IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Nanaimo Harbour Link Corporation v. Abakhan & Associates Inc.,*** 2007 BCSC 109

Date: 20070129
Docket: B060890
Registry: Victoria

Between:

Nanaimo Harbour Link Corporation

Insolvent

And

Abakhan & Associates Inc.

Trustee

Before: The Honourable Madam Justice Garson

Reasons for Judgment

Counsel for 656925 British Columbia Ltd.	B.G. Baynham, Q.C. and R. Wu
Counsel for Allied Shipbuilders Ltd. and PSI Fluid Power Ltd.	T.S. Hawkins and P.D. Mooney
Counsel for Captain Lars Friis and other Crew Members of the Vessel “Harbourlynx”	D. Williams
Counsel for Kurt A. Henderson and Douglas A. Henderson (Crew Members)	G. Douvelos
Date and Place of Hearing:	December 11 and 12, 2006 Victoria, B.C.

INTRODUCTION

[1] The applicants, Allied Shipbuilders Ltd. ("Allied") and PSI Fluid Power Ltd. ("PSI"), Captain Friis and other affected Crew Members, to whom I shall sometimes collectively refer to as the "Lien Claimants", apply for an order pursuant to s. 69.4 of the ***Bankruptcy and Insolvency Act***, R.S.C. 1985, c. B-3 ("***BIA***"), that the statutory stay of proceedings in s. 69.3 of the ***BIA*** shall not apply to Federal Court of Canada proceedings commenced by the applicants on the grounds that their claims are maritime liens (or equivalent to maritime liens) for goods and services provided to the vessel "Harbourlynx".

[2] These applications raise the issue of whether under Canadian maritime law, liens, when proven as maritime liens, are secured claims having priority to the ship's mortgage or if the claims are to be determined under the ***BIA*** as unsecured claims to debt, thereby ranking behind the ship's mortgage.

FACTS

[3] The facts which form the background to this matter are contained in the Agreed Statement of Facts below. In summary, the Harbourlynx was a privately owned passenger ferry running between downtown Nanaimo and downtown Vancouver. In January 2006 the vessel underwent extensive repairs performed by Allied and PSI. In February the starboard engine of the vessel failed for reasons unrelated to any work performed by Allied and PSI. The vessel was not repaired. Its owner, Nanaimo Harbour Link Corporation, having tried unsuccessfully to restructure its financial affairs, was in March deemed bankrupt. The crew and

captain of the vessel were not paid wages owed to them. PSI and Allied were not paid for the January repairs.

AGREED STATEMENT OF FACTS

BACKGROUND

1. Nanaimo Harbour Link Corporation (the "Company") is a company incorporated under the laws of the Province of British Columbia.

2. The Company operated a passenger only ferry service in the Strait of Georgia between downtown Nanaimo, and downtown Vancouver, in the Province of British Columbia. The business of the Company was conducted solely in the Province of British Columbia.

3. The Company owned and operated one vessel which operated under the name "Harbourlynx", which is a passenger vessel with a registered length of 34.40 metres and a gross tonnage of 501 tonnes (the "Harbourlynx").

4. Some employees of the Company were land-based, while other employees were crew members on the Harbourlynx.

5. On January 9, 2006 and through to January 23, 2006, the Harbourlynx was in drydock at Allied Shipbuilders Ltd. ("Allied") in North Vancouver to conduct a complete overhaul of the vessel's Kamewa Rollsroyce water jets, complete drydock inspection and cleaning and painting of the hull, all of which is required for the continued operation of the Harbourlynx. Allied completed the work and the drydocking and the Harbourlynx was returned to service on or about January 30, 2006.

6. On or about February 2, 2006, the Harbourlynx lost its starboard engine due to what turned out to be a broken crankshaft. The Company was unable to provide the ferry service with only one engine, and ceased operations on or about February 2, 2006. The starboard engine failure was unrelated to any of the work performed by Allied.

COURT AND TRIBUNAL PROCEEDINGS

7. On February 17, 2006, the Company filed a Notice of Intention to make a Proposal ("NOI") under s. 50.4(1) of the *Bankruptcy and Insolvency Act.*

8. On February 21, 2006, Allied filed an in rem Statement of Claim in Federal Court Action No. T-319-06 (the "Allied Action") claiming damages in the amount of $133,001.18, prejudgement interest, condemnation of the Harbourlynx or her bail, and costs. Allied also filed a Warrant to arrest the ship "Harbourlynx".

9. The Company was served with a copy of Allied's Statement of Claim on February 22, 2006. The vessel was arrested that same day.

10. By letter dated February 27, 2006, Abakhan & Associates wrote to the Federal Court of Canada with respect to the Allied Action to advise the Court that pursuant to section 69 of the *Bankruptcy and Insolvency Ac*t, all actions against Nanaimo Harbour Link are stayed upon the filing of the NOI.

11. On February 28, 2006, PSI Fluid Power Ltd. ("PSI") filed a Caveat Release in the Allied Action.

12. On March 2, 2006, PSI filed an in rem Statement of Claim in Federal Court Action No. T-380-06 (the "PSI Action"), claiming damages in the amount of $22,183.12, prejudgement interest, condemnation of the Harbourlynx or her bail, and costs.

13. On March 16, 2006, Captain Lars H. Friis filed a Caveat Release in the Allied Action, on behalf of himself as Senior Master of High Speed Passenger Vessel "Harbourlynx" and all affected crewmembers (as per Schedule "A" to the Caveat Release) (the "Crewmembers"), which list did not include any land based employees.

