

Federal Court



Cour fédérale

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Docket: T-1012-12

Citation: 2015 FC 304

Ottawa, Ontario, March 10, 2015

PRESENT: The Honourable Mr. Justice Manson

ADMIRALTY ACTION *IN REM* AGAINST THE
TUG “SEASPAN COMMODORE” AND THE
BARGE “SEASPAN SURVIVOR” AND *IN*
PERSONAM

BETWEEN:

SNOW VALLEY MARINE SERVICES LTD

Plaintiff

and

**THE OWNERS AND ALL OTHERS
INTERESTED IN THE TUG “SEASPAN
COMMODORE” AND THE BARGE
“SEASPAN SURVIVOR”, THE “SEASPAN
COMMODORE”, THE “SEASPAN
SURVIVOR”, SEASPAN MARINE
CORPORATION, RAY NICOL AND JOE
ZIZIC**

Defendants

and

MIKE HANSEN AND MIKE COLLINS

Third Parties

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I. Background

[1] This action is concerned with the unfortunate events that led to the sinking and loss of the Plaintiff’s vessel, the assist tug “Warnoc” (formerly known as the “Night Shift”), on October 5, 2011.

[2] The two main issues for the Court to decide are the liability of the parties and quantum or value of damages in respect of the value of the Warnoc, at the time of the loss in October 2011.

[3] The parties' agreed statement of facts is set out in the following paragraphs [4] to [20].

[4] The Warnoc was a tug owned by the Plaintiff Snow Valley Marine Services Ltd. ["Snow Valley"], and was used for making up log tows in Minette Bay, towing booms of logs in and out of Minette Bay and assisting in the loading of log barges at Clio Bay, British Columbia.

[5] Snow Valley was from time to time retained by log owners to assist Seaspan Marine Corporation ["Seaspan"] in loading log barges at Clio Bay near Kitimat, British Columbia. Payments for the services rendered by Snow Valley were made by the log owners and not by Seaspan.

[6] Prior to October 4, 2011, Snow Valley was instructed by the owner of a shipment of logs to assist by delivering their logs to the log barge the "Seaspan Survivor" ["Survivor"]. The Warnoc attended at Clio Bay on October 4, 2011 to provide that assistance.

[7] Snow Valley and the Warnoc's crew did not initially set, or attempt to recover, the anchor from the Survivor, which was done by the crew of the Seaspan tug, the "Seaspan Commodore" ["Commodore"].

[8] When the mate, Ray Nicol, and the deckhand, Nestor McCreery, of the Survivor retrieved her stern anchor after she was loaded, her anchor came up fouled, causing it to be lifted in a cross ways position and tangled with chain.

[9] Mr. Nicol, now deceased, had a Certificate of Competency as a Master, Intermediate Voyage, and was 66 years of age at the time of the accident.

[10] The employees of Snow Valley on the Warnoc assisted with efforts to untangle the chain from the anchor. Those employees were Mike Collins and Mike Hansen – both of whom were experienced operators of vessels like the Warnoc.

[11] Mr. Collins was at the helm of the tug at all materials times. He had worked on vessels for eighteen years and was very familiar with the Warnoc once she was purchased by Snow Valley.

[12] Mr. Nicol attended on board the Warnoc during the efforts to untangle the anchor chain.

[13] Joe Zizic, the head barge loader with Seaspan, instructed Mr. Decker to lower a safety line from the dozer boat crane on the aft end of the Survivor. A photocopied schematic of the stern of the Survivor as built is attached as Schedule A.

[14] Mr. Nicol attached a line from the Warnoc to either the anchor or anchor chain, but it is not agreed how or where it was attached.

[15] Mr. Hansen attached the other end of the line which Mr. Nicol had attached to the anchor to the tow post at the stern of the tug.

[16] Mr. Hansen decided how to attach the tow line to the tow post.

[17] When the anchor came free, it fell rapidly and the weight of the anchor and chain sunk the Warnoc in deep water, throwing Mr. Collins, Mr. Hansen and Mr. Nicol into the water.

[18] The Warnoc, including a new Kort nozzle, shaft, and propeller had been purchased by the Plaintiff for \$57,000.00 plus taxes on June 6, 2008.

[19] The Warnoc was insured at all material times for \$180,000.00.

[20] The Plaintiff paid \$218,400.00 for the Inlet Prowler, as a replacement vessel for the Warnoc.

[21] Counsels' agreed Book of Documents and Agreed Statement of Facts were very helpful in streamlining this proceeding.

II. Issues

- A. What is the liability, due to negligence, for either or both parties?
- B. If there is liability found for the Defendants, what is the measure of damages owing to the Plaintiff?

[22] For the reasons that follow, I find:

- a. The sole negligence that caused the accidental sinking and loss of the Plaintiff's vessel the Warnoc was by the Seaspan Commodore's and Seaspan Survivor's mate, Ray Nicol, and his crew, in failing to properly and safely secure a safety line from the Survivor's dozer boat crane to the Survivor's five ton or more anchor and anchor chain. The fact that neither of the Warnoc's crew, Mr. Hansen and Mr. Collins, were Master mariners, or that they were responsible to properly secure the tow line from the Warnoc's stern tow post to the Survivor's anchor and chain, did not contribute to the resulting sinking and loss of the Warnoc;
- b. I find that the Plaintiff's damages resulting from the loss of the Warnoc to be in the amount of \$257,000, as assessed in accordance with the principles set out below.

III. Analysis

A. *Liability*

[23] The Plaintiff argues that the negligence causing the sinking of the Warnoc was solely that of the employees of Seaspan in the management of the "Seaspan Survivor", in failing to properly secure a safety line to the anchor from the dozer boat crane on the Survivor. Captain Dodds admitted that the care and management of the Survivor and the tug the Commodore were his responsibility. He admitted that he delegated that responsibility to his mate, Mr. Nicol, who he left in charge of the management of the Survivor. Mr. Nicol had prior experience in clearing fouled anchors, whereas Captain Dodds did not.

[24] Moreover, the Plaintiff submits that the critical failure in the plan to free the fouled anchor involved the safety line. Using the safety line to make the operation of freeing the fouled anchor safe was planned and carried out by Mr. Nicol and Mr. Zizic. The crew of the Warnoc had no knowledge of the anchoring arrangements on the Survivor and played no part in the decision to deploy and use the safety line. Mr. Zizic and Mr. Decker admitted that Mr. Nicol instructed the dozer boat crane line to be dropped for use as a safety line, and that Mr. Nicol instructed the loaders when to stop dropping the safety line and when to raise it. Mr. Hansen's evidence is that he was present at the stern of the Survivor to make sure that Mr. Nicol did not fall in while securing the line; and the attachment of the safety line was entirely done by Mr. Nicol. Mr. Nicol ordered Messrs. Zizic and Decker to stop pulling up on the safety line when it appeared to be lifting the anchor and chain. None of the loaders saw where the safety line was attached to the anchor or chain but they felt tension on the line. Mr. Decker admitted that in his experience as a loader and logging operator, he had never before done a "blind pull", where he could not see the attachment to the object he was lifting.

[25] The Plaintiff also points out that the Incident Report, Exhibit 1(41), was prepared by Captain Dodds on the morning of the accident. He prepared it to the best of his ability from information gathered from all of the eye witnesses as noted on that report. Those eye witnesses included Mr. Nicol, Mr. Zizic, some of the other loaders, and Mr. Collins and Mr. Hansen of the tug. In that report, Captain Dodds notes that the safety line was attached to the "spot at 'anchor chain' & anchor wire joint". The evidence including Exhibit 1(35) show that joint to be 90 feet of chain away from the anchor. The Incident Report Exhibit 1(42) prepared by Captain Westmoreland after discussions with Mr. Nicol shows that there was a 60 foot bight of chain

which fell with the anchor when it released. Whether it was 60 or 90 feet, after the anchor fell, the safety line was attached at a considerable distance above the anchor.

[26] The Defendants argue that the Plaintiff's case against them is based on the position that Mr. Nicol supervised, directed, and was otherwise "in charge" of the operation to unfoul the anchor, which the Defendants deny and say has not been proven by the evidence at trial.

[27] The position of the Defendants is that the accident resulted from the actions of the Plaintiff's employees, Mr. Collins and Mr. Hansen, in not looking out for the safety of their vessel and, in particular, tying the line from the anchor to the Warnoc's stern tow post, in such a manner that it could not be released in the event of the anchor free-falling.

[28] The Defendants submit that the cause of the accident was the failure of the master and mate of the Warnoc, as they are described in paragraph 11 of the Statement of Claim, to take reasonable steps to ensure the safety of the vessel. It was they who attached the tow line in a manner that did not allow it to be released in the event of danger to the vessel, and they operated the Warnoc, all of which caused her sinking.

[29] Moreover, the Defendants refer to section 109 of the *Canada Shipping Act, 2001* SC 2001 c 26, which requires that:

Safety of persons

109. (1) The master of a vessel shall take all reasonable steps to ensure the safety of the vessel and of persons who are on board or are loading or

Sécurité des personnes

109. (1) Le capitaine d'un bâtiment prend toutes les mesures utiles pour assurer la sécurité du bâtiment et des personnes qui sont à son bord

unloading it while using equipment on it.

