PERSONAM AND IN REM

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Plaintiff

AND

ADVENTURER OWNER LTD, OWNER, AND ALL OTHERS INTERESTED IN THE SHIP M/V CLIPPER ADVENTURER

Defendants *in personam*

AND

THE SHIP M/V CLIPPER ADVENTURER

Defendant *in rem*

JUDGMENT AND REASONS

[1] It was a beautiful summer's eve in the Canadian Arctic. The sun was up and the seas in Coronation Gulf were calm. It was August 27, 2010, the day the *Clipper Adventurer* steamed full speed ahead onto an uncharted, submerged shoal. Thus a fourteen-day expedition cruise in the waters of Greenland and Canada ended on day 13 at 18:32 hrs local time at 67^{0} 58.26N, 112^{0} 40.3W. The *Clipper Adventurer* was in Nunavut *en route* from Port Epworth to Kugluktuk.

[2] Fortunately, not one of her 128 passengers and crew of 69 was injured. Over the next few days, the passengers and crew members not necessary for navigation were rescued by the Canadian Ice Breaker *Amundsen*, and brought to Kugluktuk.

[3] The *Clipper Adventurer* struck the shoal with such force that more than half her length became firmly embedded thereon. A salvage company, using four tugs, managed to refloat her on September 14th. Although a number of her double-bottom tanks had been breached, pollution was minor and controlled. As there were no nearby repair facilities, and winter was closing in, she underwent temporary repairs in Canada and in Greenland. Following a further inspection in

Iceland, she was permitted to proceed in her unseaworthy state by hugging the coastline as much as possible. Finally, after a long torturous route to Poland, she underwent permanent repairs.

[4] The owners of the *Clipper Adventurer* have sued the Canadian Government in the amount of US $13,498,431.19 for the cost of temporary and permanent repairs, payment to the salvors, business interruption, and related matters.

[5] The basis of the claim is that Her Majesty, more particularly the Canadian Coast Guard and the Canadian Hydrographic Service, knew of the presence of the shoal, had a duty to warn, and failed to do so. Had a proper warning been issued, this casualty would not have occurred.

[6] Her Majesty denies liability. She admits that both the Canadian Coast Guard and the Canadian Hydrographic Service had known of the presence of the shoal some three years before the grounding. She denies that any duty was owed to the *Clipper Adventurer* to give warning. Nevertheless, warning was given both by means of a Notice to Shipping and by a Navigational Area Warning. The casualty was caused by the *Clipper Adventurer*'s failure to update Canadian Hydrographic Chart 7777.

[7] Her Majesty filed her own action against the ship and her owners in the amount of CDN $468,801.72 for costs and expenses incurred in respect of measures taken to prevent, repair, remedy or minimize pollution damage, the whole pursuant to various provisions of the *Marine Liability Act* and the *International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001*, appended thereto.

Disposition

[8] In my opinion, the sole cause of the casualty was the failure on the part of those interested in the *Clipper Adventurer* to maintain Canadian Hydrographic Chart 7777 up-to-date.

[9] More particularly, s 7 of the *Charts and Nautical Publications Regulations, 1995*, provides:

The master of a ship shall ensure that the charts, documents and publications required by these Regulations are, before being used for navigation, correct and up-to-date, based on information that is contained in the *Notices to Mariners*, *Notices to Shipping* or radio navigational warnings. [my emphasis]	Le capitaine d'un navire doit s'assurer que les cartes, documents et publications que le présent règlement exige sont, avant d'être utilisés pour la navigation, exacts et à jour d'après les renseignements que contiennent les *Avis aux navigateurs*, les *Avis à la navigation* ou les messages radio sur les dangers pour la navigation. [je souligne]

[10] The presence of the shoal had been reported in 2007 in Notice to Shipping A102/07 which was still in force at the time of the grounding. The Master did not ensure that the chart used for navigation took account of that Notice. In the circumstances, I do not find it necessary to determine whether the issuance of a Navigation Area Warning also constituted sufficient notice.

[11] The action by the owners of the *Clipper Adventurer*, Adventurer Owner Ltd, shall be dismissed and the action *in rem* and *in personam* by Her Majesty shall be maintained.

[12] My reasons are broken down into the following topics:

I. Coronation Gulf

[13] The area in which the grounding occurred is covered by Canadian Hydrographic Chart 7777 entitled "Coronation Gulf, Western Portion". Except for an insert with respect to Kugluktuk, formerly known as Coppermine, the chart is on a scale of 1:150,000, Mercator Projection, North American Datum 1983 (NAD83). A great deal of information for mariners is to be found in this chart as well as several Canadian nautical publications which must be carried onboard, such as *Chart 1 (Symbols, Abbreviations, Terms)*, *Sailing Directions*, *Ice Navigation in Canadian Waters*, and *Radio Aids to Marine Navigation*.

[14] The chart includes a "Source Classification Diagram" which divides that portion of the Gulf into five areas. The first four areas, (a), (b), (c), and (d), are all north of a pecked magenta line. These areas were noted to be surveyed more completely than the rest of the chart. Port

Epworth was further south in area (e) which only shows tracks and spot soundings. There is no indication as to when these tracks and spot soundings were made.

[15] Of particular note are a series of islands which run from east to west, to the northwest of Port Epworth, which were on the course chosen by the *Clipper Adventurer en route* to Kugluktuk. They are known as the Home Islands and the Lawford Islands.

[16] There are a great many underwater shoals rising from a very rocky bottom. The islands which are visible have a gentle slope on the north side, but are steep on the south. For instance, the (U.K.) *Arctic Pilot*, in describing the islands, states "but few soundings are available in their vicinity which must be navigated with caution".

II. Discovery of the Shoal

[17] The shoal was discovered September 13, 2007, by Captain Mark Taylor, Master of the Canadian icebreaker the *Sir Wilfrid Laurier*. Captain Taylor began sailing in the Canadian Arctic in 1993 and had served as Master of the *Sir Wilfrid Laurier* since 2000. Nevertheless, he had never been to Port Epworth before. That name is somewhat of a misnomer as Port Epworth is not a port at all but rather an inlet. At the time, the *Laurier* was carrying out a scientific expedition as a scientist onboard was very interested in the Tree River which runs into Port Epworth and affects the salinity of the water.

[18] The *Sir Wilfrid Laurier* was proceeding from Kugluktuk along a well-travelled track at a cruising speed of about 13 knots. The track ran roughly to the northeast in safe areas above the

magenta line shown on the chart. The ship had then to drop down to the south and east in an area with no tracks and hardly any soundings. As the water is coloured white on the chart, during the trial, I called this area the "Big White".

