Federal Court  Cour fédérale

Date: 20110629

Dockets: T-520-10
T-666-10

Citation: 2011 FC 791

Ottawa, Ontario, June 29, 2011

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

Docket: T-520-10

J.D. IRVING, LIMITED

Plaintiff

and

SIEMENS CANADA LIMITED, MARITIME MARINE CONSULTANTS (2003) INC., SUPERPORT MARINE SERVICES LTD. AND NEW BRUNSWICK POWER NUCLEAR CORPORATION

Defendants

Docket: T-666-10

MARITIME MARINE CONSULTANTS (2003) INC.

Plaintiff

and

SIEMENS CANADA LIMITED, J.D. IRVING, LIMITED, SUPERPORT MARINE SERVICES LTD., NEW BRUNSWICK POWER NUCLEAR CORPORATION AND BMT MARINE AND OFFSHORE SURVEYS LTD.

Defendants

and

AXA CORPORATE SOLUTIONS

Third Party

REASONS FOR ORDER AND ORDER

Overview

[1] Within 10 seconds in the forenoon of October 15, 2008, two steam turbine rotors that were destined to the Point Lepreau Nuclear Generating Station in Point Lepreau, New Brunswick, parted from the deck of cargo barge SPM 125 at Pier 3 of the harbour in Saint John, New Brunswick, and came to rest in waters of the harbour (the “Incident”).

[2] On or about April 8, 2010, Siemens Canada Limited ("Siemens"), the suppliers of the rotors, commenced an action in the Ontario Superior Court of Justice in cause number CV-10-400645, against J.D. Irving Ltd. ("Irving"), BMT Marine and Offshore Surveys Limited ("BMT"), Maritime Marine Consultants (2003) Inc. ("MMC") and Superport Marine Services Ltd. ("Superport"). In the Ontario action, Siemens advanced claims for breach of contract, negligent misrepresentation, negligence and/or gross negligence and failure to warn, and claimed damages of $40,000,000 together with pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. 43, together with costs on a substantial indemnity basis. The initial claim of $40,000,000 was later increased to $45,000,000.

[3] Furthermore, Siemens claimed joint and several indemnification from Irving, MMC, BMT, and Superport ("the defending parties") in respect of "all claims, liabilities, charges, or demands made against it by New Brunswick Power Nuclear Corporation ("NBPNC") including all claims made by NBPNC for liquidated damages under the Agreement" between it and NBPNC. Siemens contracted to provide the rotors to NBPNC.

[4] By Statement of Claim filed on April 7, 2010, Irving commenced an action in this Court pursuant to the *Marine Liability Act*, S.C. 2001, c. 6 (the "MLA" or the "Act") seeking, among other things, a declaration that it is entitled to limit its liability in relation to the Incident to $500,000 plus interest to the date of the constitution of the limitation fund pursuant to subsections 29(6), 29.1 and 32(5) of the MLA. This action is cause number T-520-10.

[5] Irving named Siemens, MMC, Superport and NBPNC as Defendants (the "Defendants").

[6] By a Statement of Claim filed on April 30, 2010, MMC commenced an action in this Court seeking to limit its liability, pursuant to the MLA, in relation to the Incident. MMC named Siemens, Irving, Superport, NBPNC and BMT as Defendants in its action. This action is cause number T-666-10.

[7] By Third Party Notice filed on July 28, 2010, BMT claimed contribution and indemnity and other relief, in relation to the Incident, against AXA Corporate Solutions ("AXA"), a cargo insurer.

[8] By letter dated November 22, 2010, Counsel for Irving advised that Siemens had commenced a second action in the Ontario Superior Court of Justice relative to the Incident. In this action, being cause number CV-10-412-348, Siemens claimed $45,000,000 in damages against twelve individuals, including Mr. Don Bremner, a principal of MMC, and Atlantic Towing Limited, a subsidiary of Irving.

[9] This action was begun on October 14, 2010 and Irving objected that Siemens had failed to advise this Court about this second action when the several motions were argued on October 19, 2010. Irving advised the relief sought in its motion should apply to the second action. The parties were given the opportunity to make further submissions in this regard and did so by filing written arguments in January and February 2011.

Background

[10] The following facts are taken from the materials filed in the parties' Motion Records, including the pleadings that have been filed in both the Ontario Superior Court of Justice and Federal Court actions.

[11] Siemens entered into a contract with Atomic Energy of Canada Limited, on or about September 1, 2006, for certain work in refurbishing and upgrading the Point Lepreau Nuclear Generating Station located at Point Lepreau, New Brunswick. The contract, subsequently assigned to NBPNC, required the provision of three modules for incorporation into Point Lepreau. The modules included turbine rotors. The modules were manufactured in Germany and transported to Saint John, New Brunswick, for further transport to Port Lepreau.

[12] Siemens entered into a contract with Irving by means of a purchase order issued on or about January 11, 2007 for the carriage of the modules. The rotors were to be moved from Saint John harbour to Point Lepreau Nuclear Generating Station by water.

[13] Irving engaged MMC, as marine architects, relative to the water carriage of the rotors from Saint John to Point Lepreau. Irving retained MMC to approve the stability of the SMP 125, determine the appropriate lashing and securing arrangements and to calculate a ballasting plan for loading the rotors onto the SMP 125. MMC prepared a plan entitled "Barge 'SPM 125' Stability Conditions for Lepreau Rotor Move First Load", dated October 8, 2010 and revised October 10, 2010.

[14] By bareboat charter-party dated October 9, 2008, Irving chartered from Superport the SPM 125, a barge with a reported gross tonnage of 256.00 tonnes. The charter-party agreement also gave Irving the use of the tug “Mary Steele”.

[15] Siemens engaged BMT, on or about October 2, 2008, to provide marine surveying services relating to the handling and transportation plan for the movement of the rotors by the barge SPM 125.

[16] As noted above, in the course of the boarding of two rotors on to the barge SPM 125 on the morning of October 15, 2008, the two rotors left the barge and went into the waters of Saint John harbour.

[17] The rotors were damaged as a result of their submersion. Siemens alleges that it is responsible for the delivery, at its expense, of new modules to the Point Lepreau station. The cost of manufacturing and delivering two new rotors is estimated to cost approximately $20,000,000 and will require four years to complete. In an effort to mitigate its losses, Siemens arranged for repair of the damaged rotors. The costs of such repairs are estimated to be $10,000,000 plus additional transportation costs.

Procedural Steps

[18] Siemens, Irving, BMT, Superport, and NBPNC signed a tolling agreement on October 13, 2009 in which they agreed not to commence litigation before April 13, 2010 without first giving two weeks’ notice of their intention to do so. Article 1 of the tolling agreement suspended all

applicable time periods for the duration of that agreement. Siemens and Irving both provided two weeks notice to all the other parties to the tolling agreement on March 24, 2010.

[19] As noted above, Siemens commenced litigation in the Ontario Superior Court of Justice in April 2010 and the within actions were commenced at the same time. Siemens initiated its second action in the Ontario Superior Court in October 2010.

[20] The present actions in the Federal Court address issues relative to limitation of liability, including the establishment of a limitation fund. The Statements of Claim issued in causes number T-520-10 and T-666-10 are substantially the same, involving the same set of facts, the same key parties and the same legal issues. Although there are slight differences in the language of the two Statements of Claim, essentially the same relief is sought, that is a declaration that the liability of Irving and MMC is limited to $500,000 pursuant to the MLA and an order enjoining any proceedings beyond this Court, that is the Federal Court.

