Federal Court  Cour fédérale

Date: 20180928

Docket: T-109-15

Citation: 2018 FC 957

Ottawa, Ontario, September 28, 2018

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

CANPOTEX SHIPPING SERVICES LIMITED, NORR SYSTEMS PTE. LTD., OLDENDORFF CARRIERS GMBH & CO. K.G. AND STAR NAVIGATION CORPORATION S.A.

Plaintiffs

and

MARINE PETROBULK LTD., O.W. SUPPLY & TRADING A/S, O.W. BUNKERS (UK) LIMITED, ING BANK N.V., IAN DAVID GREEN, ANTHONY VICTOR LOMAS AND PAUL DAVID COPLEY IN THEIR CAPACITIES AS RECEIVERS OF CERTAIN ASSETS OF THE DEFENDANTS O.W. SUPPLY & TRADING A/S AND O.W. BUNKERS (UK) LIMITED AND OTHERS

Defendants

JUDGMENT AND REASONS

I. INTRODUCTION

[1] These motions are by way of re-hearing in accordance with the directions and reasons of the Federal Court of Appeal [FCA] in its decision of *ING Bank NV v Canpotex Shipping Services Limited*, 2017 FCA 47 [FCA Decision] that dealt with my Judgment and Reasons of September 23, 2015 in *Canpotex Shipping Services Limited v Marine Petrobulk Ltd*, 2015 FC 1108 [First Decision].

[2] There are three motions for summary judgment pursuant to Rules 108 and 216 of the *Federal Courts Rules*, SOR/98-106 [*Federal Courts Rules*] before the Court. Pursuant to an Order of Prothonotary Lafrenière (as he then was) dated March 27, 2015, Canpotex Shipping Services Limited [Canpotex] paid USD$661,050.63 into trust [Funds] which was to be treated as the equivalent to a payment into Court. Canpotex seeks summary judgment that its payment into Court has extinguished any liabilities against Canpotex related to the purchase and delivery of certain fuel bunkers. ING Bank [ING] and Ian David Green, Anthony Victor Lomas and Paul David Copley [Receivers] seek summary judgment that ING is entitled to the Funds. Marine Petrobulk Ltd [MP] seeks summary judgment that it is entitled to the Funds, minus a mark-up sum as set out in detail later in these reasons.

II. BACKGROUND

[3] I set out the general background to this dispute in my First Decision which, for convenience, I reproduce here.

[4] On February 14, 2014, Canpotex and O.W. Supply & Trading A/S [OW Trading] entered into a contract for the time-to-time purchase of marine bunkers by Canpotex from OW Trading, for vessels that Canpotex charters [Fixed Price Agreement]. The contract was not signed until sometime in June 2014.

[5] On October 3, 2014, Canpotex time chartered the vessel MV Star Jing. The vessel is owned by the Plaintiff, Olendorff Carriers GmbH & Co KG, a company incorporated in Germany and with its head office in Germany. The contract provides that Canpotex will pay for all fuel and will not allow any liens against the vessel.

[6] On October 7, 2014, Canpotex time chartered the vessel MV Ken Star which is owned by the Plaintiff, Star Navigation Corporation SA, a company incorporated in Liberia with its head office in Greece. The contract provides that Canpotex will pay for all fuel and will not allow any liens against the vessel.

[7] On October 22, 2014, Canpotex ordered marine bunkers from the Defendant, O.W. Bunkers (UK) Limited [OW UK], a subsidiary of OW Trading. The marine bunkers were to be delivered to the MV Ken Star.

[8] On October 22, 2014, Canpotex also ordered marine bunkers from OW UK to be delivered to the MV Star Jing.

[9] Both Sales Order Confirmations show that the physical supplier of the fuel was to be the Defendant, MP, a British Columbia bunker fuel supply company.

[10] The parties disagreed about whether the Fixed Price Agreement, OW UK's general terms and conditions [GTCs], or MP's standard terms and conditions [STCs] governed the fuel purchases. [This issue has now been settled by the FCA in the FCA Decision.]

[11] On October 27, 2014, MP provided the marine bunkers for use on the MV Ken Star and MV Star Jing [collectively, the Vessels] in Vancouver.

[12] On October 27, 2014, OW UK invoiced Canpotex for the marine bunkers – USD$375,525.000 for the MV Ken Star and USD$278,968.15 for the MV Star Jing. The invoices indicated that payment was due to OW UK by November 26, 2014.

[13] On October 28 and 29, 2014, MP invoiced OW UK for the marine bunkers supplied – USD$372,300.00 for the MV Ken Star and USD$276,617.40 for the MV Star Jing.

[14] Pursuant to an agreement of December 19, 2013, OW Trading, and certain subsidiaries including OW UK, assigned all rights, interest and title in their third party and intercompany receivables to ING. Receivables from the sale of marine bunkers were specifically assigned to ING. Canpotex was notified of the assignment in December 2013.

[15] On November 7, 2014, OW Trading filed for bankruptcy; OW UK, and other related subsidiaries, filed for bankruptcy shortly thereafter.

[16] On November 12, 2014, ING appointed the Receivers as receivers of OW Trading and OW UK's receivables.

[17] On December 12, 2014, Charles Christopher Macmillen [Administrator] was appointed administrator of OW UK.

[18] On December 22, 2014, the Administrator, the Receivers and ING entered into a cooperation agreement, pursuant to which money owed in relation to OW UK receivables would be paid into ING accounts.

[19] OW UK never paid MP's invoices.

[20] On December 22, 2014, MP demanded payment of USD$648,917.40 from Canpotex for the marine bunkers that MP had supplied to the Vessels. MP claimed it had a maritime lien in accordance with its contract with OW UK and would arrest the Vessels unless Canpotex paid the invoices.

[21] On January 8, 2015, the Receivers demanded payment from Canpotex for the amount owing under the OW UK invoices. The Receivers advised that if payment was not forthcoming,

they reserved the right to exercise all powers available to them, including the arrest of the Vessels.

[22] Canpotex does not dispute that it owes the sum of USD$654,493.15 under the OW UK invoices. It says that it has held back the funds because it has received competing demands for them and does not want to expose the Vessels to any liability or liens.

[23] On April 2, 2015, in accordance with the March 27, 2015 Order of Prothonotary Lafrenière, as he then was, Canpotex paid the Funds, USD$661,050.63 (the principal amount owed under the OW UK invoices plus admiralty interest), into the United States trust account of its solicitor. Prothonotary Lafrenière's Order deemed this deposit to be a payment into the Court.

[24] On June 22, 2015, the Plaintiffs brought a motion in this Court for a declaration establishing:

a) Which of the Defendants is entitled to all, or part, of the Funds;

b) The specific entitlement of each Defendant to receive part, or all, of the Funds;

c) Payment out in accordance with a) and b);

d) That any and all liability of the Plaintiffs and the Vessels to the Defendants in respect of the marine bunkers supplied to the Vessels on October 27, 2014 in Vancouver is extinguished upon payment out of the Funds; and,

e) That the Plaintiffs recover the costs of the action from one of the Defendants or the Funds.

[25] On June 22, 2015, ING and the Receivers brought a motion for:

a) A declaration that the Funds be paid to ING in satisfaction of Canpotex's debt to OW UK; and,

b) Costs of the proceedings.

[26] On June 22, 2015, MP brought a motion for:

a) Judgment in the Canadian equivalent of MP's invoices for the supply of the marine bunkers – USD$372,300.00 for the MV Ken Star and USD$276,617.40 for the MV Star Jing;

b) A declaration that MP is entitled to be paid from the Funds;

c) Interest on the amounts payable to MP at admiralty rates; and,

d) Costs of the proceedings.

III. FIRST DECISION

[27] In my First Decision, I decided as follows:

> 1. Canpotex shall pay to the Defendant, Marine Petrobulk Ltd, the sum of USD$648,917.40 together with admiralty interest thereon;
>
> 2. The Defendant, Marine Petrobulk Ltd, shall be paid the above amount from the Funds presently held in trust pursuant to the Order to March 27, 2015;
>
> 3. Canpotex shall pay (subject to the costs payable in accordance with paragraph 5 of this Order set out below) to the Defendants, ING Bank N.V., Ian David Green, Anthony Victor Lomas and Paul David Copley in their Capacities as Receivers of Certain Assets of the Defendants O.W. Supply & Trading A/S, and O.W. Bunkers (U.K.) Limited, and others, an amount equal to the mark-up payable to O.W. Bunkers (U.K.) Limited for the supply by Marine Petrobulk Ltd of bunkers to the Vessels, together with the maritime interest payable thereon. The balance of the Funds held in trust shall be applied against this amount after Marine Petrobulk Ltd has been paid in full in accordance with paragraphs 1. and 2. above;
>
> 4. Upon payment in accordance with paragraphs 1., 2. and 3. above, any and all liability of the Plaintiffs and the Vessels to the Defendants in respect of the marine bunkers supplied to the

> Vessels on or about October 27, 2014 in Vancouver, British Columbia together with any and all liens, is extinguished;
>
> 5. The Defendants, ING Bank N.V., Ian David Green, Anthony Victor Lomas and Paul David Copley in their Capacities as Receivers of Certain Assets of the Defendants O.W. Supply & Trading A/S, and O.W. Bunkers (U.K.) Limited, and others shall pay the costs of the Plaintiffs and the Defendant, Marine Petrobulk Ltd, for this action and motion which costs may be deducted and paid from the amount payable to ING Bank N.V., Ian David Green, Anthony Victor Lomas and Paul David Copley in their Capacities as Receivers of Certain Assets of the Defendants O.W. Supply & Trading A/S, and O.W. Bunkers (U.K.) Limited, and others from the Funds held in trust in accordance with paragraph 3. above; and,
>
> 6. Any balance remaining of the Funds held in trust after payments and costs are made as set out above shall be returned to Canpotex.

IV. FCA DECISION

[28] In its decision of March 10, 2017, the FCA allowed the appeal and returned the matter to me for reconsideration in accordance with the FCA's reasons.

[29] The principal findings and conclusions of the FCA that govern this reconsideration are, in my view, as follows:

(1) Section 139 Claim

> [60] With the above in mind, it seems to me that the only claims that are "conflicting" and thus can give rise to interpleader relief under Rule 108 are the contractual claims advanced by OW UK and Petrobulk. In my view, Petrobulk's assertion of a maritime lien, based on section 139 of the [*Marine Liability Act*, SC 2001, c 6], is not a conflicting claim within the meaning of Rule 108 as that claim is a claim against the Vessels, and hence against the Shipowners, and not against Canpotex. In other words, the Shipowners' liability to Petrobulk on account of section 139 of the

MLA constitutes a separate and distinct cause of action. The fact that the Shipowners may ultimately have a claim against Canpotex, based on the terms of the Charter Parties, does not transform the section 139 claim into a conflicting claim.

…

[63] On my understanding of the Prothonotary's order, it is my view that the Trust Funds would have to be paid either to OW UK, by reason of its agreement with Canpotex to supply bunkers to the Vessels, or to Petrobulk whose position was, leaving aside its assertion of a maritime lien, that both OW UK and Canpotex were contractually liable to it for the sums owed in connection with its delivery of bunkers. These claims, I am satisfied, fell under the Prothonotary's order as OW UK and Petrobulk were, in effect, claiming the same amount under the same contract. That, in my respectful view, is the extent of the Prothonotary's order. Consequently, pursuant to his order, either OW UK or Petrobulk was entitled to the Trust Funds by reason of its contractual claims, save for the small portion representing OW UK's mark up which, without doubt, was owed to OW UK and hence payable to ING.

[64] If I am correct in my view of the matter, Canpotex is entitled to the extinguishment of its liability only in regard to the contractual claims. If, as the Judge concluded, Petrobulk is contractually entitled to payment out of the Trust Funds, Canpotex's contractual liability to both Petrobulk and OW UK will be extinguished upon payment of the Trust Funds to Petrobulk. As a consequence, there will be no reason for Petrobulk to pursue its claim based on section 139 of the *MLA*.

[65] If, however, that determination is wrong and it is determined that OW UK is the party contractually entitled to payment of the Trust Funds, Canpotex's contractual liability will be extinguished but Petrobulk's section 139 claim will remain alive. As I indicated earlier, the section 139 claim, if founded, gives Petrobulk a right to arrest the Vessels owned by the Shipowners and to have the Vessels sold if its claim is not satisfied. In such circumstances, the Shipowners are the parties that would have to pay Petrobulk the amount due in respect of the bunkers in order to prevent the sale of their assets. Canpotex does not own the Vessels nor is it directly liable to Petrobulk in regard to the section 139 maritime lien. The fact that Canpotex may have to indemnify the Shipowners because of its obligations under the Charter Parties does not transform Petrobulk's maritime lien claim into a conflicting claim under Rule 108 in regard to which Canpotex's liability can be extinguished.

