

Federal Court



Cour fédérale

Date: 20230721

**Dockets: T-1860-21
T-1837-22**

Citation: 2023 FC 1004

Ottawa, Ontario, July 21, 2023

PRESENT: The Honourable Madam Justice Heneghan

Docket: T-1860-21

BETWEEN:

JEFF SCHNARR

Plaintiff

and

**LARRY MARKLE AND ATHELIE
MARKLE ELRI OOSTHUIZEN AND
CALEB LAMBERT**

Defendants

AND BETWEEN:

**LARRY MARKLE AND ATHELIE MARKLE
ELRI OOSTHUIZEN AND CALEB LAMBERT**

Plaintiffs by counterclaim

and

JEFF SCHNARR

Defendant to the counterclaim

Docket: T-1837-22

BETWEEN:

JEFF SCHNARR

Plaintiff

and

LARRY MARKLE AND ATHELIE MARKLE

Defendants

REASONS AND ORDER

I. **INTRODUCTION**

[1] By a Statement of Claim issued on December 6, 2021, Mr. Jeff Schnarr (the “Plaintiff”) commenced this action in cause number T-1860-21, seeking the establishment of a limitation fund, pursuant to the *Marine Liability Act*, S.C. 2001, c. 6 (the “MLA” or the “Act”), and related relief, in respect of a collision between two pleasure crafts, that occurred at Colpoy’s Bay on August 31, 2019 (the “Collision”). In this Statement of Claim, the Plaintiff claims the following relief:

- a) a declaration, without admission of liability, that he is entitled to limit his liability in relation to the accident of August 31, 2019 (referred to herein) to \$1,000,000.00 plus interest to the date of the constitution of a limitation fund

pursuant to ss. 29(a), 29.1 and 32 of the *Marine Liability Act*, S.C. 2001, c. 6 ("*MLA*");

- b) an order constituting a limitation fund pursuant to s.33(1)(a) of the *MLA* (the "Limitation Fund");
- c) an order approving the filing by the Plaintiffs of a guarantee in the form of a letter of undertaking from an insurer, in the amount of the Limitation Fund pursuant to s.33(1)(a) and 33(4)(b) of the *MLA*;
- d) an order enjoining any person from commencing or continuing proceedings in any court, tribunal or authority other than this Court in relation to the Incident, pursuant to s. 33(1)(c) of the *MLA*;
- e) an order postponing the distribution of the proceeds of the Limitation Fund pending a determination by this Court of the apportionment of fault as between the Plaintiff and Larry Markle and Athelie Markle, Elri Oosthuizen and Caleb Lambert, pursuant to s. 33(2) of the *MLA*, and pending the determination of any other defences;
- f) costs from any party opposing the Plaintiffs' claim to limit liability;
- g) directions for ascertaining the persons who are entitled to claim against the Limitation Fund;
- h) directions for the exclusion of the claims of persons who fail to file their claims within the time fixed by the Court for filing such claims; and
- i) such further and other relief as this Court may deem appropriate.

[2] The Statement of Claim names Mr. Larry Markle, Ms. Athelie Markle, Mr. Elri Oosthuizen, and Mr. Caleb Lambert as Defendants (collectively the "Defendants").

[3] The Plaintiff is the owner of a 45-foot 1996 Searay 450 Sundance Caterpillar Vessel. He was also the operator of that craft on the date in question.

[4] The Plaintiff alleges that Mr. Markle owns the 17-foot Bayliner Capri Vessel, that Ms. Markle was the operator, and that Mr. Oosthuizen and Mr. Lambert were aboard as passengers.

[5] On August 22, 2022, a Statement of Defence was filed on behalf of the Defendants. In their Defence, they denied liability and in their Counterclaim, they claimed the following relief:

- (a) Dismissal of the Federal Court action and their costs;
- (b) If it is determined the Federal Court action should continue and the Ontario Superior Court action should be dismissed, their costs thrown away with respect to the Ontario Superior Court action;
- (c) The Defendant Larry Markle claims \$100,000.00 for pecuniary damages and \$100,000 for general damages and special damages inclusive of costs, plus prejudgment interest and post judgment interest;
- (d) The Defendant Athelie Markle claims \$100,000 for pecuniary damages and \$100,000 for general damages and special damages inclusive of costs, plus prejudgment and post judgment interest;
- (e) The Defendant Elri Oosthuizen claims pecuniary damages in the amount of \$200,000 and general and special damages net the amount of \$250,000 inclusive of costs, plus prejudgment and post judgment interest;
- (f) The Defendant Caleb Lambert claims pecuniary damages in the amount of \$50,000 inclusive of costs and general and special damages in the amount of \$100,000 inclusive of costs, plus prejudgment and post judgment interest.