Present Motions

i) T-520-10

[21] On April 28, 2010, Siemens filed a Notice of Motion seeking a stay of this action insofar as it relates to the constitution and distribution of a limitation fund pursuant to section 33 of the MLA, as well as a permanent stay of the action relative to Irving's entitlement to limit its liability pursuant to section 28 and 29 of the Act.

[22] By Notice of Motion dated April 30, 2010, Irving sought the following relief:

a) giving advice and directions as to the manner in which the Plaintiff's action for a declaration that its liability in respect of the incident of October 15, 2008, as described in the Statement of Claim in this action, (the "Incident") is limited pursuant to the provisions of the *Marine Liability Act*, S.C. 2001 c. 6 (the "MLA") to $500,000 plus interest from October 15, 2008 to the date on which the statutory limitation fund is constituted, and for the constitution of a limitation fund (the "Limitation Fund"), may be heard and determined;

b) for service of notice of this action on potential claimants by advertising in two weekend editions of the *New Brunswick Telegraph Journal* or by such other forms of advertising as this Court deems just and appropriate;

c) authorizing the Plaintiff, J.D. Irving, Limited ("JDI"), to file a guarantee bond (the "Guarantee Bond") in an amount to be fixed by the Court, being $500,000 plus interest from October 15, 2008 to the date of the institution of the Limitation Fund, and that the filing of the Guarantee Bond shall constitute the Limitation Fund in respect of the Incident;

d) setting the time limit within which the Defendants and other potential claimants must file their defences or claims against the Limitation Fund;

e) directing that any claim against the Limitation Fund not filed within the time specified by the Court shall be barred from participation in the distribution of the Limitation Fund;

f) enjoining the Defendants, and any other person, from commencing or continuing proceedings before any court other than this Court against the Plaintiff in respect of the Incident;

g) declaring that the Limitation Fund be rateably distributed amongst the persons whom the Court decides are entitled to claim against the Limitation Fund; and,

h) such further and other relief as counsel advise and this Court deems just and appropriate.

ii) T-666-10

[23] By Notice of Motion dated June 4, 2010, Siemens sought the following relief:

> 1.An order staying this action (the "Action") as it relates to the constitution and distribution of a fund pursuant to section 33 of the *Marine Liability Act*;
>
> 2. An order permanently staying the Action as it relates to the entitlement of Maritime Marine Consultants (2003) Inc. ("MMC") to limit is [*sic*] liability pursuant to sections 28 and 29 of the *Marine Liability Act*;
>
> 3. Such further and other relief as counsel may advise and this Honourable Court deem just.

[24] By Notice of Motion dated July 23, 2010, MMC sought the following relief:

> 1. An order giving the parties advice and direction as to the manner in which the Plaintiff's action for a declaration that its liability in respect of an incident which occurred on October 15, 2008, and as further described in the Statement of Claim ("the incident") is limited pursuant to the provisions of the *Marine Liability Act*, S.C. 2001, c. 6;
>
> 2. An order for service of the notice of this action on potential claimants by advertising in two weekend editions of the New Brunswick Telegraph Journal or by such other forms of advertising as this Court deems just and appropriate, which advertising shall take place jointly with the advertising in connection with an action brought by J.D. Irving Limited bearing Court File No. T-520-10 ("the Irving action");
>
> 3. An order setting the time limit within which the Defendants and other potential claimants must file their defences or claims in connection with this action;
>
> 4. An order directing that any claim not filed within the time specified by the Court shall be barred from participation in the distribution of any limitation fund which may be established in connection with this action or the Irving action;
>
> 5. An order enjoining the Defendants, and any other person, from commencing or continuing proceedings before any other Court, other than the Federal Court of Canada, against the Plaintiff in respect of the incident;
>
> 6. Such further and other relief as counsel may advise and this Honourable Court deems just and proper.

[25] Finally, by Notice of Motion dated August 4, 2010, BMT sought the following relief:

> 1. directing the Defendants herein, including Siemens Canada Limited and any other person or party having knowledge of the said Order, from commencing or continuing proceedings in any Court, tribunal or authority other than the Federal Court of Canada, being the Admiralty Court as defined by the *Marine Liability Act*, S.C. 2001, c. 6, as amended, with respect to any claim of any nature whatsoever arising from or relating to the capsizing of the barge "SPM 125" at Saint John, New Brunswick on or about 15 October 2008;
>
> 2. directing that those claims filed by way of legal proceedings in the Ontario Superior Court of Justice in Toronto (docket number CV-10-400645), including any and all related counter and/or cross-claims, be asserted by way of counter-claims or cross-claims herein and directing further that the plaintiffs therein refrain from continuing the said proceedings;
>
> 3. such other and further relief as counsel advise and this Honourable Court deems just and appropriate;
>
> 4. The whole with costs.

The Evidence

[26] Affidavit and documentary evidence in these matters was filed both by Irving and Siemens. In support of its motion in T-520-10, Irving filed the affidavit of Mr. Wayne Power, a Vice-President with Irving.

[27] In his affidavit, Mr. Power provided background information concerning the relationship between Irving and Siemens, arrangements for the transportation of the rotors from Saint John to Point Lepreau, the engagement of MMC to advise Irving in that regard, references to the accident of October 15, 2008 and a subsequent investigation by Transport Canada in that regard. He also

referred to the commencement of the execution of a tolling agreement among the parties to this litigation and the commencement of litigation by Siemens in the Ontario Superior Court.

[28] Various documents are attached as exhibits to Mr. Power's affidavit, including Irving's quote dated April 28, 2006 for the movement of the rotors, a copy of the purchase order dated January 11, 2007 that was issued by Siemens, a copy of the charter-party between Irving and Superport, a copy of certain stability calculations that were prepared by MMC relative to the transportation of the rotors on the SPM 125 and a copy of the investigation report prepared by Transport Canada Marine Safety Division.

[29] Irving also filed three affidavits of Ms. Jean Campbell, a litigation law clerk employed by the solicitors for Irving in this matter. In her first affidavit, sworn to on April 30, 2010, Ms. Campbell attached, as exhibits, copies of certain documents prepared by Canada Revenue Agency relating to interest payable on overpayments of income tax for the financial quarter during which the Incident took place, and the two following financial quarters. Ms. Campbell also attached, as an exhibit, a table showing the interest, compounded daily, that had accrued from the date of the Incident as of June 15, 2010. The amount of interest was calculated as $29,217.96.

[30] In her second affidavit, sworn to on September 27, 2010, Ms. Campbell attached, as exhibits, copies of certain correspondence between Counsel for Irving and Counsel for Superport; copies of certain emails exchanged between Counsel for Irving and Counsel for Siemens; and a copy of a letter from Counsel for Irving providing replies to undertakings and questions taken under

advisement on the cross-examination of Mr. Power, which cross-examination was conducted on June 21, 2010.