14. The Company did not prepare or file a Proposal under the Bankruptcy & Insolvency Act.

15. On March 21, 2006 the Company was deemed to have filed an assignment into Bankruptcy. Abakhan & Associates Inc. was named as Trustee in the Bankruptcy.

16. By proof of claim Allied filed as an unsecured creditor.

17. By proof of claim PSI filed as an unsecured creditor.

18. The Crewmembers did not file a Proof of Claim in the Bankruptcy.

19. 656925 British Columbia Ltd. is a secured creditor in the Bankruptcy. The Trustee has determined that the security interest of 656925 British Columbia Ltd. is valid and enforceable against the Trustee. 656925 British Columbia Ltd.'s security agreement against the vessel was valued at approximately $3,500,000.

20. By Disclaimer dated April 24, 2006, the Trustee disclaimed, assigned, and abandoned in favour of 656925 British Columbia Ltd. all and any right, title, interest and claim that the Trustee or the bankrupt estate of the Company may have or hereinafter have in, *inter alia*, the Harbourlynx.. 656925 British Columbia Ltd. paid $2000.00 to the Trustee as consideration for this agreement.

21. On April 18, 2006, two of the Crewmembers, namely Kurt Henderson and Douglas Griffith, filed a Writ of Summons and Statement of Claim in B.C.S.C. Action No. S46924, Nanaimo Registry, claiming loss of wages, loss of holiday pay and non-payment of severance (the "Nanaimo Crewmembers Action").

22. On June 8, 2006, the balance of the Crewmembers filed a Writ of Summons and Statement of Claim in B.C.S.C. Action No. 06 2639, Victoria Registry (the "Victoria Crewmembers Action") seeking, *inter alia*, wages, holiday pay, overtime pay and severance pay for the Crewmembers. The Victoria Crewmember Action was discontinued on November 22, 2006.

23. On August 1, 2006, the Crewmembers (excluding the crewmembers named in the Nanaimo Crewmembers Action) filed a Statement of Claim in Federal Court Action No. T-1372-06 (the "Federal Crewmembers Action").

24. Pursuant to an Order dated August 30, 2006 made by Master Barber, bail was posted in the Supreme Court of British Columbia, with respect to the Nanaimo Crewmembers Action.

25. By way of a cash deposit held in a solicitor's trust account, supported by a Letter of Undertaking dated September 19, 2006, 656925 British Columbia Ltd. posted security for the Allied Action in exchange for the release of the Harbourlynx from arrest. The undertaking was given without prejudice to any claims, rights or defences which 656925 British Columbia Ltd. has or may have, none of which were to be regarded as waived. As a result of security being posted, the Harbourlynx was subsequently released from arrest. The members of the Victoria Crewmember Action consented to the release.

26. By way of a cash deposit held in a solicitor's trust account, supported by a Letter of Undertaking dated September 19, 2006, 656925 British Columbia Ltd. posted security for the PSI Action in exchange for the release of PSI's Caveat Release. The undertaking was given without prejudice to any claims, rights or defences which 656925 British Columbia Ltd. has or may have, none of which were to be regarded as waived. As a result of security being posted, PSI subsequently released its Caveat Release.

27. On or about September 28, 2006, the Harbourlynx was purchased by a third party. The sale proceeds from that transaction are inadequate to cover the secured claim of 656925 British Columbia Ltd., as well as the claims of Allied, PSI, and the Crewmembers.

CLAIM OF ALLIED AND PSI

28. Allied is a company incorporated under the laws of the Province of British Columbia.

29. On or about November 22, 2005, Allied and the Company entered into a contract in regard to providing the following services to the Harbourlynx including but not limited to:

(a) Cleaning and painting the hull of the Harbourlynx;

(b) Overhauling the Harbourlynx's Kamewa (Rolls Royce) Water Jets (the "Water Jets");

(c) Determining if inspection and service of the sea valves was required;

(d) Removing all anodes and installing new anodes;

(e) Repairing the transom;

(f) Inspecting all gear cooling pipes; and

(g) Removing all load line marks (the "Services Agreement").

30. The Company moored the Harbourlynx at Allied's premises on or about January 9, 2006. Work on the Harbourlynx was commenced that same day and was completed on or about January 23, 2006.

31. Allied claims that the amount of $133,001.18 remains outstanding for the work performed by Allied, with interest charged at the rate of 1.5% per month.

32. PSI is an extra-provincial company registered under the laws of the Province of British Columbia.

33. PSI had an ongoing relationship with the Company whereby the Company would order parts and labour for the Harbourlynx from PSI and PSI would supply such parts and labour.

34. During the period from May 2005 to January 2006, the Company ordered parts and labour from PSI, largely in support of the drydocking work performed by Allied. All ordered parts were delivered

to the Company by PSI and all ordered labour was performed on the Harbourlynx by PSI.

35. PSI claims that the amount of $22,183.12 remains outstanding for the goods and services provided by PSI, along with interest at a rate to be determined by the Court.

CLAIM OF THE CREWMEMBERS

36. There are two outstanding actions commenced by the various crewmembers, namely the Nanaimo Crewmembers Action and the Federal Crewmembers Action.

37. The Crewmembers were employed by the Company to act as master and crew aboard the Harbourlynx during portions or all of the period from October 1, 2003 to February 17, 2006.