[66] Therefore, in my respectful view, what the Judge had to decide, and he did, was who, as between OW UK and Petrobulk, was contractually entitled to the Trust Funds under the contractual arrangements with Canpotex.

…

[71] However, because the section 139 claim was not a conflicting claim under Rule 108, it should not, in my respectful view, have been dealt with in the context of interpleader relief. In other words, that claim should have either proceeded separately or waited for the outcome of the Judge's determination of the contractual claims against Canpotex.

[72] Although he does not say so in express terms, the Judge appears to have recognized that Petrobulk's section 139 claim gave Petrobulk no rights against the Trust Funds. At paragraph 142 of his reasons, where he concludes that Petrobulk has a valid maritime lien under section 139 of the *MLA*, the Judge says that:

> But whether a s 139 maritime lien in the Vessels can extend to the Funds in this case does not, in my view, automatically follow. The Funds were put up by Canpotex so that neither MP nor OW UK would asset [sic] liens and arrest the Vessels. This doesn't mean that they replace the *res*.

He completed his thoughts on this point at paragraph 144 where he stated that "I don't think it is necessary for me to decide whether MP has a contractual or a s 139 maritime lien in the Funds."

[73] There can be no doubt that the Trust Funds did not replace the *res* as the section 139 claim was not a conflicting claim; it constituted a separate cause of action against the Vessels and the Shipowners. Consequently, it is my opinion that, to the extent that the Judge could make any determination regarding the section 139 claim, he could not extinguish the Shipowners' liability. Nor could he do so in regard to Petrobulk's assertion of a contractual lien against the Shipowners. In any event, it is clear from paragraph 144 of the Judge's reasons that he did not decide whether Petrobulk had a contractual or a section 139 maritime lien against the Trust Funds.

[74] Hence, in my respectful view, it was wrong for the Judge to extinguish Canpotex's and the Shipowners' liability in regard to the section 139 claim. All that the Judge could do was to

extinguish Canpotex's liability in regard to the contractual claims asserted by OW UK and Petrobulk.

[75] Needless to say, it necessarily follows that if the Judge's determination of the contractual claims is correct, then Petrobulk, having been paid out of the Trust Funds, will not pursue its section 139 claim against the Vessels and the Shipowners. In other words, Petrobulk's claim having been satisfied by the Trust Funds, there will remain no grounds for it to pursue that claim. There will be no issue remaining for litigation.

[76] However, to make myself perfectly clear, it was not open to the Judge on the interpleader application to extinguish the Shipowners' liability and that of Canpotex arising out of its obligations under the Charter Parties. I now turn to the second question at issue in this appeal.

…

(2) Contractual Dispute

[96] In my respectful view, the Judge erred in concluding that Schedule 3 of the Fixed Price Agreement, and more particularly clause L.4 thereof, applied to the bunkers delivered to the Vessels on October 27, 2014.

[97] I begin by saying that I do not have much doubt that were it not for Mr. Ball's evidence, the Judge would necessarily have concluded that Schedule 3 of the Fixed Price Agreement did not apply to the bunker purchases at issue in these proceedings. Instead, the Judge would have concluded, in my respectful view, that the OW Group's General Terms and Conditions were applicable to the bunker purchases. A brief review of the relevant documents, and more particularly of the relevant provisions found in those documents, will demonstrate the soundness of this proposition.

…

[120] In my respectful opinion, the Judge should not have considered Mr. Ball's evidence. More particularly, his evidence could not be used to, in effect, replace the words used by the parties. In other words, to paraphrase what Mr. Justice Rothstein said at paragraph 57 of his reasons in *Sattva*, Mr. Ball's evidence could not serve to either "overwhelm the words of" the Fixed Price

Agreement or of the spot contracts or "to deviate from the text such that the court effectively creates a new agreement".

…

[127] I therefore conclude that Schedule 3 of the Fixed Agreement does not apply to the bunker purchases of October 22, 2014. Consequently, the terms applicable are those found in the OW Group's General Terms and Conditions. Hence, clause L.4 of those General Terms and Conditions is the relevant L.4 and not the one found in Schedule 3.

[128] Because of his conclusion that Schedule 3 applied to the bunker purchases at issue, the Judge did not turn his mind to the OW Group's General Terms and Conditions, and consequently, he did not examine clause L.4 of those terms. The parties are in agreement that clause L.4 of the OW Group's General Terms and Conditions differs from the one found in Schedule 3 in that the clause requires that the third party "insists". The Judge did not address the meaning of the word "insists" and he made no finding as to whether Petrobulk had insisted that Canpotex be bound by its terms and conditions.

[129] Although the parties have not pointed to any other difference between the two L.4 clauses, I see two additional differences which may be material. It is useful to again reproduce the two L.4 clauses which can already be found at paragraph 38 of these reasons:

Fixed Price Agreement, Schedule 3	**OW Group's General Terms and Conditions**
L.4 a) These Terms and Conditions are subject to variation in circumstances where the physical supply of the fuel is being undertaken by a third party. In such circumstances, these terms and conditions shall be varied accordingly, and the Buyer shall be deemed to have read and accepted the terms and conditions imposed by the said third party <u>on the Seller</u>.	**L.4 a)** These Terms and Conditions are subject to variation in circumstances where the physical supply of the Bunkers is being undertaken by a third party which insists that <u>the Buyer is also bound by its own terms and conditions</u>. In such circumstances, these Terms and Conditions shall be varied accordingly, and the Buyer shall be deemed to have read and accepted the terms and conditions imposed by the said

third party.

[emphasis added] [emphasis added]

> [130] The first additional difference that I see between the two clauses is found in the sixth and seventh lines of the L.4 clause of the OW Group's General Terms and Conditions where the words "the Buyer is also bound by its own terms and conditions" appear. Those words do not appear in L.4 of Schedule 3. The other difference is found in L.4 of Schedule 3 where the words "on the Seller" appear at the end of the clause. These words are absent in L.4 of the OW Group's General Terms and Conditions. Whether these differences have an impact or not on the ultimate determination is not a question which I intend to answer as I am satisfied that the proper remedy in the circumstances of this case is to return the matter to the Judge for reconsideration.
>
> [131] Because the Judge made no finding in respect of the OW Group's General Terms and Conditions, and in particular with regard to clause L.4 thereof, the appeal before us was argued exclusively on the basis of clause L.4 of Schedule 3. The parties did not make any arguments as to the meaning of clause L.4 of the General Terms and Conditions, except for a brief submission by Petrobulk that it had insisted that Canpotex be bound by its Standard Terms and Conditions. Consequently, it is my view that it would not be wise for us to make the determination which should be made by the Judge. Should the matter return to us in a further appeal, we would also, it goes without saying, benefit from the Judge's view on the meaning of clause L.4 of the OW Group's General Terms and Conditions and its effect on the relationship between OW UK, Canpotex and Petrobulk.

[30] I think I have to assume that the FCA found no objection to the balance of my analysis or my conclusions.

V. ISSUES

[31] My duty in this proceeding is to reconsider the matter in light of the FCA's reasons.

[32] The parties are not entirely in agreement as to what this involves.

[33] MP says that the following points are at issue before me:

> (a) As noted above the key issue for determination is whether there is any material difference between the L4 clause you relied upon in your initial decision and the L4 clause the FCA concluded applies.
>
> (b) If for any reason Marine Petrobulk is not entitled to payment from the Trust Funds can their maritime lien in relation to the supply of bunkers be extinguished?

[34] The other Defendants say there is only one issue before me:

> 26. The only question to be resolved in this proceeding is whether OW (and thus ING) or MP is contractually entitled to the Funds—i.e., the sum due under the OW Invoices. To the extent Canpotex also seeks a determination of MP's s. 139 lien claim, the Court of Appeal's judgment precludes that determination here.

[35] Canpotex characterizes the issues before me as follows:

> A. Is there a material difference between the GTC and the negotiated GTC which you previously considered?
>
> B. Which of the Defendants is entitled to all, or part, of the Funds paid into the U.S. Trust Account of Alexander Holburn Beaudin + Lang LLP in accordance with the Order of March 27, 2015?
>
> C. The specific entitlement of each Defendant to receive part, or all of the Funds.
>
> D. An Order for payment out in accordance with sub-paragraphs (B) and (C) above.
>
> E. Upon payment out of the Funds in accordance with sub-paragraph (D) above, that any and all liability of the Plaintiffs and the Vessels to the Defendants in respect of the marine

bunkers supplied to the Vessels on or about October 27, 2014, in Vancouver, British Columbia, is extinguished.

F. If OW UK is found to be contractually entitled to receive payment of its invoice, is MP entitled to a s. 139 *MLA* maritime lien?

[36] In my view, the reasons of the FCA are clear that the s 139 Maritime lien issue cannot be part of the interpleader relief that I can address in this re-hearing.

[37] This means, in my view, that I can do nothing more than consider the conflicting contractual claims to the Funds advanced by OW UK and MP. I must confine myself to the issue of "[w]ho, as between OW UK and Petrobulk, was contractually entitled to the Trust Funds under the contractual arrangements with Canpotex" (para 66, FCA Decision).

[38] MP says that the words in para 71 of the FCA Decision allow me to reconsider and decide the contractual issue and then decide the s 139 claim separately. I don't think the FCA Decision can be read in this way. The s 139 claim lien cannot now be considered as part of the interpleader process ordered by Prothonotary Lafrenière – as he then was – and so falls outside of the scope of the interpleader proceedings that are before me.

VI. THE CONTRACTUAL CLAIMS – SCOPE

[39] There is further disagreement between the parties regarding the scope of my reconsideration of the contractual claims. Canpotex and MP are of the view that the FCA did not question or overturn many of my conclusions about the respective contractual obligations of the

parties and that I must confine my reconsideration to the FCA's finding that clause L.4 of OW's GTCs is the relevant L.4 clause and not the L.4 found in Schedule 3.

[40] In written submissions, MP puts the matter before me as follows:

> 11. Importantly, in our submission, the FCA did not overturn your conclusions found at paragraphs 130-134 of your Reasons and Judgment regarding the terms under which the bunkers were supplied (i.e. the MP Standard Terms and Conditions), or the contractual consequences of the MP Standard Terms and Conditions as referenced in paragraphs 134-137 of your Reasons and Judgment (i.e. that Canpotex and OW have joint and several liability to Marine Petrobulk).
>
> 12. Many of your conclusions are not, in our submission, dependent upon any particular interpretation of clause L.4, although you do, from time to time, reference the impugned clause L.4. As you stated at paragraph 130-131:
>
> > [130] MP supplied the marine bunkers directly to the Vessels on MP's Standard Terms and Conditions, as revised May 2013. This was made clear in the confirmations that MP provided to OW on October 22, 2014. Both of the confirmations are clear on this issue and specify as follows:
> >
> > > This sale is subject to Marine Petrobulk's Standard Terms and Conditions, as revised May 2013, which is hereby incorporated in full in this Confirmation. The acceptance of this Confirmation and Marine Petrobulk's Standard Terms and Conditions shall be deemed final unless objected to by Buyer within three business days of receipt of this Confirmation.
> >
> > [131] The relevant MP Standard Terms and Conditions are set out in paragraph 121(c) above.
> >
> > [132] The record before me shows that OW UK provided purchase order confirmations for the supply of bunkers to both Vessels. No objection was raised to the Standard Terms and Conditions, and no objection has [ever] been raised. <u>So it is clear that OW UK understood and accepted that MP</u>

> would supply the bunkers to the Vessels on MP's Standard Terms and Conditions. It is also clear from Schedule 3 of the General Terms and Conditions between Canpotex and OW UK that Canpotex and OW UK understood and agreed that their contractual arrangements would be varied where the physical supply of the fuel was undertaken by a third party such as MP, and that the buyer was deemed to have read and accepted the terms and conditions imposed by the third party. Consequently, I conclude that both Canpotex and OW UK were bound by MP's General Terms and Conditions for the supply of the marine bunkers to the Vessels that are the subject of this dispute.
>
> [133] Given the clear import of the documentation between MP and OW UK, I cannot accept ING's argument that OW UK contracted with MP on OW's Standard Terms and Conditions.
>
> [emphasis added]
>
> 13. You clearly found that Marine Petrobulk agreed to contract for the supply of bunkers on its standard terms and conditions, not OW's terms and conditions. Fundamentally, the L4 provision is not determinative of that issue. Rather, Marine Petrobulk's requirement to contract on their terms is determinative, particularly once those terms were accepted by OW as was the case

[41] ING, on the other hand, is of the view that I must consider all contractual issues *de novo* and should not rely upon my previous findings.