[6] On August 25, 2022, the Markle Defendants filed a Statement of Defence and Counterclaim. In their Defence, they denied liability for the Collision. In their Counterclaim, they advanced a claim for the following relief:

- (a) Dismissal of the Federal Court action and their costs;

- (b) If it is determined the Federal Court action should continue and the Ontario Superior Court Small Claims action should be dismissed, their costs thrown away with respect to the Ontario Superior Court Small Claims action;
- (c) Damages in the amount of \$20,000.00 plus pre-judgment interest, post-judgment interest and costs; and
- (d) Such further and other relief as this Honourable Court deems just.

[7] On September 8, 2022, the Plaintiff filed a Defence to the Markle Counterclaim. He also filed a Defence to the Defendants' Counterclaim on September 8, 2022.

[8] On September 8, 2022, the Plaintiff commenced a second action against Mr. Markle and Ms. Markle, that is cause number T-1837-22, seeking an Order for contribution and indemnity for any damages awarded against him in respect of the action commenced in T-1860-21.

[9] The Markle Defendants filed a Defence to the Statement of Claim on October 17, 2022, denying that the collision on August 31, 2019, was caused and contributed to by any breach of duty or negligence on their part.

II. NOTICES OF MOTION

[10] On November 17, 2022, the Plaintiff filed a Notice of Motion seeking the following relief:

- a) giving advice and directions as to the manner in which the Plaintiff's action for a declaration that his liability in respect of the boat accident of August 31st, 2019, as described in the Statement of Claim in this action, (the "accident") is limited pursuant to the provisions of the

Marine Liability Act, S.C. 2001 c. 6 (the "MLA") to \$1,000,000 plus interest from August 31st, 2019 to the date on which the statutory limitation fund is constituted, and for the constitution of a limitation fund (the "Limitation Fund"), may be heard and determined;

- b) for service of notice of this action on potential claimants by advertising in such forms as this Court deems just and appropriate, if deemed required in the circumstances;
- c) authorizing the Plaintiff to file a guarantee bond (the "Guarantee Bond") in the form of a letter of undertaking from an insurer in an amount to be fixed by the Court, being \$1,000,000 plus interest from August 31, 2019 to the date of the institution of the Limitation Fund, and that the filing of the letter of undertaking shall constitute the Limitation Fund in respect of the Incident;
- d) setting the time limit within which the Defendants and other potential claimants must file their defences or claims against the Limitation Fund;
- e) directing that any claim against the Limitation Fund not filed within the time specified by the Court shall be barred from participation in the distribution of the Limitation fund;
- f) enjoining the Defendants, and any other person, from commencing or continuing proceedings before any court other than this Court against the Plaintiff in respect of the accident;
- g) declaring that the Limitation Fund be distributed to the extent necessary to satisfy the claims of the persons whom the Court decides are entitled to claim against the Limitation Fund, and rateably, if necessary; and
- h) for such further and other relief as counsel advise and this Court deems just and appropriate.

[11] The motion was supported by the affidavits of the Plaintiff, sworn on May 3, 2022, and of Mr. Shane Marston, sworn on November 15, 2022.

[12] In his affidavit, the Plaintiff described the operation of his vessel on the date of the Collision. He deposed that his vessel weighs less than 300 gross tons.

[13] In his affidavit, the Plaintiff also deposed that on June 30, 2021, he was served with a Statement of Claim filed in the Ontario Superior Court of Justice bearing file number CV-21-0000885-0000 by the Markle Defendants, as Plaintiffs, seeking recovery of damages for personal injuries, and that on August 25, 2021, he was served with a Claim filed in the Ontario Small Claims Court bearing file number SC21000001670000 seeking recovery of damage done to their pleasure craft (collectively the “Ontario proceedings”).

[14] Mr. Marston is a lawyer with the law firm Smockum Zarnett LLP, lawyers for the Plaintiff in this action. In his affidavit, he provided a timeline of the relevant filings and hearings in T-1860-21 and T-1837-22 (collectively the “Federal Court proceedings”). He also deposed that the Ontario proceedings are in the early stages of litigation and that no steps have been taken in the Ontario proceedings to stay and enjoin the Federal Court proceedings.

[15] In his affidavit, Mr. Marston also deposed that on May 5, 2022, the Defendants issued an amended Statement of Claim and Jury Notice in the Superior Court action. He deposed that the amended claim reduced each of the Defendants’ alleged damages to arrive at a collective total of \$1,000,000.00 inclusive of costs, excluding pre-judgment and post-judgment interest.

[16] On November 30, 2022, the Defendants filed a Notice of Motion seeking the following relief:

- a) An order to stay this action and related contribution action in T-1837-22
- b) For such other and further relief as counsel may advise and this Court deems just and appropriate.

