Federal Court of Appeal  Cour d'appel fédérale

**Date: 20120830**

**Docket: A-258-11**
**A-259-11**

**Citation: 2012 FCA 225**

**CORAM:** **NADON J.A.**
**DAWSON J.A.**
**MAINVILLE J.A.**

**Docket : A-258-11**

**BETWEEN:**

**SIEMENS CANADA LIMITED**

**Appellant**

**and**

**J.D. IRVING, LIMITED,**
**MARITIME MARINE CONSULTANTS (2003) INC.,**
**SUPERPORT MARINE SERVICES LTD., and**
**NEW BRUNSWICK POWER NUCLEAR CORPORATION**

**Respondents**

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**NEW BRUNSWICK POWER NUCLEAR CORPORATION,**
**BMT MARINE AND OFFSHORE SURVEYS LTD.**

**Respondents**

Heard at Toronto, Ontario, on May 9, 2012.

Judgment delivered at Ottawa, Ontario, on August 30, 2012.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: DAWSON J.A.
MAINVILLE J.A.

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**REASONS FOR JUDGMENT**

**NADON J.A.**

[1] Before us are two appeals which arise from events that occurred on October 15, 2008, at the port of Saint John, New Brunswick, where, in the course of loading upon a barge, two valuable steam turbine rotors fell into the waters of Saint John harbour.

[2] As a result, the appellant, Siemens Canada Limited ("Siemens"), commenced proceedings in the Ontario Superior Court of Justice against, *inter alia*, the respondents J.D. Irving, Ltd. ("Irving"), and Maritime Marine Consultants (2003) Inc. ("MMC") for recovery of its loss. That action was commenced on April 8, 2010.

[3] On April 7, and on April 30, 2010, Irving and MMC respectively filed statements of claim in the Federal Court seeking, *inter alia*, a declaration that they were entitled to limit their liability in regard to the October 15, 2008 incident ("the incident"), to a sum of $500,000, plus interest, to the date of the constitution of a limitation fund pursuant to paragraph 29(b), section 29.1, and subsection 32(2) of the *Marine Liability Act*, S.C. 2001, c. 6 (the "MLA"), and an order constituting a limitation fund pursuant to paragraph 33(1)(a) of the MLA. Irving and MMC's proceedings were both commenced pursuant to subsection 32(2) of the MLA.

[4] In the Federal Court proceedings, Siemens brought motions for an interlocutory stay of the actions to the extent that they pertained to the constitution and distribution of a limitation fund pursuant to section 33 of the MLA, and for a permanent stay of the actions insofar as Irving and

MCC claimed an entitlement to limit their liability pursuant to sections 28 and 29 of the MLA. In response to Siemens' motions, Irving and MMC filed motions in which they sought, *inter alia*, directions from the Federal Court as to the manner in which their limitation actions were to be heard and determined, as well as an order enjoining Siemens and others from commencing or continuing proceedings against them before any court other than the Federal Court in respect of the incident.

[5] On June 29, 2011, in an order cited as 2011 FC 791, Heneghan J. (the "judge") dismissed Siemens' motions for an interlocutory and a permanent stay of the Federal Court proceedings and she enjoined Siemens and others from commencing or continuing proceedings against Irving and MMC before any court or tribunal other than the Federal Court.

[6] Siemens now appeals both the order dismissing its motions to stay the Federal Court proceedings and the order enjoining it from commencing or continuing proceedings against Irving and MMC in any court other than the Federal Court.

**The Facts**

[7] In September 2006, Siemens contracted to provide three "low pressure modules" (the "modules") to Atomic Energy of Canada Ltd. ("AECL"). The modules are extremely complex and expensive pieces of equipment essential for operating nuclear generating stations. Each module comprised an outer casing and an internal turbine rotor weighing 115 tonnes and costing $12,500,000 to manufacture (the "rotors"). AECL subsequently assigned this contract to the respondent, New Brunswick Power Nuclear Corporation ("NBPNC").

[8] In January 2007, Irving contracted with Siemens to transport the rotors by water from Saint John harbour to Point Lepreau, New Brunswick (the "move"). Due to the size and value of the rotors, the move necessitated special arrangements. In October 2008, Irving chartered a barge of approximately 258 tonnes – the SPM 125 – from the respondent Superport Marine Services Ltd. ("Superport"), a Nova Scotia company. Irving retained MMC to act as marine architect, to approve the barge's stability for the move, and to prepare a plan for the safe loading and securing of the rotors on the barge. MMC's work involved conducting a number of stability calculations. BMT Marine and Offshore Surveys Ltd. ("BMT"), a Quebec-based company, was retained by Siemens to ensure that the barge could properly accommodate the dynamics of the load, to approve the use of the barge, and to witness and supervise the handling of the rotors.

[9] On October 15, 2008, during the course of loading, two rotors fell off the barge into the waters of Saint John harbour. As a result, the rotors were significantly damaged and Siemens had to take a number of steps to mitigate NBPNC's loss.

[10] Transport Canada investigated the incident under the *Canada Shipping Act*, S.C. 2001, c. 26 (the "*Shipping Act*"). While no charges were laid, it concluded that the incident arose from a failure to conduct a number of important calculations.

[11] As I indicated earlier, Irving and MMC commenced limitation actions in the Federal Court, pursuant to the MLA and Rule 496(1) of the *Federal Court Rules*, SOR/98-106. They sought, without admitting liability, a declaration that their liability for the incident was limited to $500,000

plus interest and an order constituting a limitation fund. In these proceedings, Irving and MMC named Siemens, *inter alia*, as a defendant.

[12] In its action commenced in the Ontario Superior Court, Siemens claimed a sum of $40,000,000 in damages against, *inter alia*, Irving and MMC, for negligence and breach of contract. The thrust of Siemens' action is that MMC failed to make the calculations necessary to ensure the safety of the move from Saint John to Point Lepreau. By reason of this failure, Siemens says that both Irving and MMC are precluded from limiting their liability pursuant to the MLA.

**The Relevant Legislative Provisions**

[13] The following provisions of the *Federal Courts Act*, R.S.C. 1985, c. F-7, the *Federal Courts Rules*, and the MLA are relevant to these appeals:

| **Federal Courts Act** | **Loi sur les Cours fédérales** |
|---|---|
| **22.** (1) The Federal Court has concurrent original jurisdiction, between subject and subject as well as otherwise, in all cases in which a claim for relief is made or a remedy is sought under or by virtue of Canadian maritime law or any other law of Canada relating to any matter coming within the class of subject of navigation and shipping, except to the extent that jurisdiction has been otherwise specially assigned. | **22.** (1) La Cour fédérale a compétence concurrente, en première instance, dans les cas — opposant notamment des administrés — où une demande de réparation ou un recours est présenté en vertu du droit maritime canadien ou d'une loi fédérale concernant la navigation ou la marine marchande, sauf attribution expresse contraire de cette compétence. |
| (2) Without limiting the generality of subsection (1), for greater certainty, the Federal Court has jurisdiction with respect to all of the following:<br>… | (2) Il demeure entendu que, sans préjudice de la portée générale du paragraphe (1), elle a compétence dans les cas suivants : |

(e) any claim for damage sustained by, or for loss of, a ship including, without restricting the generality of the foregoing, damage to or loss of the cargo or equipment of, or any property in or on or being loaded on or off, a ship;
(f) any claim arising out of an agreement relating to the carriage of goods on a ship under a through bill of lading, or in respect of which a through bill of lading is intended to be issued, for loss or damage to goods occurring at any time or place during transit;
…
(h) any claim for loss of or damage to goods carried in or on a ship including, without restricting the generality of the foregoing, loss of or damage to passengers' baggage or personal effects;
(i) any claim arising out of any agreement relating to the carriage of goods in or on a ship or to the use or hire of a ship whether by charter party or otherwise;
(j) any claim for salvage including, without restricting the generality of the foregoing, claims for salvage of life, cargo, equipment or other property of, from or by an aircraft to the same extent and in the same manner as if the aircraft were a ship;

…

**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 with in another court or jurisdiction; or
(b) where for any other reason it is in

…
e) une demande d'indemnisation pour l'avarie ou la perte d'un navire, notamment de sa cargaison ou de son équipement ou de tout bien à son bord ou en cours de transbordement;

f) une demande d'indemnisation, fondée sur une convention relative au transport par navire de marchandises couvertes par un connaissement direct ou devant en faire l'objet, pour la perte ou l'avarie de marchandises en cours de route;
…
h) une demande d'indemnisation pour la perte ou l'avarie de marchandises transportées à bord d'un navire, notamment dans le cas des bagages ou effets personnels des passagers;
i) une demande fondée sur une convention relative au transport de marchandises à bord d'un navire, à l'usage ou au louage d'un navire, notamment par charte-partie;

j) une demande d'indemnisation pour sauvetage, notamment pour le sauvetage des personnes, de la cargaison, de l'équipement ou des autres biens d'un aéronef, ou au moyen d'un aéronef, assimilé en l'occurrence à un navire;

…

**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;

the interest of justice that the proceedings be stayed.

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

**Federal Courts Rules**

**496.** (1) A party bringing an application under subsection 33(1) of the Marine Liability Act shall bring it as an action against those claimants whose identity is known to the party.

**Règles des Cours fédérales**

**496.** (1) Toute requête présentée par une partie en vertu du paragraphe 33(1) de la Loi sur la responsabilité en matière maritime est introduite par voie d'action contre les réclamants dont elle connaît l'identité.

(2) A party referred to in subsection (1) may bring an ex parte motion for directions respecting service on possible claimants where the number of possible claimants is large or the identity of all possible claimants is unknown to the party.