[42] It is my view that, had the FCA found fault with my contractual analysis on grounds other than my failure to apply the parol evidence rule and the application of the wrong L.4 clause, it would clearly have said so. If the FCA had accepted other aspects of ING's contractual analysis, there would have been no need for the FCA to require me to reconsider the implications of applying the correct L.4 clause, and the FCA would simply have set aside my

judgment entirely. I think that Justice Nadon's reasons are precise about what the FCA wants me to reconsider. See paras 127-131 of the FCA Decision quoted above.

[43] It is also telling, I think, that the FCA clearly states one of my principal conclusions in para 41 of the FCA Decision and never questions this conclusion: "This led the Judge to conclude that Canpotex and OK UK were bound by Petrobulk's Standard Terms and Conditions with regard to the delivery of the bunkers to the vessels on October 27, 2014." Nor does the FCA list the additional contractual issues that ING raises again in this re-hearing as being issues that the FCA needed to address on appeal. See para 4 of the FCA Decision. Had the FCA thought that Canpotex was not bound by MP's STCs then that would, effectively, have resolved the contractual issues between the parties and there would be no need for me to reconsider the meaning and implications of the L.4 clause found in OW UK's GTCs.

VII. ARGUMENTS

A. *Canpotex*

(1) Contractual Issues

[44] Canpotex says that the only words in the applicable L.4 clause that could arguably make a difference to my previous contractual analysis are "which insists that the Buyer is also bound by its own terms and conditions" so that, pursuant to this wording, the Court must decide whether MP *insisted* that Canpotex was bound by the STCs.

[45] Canpotex refers the Court to the decision of Justice Haight in *NCL (Bahamas) Ltd v OW Bunker USA Inc et al*, 3:17-CV-01327 at pp 25-32 [*NCL*] for the proposition that "insists" is analogous to "request" or "demand" and that if there is any ambiguity in the words it must be construed in the manner most favourable to the buyer (which in the present case would be Canpotex) in accordance with the *contra proferentem* rule.

[46] Also in *NCL*, as in the present case, the physical supplier, EKO, and the OW Trading entity involved in that case had knowledge of the physical supplier's terms and conditions from their history of prior dealings. In the words of Justice Haight:

> 8. I conclude that O.W. Malta, as Buyer of the NORWEGIAN SPIRIT'S bunkers under its contract with EKO, knew of and agreed to be bound by EKO'S standard terms and conditions, including law and forum selection provisions different from those contained in the OWB T&Cs. O.W. Malta purchased these bunkers from EKO in order to perform O.W. Malta's contract to sell the same amount of bunkers to O.W. USA, which had forged the first link in the chain by contracting to sell that amount of bunkers to NCL, so that the NORWEGIAN SPIRIT might be refueled in Piraeus on October 18, 2014. Nothing in these additional contracts amended EKO's standard terms and conditions or erased O.W. Malta's knowledge of and agreement to the EKO T&Cs. Given this chain of contracts, O.W. USA as Buyer rom O.W. Malta, and NCL as Buyer from O.W. USA, impliedly knew of and agreed to the EKO terms and conditions. That is sufficient to satisfy the preconditions in the contract in suit to the application of Article L4.

[47] In the present case, Canpotex points out that the STCs clearly incorporate the laws of Canada and British Columbia by way of clause L.4(b)(ii) of the STCs and the evidence shows that OW UK was well aware of MP's STCs for Sale and Delivery of Marine Fuels used by MP because of 49 previous Sales Oder Confirmations which Canpotex received from OW UK, between January 10, 2014 and September 30, 2014 in respect of bunkers ordered by Canpotex

from OW UK which were supplied by MP. See Affidavit of Keith J. Ball, Director, Ocean Transportation of Canpotex Shipping Services Limited sworn July 26, 2018. Mr. Ball swears to "50" additional Sales Order Confirmations, but counsel for Canpotex confirmed in oral argument that one of them involved other parties and was not relevant to these motions. This evidence was not disputed by the other parties.

[48] Canpotex also points out that my previous reasons make clear (paras 132-134) that "As MP's Standard Terms and Conditions make clear, 'Customers' are bound and the agreement 'will prevail notwithstanding any variance with the terms and conditions of any acknowledgement or other document submitted by the Customer'," I also found (at para 134) that "Customer" in the present case includes Canpotex as either "a "charterer" or a "party benefitting from consuming the Marine Fuel"." I also found (at para 134) that the STCs were never "added to, modified, superseded or otherwise altered in any way either by OW UK or Canpotex…."

[49] So Canpotex takes the position that the "insistence" required to satisfy the applicable L.4 provision originated in the contract between MP and OW UK as contained in MP's STCs and continued thereafter. Canpotex also says that consistent with this is the fact that, since the initial demand letter of December 22, 2014 from MP's solicitor, MP has continually insisted that its STCs are the applicable contractual terms and that they bind Canpotex. See Affidavit of K. Ball (#1), Exhibit H.

[50] Canpotex also takes the position that the doctrine of privity of contract (relied upon heavily by OW UK) cannot be invoked to defeat the clear intentions of all three parties involved:

> 37. This is not a situation in which a third party beneficiary (MP) is attempting to take the benefit of a contract to which it is not privy. In the negotiated GTCs, Canpotex and CW UK agreed to be bound by the terms and conditions of the physical supplier MP. In the CW UK/MP contract, it was agreed that the charterer of the vessel (Canpotex) would be bound by the MP terms and conditions. There is a clear consensus *ad idem* between the three parties on this point. it would be inappropriate to apply the concept of privity of contract, which is intended to carry out the intentions of the contracting parties, to frustrate those concurrent intentions.
>
> …
>
> 43. It has been held that when the wording of a contract is unambiguous, the courts should not give, it a meaning different from that which is expressed by its clear terms, unless the contract is unreasonable or has an effect contrary to the intentions of the parties. In the instance at bar, clause L.4 of the negotiated GTC clearly contemplates incorporating the terms and conditions of the physical supplier. The intention of clause L4 is clear, particularly when considering paragraphs (b) and (c), that make it clear that the rights and liabilities as between the three parties shall be identical and shall be decided in the same forum based upon the same law. This provision is unambiguous, and as you decided previously, must be given effect under the circumstances.
>
> [References omitted.]

(2) Section 139 Claim

[51] Notwithstanding the FCA's findings on this issue, Canpotex continues to argue before me that if OW UK (and hence ING) is found to be contractually entitled to receive payment of its invoice for the full amount, then I should deal with the s 139 maritime lien issue as part of these interpleader proceedings and extinguish MP's s 139 claim:

> 62. In Canada, as you noted in your previous judgment, it is an open question whether in order to have an enforceable claim under

> s.139 of the MLA, the physical supplier must have contracted with the owner. It would achieve the intended result of putting a Canadian bunkers supplier on equal footing with a US counterpart if this Court held that a condition precedent for a s.139 maritime lien was that the supplier contracted directly with the owner, charterer or agent of those parties.
>
> 63. It is important to understand the practical effect of the decision of the FCA differing with the appellate decisions in the US and holding that a s.139 maritime lien claim cannot be dealt with in an interpleader proceeding. An example is the "Elliott Bay" case referred to in affidavit #4 of Mr. Ball where the fuel was supplied to a Canpotex chartered ship in Colombia, and Canpotex has been faced with an *in rem* claim and arrest, and being required to provide security in Chile to the physical supplier, and later an arrest in Italy and requiring posting of duplicate security in a claim brought by ING, as well as an *in personam* arbitration in London by ING. A decision that encourages such duplication of proceedings, with the attendant wasted legal costs and judicial or arbitral time creates a serious injustice and should be avoided. It is respectfully submitted that as the debts arise from the same supply to suggest that the procedural difference of *in rem* proceedings makes the maritime lien claim a different claim is to elevate form over substance.
>
> 64. Therefore, if this Court should hold on the interpleader issue that if OW UK, not MP, is contractually entitled to payment, then the s.139 maritime lien claim of MP should be dismissed.
>
> [References omitted]

B. *MP*

(1) Contractual Issues

[52] MP says that the only issue before me for reconsideration is whether there is any material difference between the L.4 clause I relied upon in my First Decision and the L.4 clause that the FCA decided was applicable to the present situation.

[53] MP says it is important to note that the FCA did not overturn my conclusions regarding the terms under which the bunkers were supplied (i.e. the MP STCs), or the contractual consequences of MP's STCs as referenced in paras 134-137 of my First Decision (i.e. that Canpotex and OW UK have joint and several liability to MP).

[54] MP points out that many of my previous conclusions are not dependant upon any particular interpretation of clause L.4 and, most importantly, I clearly found that MP agreed to contract for the supply of bunkers on MP's STCs and not on OW UK's GTCs. The L.4 issue is not determinative of this issue.

[55] For the most part, MP agrees and adopts Canpotex's submissions on the L.4 issue. In addition, however, MP makes the following points:

> 16. In addition to the foregoing, it is important to review the circumstances that resulted in the supply of bunkers to two foreign flagged vessels in the port of Vancouver. As set out in our original submissions:
>
> > 6. On October 22, 2014, Marine Petrobulk was contacted by Giorgia of O.W. Bunkers, apparently on behalf of OW UK, requesting whether Marine Petrobulk Ltd. could provide marine bunkers to two vessels, the M/V "Ken Star" (IMO # 9619593) and MN "Star Jing" (IMO # 9644823) (collectively the "Vessels") both scheduled to be in the port of Vancouver in late October 2014.
> >
> > 7. In response, Marine Petrobulk replied to Giorgia at O.W. Bunkers the same day confirming details of the planned bunker stem including quantities and pricing. Both confirmations expressly referenced that the sale is subject to Marine Petrobulk's Standard Terms and Conditions, as revised May 2013 (the "Standard Terms"). Specifically each confirmation provided expressly as follows:

> This sale is subject to Marine Petrobulk's Standard Terms and Conditions, as revised May 2013, which is hereby incorporated in full in this Confirmation. The acceptance of this Confirmation and Marine Petrobulk's Standard Terms and Conditions shall be deemed final unless objected to by Buyer within three business days of receipt of this Confirmation.

…

> 9. Purchase order confirmations were provided by OW UK confirming acceptance of the planned bunker stern for both the Vessels. The Purchase order confirmations make no objection to the Standard Terms as referenced in the Confirmation quoted above.
>
> 10. Indeed, no objection of any sort to the application of the Standard Terms was ever provided by or on behalf of the OW group of companies.
>
> 11. Pursuant to that agreement (i.e. provision of bunkers based on the Standard Terms), Marine Petrobulk delivered marine bunkers to the Vessels at the Port of Vancouver on or about October 27, 2014.

17. In basic contract law terms, it is clear from the confirmations sent to OW that Marine Petrobulk offered to supply bunkers to the subject vessels on Marine Petrobulk's Standard Terms and Conditions. In turn it is clear from the Purchase Order Confirmations sent from OW to Marine Petrobulk that the offer was accepted without reservation by OW and without any attempt by OW to impose any different terms and conditions. Further, it is equally clear the contract was performed as contemplated. In short, there was an offer, acceptance and performance without any reference to OW's terms.

18. In our submission there can be little doubt that Marine Petrobulk "insisted" on the application of its Standard Terms and Conditions to the bunker sale as referenced in L4 of the OW Group's General Terms and Conditions. This is reflected in the concluding paragraph of the confirmations referenced above that were unreservedly accepted by OW. Quite obviously, if OW had come back to Marine Petrobulk and objected to the application

> of its Standard Terms and Conditions further discussions would have ensued. That did not happen, and the terms were accepted, so no other action was required on the part of Marine Petrobulk to further insist on the applicability of their terms. Quite simply, Marine Petrobulk insisted on its terms and OW agreed to them. There was nothing more to do.