[19] The *Sir Wilfrid Laurier* proceeded in a more or less southerly direction at a reduced speed of about 4 knots. Her course would leave the Lawford Islands to starboard and the Home Islands to port. Captain Taylor was concerned about the presence of shoals, of which he had discovered several in his career. His concern was heightened by the fact there was a very small island to his starboard side which was no more than a few metres above the water line.

[20] He further reduced speed to 2 knots. His echo sounder was on. The transponder, as in most ships, was about one third of the way aft. All of a sudden, he came upon a depth of only ten metres. Realising that there might be even less water under the stem, he immediately backtracked. He dispatched an officer and crew forward on a Zodiac. By using a portable echo sounder, they discovered the shoal which has also been called an isolated rock. They then found that there was deep water just to the east of the rock, so that Port Epworth was accessible. The scientist on board had wanted to carry out some work in the Gulf, north of Port Epworth, but Captain Taylor decided it was too dangerous.

III. Notice to Shipping A102/07

[21] Notices to Shipping are defined in the *Collision Regulations* as "an urgent release by the Department of Fisheries and Oceans to provide marine information". Both the Canadian Coast Guard and the Canadian Hydrographic Service fall within Fisheries and Oceans. Both may issue

Notices to Shipping, commonly referred to as NOTSHIPs. Captain Taylor reported the presence of the shoal to the Hydrographic Service and also personally caused Notice to Shipping A101/07 to be issued. He later replaced that notice with A102/07, as A101/07 did not indicate that references were to NAD83.

[22] NOTSHIP A102/07 issued September 16, 2007 reads:

> A102/07 – W Arctic – Coronation Gulf – September 16, 2007
> WESTERN ARCTIC
> A SHOAL WAS DISCOVERED BETWEEN THE LAWSON
> ISLANDS AND THE HOME ISLANDS IN THE SOUTHERN
> CORONATION GULF IN POSITION 67 58. 25° N 112
> 40.39' MINUTES W. CHARTER DEPTH IN AREA 29 METRES
> LEAST DEPTH FOUND 3.3 METRES ISOLATED ROCK
> REFER TO NAD83 DATUM
> CANCEL NOTSHIP A101/07

A102/07 is an alphanumeric designator in which "A" stands for "Arctic".

[23] NOTSHIP A102/07 was radio broadcasted for 14 days. Thereafter, it became a written NOTSHIP.

[24] At that time, reference was made at the end of each NOTSHIP broadcast to those older Notices to Shipping which were still in force. The following was stated:

> For Notices to Shipping issued prior to the last 14 days contact this centre or visit the Notice to Shipping website at www.ccg-gcc.gc.ca/notship.

The centre in question was MCTS Iqaluit (Canadian Coast Guard, Marine Communications and Traffic Services).

[25] The *Radio Aids to Marine Navigation, Pacific and Western Arctic*, published by the Canadian Coast Guard, and required to be carried onboard the *Clipper Adventurer*, states:

> Some NOTSHIPs remain in effect for extended periods of time. To reduce broadcast time, these notices are designated as Written NOTSHIP and bare the same number as the corresponding broadcast notice.

[26] In addition, these written NOTSHIPs are printed and distributed weekly on request to interested parties by fax and e-mail. There is no evidence that the *Clipper Adventurer*, or her managers, subscribed to this service.

[27] During the timeframe in question, 2007 to 2010, there was an exception to NOTSHIPs more than 14 days old being relegated to written form. These were safety NOTSHIPs, which would continue to be broadcast by radio. A102/07 was not considered a safety NOTSHIP because it was not in, or adjacent to, a well-travelled course. In fact, in the 18 years prior to the grounding, only one other ship of any size, the *Akademik Ioffe*, had called at Port Epworth.

[28] Over the next few months, Captain Taylor corresponded with Andrew Leyzack, a hydrographer based in Burlington, Ontario, which station covers Central and Arctic Canada. They knew each other from past voyages. Captain Taylor had gathered a fair amount of data on his 2007 tour, but apart from A102/07, Mr. Leyzack did not wish to publish anything further at that time. There had been no professional hydrographer onboard the *Sir Wilfrid Laurier* and the equipment used was not up to hydrographic standards. Mr. Leyzack, who testified at trial, is a perfectionist.

[29] It would be impractical to re-issue paper hydrographic charts on an annual basis. That is not so for modern electronic charts, but both the *Sir Wilfrid Laurier* and the *Clipper Adventurer* were using paper charts. Neither ship had authorised electronic charts as such, but both had available and used scanned copies of the paper chart. These scanned copies were useful in plotting courses.

[30] Most of the surveying done in the Arctic is opportunistic by nature. The Canadian Hydrographic Service does not have its own ice breaking capacity and so relies upon the Canadian Coast Guard. Less than ten percent of the vast Arctic waters have been surveyed to modern standards. The prime role of Canadian icebreakers during the short summer navigation season is, as the name implies, to act as icebreakers and to carry out search and rescue missions. Hydrographers are welcome aboard, but their surveys are not of the highest priority. For example, in 2008, a hydrographic team was on an icebreaker in Coronation Gulf. However, the icebreaker was called to other duties and so no exact survey of the shoal was carried out.

[31] In 2009, a team of hydrographers led by Mr. Leyzack was onboard the *Sir Wilfrid Laurier*. Using professional hydrographic equipment, they discovered that the highest peak of the rock was only 2.3 metres below the water line, and approximately one cable west of the position reported in A102/07.

[32] Mr. Leyzack and Captain Taylor discussed whether a new NOTSHIP should be issued replacing A102/07, but Captain Taylor vetoed the idea. No argument has been made that this

made any difference to the fate of the *Clipper Adventurer*. The plan was that NOTSHIP A102/07 would be replaced by a Notice to Mariners.

IV. Notice to Mariners and NAVAREA Warnings

[33] Notices to Mariners are well-known in Canada and internationally. They serve as a permanent update to a paper hydrographic chart. The Canadian Hydrographic Service maintains approximately 1,000 charts, and issues about 50 new charts yearly. It would be impracticable to issue a new chart every time an existing chart had to be updated, for instance to show the installation of a new light or, indeed, a recently discovered shoal. Chart 7777 was a high priority chart, meaning that every five years the Hydrographic Service would consider whether a new chart should be issued. The chart used by the *Clipper Adventurer* had been purchased by its agent, Marine Press of Canada. As printed by the Canadian Hydrographic Service, this was a new edition issued on May 30, 1997, and corrected by Notices to Mariners up to June 4, 2004. Marine Press itself corrected the chart through the last Notice to Mariners which was issued in 2008.

[34] Notices to Mariners are prepared by the Canadian Hydrographic Service and disseminated by the Canadian Coast Guard.