(2) La partie visée au paragraphe (1) peut présenter à la Cour une requête ex parte pour obtenir des directives sur la signification aux réclamants éventuels lorsque leur nombre est élevé ou qu'elle ne connaît pas l'identité de chacun d'eux.

**Marine Liability Act**

**Loi sur la responsabilité en droit maritime**

**2.** The definitions in this section apply in this Act.
"Admiralty Court" means the Federal Court.

**2.** Les définitions qui suivent s'appliquent à la présente loi.
« Cour d'amirauté » La Cour fédérale.

…

…

24. The definitions in this section apply in this Part.

24. Les définitions qui suivent s'appliquent à la présente partie.

"Convention" means the Convention on Limitation of Liability for Maritime Claims, 1976, concluded at London on November 19, 1976, as amended by the Protocol, Articles 1 to 15 of which Convention are set out in Part 1 of Schedule 1 and Article 18 of which is set out in Part 2 of that Schedule.

« Convention » La Convention de 1976 sur la limitation de la responsabilité en matière de créances maritimes conclue à Londres le 19 novembre 1976 — dans sa version modifiée par le Protocole — dont les articles 1 à 15 figurent à la partie 1 de l'annexe 1 et l'article 18 figure à la partie 2 de cette annexe.

"maritime claim" means a claim described in Article 2 of the

« créance maritime » Créance maritime

Convention for which a person referred to in Article 1 of the Convention is entitled to limitation of liability.

visée à l'article 2 de la Convention contre toute personne visée à l'article 1 de la Convention.

**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 that it is capable of floating, and
[…]
(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".

**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,
…
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 ».

(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.

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

**26.** (1) Subject to the other provisions of this Part, Articles 1 to 15 and 18 of the Convention and Articles 8 and 9 of the Protocol have the force of law in Canada.

**26.** (1) Sous réserve des autres dispositions de la présente partie, les articles 1 à 15 et 18 de la Convention et les articles 8 et 9 du Protocole ont force de loi au Canada.

(2) The Governor in Council may, by regulation, amend Part 3 of Schedule 1 to add or delete a

(2) Le gouverneur en conseil peut, par règlement, modifier la partie 3 de l'annexe 1 pour y ajouter ou en

reservation made by Canada under Article 18 of the Convention.

supprimer toute réserve faite par le Canada au titre de l'article 18 de la Convention.

(3) This Part does not apply to a claim that is the subject of a reservation made by Canada.

(3) La présente partie ne s'applique pas à la créance qui fait l'objet d'une réserve faite par le Canada.

**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
(b) $500,000 in respect of any other claims.

**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;
b) 500 000 $ pour les autres créances.

**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.

(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.

(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.

**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

**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

| | |
|---|---|
| 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<br>(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;<br>(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<br>(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. | 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 :<br>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;<br>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;<br>c) empêcher toute personne d'intenter ou de continuer quelque procédure relative à la même affaire devant tout autre tribunal ou autorité. |

Also of relevance to these proceedings are a number of provisions of the *Convention on Limitation of Liability for Marine Claims, 1976* (the "Convention"):

| **Article 1** | **Article 1** |
|---|---|
| 1. Shipowners and salvors, as hereinafter defined, may limit their liability in accordance with the rules of this Convention for claims set out in Article 2. | 1. Les propriétaires de navires et les assistants, tels que définis ci-après, peuvent limiter leur responsabilité conformément aux règles de la présente Convention à l'égard des créances visées à l'article 2. |
| 2. The term "shipowner" shall mean the owner, charterer, manager and operator | 2. L'expression « propriétaire de navire », désigne le propriétaire, l'affréteur, |

of a seagoing ship.
[…]

4. If any claims set out in Article 2 are made against any person for whose act, neglect or default the shipowner or salvor is responsible, such person shall be entitled to avail himself of the limitation of liability provided for in this Convention.

l'armateur et l'armateur-gérant d'un navire de mer.
…
4. Si l'une quelconque des créances prévues à l'article 2 est formée contre toute personne dont les faits, négligences et fautes entraînent la responsabilité du propriétaire ou de l'assistant, cette personne est en droit de se prévaloir de la limitation de la responsabilité prévue dans la présente Convention.

**Article 2**

1. Subject to Articles 3 and 4 the following claims, whatever the basis of liability may be, shall be subject to limitation of liability:
(a) claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connexion with the operation of the ship or with salvage operations, and consequential loss resulting therefrom;
(b) claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;
(c) claims in respect of other loss resulting from infringement of rights other than contractual rights, occurring in direct connexion with the operation of the ship or salvage operations;
(d) claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship;

**Article 2**

1. Sous réserves des articles 3 et 4, les créances suivantes, quel que soit le fondement de la responsabilité, sont soumises à la limitation de la responsabilité :
a) créances pour mort, pour lésions corporelles, pour pertes et pour dommages à tous biens (y compris les dommages causés aux ouvrages d'art des ports, bassins, voies navigables et aides à la navigation) survenus à bord du navire ou en relation directe avec l'exploitation de celui-ci ou avec des opérations d'assistance ou de sauvetage, ainsi que pour tout autre préjudice en résultant;
b) créances pour tout préjudice résultant d'un retard dans le transport par mer de la cargaison, des passagers ou de leurs bagages;
c) créances pour d'autres préjudices résultant de l'atteinte à tous droits de source extracontractuelle, et survenus en relation directe avec l'exploitation du navire ou avec des opérations d'assistance ou de sauvetage;

(e) claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship;
(f) claims of a person other than the person liable in respect of measures taken in order to avert or minimize loss for which the person liable may limit his liability in accordance with this Convention, and further loss caused by such measures.

d) créances pour avoir renfloué, enlevé, détruit ou rendu inoffensif un navire coulé, naufragé, échoué ou abandonné, y compris tout ce qui se trouve ou s'est trouvé à bord;
e) créances pour avoir enlevé, détruit ou rendu inoffensive la cargaison du navire;
f) créances produites par une personne autre que la personne responsable, pour les mesures prises afin de prévenir ou de réduire un dommage pour lequel la personne responsable peut limiter sa responsabilité conformément à la présente Convention, et pour les dommages ultérieurement causés par ces mesures.

**Article 4**

A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.

**Article 4**

Une personne responsable n'est pas en droit de limiter sa responsabilité s'il est prouvé que le dommage résulte de son fait ou de son omission personnels, commis avec l'intention de provoquer un tel dommage, ou commis témérairement et avec conscience qu'un tel dommage en résulterait probablement.

**Article 11**

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 that person may be liable, together with interest thereon

**Article 11**

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 dispositions des articles 6 et 7 applicables aux créances

| | |
|---|---|
| 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. | 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. |

**The Federal Court Decision**

[14] The judge began by reviewing the procedural history of the matter before her and the evidence adduced by the parties. She then turned to Siemens' argument that the Federal Court was without jurisdiction to hear its claim for damages, i.e. because the claim did not fall within the Court's maritime jurisdiction. More particularly, Siemens argued that its claim was one for breach of contract by Irving, pursuant to a purchase order dated January 11, 2007, for the transportation of the rotors from Saint John to Point Lepreau. In Siemens' submission, that contract was not a contract for the carriage of goods by sea.

[15] The judge rejected Siemens' argument. While agreeing with Siemens that mere proximity to water was insufficient to ground maritime jurisdiction in the Federal Court (Judge's reasons, paragraph 48), the judge concluded that "… it is clear that the nature of Siemens' claim is essentially maritime law" (Judge's reasons, paragraph 53).

[16] In so concluding, the judge relied on a number of factors, namely: (a) that the incident occurred on water, (b) that the rotors were on board a ship; (c) marine surveyors were involved in the transportation preparations; (d) that the incident was investigated by Transport Canada in accordance with the Transport Canada Marine Safety Policy for investigating maritime occurrences under the authority of section 219 of the *Shipping Act*; and (e) that Siemens' allegation of misrepresentations pertained to the preparation for the loading of the rotors on the barge, thus raising an issue of seaworthiness, which issue was subject to applicable admiralty laws, principles and practices.

[17] Also of relevance, in the judge's opinion, was the fact that the alleged breach of contract and negligence pertained to an agreement for the carriage of goods by sea, *i.e.* carriage of the rotors from Saint John to Point Lepreau, and that MMC had been engaged by Irving to provide marine architectural services in regard to the loading and the carriage of the rotors.

[18] In coming to this conclusion, the judge relied on the Supreme Court of Canada's decisions in *ITO-Int'l Terminals Operators v. Miida Electronics*, [1986] 1 S.C.R. 752 ("*ITO*"), *Q.N.S. Paper Co. v. Chartwell Shipping Ltd.*, [1989] 2 S.C.R. 683 ("*Q.N.S.*"), and *Isen v. Simms*, [2006] 2 S.C.R. 349 ("*Isen*"). She also relied on this Court's decision in *Radil Bros. Fishing Co. v. Canada (Department of Fisheries and Oceans, Pacific Region)*, [2002] 2 F.C. 219 ("*Radil*"). The judge also relied on subsection 22(1) and paragraphs 22(2)(e), (h) and (i) of the *Federal Courts Act*. In addition, she also found relevant the *Shipping Act* and the MLA which, by way of subsection 26(1)

thereof, incorporated a number of provisions of the Convention. At paragraph 64 of her reasons, the judge made the following remarks:

> [64] Regardless of the merit of Siemens' submissions regarding the entitlement of Irving, MMC and BMT to limit their liability, it is clear that the ultimate findings on these issues will be made with reference to the provisions of the MLA and the Convention. Put another way, Canadian maritime law will apply to the issues Siemens raises regarding the limitation of liability of Irving, MMC, and BMT.