[56] As regards the meaning of "insist," MP makes the following additional points that are worth quoting in full:

> 20. As noted by Canpotex at paragraph 34 of their submissions, Justice Haight of the US District Court for the District of Connecticut specifically addressed the use of the word "insist" in clause L.4 in the case of *NCL (Bahamas) Ltd. v. O. W. Bunker USA Inc. et al.* 3:17-CV-01327. In that case Justice Haight had to determine whether the bunker supplier insisted that their usual terms and conditions applied to a bunker stem with a chain of suppliers somewhat similar to the case at bar. At issue was whether the London arbitration clause in the OW terms applied, or the jurisdiction clause (naming the Piraeus Courts) in the actual supplier's terms.
>
> 21. Justice Haight was addressing the issue under English law and was presented with opinions from two highly regarded English barristers. Justice Haight ultimately accepted the view being advanced on behalf of NCL (the vessel owner) that "insist" in the context of clause L.4 simply means to "require" or "demand" (see pp. 24-26). He further concluded that if there was any ambiguity in the meaning of "insist" in the context of clause L.4 he would apply the *contra proferentem* rule of contractual interpretation against OW, it being their contract (p. 32).
>
> 22. In concluding Justice Haight said:
>
> > 1. Article L.4 of the contract for supply of bunkers to the M/V NORWEGIAN SPIRIT, between O.W. USA as Seller and NCL as Buyer, construed in accordance with English law, varies and supersedes the provisions in Article PI for governing English law and arbitration of disputes between those parties in London, if certain preconditions stated in Article L.4 appear to have been satisfied.

> 2. In placing that construction upon the contract, I accept as more persuasive Mr. Karia's interpretation, to the extent it differs from that of Mr. Mander. Principally, that is because I think Mr. Karia's constructions hew more closely to the plain and ordinary meaning of the words the parties used in the contract.
>
> 3. In the alternative, if the opinions of Mr. Karia and Mr. Mander are both regarded as well founded but their conclusions are irreconcilable, then these opinions demonstrate a genuine ambiguity in respect of the meaning and effect of Article L.4. In that event, the *contra proferentem* rule is applicable under English law, and the contract would be construed in a manner favorable to NCL.

23. It is equally noteworthy, in our submission, that Justice Haight, like your Lordship, found that "O.W. Malta, as Buyer of the NORWEGIAN SPIRIT's bunkers under the contract with EKO [the actual supplier], knew of and agreed to be bound by EKO's standard terms and conditions..." (p. 39). There can be no doubt, in our submission, that OW in the present case knew about, accepted and agreed to be bound by Marine Petrobulk'[s] standard terms and conditions. Nothing in any dealings between OW and Canpotex could, under basic contract law principles, change or alter the terms of the bunker supply by Marine Petrobulk. This is particularly so in circumstances where no such altered terms or conditions were ever proposed to Marine Petrobulk.

…

33. In the present case the words used by Marine Petrobulk are clear, affirmative and mandatory:

> This sale is subject to Marine Petrobulk's Standard Terms and Conditions, as revised May 2013, which is hereby incorporated in full in this Confirmation. The acceptance of this Confirmation and Marine Petrobulk's Standard Terms and conditions shall be deemed final unless objected to by Buyer within three business days of receipt of this Confirmation.

34. There can be no doubt, when objectively viewed, that these words convey a clear insistence that the Marine Petrobulk's standard terms and conditions apply to the sale. The words

"acceptance of this Confirmation and Marine Petrobulk's Standard Terms and [C]onditions shall be deemed final" is, in our submission, a clear expression of insistence. The use of the word "shall" makes the applicability of the terms mandatory, not optional. Indeed, the clause goes on to provide a single form of mechanism to overcome that insistence, but action is required (an objection), and none was taken by OW in this case.

35. As noted by Justice Haight the meaning of "insist" is clear enough and includes "request" or "demand". This is consistent with the Oxford online dictionary definition and use examples set out in Schedule "A" hereto. There can be no doubt that the confirmation sent by Marine Petrobulk was a requirement, more than a simple request or demand.

36. To emphasize the point, the Dictionary.com thesaurus found at www.thesaurus.com provides the following words as synonyms for "insist": assert, contend, demand, hold, maintain, press, reiterate, repeat, request, stand firm, urge, vow, asseverate, aver, importune, persist, require, swear, be firm, lay down the law. Again, replacing "insist" with many of these words makes it clear what Marine Petrobulk did through the confirmation is insist that their terms and conditions applied to the bunker sale.

37. Ultimately, like Justice Haight concluded, unless it is possible to come to a determination of the meaning of "insist" in the context of clause L.4, the fallback position must then be that its meaning in the context of clause L4 is unclear and as such must be construed against OW. This is clear under English law, as noted by Justice Haight, and is equally clear under Canadian law. Indeed, the Supreme Court of Canada applied the *contra proferentem* rule in *Hillis Oil & Sales v. Wynn's Canada*, [1986] l S.C.R. 57 saying:

> Given this ambiguity as to whether the distributor's agreements could be terminated pursuant to clause 23 with immediate effect or whether such termination could take effect only upon reasonable notice, I also agree with Richard J. that it should be resolved against Wynn's and in favour of Hillis by application of the contra proferentem rule of construction. It is true that this rule has been most often invoked with reference to the construction of insurance contracts, particularly clauses in such contracts purporting to limit or exclude the insurer's liability. Statements of the rule and its application in such cases may be found in the decisions of this Court in Consolidated-Bathurst, supra, and

> McClelland and Stewart, supra. The rule is, however, one of general application whenever, as in the case at bar, there is ambiguity in the meaning of a contract which one of the parties as the author of the document offers to the other, with no opportunity to modify its wording. The rule is stated in its general terms in Anson's Law of Contract (25th ed. 1979), at p. 151, as follows:
>
> > The words of written documents are construed more forcibly against the party using them. The rule is based on the principle that a man is responsible for ambiguities in his own expression, and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the Court will adopt a construction by which they would mean another thing, more to his advantage.
>
> The rule is also stated in general terms by Estey J. in McClelland and Stewart, supra, at p. 15 as follows:
>
> > That principle of interpretation applies to contracts and other documents on the simple theory that any ambiquity [*sic*] in a term of a contract must be resolved against the author if the choice is between him and the other party to the contract who did not participate in its drafting.

38. As we know from the decision of the FCA, the negotiated terms between OW and Canpotex as set out in the Fixed Price Agreement do not apply as between OW and Canpotex. Rather the general OW terms and conditions - not negotiated - are said to apply as between OW and Canpotex. As such, any ambiguity in those non-negotiated terms needs to be construed against OW, not Canpotex, based on the *contra proferentem* rule in light of the position being asserted by Canpotex.

39. Furthermore, a term in a contract between OW and Canpotex cannot, we submit, result in a unilateral amendment, without notice and agreement, to the terms and conditions agreed between OW and Marine Petrobulk for the supply of bunkers...

…

> 42. In any event, it should be noted that your finding that the Marine Petrobulk standard terms and conditions applied to the bunker sale was not over-turned by the FCA. As such, not only was there insistence, which resulted in an agreement that the Marine Petrobulk terms governed the bunker supply, but there was a consensus ad idem between all the parties on the applicability of those exact terms.
>
> [Emphasis in original, references omitted.]

(2) Section 139 Claim

[57] MP strongly takes the position that this issue is not before me:

> While a finding in this case may result in the extinguishment of any contract claims by OW and Marine Petrobulk against Canpotex, no similar determination can be made in relation to Marine Petrobulk's asserted maritime lien rights against the vessels (and by implication their owners). Put simply, the FCA has stated clearly that this proceeding cannot result in an extinguishment of Marine Petrobulk's asserted s. 139 maritime lien. There is, therefore, no reason to address this issue further.

C. *ING*

(1) Contractual Issues

[58] ING acknowledges in written submissions that the FCA "specifically … directed this Court to determine the meaning of clause L.4 of the OW Terms and its effect on the relationship between Canpotex, OW, and MP."

[59] ING reminds the Court of the basic rules of contractual construction to the effect that

> 29. In interpreting clause L.4, this Court must determine the objective intentions of the parties as expressed in the words of the contract. The court must read the contract as a whole, giving the

> words their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties.
>
> 30. It is a fundamental precept that meaning must be given to all of the words in a contract. Every word used in clause L4 is presumed to have meaning. An interpretation that ignores the phrase "insists that the Buyer is also bound" or attempts to rewrite clause L.4 must be rejected.

(See *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at paras 47, 57 [*Sattva*]; FCA Decision, at paras 104-106; Geoff R. Hall, *Canadian Contractual Interpretation Law*, 3rd ed. (LexisNexis, 2016) at p 16; *Golden Capital Securities Ltd v Investment Industry Regulatory Organization of Canada*, 2010 BCCA 359 at paras 44, 52).

[60] Applying these principles, ING says that clause L.4 is not engaged in this case because MP did not, in accordance with the wording of that provision, "insist" that OW UK's buyer should be bound by MP's terms.

[61] ING says that the word "insist" requires a supplier to take "active steps" that were not taken in this case to require OW UK to vary its terms with Canpotex to make them consistent with MP's terms. This interpretation of L.4, says ING, is supported by the ordinary meaning of the provision, in comparison with clause L.4 in the Fixed Price Agreement, and prior decisions.

[62] On this important issue, ING's arguments directly engage with the concerns of the FCA in paragraphs 127-131 of the FCA Decision and should be quoted in full because they are nuanced and important for the task before me:

> 32. The phrase "insists that the Buyer is also bound" should be given its ordinary and grammatical meaning. The use of this phrase

suggests an intention that variation cannot be triggered easily. The *Oxford English Dictionary* (online), for example, defines "insist" as follows:

> To make a demand with persistent urgency; to take a persistent or peremptory stand in regard to a stipulation, claim, demand, proposal, etc.

33. By comparison, clause L4 in the Fixed Price Agreement was engaged automatically whenever a third party supplied the fuel. That version, which is inapplicable here, provided as follows:

> (a) These Terms and Conditions are subject to variation in circumstances where the physical supply of the fuel is being undertaken by a third party. In such circumstances, these terms and conditions shall be varied accordingly, and the Buyer shall be deemed to have read and accepted the terms and conditions imposed by the said third party on the Seller.

34. Had clause L.4 of the OW Terms been intended to apply whenever a third party supplier used its standard terms and conditions, it would have been drafted so as to be triggered on a much lower threshold. Instead, on its plain language, clause L.4 of the OW Terms applies only where a stringent pre-condition is met: OW's supplier not only must wish that OW's *buyer* be bound by the supplier' s terms with OW, but also must *insist* that OW give effect to the supplier's wish.

35. The ordinary meaning of clause L.4 of the OW Terms shows that it is not sufficient for OW's supplier to request that OW's buyer be bound by its terms, much less merely to impose its standard terms and conditions *on* OW. Instead, for OW's supplier to insist that OW's buyer is also bound by its terms, the supplier must impose a legal obligation on OW to vary the terms on which it deals with its buyer, or the supplier must otherwise take active steps to ensure OW achieves this result. Such an interpretation gives meaning to all of the words of clause L4, and particularly "insists".

36. This interpretation is consistent with the weight of the decisions interpreting clause L.4. For example, in 2017 English arbitration proceedings arising from the OW bankruptcy ("*MV PIGI*"), the Arbitration Tribunal was asked to consider the meaning of clause L.4 of the OW Terms. In that case, the buyer tried to rely on the third party supplier's jurisdiction clause and

argued that the supplier had "insisted" merely by contracting with OW on its standard terms and conditions. These standard terms and conditions did not impose any obligation on OW to ensure that its terms were consistent with the third party" 5 terms.

37. The Arbitration Tribunal observed that "insists" was an unusual word to use in the commercial context. Clause L.4's language suggested that the parties did not intend for variation to be achieved easily. The Arbitration Tribunal concluded that "insists" meant that the supplier must do something "over and above standard practice or usual procedure or usual business dealings; something more than being passive".

38. In reaching this conclusion, the Arbitration Tribunal explicitly rejected the buyer's submissions that "insist" should be interpreted to mean "impose" and that clause L.4 was triggered merely when the physical supplier imposed its standard terms and conditions on OW:

> We concluded that it did not help, nor was it particularly accurate, to interpret the word *insists* by substituting it with the word *imposes* because terms that are imposed could, one might say, be imposed passively. And that would not, in our view, be sufficient to satisfy the requirement that [the third party supplier] *insists* on their terms binding the [buyer]. We were guided in our approach by adopting the legal principle that words used in contracts should, so far as possible be given their ordinary and natural meaning. There was no reason why the word "*insists*" should be replaced by another word or given any special meaning, simply because it is unusual to find it in a commercial contract. In fact, it is because it is so unusual, that we speculated its use was deliberate and that if we down-played its meaning, we would not be giving effect to the parties' intentions.

39. The Arbitration Tribunal held that the evidence in that case, which consisted simply of the supplier's use of its standard terms and conditions (similar to the MP Terms), fell far short of the requirement that the third party had insisted that the buyer be bound by the third party's terms. As a result, clause L.4 was not engaged.

40. This View of clause L4 in the OW Terms is also consistent with the New York District Court's interpretation of "insists" in *ING Bank N.V. v. M/V Temara*:

> [T]he requirement that the third party "insist [*sic*] that the Buyer is also bound by its terms and conditions" indicates that, for L4 to apply the supplier must have specifically referenced and obligated the Buyer...