Protection from hazards

(2) If the master of a vessel is informed of a safety hazard, the master shall, unless the master determines that the hazard does not exist, take reasonable measures to protect the vessel and persons on board from the hazard, including eliminating it if feasible. If it is not feasible to eliminate it, the master of a Canadian vessel shall notify the authorized representative.

ou qui le chargent ou déchargent lorsqu'elles utilisent l'équipement à bord.

Protection contre un danger

(2) Lorsqu'on lui signale un danger pour la sécurité, le capitaine doit, sauf s'il est d'avis que celui-ci n'existe pas, prendre les mesures indiquées pour protéger le bâtiment et les personnes à bord contre le danger, notamment en l'éliminant si cela est possible. S'il ne peut l'éliminer, le capitaine d'un bâtiment canadien en avise le représentant autorisé.

[30] The Defendants state that neither Mr. Collins nor Mr. Hansen were properly qualified to operate the tug as they did not have a Master, Limited certificate as required by the *Marine Personnel Regulations* SOR/2007-115, s 212(2) & (4), Table 1 ["Regulations"]. Table 1 requires that a master of a vessel like the Warnoc have a certificate for a Master, Limited for a vessel of less than 60 gross tonnage. Neither Mr. Collins nor Mr. Hansen complied with that requirement or held any certificates. Furthermore, Mr. Archibald knew that they had no certificates and nevertheless allowed them to operate the Warnoc, contrary to the Regulations.

[31] Further, Capt. Rose, Capt. Dodds, Capt. Westmoreland and Mr. Archibald all agreed at trial that the person in command of a vessel is responsible for her safe operation.

[32] It is the Defendants' position that the Plaintiff has not established any direction or instruction from Mr. Nicol that caused this accident. The only thing that Mr. Nicol may have done that contributed to the accident was the manner in which he attached the line from the

Warnoc to the fouled anchor configuration, which did not cause the loss. The loss was caused by the method of tying the line to the tow post in particular and by the overall lack of care by Mr. Collins and Mr. Hansen for the vessel.

[33] An overview of the parties' witnesses and documentary evidence at trial is useful in analyzing the issues raised in reaching my decision.

IV. Witnesses and documentary evidence

A. *Plaintiff's witnesses*

[34] Mike Collins, one of the two crew members of the Plaintiff's vessel the Warnoc, could not be located and did not testify at trial.

(1) Ronald Michael Hansen

[35] Mr. Hansen was a boom man for approximately sixteen years before leaving the industry. He worked for Snow Valley for approximately eight years and was one of the two-man crew on board the Warnoc the night of the incident which resulted in her sinking. He estimated having spent approximately one third of his time at Snow Valley working aboard the Warnoc.

[36] Mr. Hansen does not hold any certificates of competency as a seaman. His knowledge of the industry is based entirely on his experience in the field working on sidewinders, dozer and tug boats. He has been involved in many log barge loadings, including many loadings of the Survivor.

[37] Mr. Hansen testified as to some of the features of the Warnoc, confirming that she had two controls: one in the wheelhouse, and another at the stern. Both controls were in view of the stern tow post which was in the centre of the boat width-wise.

[38] He further confirmed that the Warnoc is often run by a two person team in barge loading operations, with neither one in charge and both sharing responsibilities. Generally the hitch he would use in such operations when affixing a tow line to a tow post is called a suicide hitch. It is used in cases where a line might need to be released quickly; if you slack the line at all, it comes off the post easily, or if pressure is backed off leaving some slack in the line, it can release itself. At the time of the incident, Mr. Hansen was really only aware of a suicide hitch being used for such work.

[39] On the night of the incident, Mr. Hansen testified that nothing was unusual about the loading or the tow until the moment of the sinking. After the anchor was discovered to be fouled, the Warnoc took the mate of the Survivor, Ray Nicol, and the deck hand, Nester McCreery, to the stern of the Survivor to look at the anchor and meet with the four loadermen, who had returned to assist in the operation.

[40] Throughout the manoeuvres, Mr. Collins was at the stern controls of the Warnoc. Mr. Hansen testified that he and Mr. Collins did whatever Mr. Nicol told them to do throughout the process of trying to untangle the chain from the anchor.

[41] Before attempting to free the anchor there was a meeting held at the stern of the barge. Mr. Nicol was on board the Warnoc with a radio, and Mr. Zizic, the head loader, was on the barge with the other loaders, also with a radio. They discussed strategies and mentioned concern over securing the anchor safely with a line. When Mr. Nicol and Mr. Zizic seemed comfortable with the safety line being attached from the dozer boat crane to the fouled anchor and chain, everyone moved to start the operations. Mr. Hansen testified that he was not involved in the discussion and largely did not hear what was being said, other than Mr. Zizic's safety concerns.

[42] After Mr. Nicol tied the dozer boat crane line to somewhere on the fouled anchor and chain, the Seaspan staff first attempted to raise and lower the anchor a few times with its own winch (without a line attached to the Warnoc), but these efforts were unsuccessful.

[43] Mr. Hansen states that at some point, Mr. Nicol attached a line to somewhere on the fouled anchor and chain. Mr. Hansen fed him the rope and generally stood by in case he fell into the water. Mr. Hansen then attached the line to the Warnoc's tow post using a suicide hitch. Subsequently, Mr. Hansen heard a portion of a radio conversation between Mr. Nicol and Mr. Zizic, confirming that the dozer boat crane line was attached safely to the anchor. The tow line being used was typical of what is found on the Warnoc, having a small splice on one end large enough to attach a shackle, but not large enough to fit over the tow post. Exhibit 5 is an example of a tow rope like the one that was allegedly used on the night of the incident.

[44] Once the line was attached to either the anchor or chain of the Survivor and the tow post of the Warnoc, Mr. Collins gave a bit of gas to put tension on the line, then sped up quickly. After a few attempts, Mr. Hansen remembered the boat sinking suddenly, stern straight down. He went into the water last and swam to the Survivor. He confirmed that he did not raise any concerns or make suggestions to Mr. Nicol and Mr. Zizic throughout the operations.

[45] Mr. Hansen has worked on the boat that Snow Valley purchased to replace the Warnoc after she sank, the Inlet Prowler. He confirmed that she “pretty much” does the same work, but is harder to handle and does an inferior job to the Warnoc in many regards.

(a) *Cross-examination*

[46] Mr. Hansen confirmed that while he was a boom man for approximately sixteen years, he has never held a certificate of competency as a mariner.

[47] He has worked on multiple Snow Valley boats including the Warnoc, the Gulf Prince, the Jack Point and the Inlet Prowler.

[48] In addressing the multiple corrections to his testimony at discovery, he stated that while his discovery was more contemporaneous to the incident, he was on medications for an ankle injury at the time which lead to him to think less clearly. Though he originally said that it was cable and chain wrapped around the fluke fouling the stern anchor of the Survivor on the night in question, he was less certain at trial. However, he remembered that the engine hatch on the Warnoc was closed that night, and emphasized that it is never open during such operations. He

did admit that it is possible Mr. Collins had suggested using the Warnoc to try and pull the anchor free, but could not be certain.

[49] When reviewing Mr. Nicol's drawing representing the incident he disagreed with his characterization of how the tow line was attached to the fouled anchor and chain, which showed a line looped around the anchor or chain and back to the Warnoc's tow post, when he remembered a single line from the tow post to the anchor and chain.

[50] He did not recall any discussion on the way back to the marina in Kitimat with Mr. Nicol, and the loadermen about blame or fault for the sinking of the Warnoc. He did admit that he and Mr. Collins were not under contract to stay and help free the anchor but that normal practice was to stay until the barge had left.

(b) *Re-examination*

[51] Mr. Hansen stated that on the night of the accident, Mr. Collins only acted on Mr. Nicol's orders throughout the attempts to free the fouled anchor. At some point during this process, one of the loaders asked if everything was safe and Mr. Nicol confirmed it was.

(2) Mr. James Archibald

[52] Mr. Archibald has been the President and co-owner of Snow Valley since its incorporation approximately nine years ago. At the time of the October 5, 2011 sinking of the

Warnoc, Snow Valley owned multiple vessels, three of which (the Gulf Prince, the Jack Point and the Warnoc), were tugs.

[53] Snow Valley is regularly contracted by logging companies to assist in the loading of log barges. The Warnoc was used most frequently for bringing log booms from Minette Bay to Clio Bay, then acting as an assist tug to barges as they loaded. Though Mr. Archibald has been involved in upwards of 1200 barge loadings throughout his career, he was not frequently involved in them in 2011.