[19] Then, beginning at paragraph 67 of her reasons, the judge turned to Siemens' stay motions. She held that the two-part test of *Mon-Oil Ltd. v. Canada*, [1989] F.C.J. No. 227 (Q.L.), 26 C.P.R. (3d) 379 (F.C.T.D.) ("*Mon-Oil*"), was the appropriate legal test for determining whether to grant a stay. At paragraph 77 of her reasons, she wrote:

> 77. … 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 Siemens' 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 defendant, in this case Siemens, and will the stay cause an injustice to the plaintiffs, that is Irving and MMC.

[20] The application of the *Mon-Oil* test led the judge to dismiss both Siemens' motion for an interlocutory stay and its motion for a permanent stay. With regard to the interlocutory stay, she held that Siemens had not demonstrated that the limitation actions commenced by Irving and MMC would cause it prejudice. As a result, exercising her discretion, she declined to grant an interlocutory stay of the limitation actions. With regard to the motion for a permanent stay of the limitation actions, the judge held that Siemens' argument that because Irving's conduct had been reckless and was thus not entitled to limit its liability, was premature. In her view, it was not possible, on the basis of the evidence, to conclude that Irving or MMC were not entitled to limit their liability in

regard to Siemens' loss. At paragraphs 83 and 84 of her reasons, the judge made the following remarks:

> [83] I am not persuaded that Siemens has presented evidence to show that it would be prejudiced by the continuation of the limitation proceedings. It has proceeded on the premise that the Defendants will not be able to limit liability, due to their conduct, relying on the application of Article 4 of the Convention. However, this is only an argument. The application of Article 4 will require evidence; see *Société Telus Communications v. Peracomo Inc.*, 2011 FC 494.
>
> [84] Regardless of the ultimate characterization of the Defendants' conduct, Siemens' current arguments do not demonstrate prejudice and in any event, legal arguments are no substitution for evidence.

[21] Finally, the judge turned to the motions to enjoin filed by Irving and MMC, noting that these motions had been brought pursuant to section 33 of the MLA. She began, at paragraph 122 of her reasons, by stating that the first order of business was to determine the test applicable to the exercise of the power to enjoin. She referred to Prothonotary Hargrave's decision in *Canadian Pacific Railway Co. v. Sheena M (The)*, [2000] 4 F.C. 159 (F.C.T.D.) ("*The Sheena M"*), where the learned prothonotary suggested that the tripartite test in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 ("*RJR-MacDonald*"), was the test applicable to a motion to enjoin proceedings before another court or tribunal, noting however that in the case before him, the prothonotary had not decided the point.

[22] The judge then turned to subsection 33(1) of the MLA, which provides that the Federal Court may, on application by a person who may be entitled to limit his or her liability pursuant to sections 28 or 29 of the MLA, take any step that it considers appropriate, including, *inter alia*, "enjoining any person for commencing or continuing proceedings in any court, tribunal or authority

other than the Admiralty Court, in relation to the same matter". At paragraph 124 of her reasons, the judge opined as follows:

> [124] The language of section 33 of the Act is very broad. 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 limitation of liability.

[23] The judge then stated, at paragraph 125 of her reasons, that "[t]he concept of 'appropriate' includes the element of suitability". Turning to the facts before her, she opined that both the action commenced by Siemens in the Ontario Superior Court and the limitation actions commenced by Irving and MMC in the Federal Court were proceedings in relation to the same "subject matter", i.e. "damage to the rotors, liability for that damage and any limitation of that liability" (Judge's reasons, paragraph 128).

[24] The judge was also of the view that proceeding with the limitation actions in the Federal Court and enjoining Siemens from pursuing its proceedings in the Ontario Superior Court would save significant costs to the parties. She reasoned as follows at paragraph 137 of her reasons:

> [137] The fact that Siemens' claim is in the millions is not a principled reason to postpone adjudication of the issues in the limitation proceedings, foremost whether limitation of liability is available. Indeed, in my opinion the discrepancy between the amount claimed and the prima facie amount of the limitation fund is a factor weighing heavily in favour of proceeding with the limitation actions and enjoining the liability action. This is a practical consideration which the Court acknowledges. There will be significant costs saved for all parties and persons by proceeding in this manner.

[25] Also of relevance, in the judge's opinion, was the fact that the class of potential plaintiffs or claimants against the limitation fund remained unknown and that it was open for Siemens to begin another action in the Federal Court or to file a counterclaim in the limitation actions in which it was a defendant. At paragraph 156 of her reasons, the judge summarized her view of the matter in the following terms:

> [156] Contrary to Siemens' submissions, the Federal Court is the most efficient forum to determine all the issues relative to the incident. 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. The issue of entitlement to limit can be determined in the limitation actions.

[26] As a result, the judge allowed the motions to enjoin and ordered that no proceedings be continued or commenced before any court or tribunal other than the Federal Court, in respect of the incident.

[27] I should also say that in addition to disposing of the motions to stay and the motions to enjoin, the judge ordered the establishment of a limitation fund pursuant to Articles 9 and 11 of the Convention. In making this order, the judge reasoned as follows. First, the Federal Court was the Admiralty Court, as defined at section 2 of the MLA. Second, by reason of section 32 of the MLA, the Federal Court had exclusive jurisdiction with regard to the constitution and distribution of a limitation fund. Lastly, the barge was a ship of less than 300 tonnes in regard to which the maximum liability for all claims, pursuant to section 29(b) of the MLA, was $500,000.

**The Issues**

[28] In order to determine the appeals before us, the following issues must be addressed:

a. What is the appropriate standard of review?

b. Whether the Federal Court has jurisdiction over Siemens' action for damages.

c. Whether the judge erred in enjoining Siemens and others from pursuing their claims against Irving and MMC in a tribunal other than the Federal Court.

d. Whether the judge erred in dismissing Siemens' motions for a stay of the limitation actions commenced in the Federal Court.

**Analysis**

***1. What is the appropriate standard of review?***

[29] The judge's Order enjoining Siemens and others from commencing or continuing proceedings in any court other than the Federal Court and her Order dismissing Siemens' motions for a stay of the Federal Court proceedings, are mostly discretionary orders, to which deference is usually accorded on appeal. However, this Court is entitled to substitute its own discretion if the judge is found to have given insufficient weight to relevant factors, proceeded on a wrong legal principle, misapprehended the facts or an obvious injustice would otherwise arise from the discretionary order (see: *Elders Grain Co. v. Ralph Misener (The)*, 2005 FCA 139, [2005] 3 F.C.R. 367, at paragraph 13; *Éditions Ecosociété v. Banro Corp.*, 2012 SCC 18, at paragraph 41). The criteria for exercising legal discretion are legal criteria and, hence, their definition or misapplication raise questions of law that are subject to appellate review (see: *British Columbia (Min. of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371, at paragraph 43).

### *2. Whether the Federal Court has jurisdiction over Siemens' action for damages*

[30] As I indicated earlier, the judge had no difficulty concluding that the proceedings to which the incident gave rise fell within the maritime jurisdiction of the Federal Court. In my view, Siemens' action against Irving and MMC is within the Federal Court's maritime jurisdiction and, as a result, the judge made no error in so concluding.

[31] Siemens argues, at paragraphs 85 to 91 of its Memorandum of Fact and Law, that "some or all of the matters raised in the Ontario action are not maritime in nature, and thus outside the jurisdiction of the Federal Court" (Siemens' Memorandum, paragraph 85). It further argues, at paragraph 89, that its claim is directed at Irving's failure to direct a complete transportation plan, adding that the fact that Irving's breach of the transportation plan "happened to materialize when the rotors were being loaded onto a barge does not change the nature" of its claim. Siemens also argues that since neither MMC nor BMT are shipowners under the MLA, its claim against them does not fall under the enumerated heads of jurisdiction under subsection 22(2) of the *Federal Courts Act*, nor under the general grant of jurisdiction under subsection 22(1).

[32] Both Irving and MMC take the position that there is maritime jurisdiction in the Federal Court over Siemens' claim for damages.

[33] My reasons for concluding that the judge made no error on this point are as follows.

[34] Beginning at paragraph 38 of her reasons, the judge comprehensively reviewed the Federal Court's maritime jurisdiction. The general grant of maritime jurisdiction to the Federal Court is found in section 22 of the *Federal Courts Act*. It is very broad and includes any claim under or by virtue of Canadian maritime law or any other law of Canada relating to navigation or shipping. For greater certainty, subsection 22(2) non-exhaustively lists a variety of claims that fall within this jurisdiction. More particularly, the Court has jurisdiction in respect of:

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| **22.** (2) Without limiting the generality of subsection (1), for greater certainty, the Federal Court has jurisdiction with respect to all of the following:<br>[…]<br>(e) any claim for damage sustained by, or for loss of, a ship including, without restricting the generality of the foregoing, damage to or loss of the cargo or equipment of, or any property in or on or being loaded on or off, a ship;<br>[…]<br>(h) any claim for loss of or damage to goods carried in or on a ship including, without restricting the generality of the foregoing, loss of or damage to passengers' baggage or personal effects;<br>(i) any claim arising out of any agreement relating to the carriage of goods in or on a ship or to the use or hire of a ship whether by charter party or otherwise; | **22.** (2) Il demeure entendu que, sans préjudice de la portée générale du paragraphe (1), elle a compétence dans les cas suivants:<br>…<br>e) une demande d'indemnisation pour l'avarie ou la perte d'un navire, notamment de sa cargaison ou de son équipement ou de tout bien à son bord ou en cours de transbordement;<br>…<br>h) une demande d'indemnisation pour la perte ou l'avarie de marchandises transportées à bord d'un navire, notamment dans le cas des bagages ou effets personnels des passagers;<br>i) une demande fondée sur une convention relative au transport de marchandises à bord d'un navire, à l'usage ou au louage d'un navire, notamment par charte-partie; |
| [Emphasis added] | [Non-souligné dans l'original] |

[35] Once a particular claim is found to fall within the enumerated headings, there is necessarily substantive maritime law to support the claim (See: *Skaarup Shipping Corp. v. Hawker Industries Ltd.*, [1980] 2 F.C. 746 (C.A.)).