[35] In addition to Notices to Mariners as such, there are Temporary and Preliminary Notices to Mariners (T&P NOTMARs). T&P NOTMARs are issued by many countries and may often be the next step following a NOTSHIP to alert mariners to an item which does not appear on the chart, but has yet to be completely surveyed. The Canadian Hydrographic Service used to issue

T&P NOTSHIPs but stopped the practice some time ago as it thought that they might lead to confusion. For instance, on Chart 7777, as it was at the time, there are some patches in blue indicating a reported position in 1960 which was considered doubtful, and as Mr. Leyzack discovered was not there at all.

[36] The Canadian Coast Guard does issue T&P NOTMARs, but not to denote a permanent item, such as a shoal. Temporary NOTMARs may be used to indicate some short term work the Coast Guard is carrying out, while preliminary NOTMARs serve as a proposal to make a permanent change to which the public is invited to comment.

[37] Not all countries issue T&P NOTMARs. In fact, two other countries with jurisdiction over Arctic waters, Russia and the United States, do not.

[38] Once Mr. Leyzack returned to his office in Burlington and collated the data collected in 2009, he prepared four Notices to Mariners. They were approved in February 2010 and, based on the Canadian Hydrographic Service's internal management, should have been issued by June 2010. One of these Notices to Mariners would have replaced A102/07. However, not one of Mr. Leyzack's four proposed, and approved, NOTMARs had been issued prior to the grounding.

[39] The plaintiff has severely criticised the entire Department of Fisheries and Oceans, certainly with justification when it comes to the Canadian Hydrographic Service, but not so when it comes to the Canadian Coast Guard. Mr. Leyzack's four proposed NOTMARs, as well as two others, were never transferred from one of the Service's internal departments to another.

They fell by the wayside and were forgotten. There was no system in place to follow the progress of proposed NOTMARs. There was no diary system whatsoever. Needless to say, Mr. Leyzack, who happened to be onboard the *Sir Wilfrid Laurier* in the Arctic when the *Clipper Adventurer* grounded, was astounded that the NOTMAR intended to replace A102/07 had not been issued. I find that every member of the Canadian Coast Guard and the Canadian Hydrographic Service was aware of his or her collective responsibility to warn mariners of dangers of which they had knowledge. The issue is whether NOTSHIP A102/07 fulfilled that purpose.

[40] I am also satisfied, on the balance of probabilities, that had the NOTMAR been issued, as it should have been, the *Clipper Adventurer*'s authorised chart agent, Marine Press of Canada, would have passed on that information in its weekly e-mail, and that the grounding would not have occurred. This is at the heart of the plaintiff's case.

[41] Apart from NOTMARs, NAVAREA warnings are part of the World Wide Navigational Warning Service of the International Maritime Organization. In 2010, the Canadian Coast Guard assumed the responsibility for NAVAREAs XVII and XVIII. Coronation Gulf is within area XVIII. NAVAREA's XVII and XVIII were to come into Initial Operational Condition effective January 31, 2010, but for reasons outside Canada's control, only came into effect July 1, 2010. Notice of the inauguration and the delays thereto had been given by NOTMARs.

[42] Commencing July 1, 2010, and until August 20, 2010, the language of NOTSHIP A102/07, modified slightly for international transmission, was broadcast as NAVAREA XVIII Warning 5/10 as follows:

NAVAREA XVIII 5/10
VICTORIA ISLAND
CORRONATION GULF
CHART CHS 7777
SHOAL REPORTED 67 DEGREES 58 MINUTES 25 N 112
DEGREES 40 MINUTES 39W
LEAST DEPTH 3.3 METERS

[43] Although a great deal of evidence was lead as to the communication capacities of the *Clipper Adventurer*, which was fitted, *inter alia*, with a Global Maritime Distress Safety System Station, NAVTEX, INMARSAT-C Enhanced Group Calling, as well as Internet and satellite telephone, it is not clear that the ship was actually in position to receive NAVAREA XVIII 5/10. Given the strict requirements of the *Charts and Nautical Publications Regulations*, issued pursuant to the *Canada Shipping Act, 2001*, I do not consider it necessary to deal any further with NAVAREA Warnings.

V. The voyage of the *Clipper Adventurer*

[44] The *Clipper Adventurer*, belonging to the Port of Nassau, with an overall length of 100 metres, an overall breadth of 16.22 metres, and a maximum draft of 4.65 metres, was no stranger to Polar Regions, both in Antarctica and the Arctic. She was under the command of Captain Kenth Grankvist, a Master with considerable experience. The Second Officer, or Navigation Officer, was David Mora. This was his first posting as an Officer, having signed on June 24, 2010, and his first visit to the Canadian Arctic.

[45] The (Canadian) *Sailing Directions, ARC 400*, and the *Annual Edition of Notices to Mariners*, remind mariners that they must have onboard, and in use, all Canadian charts and

publications required by the *Charts and Nautical Publications Regulations, 1995*. Indeed the ship had all the required Canadian charts and nautical publications onboard, and also made use of British publications which are widely used internationally.

[46] Her Canadian, British, and other charts and publications were supplied by Marine Press of Canada. They updated charts with Notices to Mariners. They specifically gave notice that there were no T&P NOTMARs for Chart 7777, and that they did not provide NOTSHIPs.

[47] Captain Grankvist had made some 60 previous voyages into the Canadian Arctic, although never to Port Epworth. The grounding occurred on the second Canadian Arctic voyage of the 2010 season. She had left Greenland on July 23rd and, after various calls along Baffin Island, called in Resolute Bay August 1st and 2nd. Thereafter, she returned to Greenland. Her last call in Baffin Island was August 8th.

[48] The voyage in question began August 14th at Kangerlussuaq, Greenland. Her first Canadian port of call was at Pond Inlet on August 19th. Thereafter, her last port of call before Port Epworth was at Bathurst Inlet. From there she proceeded to Port Epworth. This leg was uneventful.

[49] Captain Grankvist's practice was to navigate along the soundings shown on charts. He had done this for well over 20 years without incident.

[50] It was Mr. Mora's duty, as Navigation Officer, to plan each leg of the voyage. He would mark course changes (waypoints) on the paper charts and then insert them into the electronic charts. He would have planned the Port Epworth/Kugluktuk leg on August 2nd or 3rd. Captain Grankvist would have discussed the proposed courses with Mr. Mora, and indeed played an active role, as Mr. Mora was not familiar with Canadian charts.

[51] Captain Grankvist testified that he had three choices. Apart from the route he chose, which led him northwest into the Big White, he could have stayed to the south on a westerly course. However, that course would have brought them near a series of islands during the night. Another option was to partially retrace the course he had taken from Bathurst Inlet so as to get north of the magenta line. However, that would have taken twice as long.