[17] This Notice of Motion was supported by the affidavits of Mr. Markle and Mr. Bruce Kelly. The affidavit of Mr. Markle was sworn on November 24, 2022. The affidavit of Mr. Kelly was sworn on November 24, 2022.

[18] In his affidavit, Mr. Markle deposed that Mr. Schnarr was at fault in the Collision. He also deposed that Mr. Schnarr has not filed a defence in the Ontario proceedings and has been noted in default in those proceedings.

[19] Mr. Markle further deposed in his affidavit that the Defendants amended their Statement of Claim to “comply with the limitation on damages” as per the MLA and that they would prefer to proceed by a jury trial.

[20] Mr. Kelly is a lawyer with the law firm Morell Kelly Professional Corporation, lawyers for the Defendants. In his affidavit, he provided a timeline of the relevant filings and events in the Ontario Superior Court action, the Federal Court proceedings, and correspondence between the lawyers for the parties.

[21] Both the Plaintiff and the Defendants, in cause number T-1860-21, filed written Memoranda of Fact and Law in their respective motion records.

[22] On January 31, 2023, the Markle Defendants filed a responding motion record in T-1860-21.

[23] The Markle Defendants' motion record was supported by the affidavits of Ms. Janice Brooks, affirmed on January 26, 2023, and Ms. Heather Farr, affirmed on January 30, 2023.

[24] Ms. Brooks is the Vice President of Claims with Dumfries Mutual Insurance Company ("Dumfries"), the insurer for Mr. Markle and Ms. Markle. In her affidavit, she deposed that after the Collision, the Markles submitted a claim for the damage to their boat and contents, and that Dumfries paid approximately \$20,000.00 to the Markles in satisfaction of the claim.

[25] Ms. Brooks also deposed in her affidavit that Dumfries retained Strigberger Brown Armstrong LLP to pursue a subrogated claim in the Ontario Small Claims Court against Mr. Schnarr for the damages paid to the Markles.

[26] Ms. Brooks also deposed that Dumfries instructed Strigberger Brown Armstrong LLP to file defences in the Federal Court proceedings. She further deposed that if Dumfries becomes involved in the Superior Court action, it would prefer for the matter to be heard by a jury.

[27] Ms. Farr is a law clerk with the law firm Shillington McCall LLP, lawyers for the Markle Defendants. In her affidavit, she provided emails between the lawyers for the parties about proceeding with the Superior Court action, and deposed that the Markle Defendants are agreeable to have the Small Claims matter consolidated with the Superior Court action.

[28] The Markle Defendants filed written representations in their responding motion record.

III. DISCUSSION AND DISPOSITION

[29] Three issues arise from the Motions before the Court. The first is whether a limitation fund should be established; the second is whether the Federal Court proceedings should be dismissed or stayed; and the third is whether the proceedings in any other Court should be enjoined.

A. *Limitation Fund*

[30] The Defendants agree that a limitation fund be established, in light of the provisions of the MLA. Part 3 of the Act incorporates by reference the *Convention on Limitation of Liability for Maritime Claims, 1976* (the “Convention”).

[31] Section 25 of the MLA defines “ship” as follows:

Extended meaning of expressions

25 (1) For the purposes of this Part and Articles 1 to 15 of the Convention,

(a) ship means any vessel or craft designed, used or capable of being used solely or partly for navigation, without regard to method or lack of propulsion, and includes

(i) a ship in the process of construction from the time

Extension de sens

25 (1) Pour l’application de la présente partie et des articles 1 à 15 de la Convention :

a) navire s’entend d’un bâtiment ou d’une embarcation conçus, utilisés ou utilisables, exclusivement ou non, pour la navigation, indépendamment de leur mode de propulsion ou de l’absence de propulsion, à l’exclusion des aéroglisseurs et des plates-formes

that it is capable of floating, and

(ii) a ship that has been stranded, wrecked or sunk and any part of a ship that has broken up, but does not include an air cushion vehicle or a floating platform constructed for the purpose of exploring or exploiting the natural resources or the subsoil of the sea-bed;

(b) the definition shipowner in paragraph 2 of Article 1 of the Convention shall be read without reference to the word “seagoing” and as including any person who has an interest in or possession of a ship from and including its launching; and

(c) the expression “carriage by sea” in paragraph 1(b) of Article 2 of the Convention shall be read as “carriage by water”.

Inconsistency

(2) In the event of any inconsistency between sections 28 to 34 of this Act and Articles 1 to 15 of the Convention, those sections prevail to the extent of the inconsistency.

flottantes destinées à l’exploration ou à l’exploitation des ressources naturelles du fond ou du sous-sol marin; y sont assimilés les navires en construction à partir du moment où ils peuvent flotter, les navires échoués ou coulés ainsi que les épaves et toute partie d’un navire qui s’est brisé;

b) la définition de propriétaire de navire, au paragraphe 2 de l’article premier de la Convention, vise notamment la personne ayant un intérêt dans un navire ou la possession d’un navire, à compter de son lancement, et s’interprète sans égard au terme « de mer »;

c) la mention de « transport par mer », à l’alinéa 1b) de l’article 2 de la Convention, vaut mention de « transport par eau ».