41. As in *MV PIGI*, the supplier in *Temara* had not "specifically referenced and obligated the Buyer". As a result, clause L.4 was not engaged.

42. Canpotex seeks to rely on *MV (Bahamas)* to support its interpretation of clause L4. There, the court held that OW's knowledge of and familiarity with the supplier's standard terms and conditions was sufficient. That interpretation ignores the plain language of clause L4 and is therefore erroneous under Canadian law. In contrast, the *MV PIGI* decision provides a more thorough and persuasive analysis of the objective intentions of the parties as expressed in the words of the contract—the salient question here.

43. As the *MV PIGI* decision makes clear, the wording and context of clause L.4 requires OW's supplier to take active steps to ensure that OW's buyer is bound by the supplier's terms. Unless the supplier does so—*e.g.*, by imposing an obligation on OW to vary its terms with OW's buyer to ensure consistency with the supplier's terms—clause L.4 does not apply.

(ii) MP did not insist that Canpotex was bound by the MP Terms

44. There is no evidence that MP insisted that Canpotex be bound by the MP Terms.

45. Before the OW bankruptcy, MP and Canpotex had no direct dealings or communications with respect to the bunker purchases for the Vessels. MP sent the MP Confirmations only to OW. The MP Confirmations simply referred to MP's standard terms and conditions. The MP Confirmations and MP Invoices did not require that Canpotex be bound by the MP Terms. They did not even refer to Canpotex. There is no evidence that MP's representatives ever even raised the question, with anyone, of Canpotex being bound by MP's terms at any time before OW's bankruptcy.

46. Canpotex relies on two documents to support its claim that MP "insist[ed]" as required by clause L.4 of the OW Terms.

47. First, Canpotex asserts that the MP Terms and in particular their broad definition of "customer" are sufficient to show that MP insisted on binding Canpotex. The MP Terms, however, do not require OW to vary its terms to ensure that OW's buyer is also bound by the MP Terms. They therefore do not trigger clause L.4. In merely using its standard terms and conditions, MP did not taken the active steps needed for insistence.

48. On Canpotex's view, clause L.4 would be triggered whenever OW's supplier used its standard terms and conditions, even if they imposed no specific obligation on OW to vary the terms on which it dealt with its buyers. Such a routine application of L4 is contrary to the wording of the provision and the objective intentions of the parties. MP's use of its standard terms and conditions, without more, cannot satisfy clause L.4's requirement that MP insisted that Canpotex be bound by the MP Terms.

49. Second, Canpotex relies on the demand letter MP's counsel sent to Canpotex. MP's counsel sent the letter on December 22, 2014—months after OW and MP made their contract, and after OW's bankruptcy. It cannot constitute the insistence required by clause L.4: neither the wording nor context of clause L.4 support the extraordinary proposition that MP's post-contractual conduct could be relevant. Moreover, the demand letter does not even refer to clause L4 or suggest that MP had a direct contractual claim against Canpotex for the money owing under the MP Invoices. Rather, it simply asserts that MP had contractual and maritime liens.

50. Here, as in the *MV PIGI* and *Temara* cases, there is no evidence that MP did anything over and above its standard practice or departed from its usual business dealings in contracting with OW. Indeed, the MP Confirmations simply referred to MP's standard terms and conditions, never mentioning Canpotex. This falls far short of the requirement that MP insisted that Canpotex be bound by the MP Terms.

51. Given that MP did not take any active steps to insist on binding Canpotex to the MP Terms, clause L4 is not engaged. Accordingly, ING is the only party with a contractual claim to the Funds.

[Emphasis in original, references omitted.]

[63] In addition to arguing that clause L.4 is simply not triggered on the facts of this case because MP did not "insist" that Canpotex "is also bound by its own terms and conditions," ING also argues that, even if clause L.4 was engaged, MP would still have no contractual claim to the Funds held in trust, let alone a claim that would operate to exclude OW UK's claim to those funds.

[64] In this regard, ING relies upon interpretation and privity of contract arguments that are, again, quite subtle and need to be understood in detail:

> 54. To succeed here, Canpotex and MP must establish that MP has a contractual right against Canpotex to demand payment of the Funds *and* that OW's right to payment of the Funds under the OW Terms has been erased.
>
> 55. The MP Terms, on their own, clearly do not give MP a claim against Canpotex for payment of the Funds. No matter how broadly the MP Terms define "customer", Canpotex was not a party to the OW-MP contract. It did not even deal with MP. Only the parties to a contract can sue or be sued under it. MP can thus have no claim against Canpotex for the Funds based on MP Terms alone.
>
> 56. Instead, Canpotex argues that clause L.4 of the OW Terms gives MP a contractual claim against Canpotex for payment of the Funds. It asserts that clause L.4 somehow operates to replace the OW Terms with the MP Terms and to grant MP a right to demand payment from Canpotex to OW's exclusion. However, this interpretation is contrary to the plain language of the provision, the contractual context, and the surrounding circumstances.
>
> 57. If clause L.4 were triggered, it would merely vary the terms of the OW-Canpotex contract as necessary to ensure consistency with the OW-MP contract. Clause L.4 would not create a contractual relationship between Canpotex and MP or erase OW's rights against Canpotex. The limited exceptions to privity recognized at common law are not relevant: they do not apply here and anyway cannot be used to give MP a contractual claim against Canpotex.

(i) Clause L.4 would only vary the OW Terms as between Canpotex and OW

58. To interpret clause L.4, this Court must determine the objective intentions of the parties as expressed in the words of the contract. In particular, it must ask what a reasonable person standing in the position of the parties would have understood from the words of the document read as a whole and from the factual matrix known to both parties at the time of contracting.

59. Where engaged, clause L.4 provides that the terms on which OW deals with its buyer will be "varied" in keeping with the terms of OW's supplier:

> (a) These Terms and Conditions are *subject to variation* in circumstances where the physical supply of the Bunkers is being undertaken by a third party which insists that the Buyer is also bound by its own terms and conditions. In such circumstances, these Terms and Conditions *shall be varied accordingly*, and the buyer shall be deemed to have read and accepted the terms and conditions imposed by the said third party.

60. On a plain reading, clause L.4's effect would be simply to *vary* (not to supplant or replace) the terms and conditions governing the OW-Canpotex contract so as to align them with the terms and conditions governing the OW-MP contract. It would not render Canpotex liable to MP—a non-party to the OW-Canpotex contract—for the price charged by OW. Had the parties wished to do something as dramatic as Canpotex and MP contend—*i.e.*, to make Canpotex liable to MP and to erase OW's rights against Canpotex—they could have and would have used express language to that effect.

61. This interpretation of clause L.4(a) is consistent with its context. Sub-clauses L.4(b) and (c) provide examples of how clause L4 is intended to operate. It operates by varying the rights and obligations *as between Canpotex and OW*:

> (b) Without prejudice or limitation to the generality of the foregoing, in the event that the third party terms include:
>
> (i) A shorter time limit for the doing of any act, or the making of any claim, then such shorter

time limit *shall be incorporated* into these terms and conditions.

(ii) Any additional exclusion of liability clause, then same *shall be incorporated mutatis mutandis* into these.

(ii) A different law and/or forum selection for disputes to be determined, then such law selection and/or forum *shall be incorporated* into these terms and conditions.

(c) It is acknowledged and agreed that *the buyer shall not have any rights against the Seller which are greater or more extensive than the rights of the supplier against the aforesaid Third Party.*

62. As these provisions indicate, when clause L4 is engaged, the terms of OW's supplier vary the rights and obligations existing as between OW and its buyer. In *MV PIGI,* for example, had clause L.4 been engaged, the jurisdiction clause in the OW Terms would have been varied to match the choice of jurisdiction in the supplier's terms. The OW Terms are not supplanted or replaced in their entirety, but rather remain in force as amended, where necessary, so that they align with the terms of OW's supplier.

63. The broader contractual context also supports ING's interpretation of clause L.4. Clause 1.1 and 1.2, for example, provide that Canpotex shall pay for the bunkers as directed by OW within the period agreed in writing. Further, payment "shall be made in full, without any set-off, counterclaim, deduction, and/or discount free of bank charges to the bank account indicated by the Seller on the respective invoice(s)". There is no indication in the payment or other provisions of the OW Terms that the parties contemplated a situation in which the OW Terms would be replaced in their entirety by the supplier's terms or that Canpotex's obligation to pay OW would be replaced by an obligation to pay the supplier instead.

64. Indeed, that result would be astonishing. It would be contrary to commercial reasonableness and common sense. If the OW Terms were replaced with the MP Terms, OW would lose its right to be paid for its services in arranging the bunker delivery. It is inconceivable that a reasonable person, knowing the surrounding circumstances and wording of clause L.4, would have understood the provision as operating to erase OW's rights against Canpotex.

Nor would a reasonable person conclude that clause L.4 makes Canpotex liable to a third party, MP, with whom it had no direct dealings—and on terms that Canpotex had never even seen before December 2014.

65. At times, MP and Canpotex suggest that clause L4 might make Canpotex liable to MP only for the amount MP charged OW, not the amount OW charged Canpotex. This would leave Canpotex liable to OW for OW's so-called "mark up". There is no legal or logical basis for this suggestion. There is no principled explanation as to how clause L4, which binds only OW and Canpotex, could give a non-party, MP, a right to sue Canpotex for an amount unknown to Canpotex at the time of contracting. There is also no principled explanation as to how Canpotex's paying that amount to MP could reduce the amount Canpotex owes to OW and explicitly specified in the actual OW-Canpotex contract.

66. ING's interpretation of clause L.4, by comparison, is consistent with the plain language of the provision, the broader context of the OW Terms, and the surrounding circumstances. Clause L.4 does not give MP a direct contractual claim to the Funds.

(ii) MP's definition of "customer" is irrelevant in interpreting clause LA.

67. Canpotex also relies on the broad definition of "customer" in the MP Terms to support its argument that MP has a direct contractual claim against Canpotex under the MP Terms.

68. Regardless of how broadly the term "customer" may be defined in the MP Terms, only the actual parties to the agreement can have rights or obligations under it. To be a party to a contract, one must, when the contract is formed, have *consensus ad idem* with each of the other parties to the contract. When the OW-MP contract was formed, Canpotex had no knowledge of its terms and therefore could not have formed the intention to join the contract with OW and MP. The definition of "customer" does not alter the normal rules of privity.

69. Further, the MP Terms cannot be used to expand the effect of clause L.4 of the OW Terms. Canpotex did not see the MP Terms until it received a copy from MP's counsel in December 2014. Accordingly, it does not form part of the surrounding circumstances that can be used to interpret the Canpotex-OW contract. It is irrelevant in interpreting the OW Terms.

(iii) The exceptions to privity are inapplicable and do not assist Canpotex or MP

70. Canpotex and MP also rely on a number of exceptions to privity to argue that, as a result of clause L.4, Canpotex is bound by the MP-OW contract and MP has a direct claim against Canpotex which erases OW's rights. These exceptions to privity, however, are limited and specific in nature. They do not help Canpotex or MP to achieve this extreme result.

71. In particular, these exceptions merely permit a non-party to rely on a benefit (such as a limitation of liability) set out in a contract. The exceptions do not *create* contractual rights between a party and a non-party.

72. In *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, for example, the Supreme Court of Canada held that a non-party could rely on a benefit in a contract if the parties intended to confer the benefit on the non-party and the non-party was performing the activities contemplated in the contract. Similarly, courts have permitted non-parties to benefit from a defence found in *Himalaya*, carriage, or bailment provisions if the parties intend to confer such a benefit on the non-parties.

73. In all such cases, the exception to privity permits the non-party to rely on a contractual term only in its *defence* of an action. The exceptions do not create contractual rights or permit a non-party to sue a party under the contract.

74. Clause L4 is of a very different nature than these types of provisions. It simply operates to vary the rights and obligations as between Canpotex and OW. The exceptions to privity do not give MP a contractual right to sue Canpotex.

(iv) OW was not Canpotex's agent

75. MP has also alleged that OW was Canpotex's agent when entering into the MP-OW contract. An agency relationship exists only if the agent has the power to change the principal's legal situation and the principal is subjected to the liability of such a change. In the absence of such a power—liability relationship, there can be no agency.