[54] The Warnoc was registered as a vessel under five tonnes and Mr. Archibald's position is that she did not require mariner certifications to operate. She was purchased for \$57,000 in June of 2008 under the name Night Shift while not in operating condition. She had two controls, one in the wheelhouse and one at the stern; the tow post is fully visible from both. A "minor-major" refit was required in order to put her into working condition after purchased, at the end of which the boat was surveyed for insurance purposes by Blue Wave Marine Surveyors and valued at \$170,000-\$180,000. The Warnoc was insured for \$180,000, and remained insured at that value until she sank.

[55] In January of 2011, the Warnoc underwent a four-month complete refit, taking her out of the water from January to April of 2011, the preparations for which began even earlier. Mr. Archibald testified that he had discussed conducting a second survey of the Warnoc with Captain Rose to potentially insure her at a higher value after her refit, but was unable to schedule one before the incident.

[56] Captain Rose did see the Warnoc in person on multiple occasions during and after the refit, and was on board her at least once. He did not conduct an official survey, but did visually survey her to give verbal advice on the work being done. Mr Archibald testified that he did not know where Captain Rose obtained the figure of \$300,000 worth of work having been done on the Warnoc in writing his report assessing her value.

[57] In going through multiple invoices submitted for work done, Mr. Archibald admitted that his bookkeeper might have erred in assigning portions of invoices to work on the Warnoc versus other boats owned by Snow Valley. In many cases, vendors did not separate work done by boat on their invoices, making such a task complicated.

[58] The ambiguous and inconclusive list of invoices makes quantification of the value of the refit difficult to ascertain. However, the major refit of the Warnoc in 2011 did include such changes as:

- changing the style of the wheelhouse;
- rebuilding the engine;
- sandblasting the inside of the boat (the outside having been sandblasted and repainted in 2008);
- new rubber fendering;
- new bulwarks;
- electrical changes.

[59] On the evening of October 4 and into the early hours of October 5, 2011, the Warnoc was operating as an assist tug boat to the loading of the Survivor, with All-West Trading and North Coast Log Handling being Snow Valley's clients. She was run by two boom men, Mike Hansen and Mike Collins. Mr. Archibald testified to it being regular practice at Snow Valley for two boom men to operate a tug together, sharing responsibilities equally. Further, after the loading of

a barge is complete, it is a regular occurrence for the assist tug, in this case the Warnoc, to standby to move people back and forth from the barge to the tug. Mr. Archibald further testified to it being regular practice to use a “suicide hitch” when affixing something to be towed to the tow post, when requiring manoeuvrability or if there is risk of a mishap. The hitch is designed to come off if the boat sinks or rolls over, without human intervention.

[60] Mr. Archibald first learned of the October 5, 2011 accident after receiving a phone call from Captain Dodds of the Commodore, informing him there was a mishap and in an effort to free a fouled anchor. He remembered Captain Dodds saying “your boat sunk. Everybody’s safe, got them onboard, they’ve dried up and they’re on their way to town.” Mr. Archibald then drove to the marina, to meet his crew and offered to take them to the hospital; they declined.

[61] Having arrived on the same water taxi, the head loader, Joe Zizic, approached Mr. Archibald and allegedly apologized, stating that Ray Nicol gave the command to proceed, notwithstanding Zizic’s safety concerns.

[62] Mr. Archibald understood that the tow line from the Warnoc had been used in the efforts to free the Survivor’s anchor.

[63] After the incident, Mr. Archibald attempted to purchase another tug to do the work of the Warnoc, but was unable to find another pod-hulled vessel of comparable size available. He purchased the Inlet Prowler instead, which is a conventional hulled tug, with a draft of approximately two feet more than the Warnoc. The purchase price was \$195,000, plus tax.

[64] The Inlet Prowler required some equipment upgrades and repairs before being moved to Kitimat and put to work. She does the same work as the Warnoc, but with more difficulty and more restrictions. Because of her deeper draft and the dangers associated with running a conventional hulled vessel aground, the window of opportunity to operate the Inlet Prowler between Minette Bay and Clio Bay is much smaller than with the Warnoc. The Inlet Prowler has run aground twice since she was purchased; in one case causing damage to a second boat positioned to keep her upright, and in the other, sustaining damage herself.

(a) *Cross-examination*

[65] When purchasing the Warnoc, Mr. Archibald clarified that the new Kort nozzle, propeller and shaft that were included in the purchase, were installed as he was buying her or shortly afterwards, not prior to his purchase. This was done before the insurance survey of 2008, conducted two weeks after he purchased the Warnoc.

[66] With respect to the major refit of the Warnoc, it is Mr. Archibald's opinion that work done on a vessel can increase her value dollar for dollar, or more in some cases. Further, he believes that repairs and smaller refits can sometimes increase a vessel's value.

[67] In having the Warnoc surveyed again, Mr. Archibald admitted that while Captain Rose had been to Kitimat and surveyed other Snow Valley vessels twice since the major refit of the Warnoc, it was not possible to schedule a survey for her at those times.

[68] Mr. Archibald confirmed that when Mr. Collins and Mr. Hansen were operating the Warnoc, they shared their duties. He admitted that whoever is running the vessel is responsible for her safety, and if asked to do something unsafe, they should refuse to do so.

[69] Mr. Archibald also clarified that it is common practice for an assist tug to move the Seaspan crew from the barge to the tug and vice versa during loadings, and that given it is not part of the contracted work, it is done for free, to save the crew the hassle of calling a service boat every time they need a lift.

[70] After the Warnoc sank, Mr. Archibald contacted Mr. Harlow to help him locate a replacement vessel, having used his services before. He insisted that he only asked Mr. Harlow to locate some comparables. The remainder of the investigations was conducted by himself and Captain Rose, eventually resulting in the purchase of the Inlet Prowler.

[71] As a replacement vessel, while the Inlet Prowler does the job of the Warnoc to some degree, she is more difficult to operate and more limited in her capacity to work, as she is larger and with a deeper draft. As a result, Mr. Archibald has had to use other vessels in Snow Valley's fleet, which leaves them unavailable for other work.

[72] Mr. Archibald admitted that the length of time an engine on a boat lasts depends on many factors, but that despite having stated that the Inlet Prowler needed a completely refit engine shortly after purchase, she has been operating for nearly four years without one thus far.

(b) *Re-examination*

[73] Mr. Archibald confirmed that the draft on the Inlet Prowler, while laden, is approximately nine feet. Due to her deeper draft, at times he needs to use two vessels to do the work the Warnoc could do on her own, which reduces the work he can contract for since an extra vessel is tied up.

(3) Captain Donald Rose, Plaintiff's Expert

[74] Captain Rose has over forty-eight years of experience in the marine industry, and has testified in Court as an expert witness and a consultant on marine matters. He has also conducted vessel valuation and condition surveys and reports accepted by underwriters and the Courts. In addition, he has operated pod hull tugs ranging in size from 16'-30', and power from 110bhp to 335bhp, and was aboard the Warnoc three times prior to her sinking. He has also driven a sister vessel to the Warnoc. The Defendants accepted his qualifications as a Master Mariner and marine surveyor.

[75] He is currently the Master of the Vancouver Division of the Company of Master Mariners, among other titles. He was asked by the solicitor for the Plaintiff to estimate the fair market value of the Warnoc as of October 4, 2011, as well as her particular value to her owner. He delivered this opinion in a report dated September 11, 2013. He was also asked to provide a market value estimate for the Warnoc by Captain James Archibald in 2011, and delivered his opinion in a report dated December 16, 2011.

[76] Captain Rose based his estimate on personal knowledge of the vessel, receipts for new equipment installed, invoices for work done, research on comparable vessels, personal

knowledge of the marine industry, and personal knowledge of RSL Shipyards, where the Warnoc was built.

[77] Captain Rose outlined that the Warnoc's primary purpose was the towing of log rafts from Minette to Clio Bay, and assisting log barges in Clio Bay. The navigation channel from Minette Bay to Douglas Channel is shallow and formed by sand and mud bars that shift, occasionally changing the regular depths of areas of the channel, resulting in an increased likelihood of contact with the bottom.

[78] Captain Rose is of the opinion that the Warnoc was well suited to this type of work because of her "shallow draught, good pulling thrust and flat bottom typical of her pod hull configuration". He enumerated a number of reasons that flat bottom pod hull tugs, like the Warnoc, are so well suited:

- they do not lay over on their side when grounded, and can turn with relative ease;
- their wide flat surface means they do not tend to dig into the bottom;
- they have greater stability than a similarly sized conventional hull;
- when bottom work is necessary a soft sandy bottom where the tide will clear is sufficient (they do not need supports to be held upright); and
- they have greater thrust than a conventional hulled tug of similar power because: (1) the drive shaft is horizontal with the propeller at right angles to it, thrusting straight back (and not angled down), (2) the hull allows for good flow of water to the propeller reducing cavitation and slippage.