[52] Captain Grankvist only looked at nautical publications if he considered it necessary. He does not recall whether he had considered it necessary to consult anything apart from the chart.

[53] Captain Grankvist was on the bridge upon sailing from Port Epworth. Thereafter, he went down for a while, but then came back on the bridge before the ship was to pass between the Home and Lawford Islands. The Chief Officer was the officer of the watch. He made use of parallel indexing, which the experts consider good practice.

[54] The *Clipper Adventurer* was proceeding at full cruising speed of 13 knots. As the seas were very calm, she may have been making a little more than that through the water. There was

no tide to speak of. There was no discolouration or other sign on the surface of the water which would serve as a warning of the presence of the shoal.

[55] Captain Grankvist's reasoning was that the soundings indicated deep water. However, when he had to alter course to go through the Home and Lawford Islands, there were some variations, but the least reported depth was still 29 metres. Since he was drawing less than 5 metres, he did not consider it necessary to reduce speed or otherwise proceed with caution. The expert navigator called by the plaintiff, Captain Paul Whyte, shared this view. Indeed, just after the grounding, in Mr. Leyzack's complaint to the Hydrographic Service, he stated the ship was hard aground on an uncharted shoal reported in a 2007 Notice to Shipping, namely NOTSHIP A102/07. He said "The existing soundings give no indication that – such a shoal sounding would exist in this location". This, of course, begs the question as to whether Captain Grankvist was entitled to rely solely on the chart (which itself warned that there were only tracks and spot soundings in the area in question).

[56] In the days following the grounding, all and sundry came aboard. It was only then that NOTSHIP A102/07 came to Captain Grankvist's attention. The owners' managers in Miami claim that they tried to find A102/07 on the Canadian Coast Guard website but were unsuccessful.

[57] Mr. Mora, whose evidence was taken before trial as he could not leave his job in Panama, testified by a live video feed which I watched in Ottawa. Although he visited a number of websites, and consulted a number of publications, he is extremely vague as to what he actually

did. More to the point, he testified that although he had heard something about Notices to Shipping from another officer, he had no idea what they were. He wrongly assumed that Marine Press of Canada had provided them with all the information they needed to have. There was no communication with MCTS except to report their positions, as required. No inquiry was made as to outstanding NOTSHIPs.

[58] Needless to say, no time was wasted after the casualty in bringing mariners up-to-date. The following NOTSHIP A99/10 was issued on September 5, 2010:

> UNCHARTERD SHOAL, SOUTHERN CORRONATION GULF
> CHART: 7777
>
> AN UNCHARTERED SHOAL HAS BEEN FOUND BETWEEN
> THE LAWSON ISLANDS AND THE HOME ISLANDS IN
> SOUTHERN CORRONONATION GULF AT POSITION:
> 67-58. 2716N, 112-48.3400W
> WITH THE LEAST DEPTH FOUND 2.3 METRES
> MARINERS ARE ADVISED TO USE CAUTION WHILE
> TRANSITTING THE AREA.
> CANCELS NOTICE TO SHIPPING A102/07
> SOURCE: CANADIAN HYDOGRAPHIC SERVICE
> CONTACT: CCGS SIR WILFRID LAURIER

[59] This NOTSHIP was followed up by a NOTMAR on October 8, 2010, and later, a new version of Chart 7777 was issued.

VI. The Plaintiff's Case

[60] The case against Her Majesty sounds in negligence. At one time, the Crown could do no wrong. However, in 1952, Parliament enacted the *Crown Liability Act*, SC 1952-53, c 30. That Act imposed vicarious liability in respect of a tort committed by a Crown servant and in respect

of a breach of duty pertaining to “the ownership, possession or control of property”. The Act was later amended and renamed the *Crown Liability and Proceedings Act.* However, for the purposes of this case, the two principles enunciated above remain the same.

[61] As the shoal was in no way owned or controlled by the Crown, liability must be founded upon s 3(b)(i) and s 10 of the Act which provide for Crown liability in respect of a tort committed by a servant of the Crown as long as the act or omission of that servant would have given rise to a cause of action against that servant.

[62] This Court’s jurisdiction is based upon s 17(2)(d) and s 22 of the *Federal Courts Act*. Section 17(2)(d) gives the Court jurisdiction in actions against the Crown pursuant to the *Crown Liability and Proceedings Act*, while s 22 gives the Court jurisdiction over maritime law claims. The alleged tort is a maritime tort governed by Canadian Maritime Law. However, there is no distinction to be drawn in this case between a tort at large and a tort governed by Canadian Maritime Law, as maritime torts derive from the common law of torts. (*ITO-International Terminal Operators v Miida Electronics Inc*, [1986] 1 SCR 752 (*the Buenos Aires Maru*)).

[63] Plaintiff submits that, having learned of the presence of the shoal, any number of Crown servants in the employ of the Canadian Hydrographic Service or the Canadian Coast Guard owed a duty to give warning to the *Clipper Adventurer*. The issuance of NOTSHIP A102/07 almost three years before the grounding, when it was admitted the *Clipper Adventurer* was not within radio range, was akin to no notice at all. To find NOTSHIP A102/07 was to search for a needle in a hay stack.

[64] Reliance is placed upon the decision of Associate Chief Justice Noël in *R. v Nord-Deutsche Versicherungs Gesellschaft*, [1969] 1 ExCR 117 (*Hermes/Transatlantic*), varied, but not on this point, by the Supreme Court, [1971] SCR 849. The *Transatlantic* and the *Hermes* came into collision in an area of the St. Lawrence River downstream from Montreal known as Lac St. Pierre. One of the causes of the collision was that a buoy marking one side of the dredged channel was out of position. Although the Department of Transport was aware of this fact, no warning was issued.

[65] Associate Chief Justice Noël said:

> 135 I believe it can be said that navigators of all countries are welcome to use our navigational rivers and lakes and although they do benefit from such a use the commercial operations of all navigators, Canadian and foreign, benefit also the commerce and industry of Canada. Without the links created by canals, channels and railways, it is, I believe, doubtful that Canada as a nation would have known the industrial and commercial expansion it has now attained. We may, therefore, take it that all ships plying our waterways are invited and encouraged to do so and are entitled to rely on the means supplied to navigate such waters in safety and I would think that the same would apply to our Canadian ships navigating in foreign waters who also should be entitled to rely on the means given to navigate safely in such waters. If this is the situation, the Crown would owe an unqualified duty to see that such means are fulfilling their intended purpose to those using our waterways including the channel which leads them to and from the chief port of this country, Montreal.