76. In this case, there is no evidence that Canpotex ever intended for OW to act as its agent or agreed to such a relationship. Nothing in the terms of the contract between Canpotex and OW creates an agency relationship. The OW Confirmations and the OW Terms similarly do not contain any references to OW acting

> as Canpotex's agent or possessing the power to bind Canpotex to any agreement. Instead, the OW Confirmations make it clear that OW was acting on its own account, not on behalf of anyone else.
>
> 77. There is no other evidence in the record that demonstrates or even suggests that Canpotex agreed to be bound by OW's actions on its behalf. Given that OW did not have the power to enter into contracts for Canpotex, there is no agency relationship.
>
> [Emphasis in original, references omitted.]

(2) Section 139 Claim

[65] ING takes the position that the FCA's binding determination of the scope of these proceedings explicitly precludes me from considering Canpotex's s 139 claim.

VIII. ANALYSIS

A. *Scope*

[66] As I mentioned above (at para 37), it is my view that the scope of this reconsideration motion has been strictly prescribed by the FCA in its reasons and judgment of March 10, 2017.

[67] My First Decision was set aside and the matter was returned to me "for reconsideration in light of these reasons." As I read the FCA's reasons, I am specifically directed to consider the meaning and the implications of "clause L.4 of the OW Group's General Terms and Conditions and its effect on the relationship between OW UK, Canpotex and Petrobulk." I have quoted the full context given by the FCA for this reconsideration above at para 29.

[68] MP argues that I can only consider the implications of clause L.4 of the OW UK's GTCs and its effect upon the relationship between MP, Canpotex and OW UK. In my view, this accords with the FCA Decision. However, both Canpotex and ING urge me to go further.

[69] Canpotex says that, once I decide the clause L.4 issue I can, and should, go on to consider the s 139 maritime lien issue. In my view, I cannot do this because the FCA makes it clear that that issue cannot be part of the interpleader process that has brought the parties before the Court, and the Vessels are not before me.

[70] ING says that, in addition to the L.4 issue, I can, and should, also revisit my earlier contractual findings that do not depend upon the interpretation of the L.4 clause. For example, ING wants me to abandon my earlier findings on the contractual relationship between the parties. It is part of ING's case that, even if I decide the L.4 issue in favour of MP, MP can have no claim to the Funds held in trust because of privity of contract. In my view, privity of contract is totally independent of the interpretation of clause L.4, and so is beyond the scope granted to me by the FCA.

[71] Indeed, had the FCA felt that privity of contract and the other contractual issues raised by ING, in addition to the interpretation of clause L.4, were a problem in this case, there would have been no reason to return this matter to me for reconsideration. The FCA specifically identified the parol evidence problems in the record before me and reversed my First Decision on which terms and conditions applied between the parties. If there were privity problems, they would have been immediately apparent to the FCA who would have dealt with the matter accordingly.

ING's argument on privity issues is that the lack of privity between MP and Canpotex, on its own, prevents any claim that MP could make against the Funds held in trust. If this were so, then the FCA would have had no need to address the meaning of clause L.4, or to return the matter to me for reconsideration on the implications of clause L.4, because this would serve no useful purpose. Consequently, I cannot accept ING's position that I am now obliged to reconsider all of my findings on the contractual relationship between the parties. I believe I am only authorized to reconsider the implications of clause L.4 on the basis that it is a significant clause in a contractual arrangement that the FCA feels has been established on the evidence, and that MP cannot be excluded from a claim to the Funds held in trust on any other ground - such as privity of contract - that the FCA did not rely upon in its Decision.

B. *The Differences*

[72] In the FCA Decision, Justice Nadon made it clear that the word "insists" in clause L.4 of OW UK's GTCs marked an obvious difference from the clause L.4 in Schedule 3 of the Fixed Price Agreement that I relied upon. He also identified "two additional differences which may be material":

> [130] The first additional difference that I see between the two clauses is found in the sixth and seventh lines of the L.4 clause of the OW Group's General Terms and Conditions where the words "the Buyer is also bound by its own terms and conditions" appear. Those words do not appear in L.4 of Schedule 3. The other difference is found in L.4 of Schedule 3 where the words "on the Seller" appear at the end of the clause. These words are absent in L.4 of the OW Group's General Terms and Conditions. Whether these differences have an impact or not on the ultimate determination is not a question which I intend to answer as I am satisfied that the proper remedy in the circumstances of this case is to return the matter to the Judge for reconsideration.

[73] In addition to differences identified by Justice Nadon, I think I must also address any other differences that I can identify in order to provide what the FCA referred to as my "view on the meaning of clause L.4 of the OW Group's General Terms and Conditions and its effect on the relationship between OW UK, Canpotex and Petrobulk."

[74] The two clauses in question read as follows:

Fixed Price Agreement, Schedule 3	**OW Group's General Terms and Conditions**
L.4 a) These Terms and Conditions are subject to variation in circumstances where the physical supply of the fuel is being undertaken by a third party. In such circumstances, these terms and conditions shall be varied accordingly, and the Buyer shall be deemed to have read and accepted the terms and conditions imposed by the said third party on the Seller.	L.4 a) These Terms and Conditions are subject to variation in circumstances where the physical supply of the Bunkers is being undertaken by a third party which insists that the Buyer is also bound by its own terms and conditions. In such circumstances, these Terms and Conditions shall be varied accordingly, and the Buyer shall be deemed to have read and accepted the terms and conditions imposed by the said third party.

[75] It seems to me, then, that the differences between the two clauses are:

(a) "Fuel" becomes "Bunkers" in the GTC L.4;

(b) The concluding words "on the Seller" are removed for the GTC L.4;

(c) The words "which insists that the Buyer is also bound by its own terms and conditions" are added to GTC L.4.

[76] In their submissions before me, the parties are agreed that the change from "fuel" to "Bunkers" is not material to this dispute, and nor is the removal of the words "on the Seller." In the present case, OW UK is the Seller, Canpotex is the Buyer and the third party is MP.

[77] I see no disagreement between the parties regarding the general principles of contract construction that are applicable in this case. I have to determine the objective intention of the parties as expressed in the words of the contract. This requires me to read the contract as a whole and to give the words their ordinary grammatical meaning consistent with the surrounding circumstances known to the parties. See *Sattva* at paras 47, 57, as explained in the FCA Decision at paras 104-106.

[78] A further general principle is that meaning must be given to all of the words in a contract. See Geoff R. Hall, *Canadian Contractual Interpretation Law*, 3rd ed. (LexisNexis, 2016), p 16 and *Golden Capital Securities Ltd v Investment Industry Regulatory Organization of Canada*, 2010 BCCA 359 at paras 44 and 52.

[79] I agree with the parties that, applying these general principles to the contract and surrounding circumstances, the change from "fuel" to "Bunkers" is not material to the present dispute.

[80] However, it seems to me that the omission of the words "on the Seller" from GTC L.4 does have some significance. Clearly the words "imposed by the said third party" must encompass any party upon whom the third party (in this case, MP) imposes an obligation under its terms and conditions. This obviously includes the Seller (OW UK), but it also includes, in my view, Canpotex who agreed it would assume a contractual liability to MP. In my previous judgment, at paras 130-137, I set out my views as to how Canpotex had become bound, on a joint and several basis, with OW UK, to pay the full purchase price for the bunkers delivered to

the Vessels on MP's STCs. In my view, the omission of the words "on the Seller" in the GTC L.4 clause enforces my conclusion that the intent of both OW UK and Canpotex was to bind, not just the Seller, but also any other party who, in accordance with MP's STCs, had agreed with either OW UK or MP to be responsible for the payment of the purchase price for the bunkers, which includes Canpotex.

[81] I don't see that the FCA Decision questions my conclusions on this issue. Had the FCA thought that Canpotex had not agreed to assume obligations to MP, it would, in my view, have said so, because, as I said earlier, this would have eliminated any need to return the matter to me for my input on the meaning and effect of clause L.4 of the GTC.

[82] Be that as it may, the most important material difference, in my view, is the triggering provision in clause L.4(a) of OW UK's GTCs and the words "which insists that the Buyer is also bound by its own terms and conditions." So the question becomes, on the facts of this case, did MP "insist" that Canpotex had to be bound by MP's terms and conditions for the sale and delivery of the bunkers to the Vessels?

[83] I have set out ING's arguments on this point in full above at para 62 but I think they can be summarized as follows::

> **(i) Clause L.4 requires MP to take active steps to bind Canpotex**
>
> …
>
> 35. The ordinary meaning of clause L.4 of the OW Terms shows that it is not sufficient for OW's supplier to request that OW's buyer be bound by its terms, much less merely to impose its standard terms and conditions *on* OW. Instead, for OW's supplier

> to insist that OW's buyer is also bound by its terms, the supplier must impose a legal obligation on OW to vary the terms on which it deals with its buyer, or the supplier must otherwise take active steps to ensure OW achieves this result. Such an interpretation gives meaning to all of the words of clause L4, and particularly "insists".
>
> [Emphasis in original.]

[84] Canpotex, on the other hand, says that "insists" is analogous to "request" or "demand" and that, if there is any ambiguity in the word, it must be construed in the manner most favourable to Canpotex as the buyer in accordance with the doctrine of *contra proferentem*. In addition, Canpotex says the fact that OW UK, Canpotex and MP had conducted a significant chain of previous dealings on these terms (49 contracts) also makes it clear that MP insisted in dealing on its terms, and that both OW UK and Canpotex agreed they were bound by them.

[85] MP agrees and adopts Canpotex's submissions on this issue but also makes the additional points I have set out above at para 55.

[86] The parties also cite and discuss authorities that they feel support their respective positions and I shall deal with them in due course.

[87] In general terms, I cannot accept ING's assertion that clause L.4 of the GTC required MP to deal directly with Canpotex to "insist" that Canpotex accept MP's STCs. This is a branch of ING's privity argument that would have provided a complete answer to this contractual dispute and would have obviated the need for the FCA to return the matter for reconsideration by me. In addition, the deeming aspect of clause L.4—"the Buyer shall be deemed to have read and

accepted the terms and conditions imposed by the said third party"—would not be required if MP had to go directly to Canpotex to "insist" upon acceptance of MP's STCs. The consistent course of dealings (49 previous transactions) between Canpotex, OW UK and MP reveals that all three parties understood and accepted that the bunkers would be supplied by MP who could "insist" to OW UK that Canpotex be contractually bound. Canpotex did not require direct negotiations with MP and agreed to accept and assume responsibility for obligations that MP insisted to OW UK should be incorporated into the sale and purchase of these bunkers to these Vessels.

[88] Secondly, I think the facts of this case show that MP did, to quote ING, "[t]ake a persistent or peremptory stand in regard to a stipulation, claim, demand, proposal, etc" and insisted in the course of a significant chain of transactions that its terms and conditions would apply. Confirmations that MP provided to OW UK for delivery of the bunkers to the Vessels, made it clear that MP's STCs were "incorporated in full in this Confirmation" and that the "acceptance of the Confirmation and Marine Petrobulk's Standard Terms and Conditions shall be deemed final unless objected to by Buyer within three business days of receipt of this Confirmation." OW UK provided Confirmations and raised no objections to MP's STCs. Indeed, there is no evidence, in the significant chain of dealings between the parties, that either OW UK or Canpotex raised or conceived of any objection to MP's STCs. Even ING does not say that OW UK had any objection to MP's STCs, and Canpotex certainly raised no objection, either now or at the time the transactions at issue took place. Also, there is no indication here that, if an objection was raised, MP would have been willing to negotiate or deliver the bunkers on any terms other than its STCs. Clearly, in my view, OW UK thought MP's STCs were acceptable

and that there was no need to even alert Canpotex, who had agreed to be bound by them. To revert again to ING's argument, MP didn't just "wish" that OW UK's buyer be bound by MP's STCs; MP insisted that the supply should take place on its STCs.

[89] Thirdly, I think that the weight of what authority we have on point supports the positions of MP and Canpotex that insistence took place on these facts.

[90] ING urges me to adopt the reasoning in a 2017 English arbitration proceeding arising from the OW Trading bankruptcy called *OW Bunkers (UK) Limited, ING Bank NV v X (MV "PIGI")*, First Award, April 6, 2017 [*MV PIGI*].

[91] The buyer in *MV PIGI* tried to rely upon the third party supplier's jurisdiction clause and argued that the supplier had "insisted" by contracting with OW UK on its standard terms and conditions. The Arbitration Tribunal concluded that "insists" means that the supplier must do something "over and above standard practice or usual procedure or usual business dealings; something more than being passive" (para 62).