Incompatibilité

(2) Les articles 28 à 34 de la présente loi l’emportent sur les dispositions incompatibles des articles 1 à 15 de la Convention.

[32] Article 1, paragraph 2 of the Convention defines “shipowner” as follows:

<p>Article 1</p> <p>Persons entitled to limit liability</p> <p>[...]</p> <p>2 The term shipowner shall mean the owner, charterer, manager and operator of a seagoing ship.</p>	<p>Article 1</p> <p>Personnes en droit de limiter leur responsabilité</p> <p>[...]</p> <p>2 L’expression propriétaire de navire, désigne le propriétaire, l’affréteur, l’armateur et l’armateur-gérant d’un navire de mer.</p>
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[33] The definition of “maritime claim” in section 24 of the MLA is cross-referenced to paragraphs (1) and (2) of Article 2 of the Convention as follows:

<p>maritime claim means a claim described in Article 2 of the Convention for which a person referred to in Article 1 of the Convention is entitled to limitation of liability. (créance maritime)</p>	<p>créance maritime Créance maritime visée à l’article 2 de la Convention contre toute personne visée à l’article 1 de la Convention. (maritime claim)</p>
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[34] Article 11 of the Convention provides for the creation of a limitation fund, as follows:

<p>Article 11</p> <p>Constitution of the fund</p> <p>1 Any person alleged to be liable may constitute a fund with the Court or other competent authority in any State Party in which legal proceedings are instituted in respect of claims subject to limitation. The fund shall be constituted in the sum of such of the amounts set out in Articles 6 and 7 as are applicable to claims for which</p>	<p>Article 11</p> <p>Constitution du fonds</p> <p>1 Toute personne dont la responsabilité peut être mise en cause peut constituer un fonds auprès du tribunal ou de toute autre autorité compétente de tout État Partie dans lequel une action est engagée pour des créances soumises à limitation. Le fonds est constitué à concurrence du montant tel qu’il est calculé selon les</p>
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that person may be liable, together with interest thereon from the date of the occurrence giving rise to the liability until the date of the constitution of the fund. Any fund thus constituted shall be available only for the payment of claims in respect of which limitation of liability can be invoked.

2 A fund may be constituted, either by depositing the sum, or by producing a guarantee acceptable under the legislation of the State Party where the fund is constituted and considered to be adequate by the Court or other competent authority.

3 A fund constituted by one of the persons mentioned in paragraph 1(a), (b) or (c) or paragraph 2 of Article 9 or his insurer shall be deemed constituted by all persons mentioned in paragraph 1(a), (b) or (c) or paragraph 2, respectively.

dispositions des articles 6 et 7 applicables aux créances dont cette personne peut être responsable, augmenté des intérêts courus depuis la date de l'événement donnant naissance à la responsabilité jusqu'à celle de la constitution du fonds. Tout fonds ainsi constitué n'est disponible que pour régler les créances à l'égard desquelles la limitation de la responsabilité peut être invoquée.

2 Un fonds peut être constitué, soit en consignnant la somme, soit en fournissant une garantie acceptable en vertu de la législation de l'État Partie dans lequel le fonds est constitué, et considérée comme adéquate par le tribunal ou par toute autre autorité compétente.

3 Un fonds constitué par l'une des personnes mentionnées aux alinéas a), b) ou c) du paragraphe 1 ou au paragraphe 2 de l'article 9, ou par son assureur, est réputé constitué par toutes les personnes visées aux alinéas a), b) ou c) du paragraphe 1 ou au paragraphe 2 respectivement.

[35] Section 32 of the MLA sets out the procedure to be followed in the establishment of a limitation fund under Articles 11 to 13 of the Convention, as follows:

Jurisdiction of Admiralty Court

Compétence exclusive de la Cour d'amirauté

32 (1) The Admiralty Court has exclusive jurisdiction with respect to any matter relating to the constitution and distribution of a limitation fund under Articles 11 to 13 of the Convention.

32 (1) La Cour d’amirauté a compétence exclusive pour trancher toute question relative à la constitution et à la répartition du fonds de limitation aux termes des articles 11 à 13 de la Convention.

Right to assert limitation defence

(2) Where a claim is made or apprehended against a person in respect of liability that is limited by section 28, 29 or 30 of this Act or paragraph 1 of Article 6 or 7 of the Convention, that person may assert the right to limitation of liability in a defence filed, or by way of action or counterclaim for declaratory relief, in any court of competent jurisdiction in Canada.