[36] By its express wording, subsection 22(1) bestows *concurrent original* jurisdiction on the Federal Court. As courts of inherent jurisdiction, provincial superior courts also have general jurisdiction over maritime matters, which can only be extinguished by clear and explicit statutory language (See: *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437 ("*Ordon Estate*"); *Ontario (A.G.) v. Pembina Exploration Canada*, [1989] 1 S.C.R. 206 ("*Pembina*")). Thus, provincial superior courts can assume jurisdiction over maritime matters so long as they respect the rules of private international law. Hence, a provincial superior court will have jurisdiction if a defendant is present in its geographical territory, the defendant consents to the court's jurisdiction (either contractually or through attornment) or a real and substantial connection between the litigation's subject matter and the province exists (See: *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, ("*Van Breda*") at paragraph 79; *Breeden v. Black*, 2012 SCC 19, at paragraph 19 ("*Breeden*")).

[37] The scope of the Federal Court's maritime jurisdiction has been litigated on numerous occasions. In *Monk Corp. v. Island Fertilizers Ltd*, [1991] 1 S.C.R. 779 ("*Monk*"), the Supreme Court held that the test for determining whether the subject-matter under consideration was one of maritime law required that the subject-matter be "so integrally connected to maritime matters as to be legitimate Canadian maritime law". The test can be made out even if the parties are not privy to a

formal maritime contract: see *Monk* at paragraph 40. More recently, this test was reiterated by the Supreme Court in *Ordon Estate* at paragraph 46, and in *Isen* at paragraph 21.

[38] A number of cases illustrate the application of this deceptively simple principle. A claim against the vendor of vegetable oil drums which leaked and caused damage to a ship was found to be a matter of maritime law: *Pakistan National Shipping Corp. v. Canada*, [1997] 3 F.C. 601 (C.A.). Stuffing a container that was to be placed on a ship was also found to raise maritime issues: *Caterpillar Overseas S.A. v. "Canmar Victory" (The)* [1999] F.C.J. No. 1186 (Q.L.), 153 F.T.R. 266, 250 N.R. 192 (F.C.A.). Claims relating to warehousing and storing of goods after their unloading from a ship were also found to be of a maritime nature: in *Pantainer Ltd. v. 996660 Ont. Ltd.* [2000] F.C.J. No. 334 (Q.L.), 183 F.T.R. 211 (F.C.) and in *ITO*. However, personal injury suffered when attaching a pleasure craft to a trailer on land using a bungee cord, although occurring very close to water, was found not to constitute a maritime matter (See: *Isen*), nor was a shipowner's action against an agent regarding a contract to negotiate fishing licenses found to be within the Federal Court's jurisdiction (See: *Radil*).

[39] The essence of Siemens' argument is that its claims are not maritime in nature because Irving agreed to provide a "full transportation plan" and that the property damage just "happened to occur when being loaded onto a barge" (Siemens' Memorandum, paragraph 89). This appears to be the same argument made before the judge.

[40] With respect to the first prong of Siemens' argument, the judge clearly set out the factors which, in her opinion, justified a conclusion that Siemens' claim was maritime in nature. At paragraphs 54 to 56 of her reasons, the judge opined as follows:

> [54] The incident occurred on the water. Preparations for the transportation of the rotors involved marine surveyors, that is MMC and BMT, and a cargo insurer, that is AXA. The rotors were on board a ship, that is the SPM 125. The incident was investigated in accordance with the Transport Canada Marine Safety Policy for investigating maritime occurrences under the authority of section 219 of the Canada Shipping Act, 2001.
>
> [55] The misrepresentations alleged by Siemens relate to the preparation for loading the barge, raising an issue of seaworthiness. That issue is subject to applicable admiralty laws, principles and practices.
>
> [56] The alleged breach of contract and negligence relate to an agreement for the carriage of goods by sea. Siemens argues that the purchase order, which is a contract, is not a matter subject to Canadian maritime law. Nevertheless, the object of that contract is the transportation of the rotors from the harbour in Saint John to the nuclear plant at Point Lepreau. The obligation of a carrier, in respect of a contract of carriage of goods, is to safely load and deliver the goods; see *The "Muncaster Castle"*, [1961] 1 Lloyd's Rep. 57 (H.L.): Judgment, paras. 54-56.

[41] Thus, the judge reviewed the factual context of Siemens' claim as required by the Supreme Court. The factors which she considered clearly support her conclusion that the subject matter of Siemens' claim is sufficiently connected to maritime matters to be within the Federal Court's jurisdiction. Further, to the extent that Siemens is relying on the form of its agreement with Irving to avoid maritime jurisdiction, its argument must fail based on the Supreme Court's decision in *Monk*.

[42] With regard to the second prong of Siemens' argument, *i.e.* that the damage to the rotors "happened to materialize when the rotors were being loaded onto a barge does not change the

nature" of its claim and, hence, that its claim is not of a maritime nature, the judge referred to the Supreme Court's decision in *Isen* where the Court, at paragraph 22, made the following remarks:

> 22. Commercial shipping was traditionally viewed as within the scope of Parliament's jurisdiction over navigation and shipping. Shipping contracts involve not only the safe carriage of goods over the sea, but also the movement of goods on and off a ship…

[43] It is indisputable that Siemens' claim arises from the movement of goods onto a ship. In my view, Siemens' claim against Irving and MMC is clearly of a maritime nature. The fact that the agreement was made in the form of a purchase order, that Siemens argues that the precise promise that was breached was Irving's promise to provide "a complete transportation plan" or that the rotors were near the port or the barge are, in my respectful view, of no relevance. Siemens' claim is one arising from an agreement relating to the carriage of goods in or on a ship, it is a claim for loss or damage to goods carried in or on a ship, and it is also a claim for damage to or loss of cargo or property in or on or being loaded on or off a ship (paragraphs 22(e), (h) and (i) of the *Federal Courts Act*).

[44] Consequently, the judge's conclusion on this point is, in my opinion, without error.

[45] I now turn to the third issue.

***3. <u>Whether the judge erred in enjoining Siemens and others from pursuing their claims against Irving and MMC in a tribunal other than the Federal Court</u>.***

[46] In order to give answers to this question and to the following one with regard to the motions to stay the Federal Court proceedings, it is necessary to have a brief look at the MLA, the Convention and the Protocol Amending the Convention ("the Protocol"). I note that subsection 26(1) of the MLA provides that Articles 1 to 15 and 18 of the Convention and Articles 8 and 9 of the Protocol have the force of law in Canada. It is of crucial importance to remember that the provisions of the MLA at issue in this appeal, particularly those pertaining to the right to limit liability and the constitution and distribution of a limitation fund, are meant to give effect to the Convention of 1976 and the Protocol of 1996.

[47] Prior to Canada's adoption of the 1976 Convention and the 1996 Protocol, the relevant provisions of the *Canada Shipping Act* gave effect to the *International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships*, Brussels, 10 October 1957 ("the 1957 Convention"). Under that regime, a shipowner, in order to limit his liability, had the burden of establishing that damage or loss caused by his ship did not result from his fault or privity (see: *Stein et al v. Kathy K. (The)*, [1976] 2 S.C.R. 802 ("*The Kathy K"*); *Rhône (The) v. Peter A.P. Widener (The)*, [1993] 1 S.C.R. 497) ("*The Rhône*"). The relevant provisions of the *Canada Shipping Act*, R.S.C. 1970, c. S-9, as they read at the relevant time, are as follows:

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| **647.** … | **647.** … |
| (2) The owner of a ship, whether registered in Canada or not, is not, where any of the following events occur <u>without his actual fault or privity</u>, | (2) Le propriétaire d'un navire, immatriculé ou non au Canada, n'est pas, lorsque l'un quelconque des événements suivants se produit <u>sans</u> |

namely,

. . .

(d) where any loss or damage is caused to any property, other than property described in paragraph (b), or any rights are infringed through

(i) the act or omission of any person, whether on board that ship or not, in the navigation or management of the ship, in the loading, carriage or discharge of its cargo or in the embarkation, carriage or disembarkation of its passengers, or

(ii) any other act or omission of any person on board that ship;

liable for damages beyond the following amounts, namely,

…

(f) in respect of any loss or damage to property or any infringement of any rights mentioned in paragraph (d), an aggregate amount equivalent to 1,000 gold francs for each ton of that ship's tonnage.

qu'il y ait faute ou complicité réelle de sa part, savoir:

. .

d) avarie ou perte de biens, autres que ceux qui sont mentionnés à l'alinéa b), ou violation de tout droit

(i) par l'acte ou l'omission de toute personne, qu'elle soit ou non à bord du navire, dans la navigation ou la conduite du navire, le chargement, le transport ou le déchargement de sa cargaison, ou l'embarquement, le transport ou le débarquement de ses passagers, ou

(ii) par quelque autre acte ou omission de la part d'une personne à bord du navire;

responsable des dommages-intérêts au-delà des montants suivants, savoir:

…

f) à l'égard de toute avarie ou perte de biens ou de toute violation des droits dont fait mention l'alinéa d), un montant global équivalant à 1,000 francs-or pour chaque tonneau de jauge du navire.