[31] The third affidavit from Ms. Campbell is dated October 13, 2010. Attached as an exhibit to that affidavit was a copy of a Notice of Arbitration between Superport and Irving, dated October 13, 2010, sent by email from Counsel for Superport to Counsel for Irving. The Notice of Arbitration was given pursuant to the charter-party between Irving and Superport and gave notice that Superport intended to seek a determination by arbitration as to "whether and to what extent" Irving is liable to Superport for loss and damage as a result of the occurrence of October 15, 2008.

[32] Siemens filed four affidavits sworn to by Ms. Jennifer Robinson, a law clerk with Counsel for Siemens. In her first affidavit, sworn on April 14, 2010, Ms. Robinson referred to the event giving rise to this litigation, and related litigation, and attached various documents as exhibits, including a copy of the tolling agreement and a copy of the Statement of Claim relating to the action commenced by Siemens in the Ontario Superior Court.

[33] In her second affidavit, sworn to on June 4, 2010, Ms. Robinson referred to the commencement of the limitation proceedings by MMC in the Federal Court and attached, as exhibits, copies of the Statement of Claim in that regard, as well as a copy of the Defence filed by MMC to the limitation proceedings commenced by Irving in the Federal Court.

[34] In the third affidavit, sworn to on June 18, 2010, Ms. Robinson attached copies of certain correspondence sent by Counsel for Siemens to three of the defending parties in the Ontario

proceedings, wherein Counsel for Siemens requested defences on behalf of MMC, BMT and Superport in respect of the Ontario proceedings. This affidavit also included, as an exhibit, a copy of an expert report prepared on behalf of Siemens by Design Research Engineering. This report is dated June 10, 2010. Finally, this affidavit included a copy of a jury notice that has been filed by Siemens in relation to the Ontario proceedings.

[35] In her fourth affidavit, sworn to on September 1, 2010, Ms. Robinson attached copies of various documents relating to the Ontario proceedings and the action commenced by MMC in the Federal Court, cause number T-666-10. She also attached a copy of a supplementary expert report, dated August 2, 2010, prepared by Design Research Engineering. Siemens had commissioned this report to be used in connection with the Ontario proceedings. Finally, she attached a copy of a letter dated September 1, 2010 from Counsel for Siemens to Counsel for Irving, advising that Siemens did not require the creation of a limitation fund and advising, as well, that NBPNC waiving the creation of a limitation fund.

[36] In addition to these affidavits of Ms. Robinson, together with the attached exhibits, Siemens filed a compendium of documents consisting primarily of copies of the pleadings to date in the Ontario and Federal Court actions. Siemens also filed an Exhibit Book consisting of documents concerning efforts made by Irving to obtain a barge for the carriage of the rotors, documents relating to communications between Irving and MMC as to the suitability of the barge and stability calculations, communications concerning the timing of the transportation, and related emails. The Exhibit Book also contains copies of a series of photographs and an extract from a web page for Irving Equipment.

[37] No affidavit evidence in respect of these motions was filed by MMC, BMT or AXA.

Discussion

(i) Jurisdiction

[38] As noted at the beginning of these Reasons, there are five motions before the Court in these two proceedings. Siemens has filed a motion in both cause number T-520-10 and cause number T-666-10 seeking a stay of the two respective actions insofar as the relief sought by Irving and MMC, respectively, is principally the constitution and distribution of a limitation fund pursuant to the MLA. As well, in both actions, Siemens seeks a permanent stay of the actions on the basis that neither Irving nor MMC is entitled to limit liability pursuant to the MLA.

[39] Insofar as it seeks to stay the two limitation proceedings in the Federal Court, Siemens challenges the jurisdiction of this Court over the subject matter of its claim, that is the claim for damages in the actions that it commenced in the Ontario Superior Court of Justice. Siemens argues that its claim does not fall within the jurisdiction of this Court because it is not a matter of maritime law, and in any event, if there is doubt on that issue, this Court should decline to exercise its jurisdiction pursuant to section 33 of the MLA.

[40] It submits that its claim for damages does not arise in connection with the operation of a ship, that the damage did not occur on board the ship, and that its claim for damages does not arise from the delay in the carriage of the goods. Rather, its claim for damages relates to repair and replacement costs. It further submits that the scope of the proceedings before the Ontario Superior

Court is broader and without doubt as to the jurisdiction of that Court over all the defending parties. It argues that the purpose of the Ontario proceedings is much different from the purposes of the limitation proceedings commenced in the Federal Court.

[41] It argues that the heart of its claim is a contract with Irving, pursuant to a purchase order that was issued on January 11, 2007 for the transportation of the rotors from Saint John to Port Lepreau. It submits that this purchase order is a standard contract for transportation of goods and not a contract for the carriage of goods by sea. It argues that the essential character of its claim is unrelated to navigation, seamanship or shipping and that these elements are irrelevant to its loss.

[42] Siemens relies on the decision in *Ontario (Attorney General) v. Pembina Exploration Canada Ltd.*, [1989] 1 S.C.R. 206, to argue that a claim can have a "local or private" aspect, as well as maritime aspects, and accordingly, can be adjudicated by a provincial court.

[43] Irving, MMC and BMT resist and repudiate Siemens' characterization of the claim and submit that the claim is clearly a matter of maritime law falling within the jurisdiction of this Court.

[44] The first question, then is whether this Court has jurisdiction over Siemens' claim for the recovery of damages.

[45] Siemens characterizes its claim for the recovery of damages as a matter of contract and common law negligence. In the further submissions, Siemens and AXA refer to and rely upon the recent decisions of the Supreme Court of Canada in *Canada (Attorney General) v. TeleZone Inc.,*

[2010] 3 S.C.R. 585, arguing that this Court should consider the cause of action as it was characterized in the Ontario Superior Court of Justice, in deciding whether this Court has jurisdiction. It submits that the matter at issue does not fall within the jurisdiction of the Federal Court because its claim is not, essentially, one of maritime law.

[46] In this regard, it relies upon the decisions in *Dreifelds v. Burton* (1998), 38 O.R. (3d) 393 (O.N.C.A.), and *Isen v. Simms*, [2006] 2 S.C.R. 349, among others, to argue that the mere presence of water and a ship is insufficient to establish a claim within the jurisdiction of this Court.

[47] Irving and BMT submit that *TeleZone* has no application to the present case because that decision involves the availability of certain remedies, that is an application for judicial review as opposed to an action against the federal Crown.

[48] I agree with the general argument made by Siemens that the mere proximity of water, together with a water borne craft, is insufficient, *per se*, to grant jurisdiction in this Court. The test for finding jurisdiction in matters of navigation and shipping was set out by the Supreme Court of Canada in its decision in *ITO-Int'l Terminal Operators v. Miida Electronics*, [1986] 1 S.C.R. 752 at 766, as follows:

> The question of the Federal Court's jurisdiction arises in this case in the context of Miida's claim against ITO, a claim involving the negligence of a stevedore-terminal operator in the post-discharge storage of the consignee's goods. The general extent of the jurisdiction of the Federal Court has been the subject of much judicial consideration in recent years. In *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.*, [1977] 2 S.C.R. 1054, and in *McNamara Construction (Western) Ltd. v. The Queen*, [1977] 2 S.C.R. 654, the essential requirements to support a finding of jurisdiction in the Federal Court were established. They are:

> 1. There must be a statutory grant of jurisdiction by the federal Parliament.
>
> 2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.
>
> 3. The law on which the case is based must be "a law of Canada" as the phrase is used in s. 101 of the *Constitution Act, 1867*.