Droit d’invoquer la limite de responsabilité

(2) Lorsque la responsabilité d’une personne est limitée aux termes des articles 28, 29 ou 30 de la présente loi ou du paragraphe 1 des articles 6 ou 7 de la Convention, relativement à une créance — réelle ou appréhendée — , cette personne peut se prévaloir de ces dispositions en défense, ou dans le cadre d’une action ou demande reconventionnelle pour obtenir un jugement déclaratoire, devant tout tribunal compétent au Canada.

[36] “Admiralty Court” is defined in section 2 of the MLA as meaning the Federal Court.

[37] It is clear from the language of section 32 of the MLA that only the Federal Court has jurisdiction with respect to “any matter relating to the constitution and distribution of a limitation fund” under the applicable Articles of the Convention.

[38] Paragraph 1 of Article 9 of the Convention is also relevant and provides as follows:

Article 9

Aggregation of claims

Article 9

Concours de créances

1 The limits of liability determined in accordance with Article 6 shall apply to the aggregate of all claims which arise on any distinct occasion:

(a) against the person or persons mentioned in paragraph 2 of Article 1 and any person for whose act, neglect or default he or they are responsible; or

(b) against the shipowner of a ship rendering salvage services from that ship and the salvor or salvors operating from such ship and any person for whose act, neglect or default he or they are responsible; or

(c) against the salvor or salvors who are not operating from a ship or who are operating solely on the ship to or in respect of which the salvage services are rendered and any person for whose act, neglect or default he or they are responsible.

1 Les limites de la responsabilité déterminée selon l'article 6 s'appliquent à l'ensemble de toutes les créances nées d'un même événement :

a) à l'égard de la personne ou des personnes visées au paragraphe 2 de l'article premier et de toute personne dont les faits, négligences ou fautes entraînent la responsabilité de celle-ci ou de celles-ci; ou

b) à l'égard du propriétaire d'un navire qui fournit des services d'assistance ou de sauvetage à partir de ce navire et à l'égard de l'assistant ou des assistants agissant à partir dudit navire et de toute personne dont les faits, négligences ou fautes entraînent la responsabilité de celui-ci ou de ceux-ci;

c) à l'égard de l'assistant ou des assistants n'agissant pas à partir d'un navire ou agissant uniquement à bord du navire auquel ou à l'égard duquel des services d'assistance ou de sauvetage sont fournis et de toute personne dont les faits, négligences ou fautes entraînent la responsabilité de celui-ci ou de ceux-ci.

[39] The combined effect of Articles 9 and 11 of the Convention, which forms part of the MLA, is that only one fund is established to answer the “aggregate of all claims which arise on any distinct occasion”.

[40] There is no evidence filed to contradict the Plaintiff’s claim that his vessel weighs less than 300 gross tons. Accordingly, the limitation amount set out in subsection 29(a) of the Act applies. Subsection 29(a) provides as follows:

Other claims

29 The maximum liability for maritime claims that arise on any distinct occasion involving a ship of less than 300 gross tonnage, other than claims referred to in section 28, is

(a) \$1,000,000 in respect of claims for loss of life or personal injury; and

Autres créances

29 La limite de responsabilité pour les créances maritimes — autres que celles mentionnées à l’article 28 — nées d’un même événement impliquant un navire d’une jauge brute inférieure à 300 est fixée à :

a) 1 000 000 \$ pour les créances pour décès ou blessures corporelles;

[41] The limitation fund is available for the benefit of the shipowner, as determined in the limitation proceedings and for “any person for whose act, neglect or default” it is responsible; see Article 9, paragraph 1(a).

[42] The Plaintiff seeks directions relative to the limitation action, including directions as to the manner in which his action for a declaration that his liability in respect of the Collision is limited pursuant to the provisions of the MLA, should proceed.

[43] In my opinion, a limitation fund should be established in this case.

[44] The Plaintiff has proposed a guarantee bond be filed in an amount to be set by the Court, that is \$1,000,000.00 plus interest pursuant to subsection 33(5). The Court can determine the form of the guarantee pursuant to paragraph 33(4)(b).

[45] The matter of setting time limits within which the Defendants and other claimants must file their defences or claims against the limitation fund is a matter that can be addressed by the Case Management Judge who was appointed by Order made on August 15, 2022, pursuant to the *Federal Courts Rules*, SOR/98-106 (the “Rules”).

[46] The Case Management Judge can also deal with setting other time limits as may be required.