38. Kurt Henderson, one of the Plaintiffs in the Nanaimo Crewmembers Action, stopped working for the Company on or about October 5, 2005. He was considered by the Company to be on layoff status as at that date. The B.C. Government and Service Employees' Union (the "Union) filed a complaint with the British Columbia Labour Relations Board, (the "Board") with respect to the demotion and layoff of Kurt Henderson. The date of the hearing was January 19, 2006. The Board's decision is dated February 17, 2006. The Board concluded that with respect to the Union's complaint that the layoff of Kurt Henderson is a violation of section 5(1) of the Code, the Union's complaint was upheld.

39. It was an express or implied term of the contract of employment that the Crewmembers would be paid:

(a) an hourly wage or a weekly salary for set hours;

(b) Amounts for overtime in compliance with Provincial legislation;

(c) Amounts for holiday pay in compliance with Provincial legislation;

(d) Amounts for severance in compliance with Provincial legislation and common law.

40. The Crewmembers claim, in their various actions, *inter alia*:

(a) damages for breach of contract of employment between the Company and the Crewmembers;

(b) a declaration that the Crewmembers have a maritime lien for seamens' wages pursuant to *Canadian Maritime Law*;

(c) damages for unpaid wages including wages, holiday pay, and overtime pay;

(d) common law damages for wrongful dismissal;

(e) an Order that the Crewmembers be paid from the proceeds of sale of the Harbourlynx;

(f) interest pursuant to *Canadian Maritime Law*; and

(g) costs.

POSITION OF THE RESPONDENT MORTGAGEE

[4] The "Mortgagee", 656925 British Columbia Ltd., argues that Canadian maritime law has no application in determining the priority of the claims by the Lien Claimants in the bankruptcy of the Company due to constitutional limitations concerning the federal power over navigation and shipping under s. 91(10) of the ***Constitution Act, 1867*** (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, "***Constitution Act***").

[5] The Mortgagee says that in particular, it is significant that the route of the vessel "Harbourlynx" was solely intra-provincial in British Columbia, between ports in downtown Vancouver and downtown Nanaimo. Consequently, the applicants' claims are in "pith and substance" a matter of local concern involving property and civil rights under s. 92(13) of the ***Constitution Act***. Furthermore, the Mortgagee says the Harbourlynx ferry was a "local work or undertaking" which is under provincial jurisdiction pursuant to s. 92(10) of the ***Constitution Act***. Accordingly, it says no maritime or statutory liens in Allied or PSI's favour have been created under Canadian maritime law.

[6] Second, the Mortgagee argues that even if the applicant's claims are properly considered maritime liens, the ***BIA*** is a complete code in respect to priorities of creditors in the bankruptcy context. The Lien Claimants are therefore limited in recourse to the priority afforded to them by parliament under s. 136(1)(d) of the ***BIA***, in which case their claims rank behind the claim of the Mortgagee.

POSITION OF THE APPLICANT LIEN CLAIMANTS

[7] The Lien Claimants describe the interaction between the two regimes of law, that is bankruptcy law and Canadian maritime law, as a process of peaceful coexistence. The Lien Claimants contend that a maritime lien attaches *in rem* to a ship and is thus a secured claim. They argue that once a determination is made by the Federal Court of Canada that a claim is a secured claim under Canadian maritime law, the Bankruptcy Court will be bound by that determination. They say that the scheme of distribution under the ***BIA*** does not apply to secured claims which rank in priority to the claims that are administered under the ***BIA***

[8] The Lien Claimants say that the operation of a private ship is governed by the federal navigation and shipping powers. They contend that such operation includes the labour of the crew and the provision of necessaries by the repairers, all of which is essential to the navigation of the ship.

APPLICATION OF THE *BANKRUPTCY AND INSOLVENCY ACT* TO MARITIME LIENS

[9] In ***Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)***, [2001] 3 S.C.R. 907, 2001 SCC 90, Binnie J. explained the necessity for *in rem*

remedies to govern the claims of seamen, ship repairers and other suppliers of essential goods and services to ships. He commented, at paras. 25 to 27, as follows:

> Shipping was one of the earliest activities that required international cooperation in the regulation of the rights and obligations of its participants. "For the cradle of our maritime law we must turn to the Mediterranean Sea where the sea commerce has had a continuous history for nearly five thousand years": *Benedict on Admiralty* (7th ed. (loose-leaf)), vol. 1, at p. 1-4; and see generally W. Tetley, *Maritime Liens and Claims* (2nd ed. 1998), at pp. 7-8. Maritime lawyers were forced to confront the need for rules to govern international commerce centuries before the "universalist approach" became a key issue in bankruptcy. Seamen, salvors, ship chandlers, repairers and other suppliers of essential goods and services to the ship in foreign ports required some assurance of payment. They looked to the ship. Common rules were essential because suppliers dealt with ships from many countries and the Masters found themselves in distant ports in an age when communications with ship owners were slow and unreliable. In maritime commerce, "rules of practical convenience commanding general assent are a virtual necessity": *Laane and Baltser v. Estonian State Cargo & Passenger Steamship Line*, [1949] S.C.R. 530, per Rand J., at p. 545. See also: *Q.N.S. Paper Co. v. Chartwell Shipping Ltd.*, [1989] 2 S.C.R. 683, at p. 695. Practicality required an *in rem* proceeding against the ship as distinguished from an *in personam* action against the shipowner. The need for predictability and uniformity was so strong that even the common law courts, ever protective of their own ways, ceded jurisdiction to specialized courts of admiralty applying a largely international law of maritime commerce. As Professor Tetley, *supra*, writes, at p. 56:
>
> > [M]aritime law as we know it today is civilian in nature, finding its source in the *lex maritima* (the law maritime) which is a part of the *lex mercatoria* (the law merchant). Maritime law was codified, international law and, in England, it was apart from, and opposed to, its nearly mortal enemy, the common law.
>
> The *in rem* interest in ships took many forms, some created by statute, others by mortgage, still others by possession. One of the most ancient and effective forms of security was (and is) the maritime lien. In this action, Holt claims a maritime lien for stevedoring services pursuant to the *U.S. Commercial Instruments and Maritime Liens Act*, 46 U.S.C. s. 31342. Broadly speaking, a maritime lien arises without registration or