**649.** (1) Sections 647 and 648 extend and apply to

…

any person acting in the capacity of master or member of the crew of a ship and to any servant of the owner or of any person described in paragraphs (a) to (c) where any of the events mentioned in paragraphs 647(2)(a) to (d) occur, whether with or without his actual fault or privity.

**649.** (1) Les articles 647 et 648 s'étendent et s'appliquent

. .

à toute personne agissant en qualité de capitaine ou à tout membre de l'équipage d'un navire et à tout employé du propriétaire ou de toute personne dont font mention les alinéas a) à c) lorsque l'un quelconque des événements mentionnés aux alinéas 647(2)a) à d) se produit, qu'il y ait ou non faute ou complicité réelle de leur part.

(2) The limits set by section 647 to the liabilities of all persons whose liability is limited by section 647 and

(2) Les limites que l'article 647

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| subsection (1) of this section arising out of a distinct occasion on which any of the events mentioned in paragraphs 647(2)(a) to (d) occurred apply to the aggregate of such liabilities incurred on that occasion.<br><br>[Emphasis added] | impose aux obligations de toutes les personnes dont la responsabilité est restreinte par l'article 647 et le paragraphe (1) du présent article, qui découlent d'une occasion distincte où est survenu l'un ou l'autre des événements mentionnés aux alinéas 647(2)a) à d), s'appliquent à l'ensemble desdites obligations encourues à cette occasion.<br><br>[Non souligné dans l'original] |

[48] Where a shipowner was successful in establishing that he was entitled to limit his liability for a loss or damage, the limitation fund for vessels of a tonnage of less than 300 tonnes was somewhere in the region of $30,000 to $50,000 (See: *Rhône*).

[49] In 1998, Canada adopted the 1976 Convention and the 1996 Protocol. Two major changes resulted from the adoption of the new regime. First, by reason of Article 4 of the Convention, the burden is now on a claimant seeking to prevent a shipowner from limiting his liability to demonstrate that the loss or damage "resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.". Second, by reason of Article 15(2)(b) of the Convention, which allows state parties to regulate the limitation fund pertaining to vessels of less than 300 tonnes, Canada has set the limitation for such ships at $500,000 for loss or damage other than loss of life or personal injury (specifically, at paragraph 29(b) of the MLA).

[50] On the one hand, section 2 of the MLA defines the "Admiralty Court" as being the Federal Court and confers upon that Court exclusive jurisdiction with respect to any matter pertaining to the constitution and distribution of a limitation fund under Articles 11 to 13 of the Convention (see: subsection 32(1) of the MLA). On the other hand, subsection 32(2) of the MLA provides that where a person may limit his liability pursuant to sections 28, 29 and 30 of the MLA or paragraph 1 of Articles 6 or 7 of the Convention, that person may assert his right to limit either by way of a defence filed to an action or by way of an action or counterclaim for declaratory relief in any court of competent jurisdiction in Canada. In other words, the MLA gives a shipowner the right to choose the forum in which he will assert his right to limit, irrespective of the forum in which the claimant has filed or may file his or her action for damages. In the present instance, both Irving and MMC are seeking to assert their right to limit their liability by way of an action for declaratory relief filed in the Federal Court.

[51] Finally, section 33 of the MLA allows a shipowner, who may be entitled to limit his liability by reason of sections 28 or 29 of the MLA or paragraph 1 of Articles 6 or 7 of the Convention, to apply to the Federal Court for, *inter alia*: (a) a determination of the amount of the liability; (b) the constitution and distribution of a fund under Articles 11 and 12 of the Convention; and (c) an order enjoining any person from commencing or continuing proceedings in any court other than the Federal Court in relation to the subject matter raised by the shipowner's proceedings.

[52] I now turn to those provisions of the 1976 Convention which are relevant to this appeal. Paragraph 2 of Article 1 of the Convention defines a "shipowner" as the owner, charterer, manager,

and operator of a seagoing ship, and paragraph 4 of Article 1 provides that those persons for whose act, neglect or default a shipowner is responsible, are entitled to avail themselves of the limitation of liability provided for in the Convention. It is pursuant to this provision that MMC asserts that it is entitled to limit its liability for the incident. As the judge pointed out in her reasons, that issue is one which will be vigorously fought by Siemens. Finally, with regard to Article 1 of the Convention, paragraph 7 thereof provides that by invoking his right to limit his liability, a shipowner is not deemed to have admitted his liability.

[53] Article 4 of the Convention, as I indicated earlier, sets out the circumstances which will lead to a shipowner losing his right to limit his liability, namely, "that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result" (for a discussion of this provision, see the recent decision of Harrington J. of the Federal Court in *Société Telus Communications v. Peracomo Inc.* (*Peracomo* (FC)), 2011 FC 494, which this Court upheld in *Peracomo Inc. v. Société Telus Communications* (Peracomo (FCA), 2012 FCA 199).

[54] Articles 6 to 8 of the Convention set out the limits of liability for loss of life or personal injury and for other claims and the manner in which these limits are to be calculated.

[55] Paragraph 1 of Article 10 provides that a shipowner may invoke his right to limit his liability even though a limitation fund has yet to be constituted.

[56] Article 11 of the Convention deals with the constitution of the limitation fund. In particular, it provides at paragraph 1 thereof that 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" a shipowner may be liable. Paragraph 2 of Article 11 sets out the ways in which the fund may be constituted and Article 12 of the Convention establishes how the fund is to be distributed among those persons who have made a claim against it.

[57] Article 13 provides that once a fund has been constituted, the persons who have made claims against it "shall be barred from exercising any right in respect of any such claim against any other assets" of a shipowner on behalf of whom the fund has been constituted.

[58] Finally, relevant for our purposes, Article 14 of the Convention provides that all rules pertaining to the constitution and distribution of the fund "and all rules of procedure in connection therewith, shall be governed by the law of the State Party in which the fund is constituted".

[59] That is the context in which the judge's orders regarding the stay motions and the motions to enjoin must be considered.

[60] I now turn to the judge's Order enjoining Siemens and others from pursuing their claims against Irving and MMC in a tribunal other than the Federal Court. Before proceeding, however, it must be said that the success of either the motions to enjoin or the motions to stay necessarily lead to the dismissal of the others, in that the issue which these motions raise is whether the Federal

Court is the proper court to hear and determine the limitation actions and whether during the conduct of those proceedings, the action for damages commenced by Siemens in Ontario should also proceed.

[61] By its motion to stay the Federal Court proceedings, Siemens is, in effect, taking the position that its action for damages should proceed and that the Ontario Superior Court, in the conduct of that case, should be allowed to determine whether Irving and MMC are entitled to limit their liability. It is from that perspective that it seeks an order staying the Federal Court proceedings.

[62] In contrast to Siemens' position, Irving and MMC say that the limitation proceedings commenced in the Federal Court are in their natural forum because only that court can constitute and distribute the limitation fund which it has asked the Federal Court to constitute.

[63] In addition, Irving and MMC say that proceeding with the limitation action in the Federal Court and preventing the Ontario action from proceeding while the Federal Court determines the issues which the limitation actions raise, will give effect to Canada's adoption of the 1976 Convention. More effective use of judicial resources would be made and the parties would be allowed to deal with the issue which is at the heart of their dispute, *i.e.* their right to limit their liability.

[64] With these comments in mind, I now turn to the motions to enjoin.

[65] Siemens argues that the judge erred in enjoining it from continuing its proceedings in the Ontario Superior Court. It says that the judge failed to apply the correct test and that she failed to give proper weight to important factors.

[66] With respect to the applicable test, Siemens takes the position that the proper test under paragraph 33(1)(c) of the MLA is the anti-suit injunction test enunciated by the Supreme Court of Canada in *Amchem Products Inc. v. British Columbia (Workers Compensation Board)*, [1993] 1 S.C.R. 897 ("*Amchem*"). That test, in Siemens' view, "ensures compliance with the guiding principles of comity, order and fairness" and "ensures due respect for the inherent jurisdiction of superior courts" (Siemens' Memorandum of Fact and Law, paragraph 36).

[67] In support of that proposition, Siemens points out that the Ontario Superior Court exercises concurrent jurisdiction with the Federal Court in regard to maritime matters other than with respect to the constitution and distribution of the limitation fund, adding that pursuant to subsection 32(2) of the MLA, the Ontario Superior Court can hear and determine the issue of limitation of liability.

[68] Siemens further says that an anti-suit injunction will only be granted in rare circumstances, *i.e.* when five criteria are met: (i) a foreign proceeding is pending; (ii) an application for a stay in the foreign court has failed; (iii) the domestic court is alleged to be and is potentially an appropriate forum; (iv) the foreign court could not reasonably have assumed jurisdiction on a basis consistent with the principles of *forum non conveniens*; and (v) that granting the injunction will not deprive the

plaintiff of legitimate personal or juridical advantages in the foreign forum of which it would be unjust to deprive him or her.

[69] Siemens then asserts that three of the criteria are not met in the present instance. First, it says that neither Irving nor MMC have asked the Ontario Superior Court to stay its proceedings. Second, it then says that the Ontario Superior Court has jurisdiction on a basis consistent with the principles of *forum non conveniens*. Finally, it says that it will be deprived of three juridical advantages if it is unable to pursue its recourse in the Ontario Superior Court, namely, the right to broader discovery, the right to a jury trial, and the right to have all claims and defences decided in one proceeding.