[66] Reliance was also placed on *Rideau St Lawrence Cruise Ships Inc v R*, [1988] FCJ No 420. It was held in that case that the Crown owed a duty, not only to boaters at large, but specifically to the plaintiff, to maintain the dredged depth in the Rideau Canal. Servants were aware of a rock in the canal but neither removed it nor warned boaters of its presence.

[67] Plaintiff further submits that even allowing for the fact that the report of the shoal was not based on professional hydrographic standards, a T&P NOTMAR should have been issued. The *Clipper Adventurer* would have been on the lookout.

[68] Canada's failure to issue a NOTMAR is claimed to constitute a violation of international law. Canada has signed on to the *International Convention for the Safety of Life at Sea, 1974* (SOLAS) and is a member of both the International Maritime Organization and the International Hydrographic Organization. SOLAS recognizes NOTMARs but not NOTSHIPs.

[69] Failing the issuance of a NOTMAR, NOTSHIP A102/07 should have continued to be broadcast as either a safety NOTSHIP or, as is now the case following the grounding, that all active NOTSHIPs in the Arctic should have been subject to radio broadcast.

[70] Finally, MCTS Iqaluit should have been more proactive. The ship should have been specifically warned of the presence of the shoal as the Centre was perfectly aware of the ship's itinerary.

[71] Plaintiff submits that had any one of these things been done, the accident would not have occurred. Those onboard the *Clipper Adventurer* say they had no knowledge of NOTSHIP A102/07 or NAVAREA XVIII Warning 5/10.

VII. The Crown's Defence

[72] The Crown submits that none of her servants, including anyone in the Canadian Coast Guard or the Canadian Hydrographic Service owed a duty to warn the *Clipper Adventurer* of the presence of the shoal.

[73] In any event, as aforesaid, the *Clipper Adventurer* was adequately warned by the issuance of NOTSHIP A102/07, and additionally by the issuance of NAVAREA XVIII Warning 5/10 on July 1, 2010, which was broadcast until August 20, 2010. The *Clipper Adventurer* had spent many days in Canada during that timeframe.

[74] The *Clipper Adventurer* was under a statutory duty to sail with a chart updated, not only to take into account the latest Notices to Mariners, but also Notices to Shipping. It was that failure which led to the grounding.

[75] In the event it is held that there was a duty to warn, and that that duty had not been discharged, the *Clipper Adventurer* was the author of her own misfortune by recklessly proceeding at excessive speed in largely unknown waters.

[76] The Crown relies strongly upon the decision of Mr. Justice Addy in *Warwick Shipping Ltd v Canada*, [1982] 2 FC 147, [1981] FCJ 197 (the *Golden Robin*). That case was affirmed on appeal, [1983] FCJ No 807, (1983), 48 NR 378 (FCA), but partly overturned with respect to the award of costs, [1984] 1 FC 998, [1983] FCJ 159.

[77] According to Mr. Justice Addy, the issue on which the case turned was whether there was a duty to warn of any hazard which the Crown discovered or was brought to its attention. He found that representations in a chart were for the purposes of aiding and assisting navigation for the public at large, or at least a special class of the public.

[78] He said at para 54:

> […] Where such public representations for public purposes are made, with full expectation of a reliance on the representations, there is no need for the existence of any greater particular or special relationship between the person making them and the person relying on them for a duty to take care to arise. In addition, where, as in the present case, the safety of many lives and serious damage to property might well be at stake, and the breach of duty may thus result in very serious consequences, the degree of care must be correspondingly high.

[79] Although he was of the view that, had the Crown been an ordinary defendant, it would have been liable, the action was dismissed as he held that no individual servant of the Crown owed a duty to the *Golden Robin*.

[80] Furthermore, dredging had been carried out by independent contractors who were not servants of the Crown. Consequently, no liability lay under that heading. It was also held that the soundings and depth contourings on the hydrographic chart were not established to be inaccurate when issued some years before the grounding.

[81] Moreover, the *Sailing Directions* warned that buoys could often be forced out of position by natural hazards such as tides.

VIII. Analysis

A. *Duty to Warn*

[82] In order to succeed in a negligence claim, a plaintiff must establish that the defendant owed it a duty of care, was in breach of that duty, and that the breach caused the damages claimed. The Court must first determine whether there is sufficient proximity to give rise to a duty of care, and then, if so, whether there are policy considerations which negate that duty (*Anns v Merton London Borough Council*, [1978] AC 728, [1978] 2 All ER 492; and *Kamloops (City of) v Nielsen*, [1984] 2 SCR 2, 10 DLR (4th) 641).

[83] While there was no duty on the part of any Crown servant to seek out and discover uncharted shoals, my reading of decisions subsequent to the *Golden Robin*, such as those of the Supreme Court in *Just v British-Columbia*, [1989] 2 SCR 1228, *Cooper v Hobart*, [2001] 3 SCR 537, and the decision of the Federal Court of Appeal in *Brewer Bros v Canada (Attorney General)*, [1992] 1 FC 25, [1991] FCJ No 456, leads me to the conclusion that various Crown servants in the employ of the Canadian Coast Guard and the Canadian Hydrographic Service, once the shoal had been discovered, were under a duty to warn mariners, including the *Clipper Adventurer*, of the presence of said shoal, and that there are no policy considerations to negate that duty.

[84] The duty to warn has also been recognised in claims for pure economic loss (*Rivtow Marine Ltd v Washington Ironworks*, [1974] SCR 1189, 40 DLR (3d) 530; and *Kamloops*, above).

[85] In *Brewer Bros v Canada*, the Federal Court of Appeal held that the Canadian Grain Commission was liable to producers in negligence for failing to take timely action when aware a licenced elevator operator was in financial difficulties. In *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 SCR 261, the Supreme Court characterized *Brewer Bros*. as a case in which the statute in question imposed on a public authority a positive duty to act. In my opinion, the *Canada Shipping Act, 2001*, if not the *Oceans Act*, imposes such a duty on servants of the Crown.