> other formality when debts of a specific nature are incurred by or on behalf of a ship. The lien creates a charge which "goes with the ship everywhere, even in the hands of a purchaser for value without notice, and has a certain ranking with other maritime liens, all of which take precedence over mortgages" (*The Tolten*, [1946] P. 135 (C.A.), *per* Scott L.J., at p. 150). It may be described, in that sense, as a "secret lien".
>
> The reason for this privileged status for maritime lien holders is entirely practical. The ship may sail under a flag of convenience. Its owners may be difficult to ascertain in a web of corporate relationships (as indeed was the case here, where initially Holt named the wrong corporation as ship owner). Merchant seamen will not work the vessel unless their wages constitute a high priority against the ship. The same is true of others whose work or supplies are essential to the continued voyage. The Master may be embarrassed for lack of funds, but the ship itself is assumed to be worth something and is readily available to provide a measure of security. Reliance on that security was and is vital to maritime commerce. Uncertainty would undermine confidence. The appellant Trustees' claim to "international comity" in matters of bankruptcy must therefore be weighed against competing considerations of a more ancient and at least equally practical international system -- the law of maritime commerce.

[10] The Lien Claimants contend that maritime liens are secured claims. Section 136(1) of the ***BIA*** excludes secured claims from the scheme of distribution of the assets of the bankrupt party. Section 136(1) provides, in part, as follows:

> 1. Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows: …. [emphasis added]

[11] Section 2 of the ***BIA*** defines a “secured creditors”, in part, as follows:

> … a person holding a mortgage, hypothec, pledge, charge, or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor ...

[12] Consequently, the Lien Claimants say that the secured claims are not governed by the ***BIA***, but rather by the ranking of secured claims under Canadian maritime law.

[13] If the Lien Claimants are correct in their assertion, and if their claims are proven in the Federal Court of Canada, then those claims would rank in priority to the ship's mortgage under Canadian Maritime Law. If the Mortgagee is correct in its assertion, that the priority of claims falls to be determined under the ***BIA***, then the ship's mortgage ranks first and there will be no funds available for distribution to the Lien Claimants because the ship's mortgage will consume all the assets of the bankrupt Company.

[14] William Tetley, in ***Maritime Liens and Claims***, 2nd ed. (Montreal: International Shipping publications, 1998), describes the interaction between bankruptcy law and Canadian maritime law, at p. 1127, in the following way:

> The *Bankruptcy and Insolvency Act* defines "secured creditor" and recognizes *inter se* maritime liens at sect. 2:
>
> > …'secured creditor' means a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor or….
>
> By sect. 69.3(2), a secured creditor, as well, is permitted to realize on his security in the Admiralty Court and thus avoid the stay of proceedings called for by sect. 69.1(1)(a) of the *Bankruptcy and Insolvency Act*. Sect. 69.3(2) reads:
>
> > Subject to sections 79 and 127 to 135 and subsection 248(1), the bankruptcy of a debtor does not prevent a secured creditor from realizing or otherwise dealing with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed …

> The secured creditor therefore deals with his security in the same manner as if there were no bankruptcy and will be able to commence or continue proceedings in the [Federal Court]. This means that the secured creditor is entitled to realize his security before any amount is distributed to the mass of creditors. Maritime lienors and mortgagees may therefore enforce their claims in the [Federal Court] despite the bankruptcy.

[15] Professor Tetley's explanation of the interaction between the two bodies of law is supported by the Supreme Court of Canada's decision in ***Holt Cargo***, *supra*. In that case, a Belgium ship was arrested at Halifax by a U.S. company holding an *in rem* maritime lien for stevedoring services provided in the U.S. The ship's Belgium owner was subsequently adjudged bankrupt in Belgium. The Belgium bankruptcy order was registered and 'recognized' in Quebec. The U.S. lien claimants proceeded in the Federal Court of Canada to prove and enforce their *in rem* maritime lien, outside of the bankruptcy. The trustee in bankruptcy requested that the Federal Court stay its proceedings. The Federal Court declined to grant the stay. The Supreme Court of Canada held that the bankruptcy proceedings did not operate as a stay of the maritime lien claim proceedings in Federal Court.

[16] Binnie J., at para. 16, stated that a "maritime lien is a secured claim" within the meaning of s. 136 of the ***BIA.***

[17] At para. 52, Binnie J. noted that "the policy of the [***Bankruptcy and Insolvency Act***] in the case of bankruptcy is not to interfere with secured creditors except in so far as may be necessary to protect the estate as to any surplus on the assets covered by the security".

[18] At paras. 65-66, Binnie J. went on to hold that the maritime lien claims should be adjudicated as secured claims outside of the bankruptcy. It is in this context that I will assess the applicant's claims in the case at bar.