[79] In Captain Rose's opinion, the Warnoc had been completely retrofitted and brought up to like-new condition. He was provided invoices from Snow Valley and a detailed description of the improvements made. In his opinion, Mr. Archibald generally demands a high standard and quality of work in repairs and improvements to vessels owned and operated by Snow Valley. The improvements listed as made to the Warnoc, from 2008 to 2011, are as follows:

- fitted with a Kort Steering nozzle and renewed steering system;
- sandblasted hull inside and out, then the metal was prepped and painted;
- old bulwarks were removed and replaced with new ones;
- renewed cooling system for the main engine;
- deteriorated metal on the deckhouse was cut away and replaced;
- after deck plating was cut away and replaced;
- new windows, seats, matting, and heater in the deckhouse;
- new engine monitoring gauges installed in the wheelhouse;
- complete rewiring with new light fixtures;
- new window wipers;
- new batteries with new box installed;
- new exhaust system;
- rebuilt main engine and reduction system;
- new bilge pumps and plumbing were installed;
- new floodlights;
- new RADAR and two new marine VHF's; and
- new auxiliary fuel tank.

[80] Captain Rose compared the characteristics and performance of the Warnoc and her replacement, the Inlet Prowler, which was the most suitable vessel available immediately after the Warnoc sunk. She cost \$218,400 to purchase (inclusive of tax), required \$36,326.18 in immediate repairs and work, and is due for another \$25,000 in work to rebuild the engine. This brings the total cost of the Inlet Prowler to \$279,726.18. He is of the opinion that even with the repairs and work, the Inlet Prowler is not as efficient as the Warnoc, for the following reasons:

- 2' deeper draught reducing the tidal window in which she can transit;
- conventional hull with a high angle of dead rise from keel to chine resulting in a tendency to lay over on her side when in contact with the bottom, and difficulty turning when aground;
- she must be docked on a proper grid when bottom work is necessary;
- she has a tendency to dig into the bottom as a result of being equipped with a Kort Nozzle, making her difficult to free; and
- does not pull with as much thrust and burns more fuel per hour.

[81] In his December 16, 2011 report to Mr. Archibald, Captain Rose valued the Warnoc at between \$325,000 and \$350,000 and he continues to hold this opinion. He also estimated the cost of replacing the Warnoc with a new vessel at \$600,000.

[82] After the Warnoc sank, Mr. Archibald requested Captain Rose's help in his initial search for a replacement vessel once receiving some suggestions from Mr. Harlow. Captain Rose visited a number of boats for Mr. Archibald as well as accompanied him once he arrived in Vancouver. One of these vessels was a pod hulled vessel called the North Arm Logger, listed at \$150,000. In Captain Rose's opinion she was in terrible condition and not worth purchasing and refitting.

(a) *Cross-examination*

[83] Captain Rose began doing insurance surveys in 2009. He stated that the value of a vessel has at least something to do with the work she is needed for; generally though, a vessel is worth what someone will pay for her.

[84] He has regularly done surveys for Snow Valley and believed he had been aboard the Warnoc in July and October of 2010. He then clarified he had seen the Warnoc since her refit, while she was on the dock in Kitimat, sometime after April 2011 when doing a survey of another Snow Valley vessel. He could not survey the Warnoc at the time, due to time constraints and offered to do so at a later date.

[85] Though Captain Rose had been aboard her a number of times, he never charged for any work related to the Warnoc. Any experience he had with her was more serious than a casual glance, but was not based on a full professional survey.

[86] He agreed that the Plaintiff is not the only company operating in Minette and Clio Bay offering log booming and towing services, and confirmed that other conventional hull boats regularly operate there.

[87] It was his opinion that an engine rebuild would have had to happen on the Warnoc at some point, as is the case with any vessel. He agreed that every 21,000 hours of use is a reasonable average for an engine before a rebuild is necessary. He was unaware that the Inlet Prowler was going to have a rebuild four years after her purchase.

[88] In assessing the value of the Warnoc, Captain Rose considered the listed items of work included in his report, and admitted that a number of them are small in cost and added value. He insists though that he reached his estimate with the aid of contacting ship yards in the Vancouver area to determine what the work would cost. He further based his opinion on the value of the Warnoc to her owner.

[89] Defense Counsel presented two listings of boats Captain Rose had surveyed: the Coast 12 and the Pacific Hawk. He valued the first at \$225,000 after a survey conducted in 2012. The vessel is currently listed at \$80,000 in a bankruptcy sale, though he is not certain of her current condition. The second vessel was valued at \$550,000 after a 2009 survey and eventually sold for

\$250,000. The owner had no more work for the Pacific Hawk and was willing to sell at a discount.

[90] Captain Rose held a master certification from 1971-2009 and agreed that a master is in control and command of their vessel and is responsible for her manoeuvres and her safety. If something unsafe is suggested then it should not be followed.

(b) *Re-examination*

[91] Captain Rose stated that if a senior mariner from a towing tug comes aboard a smaller vessel, it would be natural for the operator of the smaller vessel to assume the senior mariner would make sure operations were safe, at least in part since he is at risk himself.

[92] He further stated that the invoices provided for work on the Warnoc do not give a complete picture of the value of the vessel, as they do not account for a great deal of the labour, time and work expended that are also relevant to such a calculation.

B. *Defendants' witnesses*

(1) Joe Zizic

[93] Mr. Zizic is the head loader for the Survivor and has been in the logging industry for over twenty years. He became a crane operator in April of 2000.

[94] He has been to Clio Bay at least fifty times on the Survivor since 1993 and more on other barges, using the same loading procedure and type of assist vessels. Mr. Zizic confirmed that it is common practice for an assist tug, like the Warnoc, to be the last to leave an area once the loading of a log barge is complete.

[95] He confirmed that the stern anchor on the Survivor is attached to 90 feet of chain, then a long cable. While a report from Captain Westmoreland of Seaspan suggested that the aft pintle crane should have been used in the operation instead of the dozer boat crane, Mr. Zizic disagreed. The aft pintle crane on the Survivor is not long enough to have reached over the stern of the boat to be used on October 5, 2011, unlike some other log barges.

[96] On the night of the incident, Mr. Zizic was working with three other loaders. They had begun to leave Clio Bay on the water taxi, the Northern Lights, after a normal loading when they were called back to the barge by Captain Dodds to assist in freeing the Survivor's fouled stern anchor. Mr. Zizic is not customarily involved in the raising and lowering of the anchors, but the Captain thought he might be able to help in the event of a mechanical issue.

[97] After arriving on the Commodore and changing into their uniforms, Mr. Zizic and the other loaders then returned to the Survivor, saw the fouled anchor from aboard the Northern Lights and boarded the Survivor. They gathered at her stern to meet with the crew of the Warnoc and Mr. Nicol (who was also aboard the Warnoc), and Mr. McCreery.

[98] At no point did Captain Dodds give any instructions as to what was to be done. Mr. Zizic stated that Mr. Nicol had been “left in charge” during his discovery, but later clarified at trial that he was left in charge of the barge itself and Mr. McCreery, not the Warnoc or her crew.

[99] Mr. Zizic stated that at the meeting at the stern of the Survivor there was discussion of the weight capacity of the dozer boat crane and whether or not it would be able to hold the anchor with a safety line, as well as plans of action. It was estimated the anchor weighed five tonnes; Mr. Zizic added another tonne for the chain making a total of six tonnes he thought the dozer boat crane might have to hold, a weight he was comfortable with.

[100] It is Mr. Zizic’s recollection that Mr. Collins initially suggested using the Warnoc to try and pull the anchor free and that Mr. Hansen had said nothing. He further recalled that no one objected to the plans discussed at this meeting.

[101] Before any attempts to free the anchor, a safety line was tied from the dozer boat crane to somewhere on the fouled anchor and chain. Mr. Zizic could not see where or how it was attached, as he was above the anchor on the Survivor. He could see Mr. Hansen and Mr. Nicol involved in the operation, but could not tell who actually tied it.

[102] The first attempts to free the anchor involved Mr. McCreery using the anchor winch to lower and raise it twenty to thirty feet. At every point there was movement, Mr. McCreery, Mr. Nicol and Mr. Zizic, who all had radios, would confirm “all stop, all secure”. Mr. Zizic was on the dozer boat level, approximately four feet away from Mr. Decker (another loader who was

operating the dozer boat crane). Mr. McCreery was in the winch room of the Survivor and Mr. Nicol was aboard the Warnoc with Mr. Collins and Mr. Hansen.

[103] When this method did not succeed, Mr. Nicol attached a single line from somewhere on the fouled anchor and chain. The other end was attached to the Warnoc's tow post by Mr. Hansen allegedly putting a large spliced eye over its ears. This evidence is inconsistent with that of Mr. Hansen and Mr. Archibald, and I do not believe it to be accurate or reliable.

[104] After multiple attempts to pull on the anchor with the line, the Warnoc sank suddenly. After the first attempt to pull the anchor straight forward did not succeed, Mr. Zizic testified he saw the boat attempt to pull at another angle, which caused her to roll to some degree before sinking. He thought it had been the roll to the side that submerged the Warnoc. He confirmed that when the anchor supposedly fell, the line to the dozer boat crane did not move and was still under tension, he also did not hear or feel anything to suggest the anchor had fallen.