[86] Among the objectives of the *Canada Shipping Act, 2001*, are to:

6 (b) promote safety in marine transportation and recreational boating;	6 b) de favoriser la sûreté du transport maritime et de la navigation de plaisance;
(g) ensure that Canada can meet its international obligations under bilateral and multilateral agreements with respect to navigation and shipping;	g) de faire en sorte que le Canada honore ses obligations internationales découlant d'accords bilatéraux et multilatéraux en matière de navigation et de transport maritimes;
(h) encourage the harmonization of marine practices;	h) d'encourager l'harmonisation des pratiques maritimes;

[87] Section 41 of the *Oceans Act* provides that the Minister of Fisheries and Oceans' powers, duties, and functions extend to, and include:

(a) services for the safe, economical and efficient movement of ships in Canadian waters through the provision of	a) les services destinés à assurer la sécurité, la rentabilité et l'efficacité du déplacement des navires dans les eaux canadiennes par la fourniture :
(i) aids to navigation systems	(i) de systèmes et de services

and services,	d'aide à la navigation,
(ii) marine communications and traffic management services,	(ii) de services de communication maritime et de gestion du trafic maritime,
(iii) ice breaking and ice management services, and	(iii) de services de brise-glace et de surveillance des glaces,
(iv) channel maintenance;	(iv) de services d'entretien des chenaux;

[88] Section 42 of said act provides that the Minister may, among other things, conduct hydrographic and oceanographic surveys of Canadian and other waters, prepare and publish charts, and authorise their distribution.

B. *Discharge of the Duty to Warn*

[89] The plaintiff submits that the issuance of a NOTSHIP, without follow-up, created a foreseeable and unreasonable risk of harm which led to the grounding. The standard of care against which the duty to warn must be measured required more than a mere NOTSHIP. However, this argument fails to take into account the reciprocal of section 7 of the *Charts and Nautical Publications Regulations, 1995*. If a Master must navigate based on information contained in Notices to Shipping, it follows that the issuance of a Notice to Shipping discharges the duty to warn. Nautical publications gave notice that written NOTSHIPs may be in force for some time. As I said at the outset, the casualty was caused by negligence on the part of the *Clipper Adventurer*, not on the part of Crown servants.

[90] The plaintiff emphasises that radio communication in the Arctic may be difficult, and that the *Clipper Adventurer* was not required to be fitted with the Internet. It beggars belief, however,

that all Coast Guard systems would have been down for an extended period of time. Even if they were, which I do not for a moment accept, as Captain Grankvist stated that Internet reception was excellent in Greenland, and the ship had no difficulty in making her daily positioning reports to MCTS, had Officer Mora, under the supervision of Captain Grankvist, taken serious note of the publications with which he was required to be familiar, he would have known perfectly well that there were written NOTSHIPs, and that if he could not get them by visiting the Canadian Coast Guard website, all he had to do was call MCTS Iqaluit. Indeed, he could have called the ship managers in Miami. As it was, this nonchalant attitude put the lives of close to 200 souls at risk.

[91] The owners' managers, International Shipping Partners Inc., of Miami, are not blameless either. Vice-President, Nick Inglis, was perfectly aware that Canada issued NOTSHIPs and that copies thereof were not provided to the fleet by Marine Press of Canada. Yet, Captain Grankvist and Mr. Mora were left to their own devices. The printed Passage Plan Appraisal sheets that the managers furnished referred to NAVAREA warnings, but not to NOTSHIPs. Furthermore, had there been any difficulty on the part of the *Clipper Adventurer* in communicating with MCTS Iqaluit, and no such evidence has been led, the *Clipper Adventurer* was also fitted with what is called Iridium, which is not part of the international safety system. Had the ship been having difficulty in obtaining NOTSHIPs, she could have sent the managers a message over Iridium. However, as Mr. Inglis stated, "but if they didn't know there was a problem, they wouldn't be able to call me and say 'we have a problem'."

[92] Captain Grankvist and Mr. Mora did not know they had a problem because they had not properly prepared for the voyage. They were under a legal obligation to update Chart 7777 to take into account NOTSHIPs and failed to do so. They should have made it their business to make sure that all NOTSHIPs were on hand, and consulted. They did not.

[93] While it would have been preferable to have had more fulsome communication between the *Clipper Adventurer* and MCTS Iqaluit, the shortcoming lies with the ship. The Coast Guard station MCTS was under no duty to take the initiative to warn the *Clipper Adventurer* of the presence of the shoal. It did not know which route would be taken. It may have been different if the *Clipper Adventurer* had asked for but was given misinformation.

[94] As Lord Atkin stated in *Evans v Bartlam*, [1937] AC 473, (HL) at p 479:

> The fact is that there is not and never has been a presumption that everyone knows the law. There is the rule that ignorance of the law does not excuse, a maximum of very different scope and application.

[95] Even if Canada were in breach of its SOLAS obligations, which I doubt, that breach would not afford the *Clipper Adventurer* a cause of action. Section 29 of the *Canada Shipping Act, 2001*, provides that Schedules I and II thereof list the International Conventions that Canada has signed and which either the Minister of Transport or the Minister of Fisheries and Oceans has determined should be brought into force, in whole or in part, by regulation. Some 66 regulations are listed in the Schedules including the aforesaid *Charts and Nautical Publications Regulations*. Although many of these regulations undoubtedly give force to portions of SOLAS

(see *Berhad v Canada*, 2005 FCA 267, 338 NR 75), the amendments to SOLAS relied upon by plaintiff have not been given the force of Canadian law by regulation.

[96] Canada's signature on a treaty does not make that treaty part of domestic law. The principles of international law must be adopted into our own domestic law by legislation (*Chung Tchi Cheung v The King*, [1939] AC 160, *Reference as to Powers to Levy Rates on Foreign Legations*, [1943] SCR 208).

[97] While it is true that international law may serve as a guideline as to the content of our own domestic law, it cannot overcome the clear precepts of a statute or regulation (*Kasemi Estate v Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 SCR 176, *Xela Enterprises Ltd v Castillo*, 2016 ONCA 437).

[98] It seems that Canada is the only country which calls local warnings Notices to Shipping and which may use such notices as a substitute for Notices to Mariners. Plaintiff called Horst Hecht as an expert witness. Although now retired, for many years he was the German representative on major committees of the International Hydrographic Organization, was Chairman of the German Hydrographic Society and Director of the Hydrographic Department of the Federal Marine Hydrographic Agency from 1998 to 2008. He was also involved with Chapter V of SOLAS which deals with hydrographic issues.

[99] His criticism was not so much of the nomenclature used by the Canadian Hydrographic Service. Many countries issue local warnings under different names. His complaint was that

Notices to Shipping and Notices to Mariners seem to be used interchangeably, contrary to international practice. There should not have been an active Notice to Shipping which was three years old (in fact there were some older NOTSHIPs still in effect). NOTSHIPs over 14 days old were inadequately promulgated. Radio reception in the Arctic is known to be spotty. This would include Internet reception. These shortcomings would also apply to NAVAREA warnings. Shipping is international, and Canada was in breach of its SOLAS obligations.

[100] Even if I were to accept, which I do not, that Canada's use of Notices to Shipping as a substitution for Notices to Mariners violates SOLAS, Chapter V, Regulation 9 which, in speaking of hydrographic services, refers to Notices to Mariners, but not to Notices to Shipping, Chapter V, Regulation 9 is not part of Canadian domestic law as no regulation was made under the *Canada Shipping Act, 2001* to give it force.