[19] As concerns the applicant crew members, I do not believe it is in dispute generally that the claims of seamen for wages, if proven, are maritime liens under Canadian maritime law, and are considered secured claims.

[20] In this case, all of the applicants also assert statutory lien claims under ss. 22(2)(m), (n) and (o) of the ***Federal Courts Act***, R.S.C. 1985, c. F-7. Those subsections provide as follows:

> **22(1) Navigation and shipping**
>
> 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(2) Maritime jurisdiction**
>
> Without limiting the generality of subsection (1), for greater certainty, the Federal Court has jurisdiction with respect to all of the following:
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> …
>
> (m) any claim in respect of goods, materials or services wherever supplied to a ship for the operation or maintenance of the ship, including, without restricting the generality of the foregoing, claims in respect of stevedoring and lighterage;
>
> (n) any claim arising out of a contract relating to the construction, repair or equipping of a ship;
>
> (o) any claim by a master, officer or member of the crew of a ship for wages, money, property or other remuneration or benefits arising out of his or her employment;

[21] As noted by Professor Tetley in ***Maritime Liens and Claims***, *supra*, at p. 1128, statutory rights *in rem*, unlike maritime liens, do not have the status of secured claims. They are thus ordinary claims subject to the scheme of distribution under the ***BIA***. However, both Allied and PSI submit that they are entitled to prove their claims *in rem* against the ship, elevated to a status *pari passu* with a maritime lien, under equitable principles of Canadian maritime law. They say that such an elevation would rank their claims to a secured creditor status above the claim of the Mortgagee.

[22] The basis upon which Allied and PSI say they are entitled to elevated status in the Federal Court of Canada proceedings is that as a result of their supply of labour and materials to the ship, the value of the ship was enhanced, and it would be inequitable for the Mortgagee to be enriched by that enhanced value without credit to the supplier of the goods and materials: see ***Maritime Liens and Claims***, *supra*, at p. 656.

[23] The Mortgagee disputes the seamen's claim to priority in this case as secured creditors under s. 136 of the ***BIA*** on the grounds that these seamen were engaged in operating an intra-provincial ferry, a provincial undertaking, and therefore s. 22 of the ***Federal Court Act*** has no application to them. In the result, the Mortgagee argues that the seamen's wages should be given only the priority they would have under s. 136(1)(d) of the ***BIA***. It makes a similar argument against Allied and PSI. I will turn to this "constitutional argument", as termed by the parties, in a moment.

[24] Therefore, in conclusion, I agree with the Lien Claimants' argument that, subject to the constitutional argument, if they are successful in the Federal Court in proving their claims to maritime liens, and the enhancement claim in the case of Allied and PSI, those liens would be secured claims within the meaning of s. 136(1) and s. 2 of the ***BIA***. They would therefore be entitled to an order pursuant to s. 69.4 of the ***BIA*** that the statutory stay of proceedings in s. 69.3 of the Act should not apply to their actions.

[25] I note that the statements of claim filed by Allied and PSI in the Federal Court do not include in their claim for relief a declaration of entitlement to either a statutory lien or an enhanced claim. I have construed their claims as they could be amended. The seamen's claims do include a claim for such declaratory relief.

[26] These findings do not, however, entirely dispose of these applications. I now turn to the issue raised by the Mortgagee that because the Nanaimo Harbour Link Ferry is a provincial undertaking, Canadian maritime law has no application to these claims. Insofar as this argument has some constitutional implications, the Mortgagee has given the appropriate notice under the ***Constitutional Question Act***, R.S.B.C. 1996, c. 68. Neither the Attorney General of Canada nor the Attorney General of British Columbia has intervened.

APPLICATION OF CANADIAN MARITIME LAW TO AN INTRA-PROVINCIAL FERRY

[27] The Mortgagee argues that Canadian maritime law does not create a maritime lien for wages for crew members of a vessel travelling solely in intra-provincial waters. Similarly, it argues that no maritime lien is created for the

provision of necessaries by Allied and PSI for the same reason. In his written submissions on behalf of the Mortgagee, Mr. Baynham argued:

> 5. The Secured Mortgagee submits that due to the division of powers under the *Constitution Act, 1867*, maritime law, to the extent that it establishes a maritime lien for wages, has no application to crewmembers of a vessel travelling solely in intra-provincial waters.
>
> 6. In *ITO- International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] S.C.J. No. 38, the Supreme Court of Canada confirmed that the ambit of Canadian maritime law is limited by the constitutional division of powers under the *Constitution Act, 1867*, at page 16, paragraph 20:
>
> > *In reality, the ambit of Canadian maritime law is limited only by the constitutional division of powers in the Constitution Act, 1867*. I am aware in arriving at this conclusion that a court, in determining whether or not any particular case involves a maritime or admiralty matter, *must avoid encroachment on what is in "pith and substance" a matter of local concern involving property and civil rights or any other matter which is in essence within exclusive provincial jurisdiction under s. 92 of the Constitution Act, 1867*. It is important, therefore, to establish that the subject-matter under consideration in any case is so integrally connected to maritime matters as to be legitimate Canadian maritime law within federal legislative competence. (emphasis added)
>
> 7. Under s. 91(10) of the *Constitution Act, 1867*, Parliament has legislative jurisdiction over "Navigation and Shipping". However, the "Navigation and Shipping" power is limited by the constitutional division of powers and does not extend to matters that are within provincial jurisdiction.
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> 8. Under s. 91(13) of the *Constitution Act, 1867*, Parliament has legislative jurisdiction over "Ferries between a Province and any British or Foreign Country or between Two Provinces".
>
> 9. Under s. 92(10) of the *Constitution Act, 1867*, the provinces have legislative jurisdiction over Local Works and Undertakings other than:
>
> > (a) lines of steam or other ships and other works or undertakings connecting the province with any other or others of the Provinces, or extending beyond the limits of the province;

> (b) lines of steam ships between the province and any british or foreign country; and
>
> (c) such Works, although wholly situate within the Province, are declared by the Parliament of Canada to be for the general advantage of Canada or for the Advantage of two or more of the Provinces.