[49] Section 22 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 fulfills the first step of the *ITO* test by describing the admiralty jurisdiction of this Court. Subsection 22(1) is a statement of general jurisdiction and provides as follows:

Navigation and shipping	Navigation et marine marchande
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.

[50] Subsection 22(2) identifies a number of specific instances where this Court possesses maritime jurisdiction. Paragraphs 22(2) (e), (h) and (i) are relevant and provide as follows:

Maritime jurisdiction	Compétence maritime
(2) Without limiting the	(2) Il demeure entendu que,

generality of subsection (1), for greater certainty, the Federal Court has jurisdiction with respect to all of the following:	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;	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;
…	…
(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;	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) 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;	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;
…	…

[51] This statutory grant of jurisdiction over Canadian maritime law is nourished by a number of statutes applicable to this case, including the MLA, which incorporates the *Convention on Limitation of Liability for Maritime Claims, 1976* (the "Convention") pursuant to subsection 26(1) of that Act, and the *Canada Shipping Act, 2001*, S.C. 2001, c. 26.

[52] In *Radil Bros. Fishing Co. v. Canada (Department of Fisheries and Oceans, Pacific Region)*, [2002] 2 F.C. 219 (C.A.) at para. 60, the Federal Court of Appeal identified some of the factors that will distinguish a simple claim in contract from one where the "true essence of the contract relied upon is maritime". At para. 60 the Court said the following:

> 60 None of these cases is helpful to the appellant. Quite to the contrary, they tend to show that the Court will not assert its admiralty jurisdiction in agency claims unless the true essence of the contract relied upon is maritime. This is not the case here, where the sole factor possibly connected to maritime law is the fact that the licence with respect to which the agency contract was entered into happens to be issued in relation to an activity occurring at sea. There is no contract for carriage of goods by sea. There is no marine insurance. There are no goods at issue. Nothing has happened at sea. There is no issue as to the seaworthiness of the ships. The ships are not party to the action. There are no in rem proceedings. There are no shipping agents. There are no admiralty laws or principles or practices applicable. The claim, at best and incidentally, may be said to relate to the ability of a ship to perform certain fishing activities in accordance with requirements that have nothing to do with navigation and shipping and everything to do with fisheries.

[53] Siemens is adopting a highly restrictive view of the legal context surrounding its claim for damages. On the basis of the evidence submitted and the arguments advanced by the parties in connection with the present motions, it is clear that many of the indicia of maritime jurisdiction that were identified in *Radil Bros.* are present. In my opinion, it is clear that the nature of Siemens' claim is essentially maritime law.

[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.).

[57] MMC, marine surveyors, were engaged by Irving to provide _marine architectural services. Irving's responsibility for the actions, neglect or default of MMC can be assessed pursuant to paragraph 4 of Article 1 of the Convention.

[58] The right of BMT to limit its liability will be an issue for determination in the limitation proceedings. It was engaged by Siemens to "provide marine surveying services with respect to that aspect of the handling and transportation plan". Marine surveying services are related to navigation and shipping.

[59] It is incorrect to say that Siemens' claim for damages is beyond the jurisdiction of this Court because its final adjudication may involve the application of common law principles of tort. In *Chartwell Shipping Limited v. Q.N.S. Paper Co. Ltd.* (1989), 101 N.R. 1 (S.C.C.), the Supreme Court of Canada said that Canadian maritime law encompasses the common law principles of tort, contract, bailment and agency.

[60] Siemens' argument that the nature of its claim has nothing to do with shipping is directly contradicted by the jurisprudence of the Supreme Court of Canada. In *Isen*, at para. 22, the Supreme Court of Canada said the following:

> 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.

[61] The decisions in *Dreifelds* and *Isen*, referred to above, can be distinguished. In *Dreifelds*, the Ontario Court of Appeal held that the pleadings in that case concerned the preparation for and conduct of a scuba diving trip. The plaintiff did not plead any negligence on the part of the charter boat involved, that is anything related to navigation or shipping.

[62] In *Isen*, the accident occurred on land when a bungee cord being attached to a tarpaulin, on a pleasure craft in the course of preparing for transport of that craft on a provincial highway, snapped, causing injury to the plaintiff. The Supreme Court of Canada determined that the injury was caused by a negligent act which had nothing to do with navigation or shipping. The negligent act was subject to provincial law, not federal maritime law.

[63] Siemens also argues that this Court does not have jurisdiction over its claim because neither MMC nor BMT are entitled to limit their liability under the Act as they do not fall within the relevant statutory definitions, and in any event, are barred by Article 4 of the Convention from limiting their liability.

[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.

[65] I agree with the arguments of Irving and BMT that the decision in *TeleZone* is not relevant to the issue of this Court's jurisdiction over the claim arising in relation to the Incident. Even as pleaded in the Ontario proceedings, it is clear that Siemens' claim is a maritime claim.

[66] There is concurrent jurisdiction in both the Federal Court and in the Ontario Superior Court of Justice over both the issues of liability and of limitation of liability. The jurisdiction of the Ontario Superior Court of Justice is not challenged by any of the Defendants.

(ii) Stay Motions

[67] Siemens, supported by AXA, seeks to stay the two limitation proceedings, both on an interlocutory and permanent basis. It wants the interlocutory stay in order to allow the Ontario Superior Court of Justice proceedings to continue through trial and adjudication. It wants a

permanent stay on the grounds that limitation of liability is not available to Irving and MMC, having regard to Article 4 of the Convention.

[68] Irving, MMC and BMT, for their part, oppose this motion and seek to enjoin proceedings in any other Court, including the Ontario Superior Court of Justice, arguing that all issues relating to the Incident should be addressed in the Federal Court.

[69] The authority to stay proceedings in this Court flows from subsection 50(1) of the *Federal Courts Act* which provides as follows:

Stay of proceedings authorized	Suspension d'instance
50. (1) The Federal Court of Appeal or the Federal Court may, in its discretion, stay proceedings in any cause or matter	50. (1) La Cour d'appel fédérale et la Cour fédérale ont le pouvoir discrétionnaire de suspendre les procédures dans toute affaire :
(a) on the ground that the claim is being proceeded with in another court or jurisdiction; or	a) au motif que la demande est en instance devant un autre tribunal;
(b) where for any other reason it is in the interest of justice that the proceedings be stayed.	b) lorsque, pour quelque autre raison, l'intérêt de la justice l'exige.

[70] Siemens argues that both the circumstances identified in subsection 50(1) apply in this case, that a stay should be granted because a claim is being adjudicated in another court or jurisdiction and that a stay of the limitation proceedings is required in the interest of justice.

[71] Siemens points out that it is the only party who has suffered a loss. No other party is making a claim against Siemens and that the proceedings which it has instituted in the Ontario Superior

Court of Justice is broader in scope than the limitation proceedings in the Federal Court. It further notes that with proceedings in both the Ontario Superior Court of Justice and this Court, there is a risk of inconsistent findings. It relies upon the decision in *Jazz Air LP v. Ontario Port Authority* (2009), 343 F.T.R. 165 (F.C.) at paras. 13, 31 and 32 to support its argument in this regard.