[101] Thus, we are not faced with two conflicting Regulations. The Federal Government has treaty-making power. However, even within federal legislative classes of subjects, it is Parliament which must give effect to that treaty.

[102] Having found that the Crown discharged its duty to give warning by issuing NOTSHIP A102/07, strictly speaking, it is not necessary to consider the Crown's secondary defence, which is that in any event the *Clipper Adventurer* was the author of her own misfortune. However, given all the warnings in the publications to proceed with caution, I find that those onboard the *Clipper Adventurer* were careless. They should have known there were uncharted shoals. Given that the south side of such shoals were steep, they should have proceeded through the islands at a

much slower speed in the wake of a zodiac with a portable echo sounder. On this point, I agree with the opinion of Captain Louis Rhéaume, called by the defendant.

IX. Damages

A. *The Crown*

[103] The parties admit that the quantum of the Crown's claim is CDN $445,361.64 in principal. Should the Crown have occasion to seek indemnity from the Ship–Source Oil Pollution Fund, that Fund acknowledges that the admission is also binding upon it.

[104] Sections 69, 71 and 77(1) of the *Marine Liability Act* provide that a shipowner is liable for the costs and expenses incurred by the Minister of Fisheries and Oceans in respect of measures taken to prevent, repair, remedy or minimise oil pollution damage.

[105] Section 77(3) goes on to provide that liability does not depend on proof of negligence. To escape liability, the shipowner must establish that the occurrence resulted from an act of war, hostilities, insurrection, act of God, deliberate act or omission by a third party with intent to cause damage, or wholly caused by the negligence or other wrongful act of a government authority. Thus, if there were divided responsibility, and I think this is an either/or situation, the shipowner would still be liable in full notwithstanding any contributory negligence on the part of the Crown.

B. *Claim of Adventurer Owner Ltd*

[106] Should I be wrong on the issue of liability, it is appropriate that I deal with the quantum of plaintiff's claim. The owners accept the Crown's admission that its claim, as expressed in United States dollars, is $12,764,194.51.

X. Foreign Exchange

[107] The Crown suffered its loss in Canadian dollars; not so the plaintiff. The income it lost was all in US dollars as was the vast majority of the out-of-pocket expenses it incurred. It keeps its books in US dollars and to the extent it incurred expenses in other currencies, it paid by buying those currencies with US dollars. It seeks judgment:

> In such a sum in Canadian dollars as shall at the date of payment be equal to US . . . .

This is a clever end-around s12 of the *Currency Act* which requires that any reference to money in any legal proceeding shall be stated in Canadian currency. In Canada, unlike the United Kingdom, a money award cannot be given in foreign currency.

[108] The reason the plaintiff is seeking conversion as of the date of payment is simple. On the day of the grounding, the US dollar was worth CDN $1.05. On December 15, 2016, the day the last exchange rate was furnished to the Court, the US dollar was CDN $1.34. Plaintiff submits that in accordance with the principle of *restituo in integram* this Court should no longer follow the breach day rule, or even a judgment day rule, but rather a date of payment rule. There is considerable speculation in this position because if the plaintiff succeeds at all, it will be as a result of a decision of the Federal Court of Appeal a few years down the road. Who knows what the exchange rate would be then?

[109] According to the Bank of Canada, there have been considerable fluctuations between the US and Canadian dollars over the past six years. For example, on May 8, 2013, they were at par. On September 11, 2012, the US dollar was only worth CDN $0.97. The length of time it takes to get to trial is obviously a variable, as are Central Bank policies and comparable Gross Domestic Products.

[110] For centuries, the English (and maritime) rule had been the breach day rule. However, the House of Lords departed therefrom in *Miliangos v George Frank (Textiles) Ltd*, [1976] AC 443 (HL) and *The* "*Despina R*", [1979] AC 685, [1979] 1 All ER 421 (HL). *Miliangos* was a breach of contract case, which called for payment in foreign currency. The "*Despina R*" is more on point as it was a tort case.

[111] In my opinion, precedent requires me to follow the breach day rule. In *NV Bocimar SA v Century Insurance Co*, [1984] FCJ No 510, 53 NR 386, a contractual general average case, Mr. Justice Hugessen considered he was bound by the breach day rule as set forth by the Supreme Court in *Gatineau Power Company v Crown Life Insurance Company*, [1945] SCR 655, and *The Custodian v Blucher*, [1927] SCR 420. Although he was reversed in the Supreme Court in [1987] 1 SCR 1247 on another point, the Supreme Court made no reference to the foreign currency conversion issue.

[112] In *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 and in *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR. 331, the Supreme Court set out the narrow circumstances in which trial courts may depart from settled rulings of higher

courts. There are but two situations (a) where a new legal issue is raised and (b) where there is a change in circumstances or evidence that "fundamentally shifts the parameters of the debate". Neither situation applies. Currencies go up; currencies go down. They always have and probably always will.

[113] *Stare decisis* aside – until I am instructed otherwise, I am a firm believer in the breach day rule (see *Ballantrae Holdings Inc v The Ship* "*Phoenix Sun*", 2016 FC 570).

[114] Plaintiff relies upon a decision of the British Columbia Supreme Court in *Williams & Glyn's Bank Ltd v Belkin Packaging Ltd*, [1979] BCJ No 1426, [1981] BCJ No 617, 108 DLR (3rd) 585. That decision was actually reversed on the merits, 128 DLR (3rd) 612. The majority had no need to refer to the conversion rate. Although Hutcheon JA dissented and would have upheld the trial judge on the merits, he disagreed with the trial judge's application of a judgment day exchange rule. He would have followed the breach day rule.

[115] What would the situation be if the foreign currency fell against the Canadian dollar? Defendants would then be clamouring for the judgment day rule. Furthermore, we have to take into account both pre-judgment and post-judgment interest. Not all currencies earn interest at the same rate.

[116] I stated during the trial that I would be following the breach day rule, which is really the date of loss rule. The plaintiff's losses were spread out over more than a year. The *Clipper Adventurer* went off hire the moment she grounded; she lost a charter party which was already in

place for the months ahead; the shipyard's invoice for repairs was paid in January 2011, and the salvage award was paid later in 2011. It would be intolerable if interest and conversion rates had to be calculated on dozens of individual items. I invited the parties to attempt to seek an agreement on this point. They have, and I am pleased to endorse it. Seventy percent (70%) of plaintiff's quantum shall be converted into Canadian dollars as of December 4, 2010, at which time the US dollar was CDN $1.006. The remaining thirty percent (30%) shall be converted as of December 13, 2011, at which time the US dollar was CDN $1.028.