B. *Defendants’ Stay Motion*

[47] The authority to stay proceedings in this Court comes from subsection 50(1) of the *Federal Courts Act*, R.S.C., 1985, c. F-7, which provides as follows:

Stay of proceedings authorized

50 (1) The Federal Court of Appeal or the Federal Court may, in its discretion, stay proceedings in any cause or matter

(a) on the ground that the claim is being proceeded

Suspension d’instance

50 (1) La Cour d’appel fédérale et la Cour fédérale ont le pouvoir discrétionnaire de suspendre les procédures dans toute affaire :

a) au motif que la demande est en instance devant un autre tribunal;

with in another court or jurisdiction; or

(b) where for any other reason it is in the interest of justice that the proceedings be stayed.

b) lorsque, pour quelque autre raison, l'intérêt de la justice l'exige.

[48] In *Canadian Pacific Railway Co. v. Sheena M (The)*, [2000] 4. F.C. 159 (F.C.T.D.) at paragraph 17, the late Prothonotary Hargrave discussed the difference between staying and enjoining as follows:

To complete this line of reasoning, there is a difference between enjoining and staying. The former, is defined in the revised 4th edition of Black's Law Dictionary in terms of an injunctive direction to perform or to abstain from some act [...]

In contrast a stay, or a stay of proceedings as it is correctly called, is an order by which a court suspends its own proceedings, either temporarily, until something is done, or permanently, where it is improper to proceed [...]

The test for a stay, in the interests of justice, is generally acknowledged to be the three-part test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, being the three-part American Cyanamid test [*American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 (H.L.)] although in this instance the appropriate test for a stay of proceedings is a two-part test set out in *Mon-Oil Ltd. v. Canada* (1989), 26 C.P.R. (3d) 379 (F.C.T.D.), a point that I shall touch on again in due course. The test for a stay is very different concept and test from that of an injunction of a proceeding in another court under the *Canada Shipping Act*. Indeed, this is to be expected for in one statute the draftsman has used the term enjoin and in the other the reference is to a stay [...]

[49] At paragraph 32, Prothonotary Hargrave, after reviewing two lines of cases that addressed the onus and test for a stay, reached the following conclusion:

In summary, that the two-part test is appropriate where a stay of the Court's own proceeding is at issue, while the three-part *RJR-*

MacDonald test is appropriate where the stay is that of proceedings before some tribunal or an order of the Court pending an appeal...

[50] In my opinion, the same approach applies here. The two-part test of *Mon-Oil Ltd. v. Canada* (1989), 26 C.P.R. (3d) 379 (F.C.T.D.), should be considered in respect of the Defendants' motion for a stay. That test requires the Court to consider two questions, that is, will the continuation of the action cause prejudice to the defendants, and will the stay cause an injustice to the plaintiff.

[51] As noted by Chief Justice Thurlow in *Nisshin Kisen Kaisha Ltd. v. CN*, [1982] 1 F.C. 530 (C.A.), a limitation action is "incidental" to any action for determination of liability. It is an action for the establishment and distribution of a fund, and its apportionment after findings of liability.

[52] I agree that duplicate proceedings and inconsistent findings should be avoided. However, as Prothonotary Milczynski held in *Jazz Air LP v. Ontario Port Authority* (2009), 343 F.T.R. 165 (F.C.) at paragraph 32, "accepting that duplication must be avoided does not answer the question of which court should be preferred...".

[53] The Federal Court has full jurisdiction over the Defendants' claims. The Defendants can fully pursue their claims in this Court. In my opinion, their submissions that duplication and inconsistency should be avoided, without more, do not demonstrate that they will be prejudiced if the stay of proceedings in this Court is denied.

[54] On the other hand, a stay of the limitation action would work an injustice to the Plaintiff.

[55] There is a presumptive right to limit liability. Section 33 of the MLA allows a party seeking to limit liability to bring its own action in this Court, and to apply for directions. The very purpose of the limitation regime is to avoid multiple proceedings; see *Bayside Towing Ltd. v. Canadian Pacific Railway Co.*, [2001] 2 F.C. 258 (F.C.T.D.) at paragraph 30.

[56] Staying these proceedings would restrict the Plaintiff in advancing his limitation action. Although he could raise limitation as a defence in the Ontario action, he can only address the constitution of the limitation fund in the proceedings before this Court. If the right to limit is not broken and liability is limited, the limitation fund will be distributed. These aspects of a limitation action, that is the constitution and distribution of a fund, are exclusively within the jurisdiction of this Court.

[57] I refer again to the decision in *Jazz Air LP, supra*, where Prothonotary Milczynski at paragraph 35, said that “stays are to be granted only in the clearest of cases”. Having considered the submissions of the parties, I am not persuaded that the limitation action should be stayed either on an interlocutory or permanent basis.

C. *Plaintiff's Motion to Enjoin*

[58] As noted above, the Plaintiff seeks an order enjoining the Defendants, and any other person, from commencing or continuing proceedings before any court other than this Court against him in respect of the Collision. His motion is brought pursuant to section 33 of the MLA.