[92] ING concedes that *MV PIGI*, as an arbitration case, is not binding on me in any way, but suggests that the reasoning of the Tribunal in that case is persuasive and urges me to follow it in the present case. In my view, this is ING's strongest argument, so I think it helps to examine the Tribunal's reasons on this point in full:

> "Insists"
>
> 59. "insists" is a very unusual word to use in a commercial contract. As we have said, the Respondents contended that it made commercial sense for the third party suppliers' terms and

conditions to apply so that parties in the shoes of the OW entities could benefit from them, "*exposure wise*", when facing their counterparties. That seemed questionable to us because if OWB had wanted, they could have drafted a clause that was engaged by the trigger of a much lower threshold than was the case here. In fact, a clause like the Respondents' standard terms as we have discussed above, was engaged automatically. But the First Claimants did not have such a clause and instead, clause L4 required Sinopec to insist upon their terms binding the Buyers, before they could have the effect of varying OWB T&Cs. That suggested to us that the First Claimants did not intend any variation to be achieved easily.

60. We considered, but rejected, the Respondents' point that Sinopec's terms were "*imposed*" and that satisfied the requirement that they had been insisted upon. It was conceivable that one might describe terms as having been imposed, not because they were negotiated, discussed and forced through, but simply because they were part of standard trading documentation and the counterparty did not object to them or took them as read. Indeed, this was the Respondents' point - terms of BDNs were not negotiated; it was not expected that physical suppliers of bunkers would apply some kind of commercial pressure to have their terms and conditions applied.

61. We concluded that it did not help, nor was it particularly accurate, to interpret the word *insists* by substituting it with the word *imposes* because terms that are imposed could, one might say, be imposed passively. And that would not, in our view, be sufficient to satisfy the requirement that Sinopec *insists* on their terms binding the Respondents. We were guided in our approach by adopting the legal principle that words used in contracts should, so far as possible be given their ordinary and natural meaning. There was no reason why the word "*insists*" should be replaced by another word or given any special meaning, simply because it is unusual to find it in a commercial contract. In fact, it is because it is so unusual, that we speculated its use was deliberate and that if we down-played its meaning, we would not be giving effect to the parties' intentions.

62. "*Insists*" implied that Sinopec had to do something over and above standard practice or usual procedure or usual business dealings; something more than being passive. We were shown no evidence of this. The BDN was a printed, standard form. The printed term that incorporated Sinopec T&Cs was part of the standard documentation. Even if it was capable of binding the Respondents, a printed term on a standard trading document, fell

> far short of the requirement that Sinopec *insists* that the Respondents be bound by Sinopec T&Cs. There was nothing to show that Sinopec had done something extra, in addition to their usual business practice, to seek to bind the Respondents either directly or indirectly.
>
> 63. For all these reasons, we concluded that clause L.4 was not engaged.
>
> [Emphasis in original.]

[93] The clause that the Tribunal is addressing in *MV PIGI* is quoted in para 45 of the decision and reads as follows:

> 45. Whereas, OWB T&Cs at clause L.4 provided that:
>
> > "These Terms and Conditions are subject to variation in circumstances where the physical supply of the Bunkers is being undertaken by a third party which **insists** that the **Buyer** is also bound by its own terms and conditions".
>
> [Emphasis in original.]

[94] So the first thing to note is that the Tribunal does not address the full L.4 clause that I am dealing with in the present case which reads as follows:

> **OW Group's General Terms and Conditions**
>
> **L.4 a)** These Terms and Conditions are subject to variation in circumstances where the physical supply of the Bunkers is being undertaken by a third party which insists that the Buyer is also bound by its own terms and conditions. In such circumstances, these Terms and Conditions shall be varied accordingly, and the Buyer shall be deemed to have read and accepted the terms and conditions imposed by the said third party.

[95] In my view, para 62 of *MV PIGI* is the most pertinent part of the Tribunal's decision for present purposes. It is noticeable, I think, that although the Tribunal says that Sinopec had to do

"something extra," meaning "something over and above standard practice or usual procedure or unusual business dealings; something more than being passive," it never gives an example of what this might be. The Tribunal tells us what will not suffice, but not what will.

[96] In my view, the Tribunal is wrong to insist that "insists'" must mean something over and above "usual business dealings." Insistence can be a regular and normal part of business dealings, and the basic principle that words must be given their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties (see *Sattva*, above), means that we have to address what insistence means in the context of usual business dealings in the present case.

[97] The Tribunal's treatment and comparison of the word "imposed" is also not helpful in the present case because the clause L.4 before me uses both words interchangeably. ING insists the "meaning must be given to all of the words in a contract" but says that "insist" does not mean "impose."

[98] In my view, "insist" and "impose" in clause L.4 in this case are used interchangeably. There is nothing in the syntax or the context to suggest that the drafter of this clause meant anything different by these two words. This means that "insists" in the present context, could mean no more than "imposed," in which case *MV PIGI* does not help ING, or that "imposed" was meant as a synonym for "insists." This ambiguity, in my view, brings into play the *contra proferentem* principle so that Canpotex and MP are entitled to rely upon the interpretation that, in this context, "insists" means no more than "imposed" and, as ING relied upon *MV PIGI*, this

would mean ING has to accept that "one might describe terms as having been imposed, not because they were negotiated, discussed and forced through, but simply because they were part of standard trading documentation and the counterparty did not object to them or took them as read" (para 60).

[99] Indeed, these words are the closest we get in *MV PIGI* to an understanding of what the Tribunal means by its definition of "insists." The Tribunal appears to mean a clause in a contract that is "negotiated, discussed and forced through…."

[100] The use of these words shows that the Tribunal has a particular model for contractual negotiations in mind, and that only if this model is adopted can there be insistence.

[101] It also seems to me that, implicit in the Tribunal's reasoning is that insistence can only occur where there is resistance to stated terms that requires additional force, so that there can be no insistence without resistance. However, in my view, it is possible and not unusual that a contracting party will find acceptable a term insisted upon without the need for resistance and further negotiation. There is nothing in the present context to suggest that MP would have supplied the bunkers to the Vessels on any terms other than its own STCs, or that those STCs were in any way negotiable. Relying upon *MV PIGI*, ING is suggesting that, because there was no resistance in this case, there was no insistence. I don't think that argument is tenable. A contractual term that is insisted upon can be accepted at any time. It does not require resistance.

[102] There are other reasons why I cannot accept ING's contention that *MV PIGI* should be my guide in assessing the present case. Some of these reasons are listed by Canpotex in its Reply Memorandum of Fact and Law:

> (a) Arbitration awards have no precedential value
>
> - *Seidel v. Telus Communications Inc.*, 2011 SCC 15 at para.38;
> - *Murphy v. Amway Canada Corporation*, 2013 FCA 38 at para.56;
> - *Brewer v. Insurance Corp. of British Columbia*, 1991 CarswellBC 213;
> - *Driscoll v. Hautz*, 2017 ABQB 168 at para.22 where the trial judge states "By contrast to a judgment of a court, a decision by an arbitrator has no precedential value and is unlikely to be publicly accessible";
>
> (b) In fact, the award would not have precedential effect even in another LMAA arbitration on identical facts. The LMAA website regarding Frequently Asked Questions states, "Do arbitrators follow other awards? Arbitrators will sometimes have other awards referred to them, but such awards are not precedents and no tribunal is bound to follow the views of another tribunal, even in the rare example of an identical case";
>
> (c) The Respondents in the *MV PIGI*, although it is not clear in the redacted version, were not vessel interests who actually had used the fuel, they were intermediate traders who resold the fuel to the vessel interests (see paras.16, 35, 36, 40, 44 and 58). The arbitrators noted at paragraph 35 that the Respondents "did not fall within the definition of 'Buyers' in the Sinopec T&Cs and nor were they end-users." Here Canpotex clearly falls within the definition of "Customer".;
>
> (d) Contrary to the statement in paragraph 39 of the ING Submissions, the STCs of the physical supplier in the *MV PIGI* award were not at all similar to the STCs of MP. Note the following:
>
> (i) Buyers were defined in the Sinopec STCs to be the "party contracting to purchase, take delivery and pay for the Marine Fuels." (para.31), which in that case was O.W. China which was separated by several intermediate parties from the vessel interests. in the MP STCs, Customers are

> much more broadly defined as including: the vessel, her master, owners, operators, charterers, any party benefiting from consuming the marine fuel;
>
> (ii) In addition, the MP STCs contain a specific warranty of authority in which OW UK warrants that they have authority to bind the vessel interests. No such terms appear in the Sinopec STCs;
>
> (iii) The MP STCs include the following: "Customer warrants that he has given or will give notice of the provision of this clause to the owner." No such terms appear in the Sinopec STCs;
>
> (iv) In fact, in none of the reported authorities has any Court addressed a case in which the supplier has required OW to warrant that they have authority on behalf of the owner or charterer of the vessel to enter into the supplier's agreement, and that OW also warrants that it has given notice to the owner of the supplier's agreement.
>
> [Emphasis in original.]

[103] At the oral hearing of this matter, ING did not seek to answer these issues other than to say that it agreed that *MV PIGI* had no precedential or binding effect on the present situation, and so I have no reason to question the distinctions made by Canpotex. Instead ING took the position that *MV PIGI* provided a discussion of the meaning of the word "insist" that I should find persuasive for the case before me. For the reasons set out herein, I cannot accept that position.

[104] ING also refers me to *ING Bank NV v M/V Temara et al*, 16-CV-95 (SDNY 20) at pp 18-19 [*Temara*] and the New York District Court's indication that "for L.4 to apply the supplier must have specifically referenced and obligated the Buyer." I don't see that this case throws any light on the meaning of "insists" in the present case. It is more related to ING's privity arguments

and Judge Forrest in *Temara* makes points that, in my view, are not applicable to the facts before me:

> The language in section L.4 must be read against this overall structure and specific contrary provisions within the OW Bunker Terms and Conditions. L.4 creates an exception "Where the physical supply of the fuel is being undertaken by a third party" and where there are "terms and conditions imposed by the third party on the Seller." The overall structure of the Terms and Conditions, and in particular the requirement in section A. that other parties' trading conditions apply only when "expressly accepted in writing," indicate that the condition that terms be "imposed" requires more than those terms simply being referenced as applicable. Likewise, the requirement that the third party "insist [*sic*] that the Buyer is also bound by its own terms and conditions" indicates that, for L4 to apply the supplier must have specifically referenced and obligated the Buyer, Copenship. As discussed above, CESPA's contracts and terms do not reference Copenship or any entity in its position. Finally, section L.4 at most reaches conditions that result from an arrangement between the Seller, OW Bunker, and a third party. As discussed above, there is no arrangement directly between OW Bunker and CEPSA; all of CEPSA's arrangements were with OW USA.

[105] In the present situation, I think that the model for contractual negotiations posited in *MV PIGI* bears no relationship to the circumstances in which the bunker contracts at issue here were entered into and fulfilled.

[106] The inclusion of clause L.4 in the contract came about as a result of the Confirmations that took place between MP and OW UK. For convenience, I will quote the relevant wording again:

> This sale is subject to Marine Petrobulk's Standard Terms and Conditions, as revised May 2013, which is hereby incorporated in full in this Confirmation. The acceptance of this Confirmation and Marine Petrobulk's Standard Terms and Conditions shall be deemed final unless objected to by Buyer within three business days of receipt of this Confirmation…

[107] We know from the evidence that neither OW UK or Canpotex took any objection to the inclusion of MP's STCs for supply and delivery of the bunkers. In fact, the extensive chain of dealings under the same terms (49 contracts) is powerful evidence that all three parties were entirely satisfied with MP's STCs and were willing to carry on business under those provisions. And there is no evidence that they would not have continued to do so had the OW Trading bankruptcy not intervened.

[108] The only reason these contractual terms are now being questioned before me is that ING wishes to set the clear intention of the contracting parties aside and impose other terms that were not agreed to over a chain of extensive dealings, so that ING can claim the full contractual amount rather than the mark-up that OW UK was entitled to.

[109] In other words, ING is saying that what these parties meant by "insist" in the present context, objectively speaking, was not what they agreed to or what their repeated actions demonstrate were entirely acceptable for the way that all three of them wanted to carry on business at the time. ING is saying that contractual intent—objectively ascertained—cannot be used to interpret the contract in this case. ING's purpose is to persuade the Court to by-pass that contractual intent and award ING a windfall based upon an interpretation of the word "insists" that does not accord with the context of this case.

[110] All of which is to say that, in my view, the degree and form of insistence will necessarily vary in each case. Where no resistance is encountered a supplier cannot be required to insist that negotiations take place and then "force through" contractual terms that the other party already

accepts. And, as in the present case, where a party fails to object, it cannot then say that it is not bound by a contractual term because the supplier did not negotiate and apply force to the degree which the Tribunal says was necessary in *MV PIGI*. The whole context must be examined to ascertain what kind and degree of insistence was required in the circumstances of each case.