…

13. In *Reference re Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529 (S.C.C.) (the "Eastern Canada Stevedoring Case"), Rand J. stated as follows at p. 20 (QL) about the ships that operated exclusively within one province:

> In both s. 91(13) and s. 92(10) and (16) works, undertakings and local services within provincial authority are contemplated, and the scope of Shipping must similarly be accommodated to strictly provincial subjects. In the case of a local ferry or service on, say, a lake wholly within a province, its existence, the regulation of schedules, tariffs and matters unrelated to marine features, mark out a provincial control consistent with the general regulation of Shipping. The government and management of the ship, including qualifications and discipline of the crew, and all matters relating to navigation, remain with Parliament: but the civil rights of crews must be considered.
>
> …. In these, as in strictly local undertakings, the local interest is paramount and the civil rights of the crews prima facie find their regulation in provincial law. (emphasis added)

[28] The ***Federal Court Act***, *supra*, provides at s. 22 that the Federal Court has concurrent original jurisdiction in all cases in which a remedy is sought under Canadian maritime law relating to any matter coming within the subject of navigation and shipping.

[29] The Federal Court Trial Division has jurisdiction to arrest a ship to entertain a claim for debts incurred on the ship's behalf and to assess the validity of a maritime

lien: ***Holt Cargo Systems***, *supra*, at para. 37. Mr. Baynham argued that the Federal Court has no jurisdiction to arrest a ship or exercise its admiralty jurisdiction in respect to a debt claim within provincial jurisdiction.

[30] The question in this case is therefore whether, by virtue of the fact that the vessel plies only intra-provincial waters, that is, between two ports in British Columbia, the lien claims are, in pith and substance, related to navigation and shipping and a matter of federal jurisdiction, or property and civil rights and a matter of provincial jurisdiction.

[31] In the case of ***Reference re: Industrial Relations and Disputes Investigation Act (Canada)***, [1955] S.C.R. 529, [1955] 3 D.L.R. 721 (the "***Eastern Canada Stevedoring Case***"), referred to by Mr. Baynham in his submissions, the court was asked to determine whether federal labour relations legislation applied to the employees of a stevedoring company located in Toronto, and whether the legislation in question was *ultra vires* the Parliament of Canada. Part 1 of the legislation, which was in issue, stated, in part, that it applied:

> in respect of employees who are employed upon or in connection with the operation of any work, undertaking or business that is within the legislative authority of the Parliament of Canada including but not so as to restrict the generality of the foregoing, (a) works, undertakings or businesses operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada.

[32] The concern was that the legislation in question related to property and civil rights, an area of provincial jurisdiction.

[33] The majority of the court held that the legislation was *intra vires* the Parliament of Canada and that it applied to the stevedores, who performed work on ships that operated between ports in Canada and outside of Canada, an area of exclusive federal jurisdiction. Rand J., writing separate reasons, concluded that crews of vessels engaged in strictly local undertakings or services and locally organised stevedores were outside the scope of the legislation. Locke J., also writing separate reasons, similarly concluded that that legislation did not apply to shipping activities confined within a province.

[34] In ***Hawker Industries Limited v. Santa Maria Shipowning and Trading Company S.A.,*** [1979] 1 FC 183, 89 D.L.R. (3d) 699, the court held that a contract for repair of a ship that arrives in port after becoming disabled at sea is subject matter within the body of Canadian maritime law. Jackett C.J. held, at para. 9, that "… it is not an over-generalization to say that the doing of what is necessary to enable ships to carry on their navigation operations is something that falls within the field of activity regulated by Admiralty law."

[35] In ***Whitbread v. Walley***, [1990] 3 S.C.R. 1273, 77 D.L.R. (4th) 25, the appellant Whitbread sailed a federally registered pleasure craft from Vancouver to Indian Arm via Burrard Inlet, a body of water within provincial boundaries. Whitbread asked his companion to take over the helm and then fell asleep. The ship ran aground causing Whitbread to suffer a serious injury. The defendant applied for a declaration that he was entitled to rely on the limitation of liability provisions contained in the ***Canada Shipping Act***, R.S.C. 1985, c. 5-9. The court held that the

defendant's liability was a matter of federal, not provincial, law regardless of whether the body of navigable water was inland or tidal. La Forest J., at p. 1295, stated:

> For it would be quite incredible, especially when one considers that much of maritime law is the product of international conventions, if the legal rights and obligations of those engaged in navigation and shipping arbitrarily changed as their vessels crossed the point at which the water ceased or, as the case may be, commenced to ebb and flow. Such a geographic divide is, from a division of powers perspective, completely meaningless, for it does not indicate any fundamental change in the use to which a waterway is put. In this country, inland navigable waterways and the seas that were traditionally recognized as the province of maritime law are part of the same navigational network, one which should, in my view, be subject to a uniform legal regime.