XI. Interest

[117] Each party asks that I, in my discretion, grant it pre-judgment interest at the annual rate of five percent (5%), non-compounded and interest on the judgment (principal amount and pre-judgment interest) at the same rate. The Crown does not oppose an award to the plaintiff on that basis. However, the plaintiff submits that interest on the Crown's claim is governed by s 116(1) of the *Marine Liability Act* which only gives the yield in the range of one percent (1%).

[118] Both s 31 of the *Crown Liability and Proceedings Act* and s 36 of the *Federal Courts Act*, speak to pre-judgment interest; only to say that their provisions do not apply in cases, such as this, which are governed by Canadian Maritime Law.

[119] Sections 31.1 and 37 of the aforesaid Acts provide for post-judgment interest in accordance with the laws in force in the province in which the cause of action arose. However, in cases such as this, where the causes of action did not arise solely within a given province or

territory, the sections go on to provide that the Court may grant interest at such rate it considers reasonable in the circumstances.

[120] Pre-judgment interest in maritime cases has always been considered a part of the damages suffered by a plaintiff (see *Bell Telephone Company of Canada v The Mar-Trienno*, [1974] 1 FC 294). Interest is at the Court's discretion and more recently, given low commercial rates, may be given at the rate of five percent (5%) (see *Kuehne+ Nagel Ltd v Agrimax Ltd*, 2010 FC 1303, 382 FTR 47). If left to my discretion, I would award interest on the Crown's claim, and would have awarded interest on the plaintiff's claim, at the simple rate of five percent (5%) *per annum*. Section 3 of the *Interest Act* provides that if interest is payable by law and no rate is fixed, the rate shall be five percent (5%).

[121] This brings us to s 116(1) of the *Marine Liability Act* which provides:

Interest accrues on a claim under this Part against an owner of a ship, the owner's guarantor, the Ship-source Oil Pollution Fund, the International Fund or the Supplementary Fund at the rate prescribed under the *Income Tax Act* for amounts payable by the Minister of National Revenue as refunds of overpayments of tax under that Act as are in effect from time to time.	Aux demandes en recouvrement de créance présentées en vertu de la présente partie contre le propriétaire d'un navire, le garant d'un propriétaire de navire, la Caisse d'indemnisation, le Fonds international ou le Fonds complémentaire s'ajoutent des intérêts calculés au taux en vigueur fixé en vertu de la *Loi de l'impôt sur le revenu* sur les sommes à verser par le ministre du Revenu national à titre de remboursement de paiements en trop d'impôt en application de cette loi.

[122] The Crown points out that s 116 is found in Part 7 of the Act which deals with the Ship–Source Oil Pollution Fund. The obligation imposed on the Minister to monitor pollution and the resulting liability imposed upon the polluter, are governed by s 69 and following of the Act which are in Part 6. It follows therefore that s 116 has no application. The plaintiff submits, however, that Parts 6 and 7 are intertwined. For instance, it would have been open for the Crown to claim directly against the Fund. Section 109 in Part 7 provides that proceedings such as these be served upon the Administrator of the Fund who, as a party of interest, may appear and take appropriate action.

[123] The Crown has not claimed against the Fund. It has taken an action *in rem* against the *Clipper Adventurer* and *in personam* against her owners, and has been provided with security.

[124] While the meaning of s 116(1) is not crystal clear, and while it refers to claims under Part 7 against a shipowner, the owners' guarantor, the Ship–Source Oil Pollution Fund or an international fund, it does not identify the claimant.

[125] The Ship–Source Oil Pollution Fund did not commence its own action *in rem* against the *Clipper Adventurer* under s 102 of the Act. The only involvement of the Fund in this case is that it was given notice as required by s 109 of the Act.

[126] The Crown's claim is grounded in Part 6, not Part 7. I do not think that s 109 has the effect of limiting a claim for interest against a polluter under Part 6 to the same paltry rate the Minister of National Revenue gives on refunds of overpayments of tax.

[127] Consequently, I consider it fair and reasonable to award pre-judgment interest on the Crown's claim at the simple annual rate of five percent (5%) commencing September 17, 2010, and post-judgment interest on the principal amount of the judgment and pre-judgment interest at the same rate.

[128] Likewise, I would have awarded the plaintiff pre-judgment interest at the same legal rate of five percent (5%). The starting point on seventy percent (70%) thereof would have been December 4, 2010 and December 13, 2011 on the remaining thirty percent (30%). Post-judgment interest would have been at the same rate.

XII. Costs

[129] The parties requested that all issues relating to costs be deferred until after the issuance of these reasons and judgment. The Administrator of the Ship–Source Oil Pollution Fund did not participate except to say at the first Trial Management Conference that her involvement, if any, would depend on the outcome of this litigation. During trial, she agreed that the admission as to the Crown's damages would be binding on her. She did not seek costs, and none shall be awarded.

JUDGMENT

1. For reasons given, the plaintiff's action in T-901-11 is dismissed.

2. Her Majesty the Queen in Right of Canada's action in T-1149-12 is maintained *in personam* and *in rem* in the amount of $445,361.64, with pre-judgment interest thereon at the annual rate of five percent (5%) commencing September 17, 2010, with post-judgment interest on the principal amount of the award including pre-judgment interest at the same annual rate of five percent (5%). Failing payment, the *Clipper Adventurer* shall be sold and the judgment satisfied out of the proceeds thereof.

3. Failing agreement, the parties are at liberty to make representations with respect to costs within 30 days hereof.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-901-11
STYLE OF CAUSE:	ADVENTURER OWNER LTD ET AL V HER MAJESTY THE QUEEN IN RIGHT OF CANADA
DOCKET:	T-1149-12
STYLE OF CAUSE:	HER MAJESTY THE QUEEN IN RIGHT OF CANADA V ADVENTURER OWNER LTD, OWNER, AND ALL OTHERS INTERESTED IN THE SHIP M/V CLIPPER ADVENTURER
PLACE OF HEARING:	MONTRÉAL, QUEBEC AND OTTAWA, ONTARIO
DATES OF HEARING:	MONTRÉAL, NOVEMBER 14, 15, 16, 21, 22, 23, 24, 2016 OTTAWA, NOVEMBER 28, 29, 30, DECEMBER 1, 5, 6, 7, 8, 14, 15, 2016 FURTHER WRITTEN SUBMISSIONS AND ADMISSIONS, JANUARY 19 AND 24, 2017
JUDGMENT AND REASONS:	THE HONOURABLE MR. JUSTICE HARRINGTON
DATED:	JANUARY 27, 2017

APPEARANCES:

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