[59] The first question is the test to be applied in exercising the power to enjoin, pursuant to section 33(1) of the MLA. That section provides as follows:

Powers of Admiralty Court

33 (1) Where a claim is made or apprehended against a person in respect of liability that is limited by section 28 or 29 of this Act or paragraph 1 of Article 6 or 7 of the Convention, the Admiralty Court, on application by that person or any other interested person, including a person who is a party to proceedings in relation to the same subject-matter before another court, tribunal or authority, may take any steps it considers appropriate, including

(a) determining the amount of the liability and providing for the constitution and distribution of a fund under Articles 11 and 12 of the Convention;

(b) joining interested persons as parties to the proceedings, excluding any claimants who do not make a claim within a certain time, requiring security from the person claiming limitation of liability or from any other interested person and requiring the payment of any costs; and

Pouvoirs de la Cour d'amirauté

33 (1) Lorsque la responsabilité d'une personne est limitée aux termes des articles 28 ou 29 de la présente loi ou du paragraphe 1 des articles 6 ou 7 de la Convention, relativement à une créance — réelle ou appréhendée —, la Cour d'amirauté peut, à la demande de cette personne ou de tout autre intéressé — y compris une partie à une procédure relative à la même affaire devant tout autre tribunal ou autorité —, prendre toute mesure qu'elle juge indiquée, notamment :

a) déterminer le montant de la responsabilité et faire le nécessaire pour la constitution et la répartition du fonds de limitation correspondant, conformément aux articles 11 et 12 de la Convention;

b) joindre tout intéressé comme partie à la procédure, exclure tout créancier forclos, exiger une garantie des parties invoquant la limitation de responsabilité ou de tout autre intéressé et exiger le paiement des frais;

(c) enjoining any person from commencing or continuing proceedings in any court, tribunal or authority other than the Admiralty Court in relation to the same subject-matter.

c) empêcher toute personne d'intenter ou de continuer quelque procédure relative à la même affaire devant tout autre tribunal ou autorité.

[60] Paragraph 33(1)(c) specifically allows the Federal Court to enjoin the commencement or continued prosecution of proceedings in any Court “other than the Admiralty Court in relation to the same subject-matter”.

[61] The language of section 33 of the MLA is broad.

[62] Subsection 33(1) says that the “Admiralty Court... may take any steps it considers appropriate”, including the extraordinary remedy identified in paragraph 33(1)(c) of enjoining proceedings before any other court, tribunal or authority. The availability of this remedy indicates the value attached to the importance of adjudicating all issues relevant to the constitution and distribution of a limitation fund, in one forum. Proceeding in one Court contributes to the expeditious disposition of issues relating to the limitation of liability.

[63] The applicable test under subsection 33(1) of the MLA is that of “appropriateness”. I refer to the decision of the Federal Court of Appeal in *Siemens Canada Limited v. J.D. Irving Limited*, [2014] 1 F.C.R. 676 at paragraph 107:

[107] This test is, no doubt, a broad and discretionary one. The words of the provision could not be clearer in that Parliament has directed the Federal Court to make an order of injunction where it

is of the view that it would be appropriate to make such an order. Thus, I am of the view that the Court may enjoin if, in all of the circumstances, that is the appropriate order to make. [...]

[64] The concept of “appropriate” includes the element of suitability. In this regard, I refer to the decision in *Levitt v. Carr et al.*, [1992] 4 W.W.R. 160 (B.C.C.A.) at paragraph 51.

[65] I refer as well to the decision in *R. v. McIvor* (2006), 210 C.C.C. (3d) 161 (B.C.C.A.) where the British Columbia Court of Appeal, in the context of a criminal proceeding, said the following at paragraph 30:

[...] in its ordinary meaning, the word “appropriate” connotes suitability for a particular purpose, something that is fit and proper in the circumstances.

[66] In my opinion, having regard to the facts alleged in the evidence submitted in the present case, it is appropriate that the proceedings outside the Federal Court be enjoined, to allow adjudication in this Court of all issues relating to the Collision, including the issues of liability which are the subject of the current proceeding before the Ontario Superior Court of Justice.

[67] In my view, the “subject matter” of both the Ontario and Federal Court proceedings is the Collision, liability, and any limitation of that liability.

[68] The Convention, which forms part of the MLA, clearly shows that there is a presumptive right to limit liability.

[69] In the within proceedings, the Plaintiff asserts a right to limit his liability, if any, relative to the Defendants.

[70] The determination of liability, and limitation thereof, for the Collision can be determined in the Federal Court, as well as in the Ontario Superior Court of Justice.