[36] In ***Ordon Estate v. Grail***, [1998] 3 S.C.R. 437, 166 D.L.R. (4th) 193 at para. 73, the Supreme Court of Canada stated that the question of whether a claim falls within the ambit of federal maritime law (i.e. navigation and shipping), involves an examination of the factual context of the claim and that "[t]he test for making this determination is to ask whether the subject matter under consideration in the particular case is so integrally connected to maritime matters as to be legitimate Canadian maritime law within federal legislative competence."

[37] In ***Isen v. Simms*** , 2006 SCC 41, Isen, the owner of a 17-foot pleasure craft, was preparing the boat for transport over Ontario highways when a bungee cord slipped from his grasp and injured Simms. Isen denied liability, and also obtained a declaration from the Federal Court that in the event he was found liable, his liability would not exceed $1 million pursuant to s. 577 of the ***Canada Shipping Act***, *supra*. The Federal Court of Appeal upheld the ruling, and Simms appealed to the Supreme Court of Canada.

[38] Rothstein J., writing for the court, held that the allegedly negligent acts were not governed by federal maritime law, but rather, were governed by provincial law. Rothstein J. further held that the ***Canada Shipping Act*** was not constitutionally applicable to the appellants' action for damages, and thus the respondent could not claim the benefit of the limitation of liability. At para. 20, he commented as follows:

> The constitutional division of powers lies at the heart of this issue. Maritime law falls within Parliament's jurisdiction over navigation and shipping under s. 91(10) of the *Constitution Act, 1867*,: see [*ITO*]. … In *ITO*, McIntyre J. confirmed that the ambit of Canadian maritime law is limited by the constitutional division of powers under the *Constitution Act, 1867*.

[39] The Court held that Canadian maritime law did not apply and stated, at paras. 24 and 25, that:

> Parliament does not have jurisdiction over pleasure craft *per se*. The mere involvement of a pleasure craft in an incident is not sufficient to ground Parliament's jurisdiction. Rather, in cases such as this, a court must look at the allegedly negligent acts and determine whether that activity is integrally connected to the act of navigating the pleasure craft on Canadian waterways such that it is practically necessary for Parliament to have jurisdiction over the matter. …
>
> … A uniform federal law respecting the launching and removal of pleasure craft is practically necessary as such activities can pose a hazard to and interfere with the navigation of other vessels using the waterway. Moreover, the standard of care applicable to these acts, whether it arises from boating regulations or negligence law, is unique to the maritime context.

[40] At paras. 26 and 27, the court went on to hold that:

> The actions of the respondent had nothing to do with navigation of the boat on water and everything to do with preparing the boat to be transported on Ontario's highways …

> … It would be anomalous that provincial law would apply to carriage of other goods on Ontario highways, but that maritime law would apply when the goods are a boat.

[41] At para. 28 Rothstein J. adopted the dissenting reasons of Décary J.A. in the court below, where he said:

> The accident occurred on land. The injury was caused on land by a person who was neither on the boat nor in the water. There is no contract for carriage of goods by sea. There are no goods at issue. Nothing has happened on water which could be said to be directly or even indirectly related to the accident. There is no issue as to the seaworthiness of the ship, the issue at best being one as to the roadworthiness of a boat being prepared on land for road transportation. There are no *in rem* proceedings. There are no concerns of good seamanship. *There are no specialized admiralty laws, rules, principles or practices applicable.* The accident has nothing to do with navigation nor with shipping. There is no practical necessity for a uniform federal law prescribing how to secure the engine cover from flapping in the wind when a pleasure craft is transported on land in a boat trailer. The sole factor possibly connected to maritime law is that the pleasure craft had just come out of the water and was still being secured on the trailer when the accident happened. This, clearly, is not enough to constitute an integral connection with navigation and shipping and an encroachment of civil rights and property. [Emphasis added]

[42] In this case there are *in rem* proceedings, and there is a practical necessity for uniform federal law prescribing the enforcement of claims for seamen's wages and repairer's liens as described above by Binnie J. in ***Holt Cargo***.

[43] The Mortgagee relies heavily on the case of ***Singbeil v. Hansen*** (1985), 19 DLR (4th) 48, 63 B.C.L.R. 332 (C.A.). This case concerned an application to set aside a garnishing order attaching wages due to a seaman employed by the British Columbia Ferry Corporation. The court held that the garnishment of a seaman's wages does not relate to navigation and shipping where he is employed by a local

undertaking. Seaton J.A. relied on ***Eastern Canada Stevedoring*** case, *supra*, and quoted from the judgment of Rand J., at pp. 745-746, as follows:

> In both s. 91(13) and s. 92(10) and (16) works, undertakings and local services within provincial authority are contemplated, and the scope of Shipping must similarly be accommodated strictly to provincial subjects. In the case of a local ferry or service on, say, a lake wholly within a Province, its existence, the regulation of schedules, tariffs and matters [unrelated] to marine features, mark out a provincial control consistent with the general regulation of Shipping. The government and management of the ship, including qualifications and discipline of the crew, and all matters relating to navigation, remain with Parliament: but the civil rights of crews must be considered.
>
> Shipping is not confined to the larger sense of undertakings such as "lines of ships"; it may be fluid both in routes and functions. Single ships may be engaged in interprovincial or foreign commerce today, otherwise than incidentally; and local trade tomorrow: they may be carriers of goods for their owners or for the public: they may compose fishing fleets as in the Maritime Provinces and British Columbia with employees in incidental activities. They have their home port in a Province. In these, as in strictly local undertakings, the local interest [is] paramount and the civil rights of the crews prima facie find their regulation in provincial law.