[111] The facts of the present case are also clear that OW UK and/or Canpotex never responded within the 3-day deeming provision of the Confirmations and, this being the case, MP could not have entered into discussions and "force through" the terms it insisted would be part of the contract. It seems to me that no forcing, in the sense envisaged by the Tribunal in *MV PIGI*, was either possible or required in the circumstances of this case.

[112] In my view, a much more helpful and apposite discussion of the meaning of "insist" is provided in the case of *NCL* where Justice Haight, a Senior District Judge of the United States District Court (Connecticut) had to determine whether the bunker supplier in that case had insisted that their usual terms and conditions should apply to a bunker stem in a situation where there was a chain of suppliers. At issue was whether a London arbitration clause in OW's terms applied or whether the jurisdiction clause in the supplier's terms (which named Piraeus Courts) governed the situation.

[113] Justice Haight had to deal with this issue under applicable English law and was presented with opinions on point by two highly regarded English barristers. Needless to say, the barristers' opinions differed significantly. Because of several similarities to the case before me, I think it is appropriate to quote Justice Haight extensively on point:

It is in these circumstances that the first question of interpretation of the O.W. USA –NCL contract arises. Do the relevant events at Pireaus establish a situation "where the physical supply of the Bunkers is being undertaken by a third party which insists that the Buyer is also bound by its own terms and conditions," as that language is used in Article L.4 of the contract? EKO is obviously a third party undertaking to supply the bunkers. No one contends otherwise. The decisive question is whether EKO manifested the requisite insistence upon its terms and conditions for the value of the bunkers EKO supplied to the NORWEGIAN SPIRIT in such a way as to vary, vacate and supersede the London arbitration clause in the contract between O.W. USA and NCL. Mr. Karia and Mr. Mander both undertake to apply English law in answering that question. Mr. Karia opines the answer is "Yes." Mr. Mander opines it is "No." Their declarations give voice to the argument in forceful and lucid terms.

…

The verb's seeming change from an "unusual word" to an "ordinary word" may pique the interest of etymologists, but for my part I think the meaning to be ascribed to "insist" is clear enough. My attention is not called to an English court decision defining the word. I may be excused, in a case governed by English law, for turning to a favorite source of enlightenment: the Oxford English Dictionary ("OED"). The OED's fourth definition of "insist" is: "To make a demand with persistent urgency; to take a persistent or peremptory stand in regard to a stipulation, claim, demand, proposal, etc." Insist, Oxford English Dictionary (compact ed., 23d prtg, 1984). The OED records Dr. Johnson's use of the word in 1778: "No good and worthy man will insist upon another man's drinking wine." Johnson lacked the benefit of a law degree—he left that to Boswell—but his authoritative use of the English language is legendary. These passages in the OED are consistent with Mr. Karia's understanding of "insist" to mean "request" or "demand."

…

Mr. Mander's declarations seem to me to argue for meanings or effects contrary to or inconsistent with the plain meaning of the words used in Article L.4 of the OWB T&Cs. *Au fond* the case for O.W. USA is that when the provisions of L4 are considered within the context of the contract as a whole, the interpretation for which Mr. Karia contends is so bad that it cannot be right — a "legal lottery," in Mr. Mander's vivid phrase — and could not have been intended by the parties at the time of

contracting. This argument is forcefully made, but I think it runs counter to a recent decision of the United Kingdom Supreme Court, which both barristers cite as declarative of current English law.

…

I think that to the extent the parties' contractual intent can be divined regarding the payment of a bunkers invoice in the event of O.W. Bunker's sudden insolvency, the answer is found in the provision of OWB T&C clause L.4 that a physical supplier's forum and law selections are paramount if the supplier "insists that the Buyer [here, NCL] is also, bound by its own terms and conditions." That provision is not limited in any way; the, language is broad enough to cover a situation where a supplier is not paid because an O.W. entity fails; and presumably the O.W. Bunker Group (which drafted the OWB T&Cs) regarded it as in O.W.'s best interests to have uniform treatment for physical suppliers of bunkers who insist on their own terms and conditions.

The declarations of Messrs. Karia and Mander cite and attach a number of English appellate court decisions. I have read them. They declare general principles, whose application is fact-specific. The Supreme Court's decision in *Arnold v. Britton* is for me the most instructive, and I have quoted Lord Neuberger's judgment at some length. Given the rationale in *Arnold* and the wording of the underlying contract between O.W. USA and NCL, I conclude that Mr. Karia has the better of it in opining under English law about the meaning of the contract, in particular Article L.4 thereof. That is to say: the natural language of Article L.4, if applicable to the case, has the effect of varying, vacating, and superseding the London arbitration clause in the underlying contract. O.W. USA's efforts to avoid that effect of Article L.4 by appealing to other provisions in the contract, perceived commercial common sense, or other like factors is impermissible under English law, as articulated in a case like *Arnold*.

If I am wrong in that conclusion, we are left with a situation where Mr. Karia and Mr. Mander, each an outstanding English lawyer, express different and irreconcilable opinions about the meaning and effect of clause L4 in this contract. I accept Mr. Karia's view that if those opinions were addressed to an English court, "it is possible that an English court would conclude that there was genuine ambiguity as to the meaning of clause L.4." September 14 declaration at paragraph 16. Indeed, I think it not only possible but a near certainty that an English judge would reach that conclusion; and as noted *supra*, Messrs. Mander

> and Karia agree that the *contra proferentem* rule is used "where there is genuine ambiguity in the meaning of a contractual provision." Consequently, and as an alternative basis for this Ruling, I apply the *contra proferentem* principle, accept NCL's interpretation of the contract, and reject that of O.W. USA.
>
> …
>
> The evidence supports the fair inference, which I draw on the present motion, that EKO's delivery of bunkers to the NORWEGIAN SPIRIT, in performance of its contract with O.W. Malta in this case, was preceded by bunker deliveries by EKO to different vessels under other contracts between EKG and O.W. Malta, in each of which EKO insisted upon the terms and conditions which Mr. Voskos identifies as part of EKO's standard business practice. The likely ubiquity of EKO's terms and conditions is suggested by their form, as illustrated by an exhibit in evidence [Doc. 2-6]. These T&Cs are expressed in that Legal English which is the *lingua franca* of contemporary commerce.
>
> [Emphasis in original.]

[114] As I read *NCL*, Justice Haight concludes that, in the context he was dealing with, the word "insists" is analogous to "request" or "demand," and that if there is any ambiguity the *contra proferentem* rule will apply in favour of the buyer.

[115] Justice Haight also relied upon prior dealings between the parties to conclude that "Given this chain of contracts, O.W. USA as Buyer from O.W. Malta, and NCL as Buyer from O.W. USA, impliedly knew of and agreed to the EKO terms and conditions. That is sufficient to satisfy the preconditions in the contract in suit to the application of Article L4." In the case before me, the prior dealings between the parties on the same contractual terms were even more extensive (49 contracts) than in *NCL*.

[116] In so far as privity concerns may remain in the present case, I note that Justice Haight is clearly saying that "NCL as Buyer from O.W. USA impliedly knew of and agreed to the EKO terms and conditions." In the present case, I have already found that, in the negotiated GTCs, Canpotex and OW UK agreed to be bound by the terms of the physical supplier (MP). In the OW UK/MP contract, it was also agreed that Canpotex as charterer of the vessels would be bound by MP's terms and conditions. Hence, it is my view that there was a complete *consensus ad idem* on this issue between the three parties involved and I do not see the FCA questioning my conclusions on this point or requiring me to provide further input.

[117] In a general sense, then, I agree with Justice Haight. In the present context, "insist" can mean no more than "require" or "demand" and that if there is any ambiguity in the meaning of "insist" in the context of clause L.4 the *contra proferentem* rule must be applied against OW UK and in favour of MP. MP required and demanded that OW UK and Canpotex contract on its STCs and this requirement or demand met with no resistance and was accepted. MP was not required to go further and insist upon further negotiation or apply further force to OW UK and/or Canpotex.

[118] In summary, then, it is my view that the "ordinary and grammatical meaning" of "insist" in the present context is the meaning found in *The Oxford Dictionary of English*, Third Edition. "Insist" as a verb means to "demand something forcefully, not accepting refusal."

[119] In the context of a commercial contract, I take these words to mean that insistence occurs when one of the contracting parties says that the contemplated transaction has to, or must, take

place on certain terms and conditions, so that if those terms and conditions are not accepted there is no deal.

[120] In the present case, MP made it clear to OW UK that the bunkers had to be sold and delivered to the Vessels on MP's STCs, and that this was imperative and final "unless objected to by the Buyer within three business days of receipt of this Confirmation."

[121] There is no evidence to suggest that MP would have sold and delivered the bunkers on any other terms than its own STCs. Hence, I think it is clear that, if objection had been made, there was no deal. And the significant and continuous course of dealings in this case clearly establishes that there was no objection to the bunkers being sold and delivered on MP's STCs.

[122] The fact that these terms and conditions are part of MP's STCs does not mean they were not forcefully demanded with no room for refusal. Habitual and continuing insistence is still insistence.

[123] In my view, the meaning of "insist" will always be defined and/or modified by reference to the context in which it is used and the way that parties do business. In the present case, because OW UK and Canpotex accepted MP's STCs, insistence did not require MP to negotiate further and force its STCs upon OW UK and/or Canpotex. This is simply another way of saying that the meaning of "insist" will always be a matter of degree in each case, and the degree required will always be in proportion to the degree of resistance encountered from the other side. In the present case, MP insisted, required or demanded that its terms would apply to the bunker

deliveries. The wording in the Confirmations, when viewed objectively, conveys a clear insistence that MP's STCs will apply to the sale of the bunkers. The words used were that:

> The acceptance of this Confirmation and Marine Petrobulk's Standard Terms and Conditions *shall* be deemed final unless objected to by Buyer within three business days of receipt of this Confirmation.
>
> [Emphasis added.]

[124] There is clear insistence here. The fact that an objection could be raised does not make this into an offer to negotiate, and both OW UK and Canpotex by their action or inaction showed that they fully understood and accepted this. No objection was raised in the present case. The insistence remained in place and OW UK and Canpotex agreed to contract on MP's terms. There was nothing more that MP needed to do, or could have done, in the circumstances because there was no resistance to MP's demand, request or insistence that its STCs were "final."

[125] As a result of these findings, my judgment regarding the payment out of the Funds and the extinguishment of liabilities remains much the same as in my First Decision in so far as the contractual issues are concerned.

IX. COSTS

[126] As parties adverse in interest, Canpotex and MP should both have their costs against ING. However, as the scope and quantum of costs may be complex in this case, if the parties cannot agree I will deal with scope and quantum by way of separate order following written submissions by the parties and, if necessary, further oral arguments on the issue of costs.

JUDGMENT IN T-109-15

THIS COURT'S JUDGMENT is that

1. Canpotex shall pay to the Defendant, Marine Petrobulk Ltd, the sum of USD$648,917.40 together with admiralty interest thereon;
2. The Defendant, Marine Petrobulk Ltd, shall be paid the above amount from the Funds presently held in trust pursuant to the Order of March 27, 2015;
3. Canpotex shall pay to the Defendants, ING Bank N.V., Ian David Green, Anthony Victor Lomas and Paul David Copley in their Capacities as Receivers of Certain Assets of the Defendants O.W. Supply & Trading A/S, and O.W. Bunkers (U.K.) Limited, and others, an amount equal to the mark-up payable to O.W. Bunkers (U.K.) Limited for the supply by Marine Petrobulk Ltd of bunkers to the Vessels, together with the maritime interest payable thereon. The balance of the Funds held in trust shall be applied against this amount after Marine Petrobulk Ltd has been paid in full in accordance with paragraphs 1. and 2. above;
4. Upon payment in accordance with paragraphs 1., 2. and 3. above, any and all liability of the Plaintiffs to the Defendants in respect of the marine bunkers supplied to the Vessels on or about October 27, 2014 in Vancouver, British Columbia is extinguished;
5. The Defendants, ING Bank N.V., Ian David Green, Anthony Victor Lomas and Paul David Copley in their Capacities as Receivers of Certain Assets of the Defendants O.W. Supply & Trading A/S, and O.W. Bunkers (U.K.) Limited, and others shall pay the costs of the Plaintiffs and the Defendant, Marine Petrobulk Ltd, for these proceedings. If the parties cannot agree on the scope and quantum of costs then the

Court will deal with costs by separate order following written submissions by the parties and, if necessary, further oral arguments; and,

6. Any balance remaining of the Funds held in trust after payments are made as set out above shall be returned to Canpotex.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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DATED:	SEPTEMBER 28, 2018

APPEARANCES:

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