[105] Once Mr. Nicol, Mr. Collins and Mr. Hansen were retrieved from the water and on board the Survivor, they were taken to the stern room and given dry clothes and emergency blankets so they could warm up. Everyone then went to the wheelhouse of the Commodore for a discussion with Captain Dodds as to what had happened. Blame was not discussed.

[106] Leaving the Commodore, Mr. Zizic testified that he saw the anchor, now freed, hanging straight down from the stern with the safety line from the dozer boat still attached. He confirmed there was no damage to the dozer boat crane. He thought that the safety line was eventually

disconnected by someone on the Northern Lights, since she was the only other vessel available to do so once the Warnoc had sunk.

[107] After the incident, Mr. Zizic saw Mr. Archibald on the dock at the marina in Kitimat. He denied having apologized to him or stating he had asked three times if everything was safe. He did remember having mentioned to him that he wanted to be sure the weight of the anchor was safely supported throughout the operations.

(a) *Cross-examination*

[108] In cross-examination, Mr. Zizic confirmed he is not a mariner, has never held any certificates of competency as a seaman, and has never operated an assist tug or worked in a booming ground. He stated that during the meeting at the stern of the Survivor, Mr. Nicol had boarded the Survivor with the four loadermen, while Mr. Collins and Mr. Hansen remained on board the Warnoc.

[109] Mr. Zizic stated that he considered Mr. Collins the “captain” of the Warnoc, since he was at her controls. He did not know that it was Snow Valley’s practice not to assign skippers to their tugs. He further stated that in his experience in the industry, it would not be strange for a crewman on an assist barge to have an opinion as to how to free an anchor, and everyone’s opinion is generally valued. Mr. Zizic confirmed that he is not customarily involved in the setting and recovering of anchors from the Survivor, nor are Mr. Collins and Mr. Hansen.

[110] Mr. Zizic confirmed that after Captain Dodds put Mr. Nicol in charge, all additional instructions came from Mr. Nicol, as did any information regarding the safety line from the dozer boat crane.

[111] When asked to confirm the type of eye he saw being attached to the tow post on the Warnoc, and after being presented with the tow line marked as Exhibit 5, with a small eye at the end, Mr. Zizic insisted that in his years in the industry he had never seen an eye that small and further insisted he saw a line with a larger eye being thrown over the tow post by Mr. Hansen. As I stated above, I have trouble with Mr. Zizic's evidence on this point.

[112] Mr. Zizic also insisted that he never apologized to Mr. Archibald in Kitimat, though he remembered saying something along the lines of it being a good thing that no one got hurt.

(2) Captain Don Westmoreland

[113] Captain Westmoreland worked for Seaspan as a port captain, until his retirement in December of 2014. He began his career as a seaman in 1970, earning his masters certificate of competency in 1976. He was one of three port captains working for Seaspan at the time of the incident and was on call on October 5, 2011.

[114] He made notes throughout the incident which outline that he first heard about the Warnoc's sinking by phone from dispatch at 3:40 am. He ascertained that everyone was safe and there were no injuries, then called the Commodore to speak with Captain Dodds. He instructed

Captain Dodds to contact the proper authorities, then called his supervisor, Mr. Eckford, to apprise him of the situation.

[115] In compiling his incident report, he consulted Captain Dodds' report as well as interviewed Mr. Nicol and Captain Dodds. The majority of his information came from Mr. Nicol, and a drawing Mr. Nicol provided of what had happened that night. He spoke with him a second time over the phone before finishing his report. At no time did he consult Mr. Zizic.

[116] Captain Westmoreland confirmed that a master is in command of a vessel and responsible for her safety, the safety of her crew and her manoeuvres. A master is usually at the controls of a vessel, and should refuse to do something if they feel it is unsafe.

[117] He reviewed the report he had filed and admitted he had made some small errors regarding certain facts. He did confirm that Mr. Nicol agreed at some point in their meeting that more planning should have taken place before acting to free the anchor.

(a) *Cross-examination*

[118] Captain Westmoreland admitted that the use of a shackle and J hook with a small eye on a tow line is common in log booming. He further stated that he is aware of a suicide hitch but insisted he has never condoned its use.

[119] In completing his report, he only met with Mr. Nicol days after the Survivor had sunk.

[120] When asked about securing a fouled anchor, he offered a number of ways to deal with such an issue, none of which appear to have been explored the night of the incident.

(b) *Re-examination*

[121] Captain Westmoreland clarified that while he did not find Mr. Nicol easy to interview, at no time did he find him evasive, or trying to minimize his involvement in the incident. Further, Captain Westmoreland confirmed that in his opinion someone should have been at the tow post on the Warnoc ready to react if something had gone wrong.

(3) Captain Richard Dodds

[122] Captain Dodds has held a 500 tonne master certificate of competency since the early 1990s, and is currently employed as a master on outside boats for Seaspan. He is not posted to a single vessel and floats between three or four, including the Commodore. He had towed the Survivor six to twelve times prior to October 5, 2011, and had been to Clio Bay approximately six times. He recalled having worked with the Warnoc before on at least one occasion.

[123] When Captain Dodds heard of an issue with the Survivor's stern anchor he called Mr. Zizic by radio and asked him to return. He then ordered the Survivor be brought out of the Bay, into deeper more open water because there is little room in the Bay and he was concerned about drifting too much in poor weather conditions while they attempted to free the anchor.

[124] Captain Dodds confirmed that he did not instruct Mr. Nicol as to how to proceed to free the anchor. He knew Mr. Nicol was more experienced in that regard and directed him to be in charge of the Survivor, but did not put him in charge of the Warnoc or her crew. Throughout the operation, Captain Dodds was listening to the radio communications, but only heard portions of what was said as he was otherwise occupied with maintaining the integrity of the Survivor and the Commodore.

[125] After the Warnoc sank and the crew was safe and dry, he called everyone into the wheelhouse of the Commodore to review what had happened, taking notes throughout. Those notes formed the basis for his report, which was written later that morning. At no point did Captain Dodds see the fouled anchor himself. He was also not informed of who attached either line to the fouled anchor and chain or how they were secured.

[126] Captain Dodds confirmed that he would interpret the captain of a ship to be in command of the vessel, responsible for her safety, and the safety of everyone on board. Generally, manoeuvres are decided by the person at the controls. Importantly, if unsafe directions are given, then they should be ignored by a master or captain. These basic guidelines do not change with the size of vessel.

(a) *Cross-examination*

[127] Captain Dodds confirmed that he had only worked with Mr. Nicol, once or twice before the night of the incident. He was aware that Mr. Nicol was a knowledgeable mariner and left him in charge of solving the issue with the fouled anchor, as he himself has never been involved in

such an operation. He could not recall if he heard discussion over the radio of attaching a safety line from the dozer boat crane at any point.

[128] When asked if Mr. Decker was present in the wheelhouse meeting, Captain Dodds admitted that he could not recall specifically; he had assumed that all of the loadermen were present. The rough notes he took at that meeting were made with the intention of making his report as accurate as possible. He was not aware of who had removed the safety line after the anchor fell and was retrieved, nor was he aware of who had put the dozer boat crane away on October 5, 2011.

[129] Captain Dodds demonstrated a method of tying a line to a tow post in a way that would allow the line to slacken if under tension. He admitted though that it would require human intervention to release and if sinking was immediate then there would be no time to do so.

[130] When asked about the behaviour of the master of a vessel, Captain Dodds admitted that he would likely consider the opinion of a more competent and experienced seaman if it was voiced on his vessel. He maintained, however, that he would still make his own decision as to the best way to proceed in a given situation.

(b) *Re-examination*

[131] Captain Dodds confirmed that if the eye at the end of a tow line was placed above the ears, around the top of a tow post it could slip off if a boat was sinking. Also, he clarified that

even if the sinking of the Warnoc was almost immediate, if the tie he demonstrated had been used, it is possible that a person could have released the line.

(4) Mr. James Allen Decker

[132] Mr. Decker had been a loaderman for Seaspan for approximately eight years, though he has recently been working for other companies. He was working on the Survivor for approximately the fifteenth time on the night the Warnoc sank. He did not recall ever having seen the Warnoc before.

[133] After being called back to the Survivor, Mr. Decker recalls meeting at the stern of the barge with Mr. Collins, Mr. Hansen, Mr. Nicol, Mr. Zizic and the other loadermen for a safety discussion before attempting to free the fouled anchor. To the best of his memory, Mr. Nicol remained on board the Warnoc throughout.

[134] He recalled the development of numerous plans to free the anchor. The first step was to use the dozer boat crane to attach a safety line, then try lifting and lowering the anchor on its own winch, and next to try and pull at it with the Warnoc. At the conclusion of the meeting Mr. Zizic and Mr. Nicol decided it would be best if Mr. Nicol remained on board the Warnoc to keep in radio contact. After the discussion, Mr. Decker and Mr. Zizic proceeded to the dozer boat crane platform at the stern of the Survivor. From this position, he could not see the anchor which was below him, but could see the Warnoc.