[72] Irving, MMC and BMT oppose Siemens' motion for a stay. Among other things, they note that a stay pursuant to subsection 50(1) is a discretionary order. They argue that the interests of justice will be best served, with less inconvenience and expense to all parties, if the proceedings in this Court are allowed to proceed and proceedings in any other Court, including the current proceedings in the Ontario Superior Court of Justice, are enjoined.

[73] Irving, MMC and BMT are of one voice in arguing against Siemens' stay motion, each of them referring to the broad powers conferred upon the Federal Court, as the Admiralty Court for the purposes of the Act, with respect to establishing the procedure in relation to the constitution and distribution of a limitation fund. These powers are described, not exclusively, in subsection 33(1) of the MLA which provides as follows:

Powers of Admiralty Court	Pouvoirs de la Cour d'amirauté
33. (1) Where a claim is made or apprehended against a person in respect of liability that is limited by section 28 or 29 of this Act or paragraph 1 of Article 6 or 7 of the Convention, the Admiralty Court, on application by that person or any other interested person, including a person who is a party to proceedings in relation to the same subject-	33. (1) Lorsque la responsabilité d'une personne est limitée aux termes des articles 28 ou 29 de la présente loi ou du paragraphe 1 des articles 6 ou 7 de la Convention, relativement à une créance — réelle ou appréhendée — , la Cour d'amirauté peut, à la demande de cette personne ou de tout autre intéressé — y compris une

matter before another court, tribunal or authority, may take any steps it considers appropriate, including	partie à une procédure relative à la même affaire devant tout autre tribunal ou autorité — , prendre toute mesure qu'elle juge indiquée, notamment :
(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;	a) déterminer le montant de la responsabilité et faire le nécessaire pour la constitution et la répartition du fonds de limitation correspondant, conformément aux articles 11 et 12 de la Convention;
(b) 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	b) joindre tout intéressé comme partie à la procédure, exclure tout créancier forclos, exiger une garantie des parties invoquant la limitation de responsabilité ou de tout autre intéressé et exiger le paiement des frais;
(c) enjoining any person from commencing or continuing proceedings in any court, tribunal or authority other than the Admiralty Court in relation to the same subject-matter.	c) empêcher toute personne d'intenter ou de continuer quelque procédure relative à la même affaire devant tout autre tribunal ou autorité.

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

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

> To complete this line of reasoning, there is a difference between enjoining and staying. The former, is defined in the revised 4th edition of Black's Law Dictionary in terms of an injunctive direction to perform or to abstain from some act…
>
> In contrast a stay, or a stay of proceedings as it is correctly called, is an order by which a court suspends its own proceedings, either temporarily, until something is done, or permanently, where it is improper to proceed….
>
> The test for a stay, in the interests of justice, is generally acknowledged to be the three-part test set out in *RJR--MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, being the three-part American Cyanamid test [*American Cyanamid Co. v. Ethicon Ltd*., [1975] A.C. 396 (H.L.)] although in this instance the appropriate test for a stay of proceedings is a two-part test set out in *Mon-Oil Ltd. v. Canada* (1989), 26 C.P.R. (3d) 379 (F.C.T.D.), a point that I shall touch on again in due course. The test for a stay is very different concept and test from that of an enjoinment of a proceeding in another court under the *Canada Shipping Act*. Indeed, this is to be expected for in one statute the draftsman has used the term enjoin and in the other the reference is to a stay…

[76] At para. 32, Prothonotary Hargrave, having reviewed two lines of cases addressing the onus and test for a stay stated the following conclusion:

> In summary, that the two-part test is appropriate where a stay of the Court's own proceeding is at issue, while the three-part *RJR--MacDonald* test is appropriate where the stay is that of proceedings before some tribunal or an order of the Court pending an appeal…

[77] In my opinion, the same approach applies here. The two part test of *Mon-Oil Ltd. v. Canada* (1989), 26 C.P.R. (3d) 379 (F.C.T.D.), should be considered in respect of 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.

[78] As noted by Chief Justice Thurlow in *Nisshin Kisen Kaisha Ltd. v. CNR*, [1982] 1 F.C. 530 (C.A.), a limitation action is "incidental" to any action for determination of liability. It is an action for the establishment and distribution of a fund, and its apportionment after findings of liability. In my opinion, Siemens has not demonstrated that these actions, which have been commenced in a timely basis, will prejudice it. In the exercise of my discretion, I decline to grant an interlocutory stay of the limitation action.

[79] I will now address Siemens' request for a permanent stay of these two actions.

[80] Underlying Siemens' request for a permanent stay of the Federal Court proceedings is its position that the right to limit liability is unavailable to Irving, MMC and BMT pursuant to the application of Article 4 of the Convention, which provides as follows:

Conduct barring limitation	Conduite supprimant la limitation
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.	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.

[81] Siemens relies upon the expert opinion which it obtained for use in the Ontario proceedings, that is the two reports prepared by Design Research Engineering. These two reports challenge in particular the stability calculations that were prepared in connection with the loading and carriage of the rotors in October 2008. Mr. Robert K. Taylor, the author of the two reports, expressed the following opinion in his supplementary report of August 2, 2010:

> Barring the presence of such an analysis, it remains my opinion that the failure to consider the overall transverse stability of the entire system is dangerous and from an engineering standpoint, reckless.

Relying on this opinion, Siemens argues that the conduct of Irving was reckless and accordingly, that it has no right to limit liability having regard to Article 4 of the Convention.

[82] However, in my opinion, this argument is premature. There is an insufficient evidentiary foundation before the Court at this time to find that Irving, MMC or BMT are not entitled to limit their liability, if any, to Siemens. Denial of the right to limit liability cannot be made in the absence of a proper evidentiary record and that evidentiary record will be available after a trial.

[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.

[85] Siemens also argues, based on *Jazz Air LP*, that the limitation action should be permanently stayed in order to avoid duplication of proceedings and inconsistent findings.

[86] I agree that duplicate proceedings and inconsistent findings should be avoided. However, as Prothonotary Milczynski held in *Jazz Air LP* at para. 32, "accepting that duplication must be avoided does not answer the question of which court should be preferred...".

[87] As discussed, the Federal Court has full jurisdiction over Siemens' claim. Siemens can fully pursue its claim in this Court. In my opinion, Siemens' submissions that duplication and inconsistency should be avoided, without more, do not demonstrate that it will be prejudiced if the stay of proceedings in this Court is denied.

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

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

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

(iii) Limitation Fund

[91] In its present motion before this Court, Irving seeks advice and directions as to the manner in which its limitation action in this Court may be heard and determined, as well as advice and directions concerning the constitution of a limitation fund. In their motions, MMC and BMT likewise seek directions as to the manner in which its limitation action should proceed.

[92] Insofar as Siemens and AXA dispute the right to limit, they will have that opportunity in the context of the limitation action.

[93] The first matter to be addressed is whether a limitation fund should be established.

[94] There is a presumption in favour of limitation of liability relative to a maritime claim, as provided by the Convention which forms part of Canadian maritime law pursuant to its incorporation in the MLA.

[95] Part 3 of the MLA is entitled “Limitation of Liability for Maritime Claims”. Section 24 contains definitions that are relevant to the present proceedings, specifically “convention” and “maritime claim” which are defined as follows:

“Convention”	« Convention »
“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”	« créance maritime »
“maritime claim” means a claim described in Article 2 of the Convention for which a person referred to in Article 1 of the Convention is entitled to limitation of liability.	« créance maritime » Créance maritime visée à l’article 2 de la Convention contre toute personne visée à l’article 1 de la Convention.