[70] In the alternative, Siemens argues that even if the power granted to the Federal Court under paragraph 33(1)(c) of the MLA is not in the nature of an anti-suit injunction, it is still in the nature of injunctive relief. Thus, the applicable test is the one developed by the Supreme Court in *RJR-MacDonald*, which test allows the granting of an interlocutory injunction only where there is a serious issue to be tried, where the failure to grant the injunction will result in irreparable harm to the moving party, and where the balance of convenience favours the moving party. In Siemens' view, Irving and MMC do not meet the requirements of the test.

[71] As another argument, Siemens submits that the plain language of sections 32 and 33 of the MLA requires the Federal Court to exercise its power to enjoin only in the clearest of cases, adding that the tests enunciated in *Amchem* and *RJR-MacDonald* are necessary to ensure that the Federal Court, in exercising its broad powers under those provisions, uses them only in "proper cases and in

a manner respectful of superior courts' inherent jurisdiction" (Siemens' Memorandum, paragraph 60). More particularly, Siemens says that since the Ontario Superior Court has concurrent maritime jurisdiction with the Federal Court, which includes the determination of the validity of a right to limit under the MLA, the Federal Court must exercise great care before enjoining proceedings, the effect of which would be to defeat Parliament's grant of concurrent jurisdiction on the Ontario Superior Court.

[72] Siemens points out that the only exclusive jurisdiction conferred on the Federal Court is in respect of the constitution and distribution of a limitation fund, and that Article 10 of the Convention does not require that a limitation fund be constituted *a priori*. Hence, Siemens says that where a fund is not needed or a vessel is not arrested, there is no basis for the Federal Court to enjoin other proceedings.

[73] As a final argument, Siemens argues that the power to enjoin is not available until the right to limit liability has been determined, adding that in the present matter no such determination has been made.

[74] For the reasons that follow, I am of the opinion that the judge made no error in enjoining Siemens and others from commencing or continuing proceedings before a court or tribunal other than the Federal Court.

[75] I begin with Siemens' argument that the Federal Court's power to enjoin is not available until the right to limit liability has been determined. That argument, in my respectful view, flies in the face of subsection 33(1) of the MLA.

[76] As Irving argues, a fair reading of section 33 "compels the opposite conclusion" (Irving's Memorandum, paragraph 73). Subsection 33(1) provides that a person, *i.e.* a shipowner, may seek a determination of the amount of the liability and an order enjoining any person from commencing or continuing proceedings in any court other than the Federal Court where a claim is made or apprehended against that shipowner "in respect of liability that is limited by section 28 or 29 of this Act or paragraph 1 of Articles 6 or 7 of the Convention".

[77] I cannot see how subsection 33(1) of the MLA can be read as supporting the view taken by Siemens that no order enjoining it and others from commencing or continuing proceedings in a court other than the Federal Court can be made prior to a determination of whether or not a shipowner can limit his liability. The *raison d'être* of the provision is clearly to allow a shipowner against whom a claim has been made or where one is apprehended to have the Federal Court determine whether or not he can limit his liability in respect of the loss suffered by the claimant. If that were not the case, there would be no reason to allow the shipowner to seek a determination of the amount of his liability and an order enjoining others from proceeding in a different court. Thus, subsection 33(1) of the MLA clearly contemplates situations where the right to limit has not been judicially determined.

[78] In my view, the text of both the French and English versions of subsection 33(1) is to the effect that where a shipowner, by reason of section 28 or 29 of the MLA or paragraph 1 of Article 6 or 7 of the Convention, may be entitled to limit his liability in respect of a claim that has been made or one that is apprehended, the shipowner may seek from the Federal Court the orders which the Court may make under paragraphs 33(1)(a) and (c) of the MLA.

[79] The expression "that is limited by section 28 or 29 of this Act or paragraph 1 of Article 6 or 7 of the Convention", found at subsection 33(1), cannot possibly refer to a judicial determination on entitlement to limitation, as judicial determination is the very purpose of the limitation action. The expression refers to a type of liability, *i.e.* one that is limited by section 28 or 29 of the MLA or Article 6 or 7 of the Convention. Of great significance to the interpretation of subsection 33(1) is the fact that a shipowner may approach the Federal Court not only when a claim has been made against him, but also when a claim is "apprehended". Thus, if a shipowner may proceed under subsection 33(1) when a claim against it is simply "apprehended", it cannot be the case that a judicial determination must have occurred before proceeding under the provision.

[80] In my respectful opinion, no other interpretation of the provision is possible. Consequently, Siemens' argument must be rejected.

[81] I now turn to Siemens' argument that where a fund is not needed or a vessel is not arrested, there is no basis for the Federal Court to enjoin other proceedings. Again, I see no merit in this argument. There is nothing in the MLA and, in particular, in section 33 thereof, that could possibly

support Siemens' argument. The power to establish a fund and the power to enjoin proceedings are set out in separate paragraphs of subsection 33(1), and the making of an order enjoining proceedings is clearly not dependent on the constitution of a limitation fund. In my view, the Court can enjoin other proceedings, whether or not it has agreed to constitute a limitation fund under Articles 11 and 12 of the Convention.

[82] I will now address Siemens' arguments concerning the test applicable under subsection 33(1) of the MLA. For the reasons that follow, I conclude that the applicable test is that of "appropriateness" and not the tests set out in *Amchem* and *RJR-MacDonald*.

[83] The specific issue which arises from Irving and MMC's motions to enjoin is whether the Federal Court can prevent Siemens from pursuing its action in Ontario while the limitation actions proceed in the Federal Court. In the context of their proceedings in the Federal Court, Irving and MMC have asked the Court, pursuant to subsection 33(1) of the MLA, to determine the amount of their liability, to constitute a limitation fund and to enjoin Siemens and others from commencing or continuing proceedings in a court other than the Federal Court. I understand the words "determining the amount of their liability", found in paragraph 33(1)(a) of the MLA, to mean a determination of the amount of the liability that is limited by section 28 or 29 of the MLA or paragraph 1 of Article 6 or 7 of the Convention.

[84] In the Ontario Superior Court, Siemens has commenced an action in which it seeks compensation for the loss it claims to have suffered as a result of the incident. More particularly,

Siemens seeks an amount of compensation which, by far, exceeds the amount of limitation to which Irving and MMC might be entitled to should they succeed in their limitation actions in the Federal Court. That amount, as I have already indicated, is $500,000.

[85] Although I have already discussed the judge's reasons for granting Irving and MMC's motions to enjoin, I will briefly summarize them for ease of reference.

[86] First, the judge expressed the view that there was a presumptive right to limit liability under the MLA and the Convention and that there was a heavy burden placed on a claimant who sought to prevent a shipowner from limiting his liability.

[87] She then indicated that the fact that the limitation amount of $500,000 for all claims arising from the incident was far inferior to the amount claimed by Siemens in its action, *i.e.* $40,000,000, was a factor which weighed heavily in pursuing with the limitation action in the Federal Court. In her view, determining Irving and MMC's right to limit their liability first would no doubt contribute to a significant saving of costs for all those involved in the proceedings.

[88] The judge then remarked that Irving appeared to meet the definition of "shipowner" of Article 1 of the Convention, adding that in the case of MMC, the issue was not as clear. She indicated that MMC's claim to entitlement was based on paragraph 4 of Article 1 of the Convention, but that its claim to entitlement would be "robustly debated". At paragraph 149 of her reasons, she emphasized the fact that although Siemens had chosen Ontario as the forum in which to

advance its claim for damages, the MLA gave Irving and MMC the option to choose the forum in which they wished to pursue their limitation actions, noting that such proceedings were meant to be expeditious.

[89] The judge then turned to Siemens' argument that Ontario's *Rules of Civil Procedure* allow for a broader range of discovery and that jury trial was available. She dealt with these arguments by saying that in the Federal Court a case management judge could allow broader discovery if such discovery was warranted, and that Siemens' option "to have its claim considered by a jury is outweighed by the inconvenience and repetition that will be required to have the issue of limitation considered in this Court and the issue of liability considered in the Ontario Superior Court of Justice".

[90] She then opined that the Federal Court had jurisdiction over all claims pertaining to the incident and that the issue of liability could be addressed in the context of the limitation actions, adding that Siemens could commence its action in the Federal Court or proceed by way of a counterclaim to the limitation actions pursuant to paragraph 33(4)(a) of the MLA. The judge concluded her remarks on this issue by saying at paragraph 156 of her reasons:

> [156] Contrary to Siemens' submissions, the Federal Court is the most efficient forum to determine all the issues relative to the incident. 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. The issue of entitlement to limit can be determined in the limitation actions.

[91] I begin by stating what I believe to be the obvious, that is, that the proceedings commenced by Irving and MMC in the Federal Court stem from subsection 32(2) of the MLA whereby Parliament gave shipowners, *i.e.* those who might be entitled to limit their liability pursuant to section 28 or 29 of the MLA or paragraph 1 of Article 6 or 7 of the Convention, the choice of the forum in which they intended to assert their right to limitation. Thus, notwithstanding the fact that Siemens was entitled to commence its proceedings in the Ontario Superior Court, Irving and MMC properly commenced their limitation proceedings in the Federal Court. As a result, the Federal Court was properly seized of those actions and could thus exercise the powers granted to it by Parliament under subsection 33(1) of the MLA.

[92] Thus, on the facts, it is my view that the only court that can adjudicate Irving and MMC's right to limit their liability for the incident is the Federal Court. Hence, the issue as to whether Irving and MMC's conduct bars them from limiting their liability is an issue that only the Federal Court can determine. Consequently, whether Siemens' loss "resulted from his [Irving and/or MMC] personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result" is what the Federal Court will have to determine in the context of the limitation proceedings before it. In other words, that issue is not one which a jury in Ontario would be faced with in the context of the Ontario proceedings commenced by Siemens. That jury would, no doubt, hear evidence regarding liability and damages but, in my respectful view, the issue pertaining to the right to limit is not one which an Ontario judge would put to it, by reason of the Federal Court being properly seized of that issue pursuant to subsection 33(1) of the MLA.