[71] I do not accept that the Defendants' choice of forum militates in favour of the Ontario proceedings. As discussed, the MLA provides the Plaintiff with his own cause of action to limit liability, a proceeding which is meant to be expeditious. He too has a choice of forum in which to bring his action, and that choice must be balanced with the choice made by the Defendants.

[72] While the Ontario Rules of Practice and Procedure may allow a broader range of discovery, a Case Management Judge of this Court can also allow for broader discovery, if warranted.

[73] The question of the availability of a jury trial is an appropriate factor to consider, but it is not determinative. In my opinion, depriving the Defendants of the option to have their claims considered by a jury is outweighed by the inconvenience, expense and repetition that would be required by determination of the issue of limitation in this Court, and determination of the issue of liability in the Ontario Superior Court of Justice.

[74] The Defendants can pursue their claim for personal injury and property damage in the Federal Court. Those claims can be accommodated by filing pleadings in this action, including counterclaims.

[75] Contrary to the Defendants' submissions, the Federal Court is the most efficient forum to determine all the issues relative to the Collision. It is beyond doubt that the Federal Court has jurisdiction over the issue of liability. Only the Federal Court has jurisdiction over the constitution and distribution of a limitation fund. While such a fund may be incidental to the determinations of liability and limitation, having the entirety of the proceedings considered in one Court would be the most efficient.

[76] In the result, the Plaintiff's motion to enjoin the Defendants, and any other person, from commencing or continuing proceedings before any court other than this Court, against the Plaintiff in respect of the Collision is allowed.

IV. CONCLUSION

[77] The Plaintiff's Motion is granted in part, with costs.

[78] The Motion to enjoin the Defendants, and any other person, from commencing or continuing proceedings before any court other than the Federal Court, against the Plaintiff in respect of the Collision, is granted.

[79] The Motion of the Defendants is dismissed in its entirety.

[80] If the parties cannot agree on costs, that issue may be addressed in brief submissions, not exceeding five (5) pages, to be served and filed on or before August 31, 2023.

ORDER in T-1860-21 and T-1837-22

THIS COURT ORDERS that:

1. The Motion to stay these proceedings is dismissed.
2. The Defendants and any other person are enjoined from commencing or continuing proceedings before any other Court or tribunal than the Federal Court against Jeff Schnarr in T-1860-21, in respect of the Collision.
3. Any claim in respect of the Collision which may be subject to limitation of liability shall be asserted either by way of a counterclaim or cross-claim in these actions, or by way of a separate action before this Court.
4. The issues determined and the procedure established by this Order does not preclude any of the Defendants or claimants from alleging that:
 - a. Jeff Schnarr, as Plaintiff, and any other party, are not entitled to limit liability as contemplated by the MLA; and
 - b. One or more of the parties do not fall within the category of those entitled to invoke pursuant to the MLA, the right to limit liability.
5. The parties herein are directed to consult and to submit a draft order to give effect to the Reasons for Order, concerning the establishment of a limitation fund in the amount of \$1,000,000.00 plus interest from August 31, 2019, to the date on which the statutory limitation fund is constituted, pursuant to subsection 33(5) of the Act. The parties shall specifically address the relief sought in paragraphs (a), (b), (c), (d), (e), (g), and (h) of the Plaintiff's Notice of Motion. The draft order will be submitted to the Court on or before August 31, 2023.

6. The establishment of a limitation fund, in accordance with the MLA, in the amount of \$1,000,000.00 and interest, shall not preclude any party or person from denying liability or legal responsibility and contesting the quantum of any claim.
7. These actions are specially managed proceedings and following constitution of the limitation fund, any party shall be at liberty to seek orders and directions from the Case Management Judge concerning the completion of pre-trial steps, the consolidation of the actions, the fixing of a single or separate hearing and any other relevant matter mentioned in the MLA or the Rules.
8. If the parties cannot agree on costs, that issue may be addressed in submissions to be served and filed on or before August 31, 2023.

“E. Heneghan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKETS: T-1860-21 and T-1837-22

STYLE OF CAUSE: JEFF SCHNARR v. LARRY MARKLE AND ATHELIE
MARKLE AND ELRI OOSTHUIZEN AND CALEB
LAMBERT

PLACE OF HEARING: HELD BY WAY OF VIDEOCONFERENCE

DATE OF HEARING: FEBRUARY 9, 2023

REASONS AND ORDER: HENEGHAN J.

DATED: JULY 21, 2023

APPEARANCES:

Patrick Monaghan and Shane Marston	FOR JEFF SCHNARR
Lindsay Rodenburg	FOR LARRY MARKLE AND ATHELIE MARKLE
Lisa Morell Kelly	FOR ELRI OOSTHUIZEN, CALEB LAMBERT, LARRY MARKLE, AND ATHELIE MARKLE

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