[96] Section 25 of the Act is also relevant and provides as follows:

25. (1) For the purposes of this Part and Articles 1 to 15 of the Convention,	25. (1) Pour l’application de la présente partie et des articles 1 à 15 de la 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

(ii) a ship that has been stranded, wrecked or sunk and any part of a ship that has broken up,

but does not include an air cushion vehicle or a floating platform constructed for the purpose of exploring or exploiting the natural resources or the subsoil of the sea-bed;

a) « navire » s’entend d’un bâtiment ou d’une embarcation conçus, utilisés ou utilisables, exclusivement ou non, pour la navigation, indépendamment de leur mode de propulsion ou de l’absence de propulsion, à l’exclusion des aéroglisseurs et des plates-formes flottantes destinées à l’exploration ou à l’exploitation des ressources naturelles du fond ou du sous-sol marin; y sont assimilés les navires en construction à partir du moment où ils peuvent flotter, les navires échoués ou coulés ainsi que les épaves et toute partie d’un navire qui s’est brisé;

(b) 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;

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 »;

…

…

(2) In the event of any inconsistency between

(2) Les articles 28 à 34 de la présente loi

sections 28 to 34 of this Act and Articles 1 to 15 of the Convention, those sections prevail to the extent of the inconsistency.	l'emportent sur les dispositions incompatibles des articles 1 à 15 de la Convention.

[97] Paragraph 2 of Article 1 of the Convention defines "shipowner" as follows:

2. The term "shipowner" shall mean the owner, charterer, manager and operator of a seagoing ship.	2. L'expression « propriétaire de navire », désigne le propriétaire, l'affréteur, l'armateur et l'armateur-gérant d'un navire de mer.

[98] The definition of "maritime claim" in section 24 of the MLA is cross-referenced to paragraph (1) and (2) of Article 2 of the Convention as follows:

Article 2 Claims subject to limitation	Article 2 Créances soumises à la limitation
1. Subject to Articles 3 and 4 the following claims, whatever the basis of liability may be, shall be subject to limitation of liability:	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) 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;	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) claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;	b) créances pour tout préjudice résultant d'un retard dans le transport par mer de la cargaison, des passagers ou de leurs bagages;
2. Claims set out in paragraph 1 shall be subject to limitation of liability even if brought by way of recourse or for indemnity under a contract or otherwise. However, claims set out under paragraph 1(d), (e) and (f) shall not be subject to limitation of liability to the extent that they relate to remuneration under a contract with the person liable.	2. Les créances visées au paragraphe 1 sont soumises à la limitation de la responsabilité même si elles font l'objet d'une action, contractuelle ou non, récursoire ou en garantie. Toutefois, les créances produites aux termes des alinéas d), e) et f) du paragraphe 1 ne sont pas soumises à la limitation de responsabilité dans la mesure où elles sont relatives à la rémunération en application d'un contrat conclu avec la personne responsable.

[99] There is no dispute that the barge SPM 125 is a ship as defined in paragraph 25(1)(a) of the Act nor that Irving is a "shipowner" as defined both in paragraph 25(1)(b) of the MLA and in paragraph 2, Article 1 of the Convention.

[100] There is no dispute that the barge SPM 125 weighs less than 300 tonnes and accordingly, the limitation of that amount set out in subsection 29(b) of the Act applies. Subsection 29(b) provides as follows:

29. The maximum liability for maritime claims that arise on any distinct occasion involving a ship of less than 300 gross	29. La limite de responsabilité pour les créances maritimes — autres que celles mentionnées à l'article 28 — nées d'un même

tonnage, other than claims referred to in section 28, is	événement impliquant un navire d'une jauge brute inférieure à 300 est fixée à :
…	…
(b) $500,000 in respect of any other claims.	b) 500 000 $ pour les autres créances.

[101] Article 11 of the Convention allows for the creation of a limitation fund and provides as follows:

Article 11	Article 11
Constitution of the fund	Constitution du fonds
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 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.	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 dont cette personne peut être responsable, augmenté des intérêts courus depuis la date de l'événement donnant naissance à la responsabilité jusqu'à celle de la constitution du fonds. Tout fonds ainsi constitué n'est disponible que pour régler les créances à l'égard desquelles la limitation de la responsabilité peut être invoquée.
2. A fund may be constituted, either by depositing the sum, or by producing a guarantee acceptable under the legislation	2. Un fonds peut être constitué, soit en consignant la somme, soit en fournissant une garantie acceptable en vertu de la

of the State Party where the fund is constituted and considered to be adequate by the Court or other competent authority.	législation de l'État Partie dans lequel le fonds est constitué, et considérée comme adéquate par le tribunal ou par toute autre autorité compétente.
3. A fund constituted by one of the persons mentioned in paragraph 1(a), (b) or (c) or paragraph 2 of Article 9 or his insurer shall be deemed constituted by all persons mentioned in paragraph 1(a), (b) or (c) or paragraph 2, respectively.	3. Un fonds constitué par l'une des personnes mentionnées aux alinéas a), b) ou c) du paragraphe 1 ou au paragraphe 2 de l'article 9, ou par son assureur, est réputé constitué par toutes les personnes visées aux alinéas a), b) ou c) du paragraphe 1 ou au paragraphe 2 respectivement.

[102] Section 32 of the MLA sets out the procedure to be followed with respect to the establishment of a limitation fund under Articles 11 to 13 of the Convention and provides as follows:

Jurisdiction of Admiralty Court	Compétence exclusive de la Cour d'amirauté
32. (1) The Admiralty Court has exclusive jurisdiction with respect to any matter relating to the constitution and distribution of a limitation fund under Articles 11 to 13 of the Convention.	32. (1) La Cour d'amirauté a compétence exclusive pour trancher toute question relative à la constitution et à la répartition du fonds de limitation aux termes des articles 11 à 13 de la Convention.
Right to assert limitation defence	Droit d'invoquer la limite de responsabilité
(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	(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

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.	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.

[103] "Admiralty Court" is defined in section 2 of the Act as meaning the Federal Court.

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

[105] Paragraph 1 of Article 9 of the Convention is also relevant to the within proceedings and provides as follows:

Aggregation of claims	Concours de créances
1. The limits of liability determined in accordance with Article 6 shall apply to the aggregate of all claims which arise on any distinct occasion:	1. Les limites de la responsabilité déterminée selon l'article 6 s'appliquent à l'ensemble de toutes les créances nées d'un même événement :
(a) against the person or persons mentioned in paragraph 2 of Article 1 and any person for whose act, neglect or default he or they are responsible; or	a) à l'égard de la personne ou des personnes visées au paragraphe 2 de l'article premier et de toute personne dont les faits, négligences ou fautes entraînent la responsabilité de celle-ci ou de celles-ci; ou

(b) against the shipowner of a ship rendering salvage services from that ship and the salvor or salvors operating from such ship and any person for whose act, neglect or default he or they are responsible; or	b) à l'égard du propriétaire d'un navire qui fournit des services d'assistance ou de sauvetage à partir de ce navire et à l'égard de l'assistant ou des assistants agissant à partir dudit navire et de toute personne dont les faits, négligences ou fautes entraînent la responsabilité de celui-ci ou de ceux-ci;
(c) against the salvor or salvors who are not operating from a ship or who are operating solely on the ship to or in respect of which the salvage services are rendered and any person for whose act, neglect or default he or they are responsible.	c) à l'égard de l'assistant ou des assistants n'agissant pas à partir d'un navire ou agissant uniquement à bord du navire auquel ou à l'égard duquel des services d'assistance ou de sauvetage sont fournis et de toute personne dont les faits, négligences ou fautes entraînent la responsabilité de celui-ci ou de ceux-ci.