[93] To this, I would add that intent and recklessness are of no relevance other than in the context of the limitation proceedings before the Federal Court. Whether Irving and MMC intended the loss to happen or whether they were reckless with the knowledge that the loss would result has no bearing on their liability for the loss. These concepts only become relevant when Irving and MMC seek to limit their liability pursuant to the relevant provisions of the MLA and the Convention.

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

[95] With these considerations in mind, I now turn to the applicable test.

[96] I begin by referring to Prothonotary Hargrave's decision in *The Sheena M*, where he made a clear and concise statement regarding the approach to be taken when dealing with motions such as the ones that are now before us.

[97] In *The Sheena M*, the issue was whether an action for damages – arising out of an accident in which a barge, in tow of a tug, struck a bridge – should be stayed so as to allow the owner, master and crew members of the Sheena M to pursue their limitation of liability action commenced under the 1976 Convention and the Protocol of 1996. Unlike the present matter, both actions had been commenced in the Federal Court.

[98] Also before the prothonotary was the question of whether the action for damages and the limitation action should be consolidated. In refusing consolidation, the Prothonotary made the following remarks at paragraph 3 of his reasons:

> 3. I have thoroughly considered the aspects of the consolidation motion urged by counsel for the CPR and by counsel for Rivtow Marine Ltd., but have rejected consolidation for many reasons. These reasons include that the limitation and the liability actions are incompatible for consolidation because they are different issues, a conflicting burden of proof and different standards of conduct at issue; that the limitation action should border on a summary procedure, particularly here where the Sheena M interests do not want discovery, but in contrast, the liability action will almost inevitably prove a complex piece of litigation; that consolidation will save little in cost and indeed could result in substantial extra cost; and that the Sheena M interests, as plaintiffs in the limitation action, are substantially ahead of the CPR, as plaintiffs in the liability action: the Sheena M interests ought not to be delayed in having their relatively narrow position determined. I thus rejected the consolidation motion.
>
> [Emphasis added]

[99] In my view, the considerations emphasized above are also relevant in determining whether the motions to enjoin should be granted.

[100] After making his determination with regard to consolidation, the prothonotary turned to the stay motion and explained the essential differences between the 1957 Convention and the 1976 Convention, highlighting the fact that under the new regime, the burden of proof was now on the claimant and not on the shipowner. As I indicated above, another notable change is the fact that the limit of liability under the new regime was dramatically increased for vessels of a tonnage of less than 300 tonnes. That limitation, $500,000, is at least tenfold the amount of limitation prevailing under the 1957 Convention.

[101] The prothonotary then referred to the remarks made by Mr. Justice Sheen of the English High Court, Queen's Bench Division (Admiralty Division), in *The Breydon Merchant*, [1992] 1 Lloyd's Rep. 373, who remarked at page 376 that one of the purposes of the Convention was to establish a right to limit liability that was almost "indisputable", adding that "[i]n exchange for those rights, the ship-owners agree to a higher limit of liability".

[102] The prothonotary then referred to a passage from *Limitation of Liability for Maritime Claims*, Lloyd's of London Press, 1998, at page 3, where the learned authors Patrick Griggs and Richard Williams make the point that one of the goals of the Convention was to reduce the amount of litigation as far as actions for limitations of liability were concerned, explaining that to achieve that goal, the signatories to the Convention had agreed to increase the limitation fund and to create

"a virtually unbreakable right to limit liability". I note that in this Court's recent judgment in *Peracomo* (FCA), Gauthier and Trudel JJ.A., who wrote the opinion for the Court with which Létourneau J.A. concurred, referred with approval to the remarks of Griggs and Williams which appear in Prothonotary Hargrave's reasons in *The Sheena M.*

[103] This led the prothonotary to state, at paragraph 9 of his reasons, that while the right to limit under the Convention was not absolute, it would be very difficult to break the limitation, adding that "[o]ne must question the sense of allowing a complex trial on liability to proceed when there is a quicker, cheaper and likely resolution by way of a limitation action". At paragraph 11, the prothonotary then expressed the view that where a claimant was successful in preventing a shipowner from limiting his liability, "it is difficult to conceive that a shipowner could even wish to defend a liability action".

[104] At paragraph 16 of his reasons, in determining whether the Federal Court had lost jurisdiction by reason of *res judicata*, *i.e.* by reason of an earlier order made by him whereby he had enjoined the plaintiffs in the action for damages from commencing or continuing proceedings before any court other than the Federal Court, the prothonotary opined that the issue on the enjoinment motion had been whether the shipowner interests could avoid "facing actions on another front", specifically in the British Columbia Supreme Court, until the limitation action had been dealt with by the Federal Court. The motion to enjoin which he had disposed of had been brought under paragraph 581(1)(c) of the *Shipping Act* which, as I indicated earlier, was the predecessor provision of subsection 33(1) of the MLA.

[105] In making these remarks, the prothonotary indicated that the test for enjoining was "that of appropriateness set out in the preamble to subsection 581(1) of the *Shipping Act*", which subsection reads as follows:

> **581.** (1) Where a claim is made or apprehended against a person in respect of a liability that is limited by section 577 or 578 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 in any other court, tribunal or other authority, may take any steps it considers appropriate, including, without limiting the generality of the foregoing,
> (a) determining the amount of the liability and providing for the constitution and distribution of a fund pursuant to Articles 11 and 12, respectively, of the Convention, in relation to the liability;
> (b) proceeding in such manner as to make interested persons parties to the proceedings, excluding any claimants who do not make a claim within a certain time and requiring security from the person claiming limitation of liability or other interested person and the payment of any costs, as the court considers appropriate; and
> (c) enjoining any person from commencing or continuing proceedings before any court, tribunal or other authority other than the Admiralty Court in relation to the same subject matter.
>
> **581.** (1) Lorsqu'une créance est formée ou appréhendée relativement à la responsabilité d'une personne, laquelle peut être limitée en application des articles 577 ou 578 ou du paragraphe 1 des articles 6 ou 7 de la Convention, la Cour d'Amirauté peut, sur 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 appropriée, notamment :
> a) déterminer le montant de la responsabilité et faire le nécessaire pour la constitution et la répartition du fonds de limitation y afférent conformément aux articles 11 et 12 de la Convention;
> b) joindre les intéressés aux procédures, exclure tout créancier qui ne respecte pas un certain délai, exiger une garantie des parties invoquant la limitation de responsabilité ou de tout autre intéressé et exiger le paiement des frais qu'elle estime indiqués;
> c) empêcher toute personne de commencer ou continuer toute procédure relative à la même affaire devant tout autre tribunal ou autorité.

[106] As the prothonotary correctly held, the test for granting a motion to enjoin is that of "appropriateness". I do not see how it is possible to come to a different view, considering the words used by Parliament in subsection 33(1) of the MLA that the Federal Court "… may take any steps it considers appropriate, including:… (c) enjoining any person from commencing or continuing proceedings in any court, tribunal or authority other than the Admiralty Court in relation to the same subject matter".

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

[108] I will now set out the circumstances which lead to the conclusion that the judge made no error in enjoining Siemens and others from commencing or continuing proceedings in any a court or tribunal other than the Federal Court.

[109] First, Irving and MMC have chosen, pursuant to subsection 32(2) of the MLA, to have their limitation actions determined in the Federal Court. In furtherance of that decision, they have asked the Federal Court to determine the amount of their liability and to constitute a limitation fund under

Articles 11 and 12 of the Convention. Hence, as I have already indicated, the Federal Court is the only court which can determine Irving and MMC's right to limit their liability for the incident.

[110] Next, both the action for damages in Ontario and the limitation proceedings in the Federal Court arise from the same incident. Another consideration is that Irving and MMC have a presumptive right to limit their liability and that Siemens, as a claimant, bears the onus of demonstrating that Irving and MMC's conduct is such that limitation is not available to them or that MMC cannot invoke to its benefit paragraph 4 of Article 1 of the Convention. In that perspective, it is important to remember that one of the purposes of the Convention was to do away with unnecessary litigation with regard to the right to limitation by transferring the burden of proof onto claimants and by increasing the limitation fund tenfold.

[111] Consequently, should the limitation actions succeed, a fund of $500,000 will be available to meet Siemens' claim and that of other possible claimants. Whether or not there are other claimants is, in my view, an irrelevant consideration. As I indicated earlier, the right to limit liability is, for all intents and purposes, the sole issue of the proceedings arising from the incident. Although Irving and MMC have not admitted liability, the fact of the matter remains that the rotors fell into the waters of Saint John harbour and thus there is likely no real defence to the action for damages other than the assertion by Irving and MMC that they are entitled to limit their liability. I am obviously not to be taken as opining that Irving and MMC do not have a defence, but I am simply pointing out that the crux of these proceedings is whether or not Irving and MMC can limit their liability. I am therefore unable to avoid the observation that the dispute between the parties will likely be resolved

by the Federal Court's determination of the right to limit liability, in that the limitation proceedings will allow the parties to deal immediately with the true issue between them and, as a result, will achieve a significant cost saving to all concerned.