[135] Mr. Decker was only a few feet away from Mr. Zizic throughout the operations, getting instructions from him as to when to raise and lower the crane. Mr. Decker did not have a radio of his own, and received his instructions through Mr. Zizic. He does not recall who attached the safety line or how they did so.

[136] When raising and lowering the anchor on its own did not succeed Mr. Decker overheard someone on board the Warnoc suggest they try and pull at it with a tow line, through Mr. Zizic's radio.

[137] After a single line had been attached to the fouled anchor and chain, Mr. Decker saw the Warnoc pull away from the Survivor with the line tied to her by a crewmember and it looked to be attached by a large eye over the top of the tow post. As the Warnoc attempted three times to pull on the tow line, the rope spun on the post, changing angles.

[138] During the third attempt, Mr. Decker could not see the anchor but felt something break loose; tension remained on the line held by the dozer boat crane. He could see one person on the Warnoc with his ankles in water which quickly became knee deep, then the Warnoc began sinking bow up and stern down, rolling partially to starboard.

[139] After the Warnoc sunk and her three passengers were on board the Survivor, Mr. Decker does not recall any discussion about what happened. When Captain Dodds called a meeting in the wheelhouse of the Commodore, Mr. Decker was the only person involved in the incident

who was not present. He does not recall the details of this meeting, but does remember that someone suggested if the rope were tied differently to the Warnoc then she might not have sunk.

(a) *Cross-examination*

[140] At the outset, Mr. Decker admitted that he had had discussions with Mr. Zizic recently at Defense Counsel's offices about what they had seen, prior to trial.

[141] He confirmed that after Captain Dodds had called the loadermen back to the barge on October 5, 2011, he remembered circling around the stern of the barge and seeing the fouled anchor and chain. They were then taken to the Commodore to change into their uniforms and brought back to the Survivor. These uniforms include ear protection because of loud generators on board the Survivor and a loud exhaust system.

[142] During the safety discussion at the stern of the barge, Mr. Decker could not recall exactly where the Warnoc was positioned. He did recall that Mr. Nicol was aboard the Warnoc at the time, and that only one of the Warnoc's crew was there, as the other was operating her controls. He confirmed that it was a bit loud in the area because of the exhaust systems of the Survivor and the Warnoc.

[143] After the safety discussion, all communications were conducted by radio. Mr. Decker was standing close to Mr. Zizic on the Survivor, but they still had to raise their voices to speak to each other. At no point did Mr. Decker hear Captain Dodds put Mr. Nicol in charge of the operation, but he agreed with Mr. Zizic's answers on discovery that Captain Dodds would have

done so, since he was not there himself to oversee the operation. Mr. Decker had only worked with Mr. Nicol once before but agreed it would be normal practice to leave him in charge as mate of the Survivor.

[144] With regards to the attachment of the safety line, Mr. Decker stated that Mr. Zizic had voiced his concerns over the weight of the anchor and the dozer boat crane's ability to provide adequate safety. Mr. Nicol assured him it was safe and they lowered a line to be attached to the fouled anchor and chain. While he admitted it is more common for a crane operator to see what they are towing or lifting before proceeding, Mr. Zizic and Mr. Decker could not on this occasion. Mr. Decker had never before been involved in a "blind pull" like this one.

[145] When the tow line was later attached to the Warnoc, Mr. Decker insisted it was not by a suicide hitch and that it was with a large eye at the end of the line. He further insists that after he felt the anchor fall free, the Warnoc sank almost immediately.

[146] After the anchor was brought up, Mr. Decker was not made aware of whether the safety line remained attached. He does not recall if he put the dozer boat crane and line away that night, nor does he recall who lifted the anchor.

[147] When they returned to Kitimat, he does not remember speaking with Mr. Archibald, but did see Mr. Zizic speak with him and could not hear what was said.

(5) Christopher Small, Defendants' First Expert Witness

[148] Mr. Small has been a full-time marine surveyor since 1979. Chris Small Marine Surveyors Ltd was incorporated in 1984, and he has been the owner and principal surveyor since that time. The Plaintiff accepts his qualifications as a marine surveyor.

[149] Mr. Small was asked by Defense Counsel to estimate the fair market value of the Warnoc before she sank, and compiled his report between May 2 and September 11, 2012. He considered the following in forming his opinion:

- Blue Wave Marine Surveyors survey report, June 20, 2008;
- Captain Rose Marine Consulting and Surveys evaluation, December 16, 2011;
- rebuilding and improvement cost summary 2010-2011 (undated);
- various invoicing and time sheets apparently related to the "Warnoc";
- comparable vessels to the "Warnoc" available for sale.

[150] Mr. Small noted very few used vessels with similar characteristics on the market at the relevant time, October 2011, which he opined could result in the Warnoc having some premium value. He located four used vessels with somewhat similar characteristics between 19' and 42' and priced between \$80,000 and \$179,000, which helped him conclude that the Warnoc had a market value between \$155,000 and \$185,000 at the relevant time.

[151] It is his opinion that the purchase of a new vessel is preferable to refitting an older one, since the costs of extensive refits are often not reflected in market value. He spoke to Mr. Dunagan of Canadian Alberni Engineering who informed him of a similar new construction vessel they sell, incorporating newer technology, new hull material, equipment, and systems for \$295,000 to \$315,000. His estimate was also informed by the idea that a used refit vessel would

likely not achieve a market value of more than 60% of the replacement cost of a new vessel. Given the estimate that a comparable new vessel would cost on average \$310,000, 60% is \$186,000.

[152] In reviewing the invoices for work carried out on the Warnoc, Mr. Small noted that much of what was done involved restoration of equipment and hull structure, which would not affect market value. Further, some costs associated with boat moving, disposal, and roof fabrication were included in the invoices and should not be considered. As well, invoice #3243 included no specific breakdown of the total labour charges of \$12,742.20, and should not be included.

(a) *Cross-examination*

[153] Mr. Small confirmed that he is not a master mariner and holds no certificates of competency as a seaman. He has never operated a commercial tug and has never been to Minette or Clio Bay. He further has never seen the Warnoc in person and admitted Captain Rose is more knowledgeable regarding tugs. He further confirmed that he was hired to evaluate the theoretical market value of the Warnoc, without considering her appropriateness to the work she had been used for or her value to the Plaintiff specifically.

[154] Mr. Small agreed that someone who actually surveyed the Warnoc would be in a better position to assess her value, but pointed out the only survey done was four years old, and some of the vessel's refits were already underway or completed at the time.

[155] He agreed that the condition of a vessel can be influential in assessing her value, but that some work, like sandblasting the interior and exterior, would only have added pennies on the dollar. He was aware of the work listed as having been done on the Warnoc and the invoices he was provided for consideration, but was unaware that some work had been paid for through bartering.

[156] In assessing the Warnoc's value, Mr. Small looked online only at what he considered to be comparables, without searching for specific equipment installed on the Warnoc. He admitted that his list of comparables is diverse, since very few boats of similar size and hull design were available at the relevant time.

[157] Mr. Small also confirmed that the estimate he received for a replacement vessel from Canadian Alberni Engineering was based solely on two phone calls, and his enquiry was mostly confined to the dimensions of the Warnoc, her hull-style, and Kort nozzle. The price given was "off the cuff" and did not include a formal quotation.

[158] When Plaintiff's Counsel asked whether the quoted price for a new vessel is usually lower than the actual price Mr. Small did not agree, but admitted it is often the case. Further, a newly built boat is not an immediate solution, as they take between six months to a year to complete.

[159] He stated that despite his calculation of 60% of replacement cost being appropriate to determine a vessel's value, he would not increase his overall estimate if the Court found a higher

replacement value to be appropriate in the case at bar. He stated that the replacement cost is a reasonable reference point in estimating value and not the only consideration. In my opinion, this position lacks transparency or intelligibility.

(6) Gary Harlow, Defendants' Second Expert

[160] Mr. Harlow is a commercial marine broker and consultant with more than thirty years of experience in the marine community. He is the principal and founder of Harlow Marine International Inc., a brokerage company founded in January 1994 specializing in the purchase and sale of tugs, barges, crewboats, landing craft, and boom boats in Canada, the United States, and internationally. In the last ten years Mr. Harlow has provided consulting services to banks, insurance companies, trustees in bankruptcy, and major accounting and law firms to evaluate fair market value of marine equipment. He is accepted as qualified as a marine broker and consultant by the Plaintiff.

[161] Mr. Harlow was asked to estimate the theoretical market value of the Warnoc prior to her sinking on October 5, 2011. In compiling his report, he consulted the following:

- agreement for sale of the "Warnoc", June 6, 2008;
- Blue Wave Marine Surveyors survey report, June 20, 2008;
- Captain Rose Marine Consulting and Surveys evaluation, December 16, 2011;
- invoices for work reported to be done on the "Warnoc", 2008-2011;
- comparison of similar vessels based on vessel size, horsepower, vintage, hull design (reported in Schedule A to his report)

[162] Mr. Harlow is of the opinion that generally, the maintenance costs of a vessel do not increase her overall value, unless the modifications are of such magnitude as to change her

design, and/or improve overall performance. He also noted that the majority of the invoices provided by the Plaintiff could not be confirmed to relate to work done on the Warnoc.