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

[107] On the basis of the evidence presently submitted, the "distinct occasion" in the present circumstance is the loss of the rotors in the harbour of Saint John on October 15, 2008.

[108] In its supplementary submissions, Siemens argues that there is no need for a limitation fund, because the need for such fund arises only when the loss is international in nature and property has been arrested.

[109] This argument is without merit. The MLA, incorporating the Convention, is domestic legislation. There is nothing in the Act to suggest that limitation proceedings are not available for maritime claims occurring in Canada. The Incident occurred in Canada.

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

[111] As discussed, the Act provides for different limits in different circumstances. In the circumstances of this Incident, a "distinct occasion involving a ship of less than 300 gross tons", the maximum liability for all claims arising is $500,000 pursuant to subsection 29(b) of the Act. As described by Chief Justice Thurlow in *Nisshin Kisen Kaisha Ltd.* at 237, limitation funds are constituted "for the purpose of apportioning the limitation fund among the claimants".

[112] Irving, MMC and BMT seek various directions relative to the limitation actions, including directions as to the manner in which those actions should proceed, the giving of notice of the actions to potential claimants, the constitution of a limitation fund by the filing of a guarantee bond, the filing of claims against the limitation fund and the distribution of the fund following the hearing of the action in cause number T-520-10.

[113] In my opinion, a limitation fund should be established in this case. Irving has proposed that a guarantee bond be filed in an amount to be set by the Court, that is $500,000 plus interest pursuant

to subsection 33(5). The Court can determine the form of the guarantee pursuant to paragraph 33(4)(b) of the Act.

[114] I am not satisfied that sufficient detail has been provided by the parties for me to issue further directions at this time. The parties have not made submissions as to acceptability of a guarantee bond, or its form, as constituting the limitation fund, nor have there been submissions as to the circumstances of publication of notice of these actions. These matters, among others, should be discussed between the parties.

[115] The matter of setting time limits within which the Defendants and other potential claimants must file their defences or claims against the limitation fund is a matter that can be addressed by the Case Management Judge who was appointed by Order made on June 10, 2010, pursuant to the *Federal Courts Rules*, SOR/98-106 (the "Rules"), in respect of both Irving and MMC.

[116] The Case Management Judge can also deal with setting other time limits as may be required in the prosecution of the two limitation actions to trial.

[117] However, there is a time period that will be set by the Court, in reference to paragraph (e) of Irving's prayer for relief as follows:

> directing that any claim against the Limitation Fund not filed within the time specified by the Court shall be barred from participation in the distribution of the Limitation Fund;

[118] This time limit will be set by the Court upon review of submissions from the parties as to an appropriate timeframe.

(iv) Motion to Enjoin

[119] As noted above, Irving, MMC and BMT seek an order enjoining the continued prosecution of the proceedings in the Ontario Superior Court, as well as against the commencement of proceedings before any other court or tribunal. Their motions are brought pursuant to section 33 of the MLA.

[120] Siemens argues that this Court should not enjoin the Ontario proceedings unless it is satisfied that Federal Court actions and the Ontario actions arise "in relation to the same subject matter". It submits that this is not the case.

[121] Siemens further argues that its right to choose its forum should not be lightly interfered with, that the Ontario Rules of Practice and Procedure allow a broader range of discovery, that the Ontario Court possesses jurisdiction over all parties and all claims, that it would be forced to begin another action against Irving, MMC, BMT and Superport and the parties would be required to take third party claims for contribution and indemnity. As well, it submits that the Federal Court is not the most efficient forum to determine all these issues.

[122] The first question is the test to be applied in exercising the power to enjoin, pursuant to section 33 of the MLA.

[123] In the *Sheena M*, Prothonotary Hargrave suggested that the tri-partite test in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, would apply to a motion to

enjoin proceedings before another court or tribunal. However, he did not decide the point in that case and in my opinion, his remarks in that regard are to be taken as *obiter*.

[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.

[125] The concept of "appropriate", includes the element of suitability. In this regard, I refer to the decision in *Levitt v. Carr et al.* (1992), 23 W.A.C. 27 at para. 53.

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

> …in its ordinary meaning, the word "appropriate" connotes suitability for a particular purpose, something that is fit and proper in the circumstances.

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

[128] I disagree with Siemens' argument that its Ontario actions are not "in relation to the same subject matter" as these proceedings. I prefer the arguments advanced by Irving and BMT on this point. In my opinion, the "subject matter" of both the Ontario and Federal Court proceedings is the Incident, that is the damage to the rotors, liability for that damage and any limitation of that liability.

[129] In its Ontario actions, Siemens claims that Irving, BMT, MMC and others are liable for its loss. The within proceedings raise a claim for limitation of liability. The Convention, which forms part of the MLA, clearly shows that there is a presumptive right to limit liability and a heavy burden, pursuant to Article 4 of the Convention, on the part of any person seeking to break that limit.

[130] In their pleadings in the within proceedings, Irving, MMC and BMT assert a right to limit their liability, if any, relative to Siemens.

[131] In cause number T-520-10, MMC as a Defendant, seeks contribution and indemnity from Irving and says that this specific claim is not subject to limitation. In its Reply, Irving pleads that the claim for contribution and indemnity is subject to limitation pursuant to the Act and the Convention.

[132] In cause number T-666-10, BMT as a Defendant, claims contribution and indemnity from MMC and advances a claim in negligence against AXA, by way of a Third Party Claim.

[133] MMC, in its Defence to Counterclaim, pleads that the claim for contribution and indemnity is subject to limitation. Irving, in its Defence to the MMC action, pleads that MMC is entitled to limit its liability as long as Irving is able to do so.

[134] Irving and MMC, in their pleadings filed in these two limitation actions, claim that the aggregate of all claims made against them, jointly, is limited to the sum of $500,000.

[135] The sum of $500,000, as the limit of liability, derives from the combined effect of subsection 29(b) and Article 9 of the Convention.

[136] Presumptively, the fund available to answer Siemens' claim for damages is $500,000. The damage claim arises in relation to the Incident. Regardless of the number of actions started and cross-claims advanced, if the right to limit is not defeated by evidence of recklessness pursuant to Article 4 of the Convention, the only amount available to meet Siemens' claim will be $500,000, together with interest.

[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.

[138] While it is clear that Irving meets the definition of “shipowner” set out in Article 1 of the Convention, it is also clear from the arguments made that the status of MMC and BMT, as “shipowners”, will be robustly debated. Arguably, MMC will rely on paragraph 4 of Article 1 to claim the right to limit.

[139] Insofar as BMT claims the right to limit, there is an issue as to whether Siemens meets the definition of “shipowner”, a status that may arise from its contractual relationship with Irving.