[112] Further, because of the view which I expressed earlier in these reasons, the issue of limitation would not, in any event, go to a jury even if the Ontario proceedings were not enjoined, as a finding of liability for the loss does not depend on a finding of intent or recklessness. To this, I would add that in determining the limitation action, the Federal Court is not called upon to determine, as a matter of law, whether Irving and MMC are liable for the loss. It should be remembered that paragraph 7 of Article 1 of the Convention makes it clear that by invoking his right to limit liability, a shipowner is not admitting his liability for the loss. Again, to repeat myself, there can be no doubt whatsoever that should Irving and MMC be entitled to limit their liability, the limitation fund of $500,000 plus interest will be paid to Siemens and other claimants, if any, and that will be the end of the proceedings commenced in Ontario, as far as Irving and MMC are concerned.

[113] In these circumstances, it is my view that it would not be reasonable, prior to a determination of Irving and MMC's right to limit their liability, to allow Siemens to pursue its action before the Ontario Superior Court. I should say here, on the basis of the evidence before us, that Irving appears to be a "shipowner" as defined at paragraph 2 of Article 1 of the Convention; therefore, Irving is clearly entitled to assert its right to limit liability. With respect to MMC's right to limit liability, it is not as clear as that of Irving. However, MMC asserts that it is also entitled to

limit liability by reason of paragraph 4 of Article 1 of the Convention which provides that "any person for whose act, neglect or default, the shipowner… is responsible" may "avail himself of the limitation of liability provided for in this Convention". I would complete these remarks by saying that, at the very least, there is no evidence that would lead us to conclude that either Irving or MMC's entitlement to limitation cannot possibly succeed. I can see no prejudice to Siemens in temporarily preventing it from continuing its action in Ontario and by forcing it to proceed in the Federal Court to resolve the limitation issue.

[114] Also of relevance is the fact that the judge, as she was entitled to, ordered the establishment of a limitation fund in the amount of $500,000 plus interest from the date of the incident and that that fund is for the benefit of Irving as a shipowner and for MMC as any person for whose act, neglect or default Irving is responsible.

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

[116] I would conclude my remarks on this point by saying that although the Federal Court does not have exclusive jurisdiction regarding the issue of limitation of liability, it does, for all practicable purposes, have that exclusive jurisdiction. I am of this view because first, subsection 32(2) allows a shipowner to choose the forum in which he will assert his right to limit his liability. Second, the Federal Court is the only court which has jurisdiction with regard to the constitution and distribution of a limitation fund. Thus, save in exceptional circumstances, shipowners will almost invariably choose to assert their right to limit liability in the court which has exclusive jurisdiction with respect to the constitution of the limitation fund. To this, I would add that the Federal Court is the court which has the expertise in admiralty matters and that that fact is well known to the shipping community here in Canada and internationally.

[117] It is my view that Parliament was aware of these considerations and had them in mind when it gave the Federal Court the broad powers, including that of enjoining, found in subsection 33(1) of the MLA. The words of subsection 33(1) constitute a clear recognition by Parliament that the Federal Court was the court to which broad powers should be given so as to allow it to deal effectively with all issues pertaining to the limitation fund and the underlying claims for limitation of liability.

[118] In the end, the determination of a motion to enjoin pursuant to subsection 33(1) of the MLA is a discretionary decision which must be made taking into account all of the relevant circumstances. In my respectful opinion, that is what the judge did in determining, on the facts before her, that it was appropriate to enjoin Siemens and others from commencing or continuing

with proceedings in a court other than the Federal Court. I see no basis whatsoever to interfere with her decision.

[119] Before turning to the stay motions, I will say a few words regarding Siemens' submissions that the proper test is either that of *Amchem* or that of *RJR-Macdonald*.

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

[121] As a result of the Convention, shipowners are entitled to set up one fund and to have all claims against the fund brought in one proceeding and in one court for the distribution of that fund. Consequently, I have no difficulty stating that subsection 33(1) and the test of "appropriateness" which appears therein are in no way analogous to a conflict of laws situation where one jurisdiction may be more appropriate than another jurisdiction. Considerations such as comity have no relevance in making a determination under subsection 33(1). As counsel for MMC argues in his Memorandum at paragraph 26, "[t]he paramount consideration is practicality and giving effect to the purpose of the legislation: [t]he need to bring all claims into concursus".

[122] In the circumstances of this case, and in the circumstances of most actions for limitation of liability, subsection 33(1) of the MLA clearly enables the Federal Court and its judges to provide the ways and means to deal in the most expeditious manner with the issues arising from a shipowner's claim that he is entitled to limit his liability. Consequently, the question of *forum non conveniens* is not one that arises in the context of a claim for limitation of liability, particularly when, as here, the Federal Court's jurisdiction over the matter before it cannot be disputed. To this, I would add that there is also no question that the Ontario court is properly seized with the action for damages commenced by Siemens. This is in sharp contrast to the situation which arises in anti-suit injunctions where the main question is whether a foreign court has improperly assumed jurisdiction over a matter which is pending in a Canadian court. Thus, in my respectful view, the *Amchem* test is not the relevant test in dealing with a motion brought under subsection 33(1) of the MLA.

[123] With regard to the test enunciated by the Supreme Court in *RJR-MacDonald*, I see no basis whatsoever for the application of that test.

### *4. Whether the judge erred in dismissing Siemens' motions for a stay of the limitation actions commenced in the Federal Court*

[124] As I indicated earlier, it is my view that the success of either the motions to enjoin or the motions to stay leads to the dismissal of the other motions. By concluding that the motions to enjoin were properly granted, I conclude that the motions for a stay of the limitation actions must be dismissed. In other words, if the Federal Court was correct in finding, as I conclude, that it was appropriate in the circumstances to enjoin Siemens and others from commencing or continuing with proceedings in a court other than the Federal Court, it necessarily follows that it is not in the interest of justice to stay the Federal Court proceedings. In any event, I am of the view that the judge made no error in concluding that Siemens' motions to stay the limitation actions should be dismissed.

[125] Pursuant to subsection 50(1) of the *Federal Courts Act*, the Federal Court may stay proceedings in any cause or matter where: (a) a claim is being proceeded with in another court or jurisdiction; (b) for any other reason, it is in the interest of justice that the proceedings be stayed. Thus, as in the case of the motions to enjoin, the decision to stay proceedings in the Federal Court is a discretionary decision. As I indicated earlier, the judge agreed with the view expressed by Prothonotary Hargrave in *The Sheena M* that the two-part test in *Mon-Oil* is the test that should apply in determining a motion for a stay. In my view, in the context of these proceedings grounded in section 32 of the MLA, the judge made no error in the choice of the applicable test.

[126] There can be no doubt that in *The Sheena M*, the prothonotary dismissed the motion for a stay before him on the basis of paragraph 50(1)(b) of the *Federal Courts Act* (*The Sheena M*, paragraph 21). In the present matter, the motions to stay the Federal Court proceedings stand to be decided on the basis of that provision and not on the basis of paragraph 50(1)(a). Contrary to Siemens' assertion, the action pending in Ontario is not a "parallel proceeding" to the limitation actions in the Federal Court, in that the limitation actions are summary in nature and that they are meant to deal, not with liability or damages, but with a precise issue, *i.e.* Irving and MMC's right to limit their liability for the loss which arises from the incident. Clearly, the relief sought in the Ontario proceedings and that sought in the Federal Court are not the same.

[127] Consequently, the sole question before the judge was whether it was in the interest of justice that the Federal Court proceedings be stayed. Under the *Mon-Oil* test which, in my view, is the correct test, the judge had to determine two questions, namely, whether the continuation of the Federal Court proceedings would cause prejudice to Siemens and whether the stay of the Federal Court proceedings would cause an injustice to Irving and MMC. The judge asked herself these questions and she concluded that the test was not met by Siemens.

[128] First, with regard to the question of whether the continuation of the Federal Court proceedings would cause prejudice to Siemens, I cannot see how Siemens can suffer prejudice by reason of the Federal Court proceedings. As I have already indicated, if Irving and MMC are entitled to limit their liability, that will be the end of the litigation between Siemens and these two entities. Siemens's arguments with respect to its right to broader discovery and to trial by jury are, in

my view, of no relevance. To the contrary, the Federal Court proceedings will resolve the main, if not the only issue, between the parties, and this in a more cost effective manner in that unnecessary litigation may well be avoided.

[129] As to the question of whether a stay of the Federal Court proceedings would cause an injustice to Irving and MMC, the answer is that there would be an injustice to them in that they have a presumptive right to limit their liability under the Convention. In effect, both Irving and MMC enjoy a presumptive right to limit their liability and they need not be engaged in unnecessary litigation in Ontario if they are found to be entitled to limit their liability. Thus, both Irving and MMC are entitled to proceed with their limitation proceedings in the Federal Court, which, *inter alia*, has agreed to constitute a limitation fund for all claims arising as a result of the incident. It would thus be unjust to Irving and MMC to stay the limitation actions and, consequently, I can find no error in the reasons given by the judge in refusing to grant a stay of the limitation actions.

**DISPOSITION**

[130] For these reasons, I would dismiss Siemens' appeals with costs in favour of the respondents, Irving and MMC.

"M. Nadon"

J.A.

"I agree.
Eleanor R. Dawson J.A."

"I agree.
Robert M. Mainville J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | A-258-11 |
| **STYLE OF CAUSE:** | SIEMENS CANADA v. J.D. IRVING et al |
| **DOCKET:** | A-259-11 |
| **STYLE OF CAUSE:** | SIEMENS CANADA v. MARITIME MARINE CONSULTANTS (2003) INC. et al |
| **PLACE OF HEARING:** | Toronto, ON |
| **DATE OF HEARING:** | May 9, 2012 |
| **REASONS FOR JUDGMENT BY:** | Nadon J.A. |
| **CONCURRED IN BY:** | Dawson J.A.<br>Mainville J.A. |
| **DATED:** | August 30, 2012 |

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