[163] Mr. Harlow estimated the replacement cost of the Warnoc at somewhere between \$425,000 and \$450,000, as quoted by Sylte's Shipyard on March 12, 2012. Based on this and the above evidence, he estimated the fair market value of the Warnoc to be between \$135,000 and \$160,000 on October 5, 2011.

(a) *Cross-examination*

[164] Mr. Harlow admitted that he is not a master mariner and holds no certificates of competency as a seaman. It has been over thirty years since he worked in the marine industry, outside of being a broker and surveyor. He has never worked in Minette or Clio Bay and never seen the Warnoc in person. He further agreed that Captain Rose is more knowledgeable on the operation and use of tug boats.

[165] He agreed that in some cases, a refit or rebuild can increase the value of a vessel, but stressed that repairs and maintenance do not. He reviewed the invoices provided to him for work on the Warnoc and knew that a lot of money and effort had been expended but did not know about the substantial expense of her engine rebuild paid for by barter.

[166] He had a discussion with Mr. Sylte over the phone about what it might cost to build a new boat similar to the Warnoc, but did not receive a formal quote and admitted that Mr. Sylte later provided a formal detailed quotation for Mr. Archibald at a higher price.

[167] In terms of comparables, none of those he listed in his report were available for sale in October of 2011. When he was asked shortly after the Warnoc sank for comparable vessels, he admitted to having told Captain Rose about the North Arm Logger, another pod-hulled vessel, but did not remember the conversation well. He was adamant that he would not have commented on her condition, as he knew Captain Rose was a surveyor and not a prospective buyer. Mr. Harlow had seen the North Arm Logger in person in the summer of 2011, while she was in the process of having some work done. She was listed at \$150,000.

[168] The Crofton Prince is another pod-hulled vessel that might be considered a comparable to the Warnoc. She was not for sale in October of 2011 but was for lease and was under lease by another company.

(b) *Re-examination*

[169] Defense Counsel asked Mr. Harlow to focus on the asking price for another pod-hulled vessel of a similar size, but with a bigger engine in Western Mariner listing pages from October and November 2011. She was listed at \$110,000 and eventually sold for \$90,000, to the best of his recollection.

V. Analysis

[170] The canvas is stretched and the questions to be answered with respect to “what is the liability of Seaspan?” are fairly clear:

- a. was the alleged negligence by the Warnoc crew (Hansen and Collins), who were responsible for the control and the safety of the Warnoc, and their failure to ensure

- the proper and safe use of the tow rope from the stern tow post of the Warnoc to the Survivor anchor and chain, the cause of the sinking and loss of the Warnoc? Or
- b. was the negligence of Ray Nicol, a master mariner and mate of the Seaspan Commodore and Survivor, who was responsible for the control and safety of the Survivor, and his failure to ensure the proper and safe use of the safety line from the dozer boat crane on the Survivor to the Survivor anchor and chain, the cause of the sinking of the Warnoc?

[171] The issues considered in reaching my decision, based on the evidence before me, are:

- i. preliminary hearsay objections;
- ii. qualifications of the Warnoc crew;
- iii. responsibility for and safety of the tow line attached from the tow post of the Warnoc to the Survivor barge's anchor and anchor chain;
- iv. responsibility for the safety line attached from the Survivor barge's dozer boat crane to the Survivor's anchor and anchor chain;
- v. quantum of the Resulting Damages for the loss of the Warnoc and attribution of those damages.

A. *Preliminary Hearsay Objections*

[172] Tabs 5, 38, 39, 41 and 42 of Exhibit 1 are admissible as exceptions to the hearsay rule.

Mr. Nicol is deceased, and necessity and reliability are present to allow for their admission into evidence. The report made by Captain Westmoreland was relatively contemporaneous with the incident involving the Warnoc, was largely based on first hand discussions with Mr. Nicol, and was as accurate as possible at the time. Captain Dodds' report presents the best evidence of Mr. Nicol's account as it was based on first hand discussions with Mr. Nicol, intended to be as accurate as possible, and were made immediately after the incident.

[173] Tabs 45 and 47 of Exhibit 1 relating to quotations given to Mr. Archibald for newly built replacement vessels, while not necessary given witnesses could have been called, are nevertheless reliable. The details of their quotations are listed in admitted documents, and the

Defendants' two experts referred to these specific ship builders in their reports and contacted them independently for advice regarding the replacement value of newly built comparable vessels. Their reliance on advice of these ship builders and the apparent reliability of their reports, lead me to conclude that the exhibits should be admissible, albeit of little weight.

[174] Tab 48 of Exhibit 1, a note from Harbour Machining for work done to the Warnoc is admissible, but is of little or no weight. The company suffered unexpected damage to its invoicing records and as such, the original invoice was unavailable for reference. The company provided its best estimate of the cost for work that was performed. Given the original invoice was not available and that Harbour Machining was in the best position to estimate the cost of work performed, necessity and reliability are established. However, like the other invoices provided for work done on the Warnoc, I afford little weight to this invoice in my evaluation of the vessel's value.

B. *Qualifications of the Warnoc crew*

[175] Neither Mr. Hansen nor Mr. Collins was a qualified Master, Limited, or held a qualified mate's certificate. The Regulations, section 212(2) and 212(4), require that a Master, Limited be one of the crew on a vessel such as the Warnoc. Section 207 provides the number of personnel required on a vessel like the Warnoc involved in operations such as these. A two person crew is sufficient.

[176] While section 212(5) of the Regulations lets a person holding a certificate in column 1 of Table 1 to perform the duties of a position referred to in any of column 2 to 5 on vessels engaged

in the stipulated class of voyage (in other words, if the other crew member holds any of the certificates in items 1 to 6, down to chief mate, near coastal), he could also act as master and perform the master's duties, neither Mr. Hansen nor Mr. Collins so qualify.

[177] Accordingly, the crew of the Warnoc was not technically qualified to operate, control and ensure the safety of the Warnoc, notwithstanding their years of experience in doing so. However, I cannot ignore those years of experience, nor the particular series of events in this case that led to the sinking of the Warnoc, and whether this lack of technical qualifications contributed to her sinking.

C. *Responsibility for the safety of the tow line attached from the tow post of the Warnoc to the Survivor barge's anchor or chain*

[178] Mr. Hansen has admitted he attached and was responsible for the tow line on the tow post of the Warnoc. While there is conflicting evidence on whether Mr. Nicol alone attached the other end of the tow line to the Survivor's anchor and chain, I am satisfied on a balance of probabilities that he did so, based on my review of all the evidence.

[179] Nevertheless, the crew of the Warnoc was responsible for the safety of their vessel, and that includes ensuring that the tow line was properly and safely secured from the Warnoc's tow post to the Survivor's anchor and chain, even if Mr. Nicol attached the other end of the tow line to the anchor or chain.

[180] However, the question remains, did that tow line connection, wholly or in part, cause the sinking of the Warnoc? In my opinion, based on all the evidence, it did not.

D. *Responsibility for the safety line attached from the Survivor barge's dozer boat crane to the Survivor's anchor and anchor chain*

[181] Mr. Nicol was delegated the full authority and control by Captain Dodds to ensure that the safety of the Survivor and the defouling of the Survivor anchor and anchor chain was properly and safely carried out. He, together with the log loader crew, were responsible for securing the safety line from the Survivor's dozer boat crane to the fouled anchor and chain, and due to the failure of that safety line, when the anchor fell free the Warnoc sank and was lost.

[182] If that safety line had been properly secured to the Survivor's anchor and chain, the positioning of the tow line from the Warnoc to the Survivor's anchor and chain would have had no bearing or effect on the resultant sinking of the Warnoc.

[183] It was Mr. Nicol's expertise, his responsibility as mate of the Survivor, and his instructions that were followed by all involved with respect to the safety line, that resulted in the loss of the Warnoc.

E. *Question of the Resulting Damages for the loss of the Warnoc*

[184] The Defendants' experts, Mr. Small and Mr. Harlow, both take the position that the fair market value of the Warnoc, as at October 5, 2011, should form the basis for calculation of any damage to the Plaintiff as a result of the loss of the Warnoc.

[185] Both Mr. Small and Mr. Harlow acknowledged in oral argument that Captain Rose, the Plaintiff's expert, as an experienced master mariner and former operator of tugs, knows more about tugs than they do.

[186] Mr. Small conducted a theoretical analysis of the value of the Warnoc and a replacement for her at the relevant time. In reviewing comparable vessels, he considered three variables at play: the cost of a rebuild, the cost of the Warnoc's refit, and the cost of a vessel to be able to do the work necessary.

[187] He did not consider the value of the Warnoc to the Plaintiff, Snow Valley, but also did acknowledge that there could be a premium value for a vessel like the Warnoc due to her relative uniqueness on the market. Both he and Mr. Harlow agreed that money put into a vessel for refit, maintenance and repair, does not equate to value out of a vessel.

[188] His estimate of damage is in the range of \$155,000 to \$185,000.