[140] I refer, as well, to the individuals who were named as defendants in the second action commenced by Siemens in the Ontario Superior Court of Justice. At first blush, they would appear to benefit from paragraph 4, Article 1 of the Convention as being persons “for whose act, neglect or default the shipowner” is responsible.

[141] All of these issues will be subject to argument, both for and against, upon the basis of whatever evidence is submitted.

[142] Siemens will resist the invocation of the right to limit. It has already shown, by the commencement of the two Ontario actions, that it is casting a broad net in terms of potential defendants.

[143] This wide range of litigation is another factor in favour of proceeding with the limitation action first, or at least at the same time, as the liability action and to deal with the issues of the entitlement to limit, both in terms of who can limit and whether there is conduct barring limitation.

[144] I note, as well, that the class of potential plaintiffs or claimants against the limitation fund is not yet known. Siemens, to date, is the only Plaintiff but there may be others. In these circumstances, it becomes important to enjoin suits and actions in other courts or tribunals and upon giving notice, allow potential claimants to file their claim against the limitation fund.

[145] Siemens has made it clear that it will also contest the right of Irving and others to invoke limitation of liability, having regard to Article 4 of the Convention. In order to show that the right to limit is unavailable, it will have to lead evidence to establish that the conduct of Irving and others in relation to the Incident was reckless. In my opinion, there will inevitably be an overlap between this evidence with the evidence required to prove liability against the defending parties in the Ontario actions. As Siemens argues, duplicity of proceedings with the risk of inconsistent findings should be avoided.

[146] As discussed, the determination of liability, and limitation thereof, for the Incident can be determined in the Federal Court, as well as in the Ontario Superior Court of Justice.

[147] The present motions for directions, with respect to section 33 of the Act, are interlocutory in nature. An order dealing with the limit of liability and its ultimate availability would be made only after a full trial of the issues.

[148] I do not accept the submissions made by Siemens, endorsed by AXA, that the liability trial should proceed before the Ontario Superior Court of Justice, on the basis that certain steps have been taken in the prosecution of the existing action, including the retention of an expert in preparation of an expert report, and the serving of a jury notice. Siemens points out that section 49 of the *Federal Courts Act* prohibits jury trials.

[149] I also do not accept that Siemens' choice of forum militates in favour of the Ontario proceedings. As discussed, the MLA provides Irving, BMT and MMC with their own cause of action to limit liability, a proceeding which is meant to be expeditious. Those parties, too, have a choice of forum in which to bring their actions, and that choice must be balanced with the choice made by Siemens.

[150] While the Ontario Rules of Practice and Procedure allow a broader range of discovery, a case management judge of this Court can also allow for broader discovery, if warranted.

[151] The question of the availability of a jury trial is an appropriate factor to consider, but is not determinative. In my opinion, depriving Siemens of the option to have its claim considered by a jury is outweighed by the inconvenience and repetition that would be required to have the issue of limitation considered in this Court, and the issue of liability determined in the Ontario Superior Court of Justice.

[152] Siemens also argues that the Ontario Court possesses jurisdiction over all parties and all claims, and again submits that this Court does not have that jurisdiction.

[153] On the other hand, BMT submits that it is not clear that the Ontario Superior Court of Justice has jurisdiction over all the defendants Siemens has named in the Ontario actions, particularly the individuals in its second action. The Incident did not occur in Ontario, and Siemens has not demonstrated that those individuals have attorned to the Ontario action, that they have business assets in that Province, or that there is a contractual nexus between those individual defendants and the Ontario Superior Court of Justice.

[154] The Federal Court has jurisdiction over all claims relating to the Incident, which is clearly maritime in nature. The issue of liability as between Siemens and the Defendants can be addressed in the context of the limitation actions.

[155] It will not be necessary for Siemens to begin another action in the Federal Court, with resulting counterclaims and cross-claims by the other parties, although it can do so if it likes. Siemens, itself, can proceed by way of counterclaim or cross-claims against the Defendants in the two limitation actions, pursuant to paragraph 33(4)(a) of the MLA. If it is determined in the limitation actions that any party is not entitled to limit its liability pursuant to the Convention, Siemens can pursue its claims in the Ontario proceedings.

[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.

[157] In the result, the motions of Irving, MMC and BMT to enjoin all parties and any persons from continuing with or commencing any proceedings before any court or tribunal, including an arbitration panel, other than this Court, in respect of the Incident are allowed.

Conclusion

[158] For the reasons above, Siemens' motions to stay are dismissed and the limitation actions will proceed in accordance with these Reasons.

[159] The motions of Irving, MMC and BMT to enjoin any other proceedings before any court or tribunal in respect of the Incident is granted.

[160] If the parties cannot agree on costs, that issue may be addressed in submissions to be served and filed on or before July 14, 2011.

[161] These Reasons for Order and Order will be filed in both cause number T-520-10 and cause number T-666-10.

ORDER

THIS COURT ORDERS that:

1. The motions to stay these proceedings are dismissed.

2. The Defendants and any other person are enjoined from commencing or continuing proceedings before any other Court or tribunal than the Federal Court against Irving, the Plaintiff in T-520-10 and MMC, the Plaintiff in T-666-10, in respect of the Incident.

3. Any claim in respect of the Incident which may be subject to limitation of liability shall be asserted either by way of a counterclaim or cross-claim in these actions, or by way of a separate action before this Court.

4. The issues determined and the procedure established by this Order do not preclude any of the Defendants or claimants from alleging that:
    (a) Irving and MMC, as Plaintiffs, and any other party, are not entitled to limit liability as contemplated by the MLA; and
    (b) One or more of the parties do not fall within the category of those entitled to invoke pursuant to he MLA, the right to limit liability.

5. The parties herein are directed to consult and to submit a draft order to give effect to the Reasons for Order, concerning the establishment of a limitation fund in the amount of $500,000 plus interest from October 15, 2008 to the date on which the statutory

limitation fund is constituted, pursuant to subsection 33(5) of the Act. The parties shall specifically address the relief sought in paragraphs (a), (b), (c), (d), (e), (g) and (h) of Irving's Notice of Motion. The draft order will be submitted to the Court on or before July 14, 2011.

6. The establishment of a limitation fund, in accordance with the MLA, in the amount of $500,000 and interest, shall not preclude any party or person from denying liability or legal responsibility and contesting the quantum of any claim.

7. These actions are specially managed proceedings and following constitution of the limitation fund, any party shall be at liberty to seek orders and directions from the Case Management Judge concerning the completion of pre-trial steps, the consolidation of the actions, the fixing of a single or separate hearing and any other relevant matter mentioned in the MLA or the Rules.

8. If the parties cannot agree on costs, that issue may be addressed in submissions to be served and filed on or before July 14, 2011.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-520-10 and T-666-10
STYLE OF CAUSE:	T-520-10, J.D. Irving, Limited v. Siemens Canada Limited et al. T-666-10, Maritime Marine Consultants (2003) Inc. v. Siemens Canada Limited et al.
PLACE OF HEARING:	Toronto, ON
DATE OF HEARING:	October 19, 2010
FURTHER SUBMISSIONS:	January 7, 10, 17, 18, 24 and 26, 2011 February 2 and 8, 2011
REASONS FOR ORDER AND ORDER:	HENEGHAN J.
DATED:	June 29, 2011

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