[189] Mr. Harlow, a marine broker, also believes that fair market value of a replacement vessel as at October 5, 2011, is the relevant comparator for calculating damage. While it is better to see the boat in question in estimating her value, it is normal to use surveys and consider details of the boat for valuation when it is not possible to see her.

[190] In Mr. Harlow's opinion, generally the maintenance costs or amounts spent to keep a vessel in good running order do not necessarily increase the value of a vessel, unless the

modifications are of such great magnitude as to change the design and /or improve her overall performance.

[191] In comparing the Warnoc to four other vessels, none of which were for sale in October, 2011, he estimated that her value was in the range of \$135,000 to \$160,000.

[192] The Plaintiff's expert, Captain Rose, estimated the value of replacing the Warnoc at \$325,000 to \$350,000. He considered the value of a vessel to be based on the improvements made, the work the vessel can do and value of her capability at the relevant time, her condition when surveyed, and the value of an equivalent replacement. The invoices relied upon by the Plaintiff, however, were vague and not an accurate reflection of work done on the Warnoc's refit.

[193] In my opinion, the proper test for measure of damages in this case should be the value of the Warnoc to Snow Valley as a going concern at the time and place of the loss in October, 2011. The value of the Warnoc is to be assessed by considering (1) the market price of a comparable replacement tug; (2) the cost of refitting a tug to do her work; (3) the compensation required to put Snow Valley in the same position as if the loss had not been inflicted, subject to the rules of law on remoteness of damages (*Liesbosch Dredger v SS Edison*, [1933] AC 449 at pp 463, 468 (H.L.); *Engine and Leasing Co v Atlantic Towing Ltd*, [1993] FCJ No 741 at para 61 (FCA)).

[194] One cannot assess the value of the Warnoc to Snow Valley as a going concern at the time the vessel was sunk with any great certainty when no comparable tug was available, no current

survey is available, and assessment cannot be based on simply a fair market value estimate (*The Harmonides*, [1903] P1 at 5-6 (Westlaw, UK)).

[195] The decision of Mr. Justice Cameron in *The Giovanni Amendola v The Teeshoe*, [1959] ExCR 1 at paras 23-24 is relevant to this case:

23 The principle so stated seems to me to be directly applicable to the instant case. The Teeshoe had been in constant use by its owners as a necessary and integral part of its day to day business. The owners had no available substitute tug and without a substitute a substantial and necessary part of its operations would have been stopped and loss occasioned. If operations were to be continued, another tug had to be secured immediately and at least one of the appellants' witnesses agreed that the action of the owners in hiring a tug at once was proper in the circumstances. The Registrar's finding on this point was stated as follows:

To put the Plaintiff in the same position as if the loss had not occurred would require, in addition to the value of the vessel lost, compensation for loss of user. This loss of user, in my opinion, is the difference between the cost of chartered vessels and the cost of the operation of the "Teeshoe" for the period required to build another vessel in six months, there being no vessels on the market at that time available for purchase.

25 It is clear, therefore, that the Registrar found that there were no tugs of a suitable type available for purchase and while there was conflicting evidence on this point also, there was evidence which the Registrar was entitled to accept that no such tug was available for purchase. It was therefore necessary for the owners to hire a tug for the period which it would normally take to construct a new tug and it is not denied that such a period is six months.

[196] Having regard to the facts presented by the experts, and considering the special nature of the Warnoc's ability to work in Clio Bay, an unusual work environment, as well as the documentary evidence provided in support of replacing the Warnoc with the refitted Inlet

Prowler, I fix the amount of damage to Snow Valley in the amount of \$257,000, which is approximately 60% of the replacement cost estimated by Canadian Alberni Engineering, which took into account detailed information regarding the equipment on board the Warnoc when she sank.

F. *Interest*

[197] The parties agree that interest in maritime cases is allowed at prime rate. Prime rate from October 5, 2011 to January 28, 2015 was 3%. On January 28, 2015, it was reduced to 2.85%.

[198] Where the parties disagree is whether interest should be simple or compounded. The Plaintiff argues that based on a number of cases, including the decision of the Supreme Court of Canada in *Bank of America Canada v Clarica Trust Company*, [2002] 2 SCC 601 at paras 24, 37, 38 and 44, compound interest should be awarded, as it is a more precise measure of the value of possessing money for a period of time.

[199] The Defendants argue that given the different nature of the cases relied upon by the Plaintiff, and that the Plaintiff elected to forego any claim to business loss for the period in question, the Court should not exercise its discretion in favour of awarding compound interest. I agree with the Defendants.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The sole negligence that caused the accidental sinking and loss of the Plaintiff's vessel the Warnoc was by the Seaspan Commodore's and Seaspan Survivor's mate, Ray Nicol, and his crew, in failing to properly and safely secure a safety line from the Survivor's dozer boat crane to the Survivor's five ton or more anchor and anchor chain. The fact that neither of the Warnoc's crew, Mr. Hansen and Mr. Collins, were Master mariners, or that they were responsible to properly secure the tow line from the Warnoc's stern tow post to the Survivor's anchor and chain, did not contribute to the resulting sinking and loss of the Warnoc;
2. I find that the Plaintiff's damages resulting from the loss of the Warnoc to be in the amount of \$257,000;
3. Pre-and-post judgment interest of prime rate of 3% for the period of October 5, 2011 to January 28, 2015, and 2.85% from January 29, 2015 to present to the Plaintiff;
4. Costs to the Plaintiff.

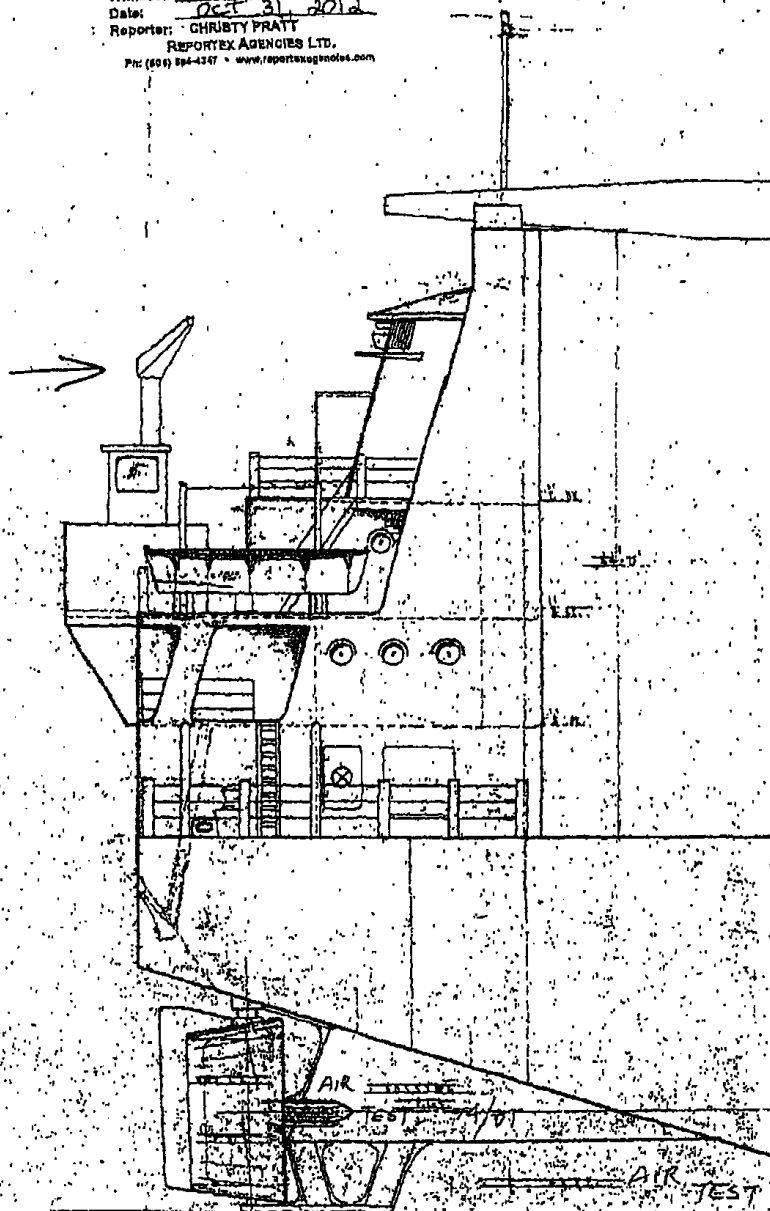
"Michael D. Manson"

Judge

SCHEDULE "A"

Exhibit: 2 for identification
Witness: NOE 2121C
Date: OCT 31 2012
Reporter: CHRISTY PRATT
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Schedule "A"



Document1

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1012-12

STYLE OF CAUSE: SNOW VALLEY MARINE SERVICES LTD V
SEASPAN COMMODORE ET AL

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: FEBRUARY 9, 2015

JUDGMENT AND REASONS: MANSON J.

DATED: MARCH 10, 2015

APPEARANCES:

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