[44] In his concurring reasons in ***Singbeil***, Lambert J.A. stated:

> My third comment is that laws that are truly laws in relation to matters coming within the class of subjects "navigation and shipping" in head 91(10) of the *Constitution Act, 1867* will apply to the British Columbia ferries. It is not necessary for me to deal further in this case with the legislative competence of the Parliament of Canada under head 91(10), or with whether "navigation" should be treated as a separate head from "shipping". The law has been settled by the Supreme Court of Canada that legislative competence over labour relations follows the legislature that has the power to regulate the particular undertaking. The legislative competence of the Parliament of Canada over "navigation and shipping" deals with many matters that impinge on the operations of the British Columbia ferries, but it does not encompass the regulation of the British Columbia ferries as an undertaking. The power to regulate the British Columbia ferries as an undertaking rests with the provincial Legislature.

> This case illustrates the problems that may arise in the process of categorizing a law as being, on the one hand, in relation to a matter coming within the class of subjects, "navigation and shipping", or as being, on the other hand, in relation to the matter of employment relations and labour relations on a federal undertaking. I have looked at the history of para. 205(1)(a), in its context, and at its primary purpose and primary effect, and I have categorized that provision as coming within employment relations and labour relations on a federal undertaking. But if the provision had related more directly to the safety of the vessel, in its operations, such as a provision about consecutive working hours or the size of the crew, I would have had to consider whether the law came within "navigation and shipping", as well as, or instead of, employment relations and labour relations on a federal undertaking, and so would apply to provincial maritime undertakings.
>
> I have not considered any of the provisions of Part III of the *Canada Shipping Act*, other than s. 205, for the purpose of determining which, if any, of those provisions could be constitutionally upheld under head 91(10) as well as, or instead of, under the constitutional headings relating to federal undertakings.
>
> In my opinion, para. 205(1)(a) of the *Canada Shipping Act* is within the legislative competence of the Parliament of Canada; but it does not apply to permit the garnishment of the wages of James Hansen, in his service on the British Columbia ferry "Queen of Oak Bay", because that would be an unconstitutional application. Paragraph 205(1)(a) should be read down to prevent such an unconstitutional application.

[45] In ***Singbeil***, there were conflicting statutes. A federal law stated that seamen's wages could not be attached, while a provincial law stated that wages could be attached. The court found that the issue of attachment as between a third party and seaman was not sufficiently related to navigation and shipping to bring the matter into exclusive general federal jurisdiction.

[46] In this case, the Mortgagee's main argument is that the vessel is part of a provincial undertaking similar to the one in ***Singbeil***, which involved a claim concerning wages paid to an employee of the British Columbia Ferry Corporation. The provincial ferry system is considered an extension of the provincial highway

system whereas in this case, the ship is a private passenger ferry. The vessel, as this case illustrates, is highly movable. In the event of a termination of the business by the owner, there is nothing preventing the vessel from suddenly and permanently leaving the province, thus leaving the seamen without security.

[47] Mr. Williams, counsel for Captain Lars Friis, distinguished ***Singbeil*** on the basis that the claim in that case was between a creditor and the seaman, and it was unrelated to the vessel. The claim was only related to the maritime employer because it was the conduit of attachment. Effectively, the claim was not a seaman's claim against a vessel for unpaid wages. In the case at bar, the unpaid seaman's claim arises as a result of the navigation and operation of the vessel. Thus, Mr. Williams argued that the crew's wages are integral to navigation and shipping.

[48] In my view, the fact that the business of the owner of the vessel "Harbourlynx" operated within provincial boundaries does not characterize the navigation and shipping aspects of the ship's operation as something outside the federal powers of navigation and shipping. I would distinguish ***Singbeil*** on the grounds suggested by Mr. Williams. Moreover, the *ratio* of ***Whitbread*** implicitly overrules the *dicta* in ***Singbeil***, if ***Singbeil*** is understood to stand for the proposition that ships plying intra-provincial waters are provincial undertakings.

[49] In the case at bar, the seamen operated the vessel in question. The Mortgagee's argument would require a court to segregate lien claims under s. 22 of the ***Federal Court Act***, *supra*, on the basis that the business of the owner of the vessel, at the time the seaman worked, operated wholly within the province. In my

view, such an argument runs counter to Canadian and international maritime law, which states that a seaman's claim attaches to the vessel, not to the owner, because the vessel is a highly moveable object. In my view, the underlying rationale for this maritime legal proposition is applicable whether or not a boat plies intra-provincial waters or inter-provincial waters.

[50] Similarly, a supplier of materials and services that enable the vessel to operate should not have to enquire into the business of the owner to determine if its business is operated solely within provincial boundaries. Such an argument runs counter to the notion that navigation and shipping, even on inland waters, is a federal power: see ***Whitbread***.

[51] As an example, drawing an artificial distinction between the legal rights of a ship repairer employed on a ship running between Alaska and Vancouver, and one employed on a ship running between Prince Rupert and Vancouver, runs counter to long standing principles of maritime law that a ship repairer could look to the ship wherever located as security for his claim concerning labour and materials contributed to the operation of the ship.

[52] I conclude that the labour of the seamen and the supply of necessaries to repair the ship are integrally connected to the navigation of the ship on the sea. The ship cannot operate without the Lien Claimants' supply of goods and services.

CONCLUSION

[53] In summary, I conclude the following:

- The claims of the seamen, Allied and PSI, are integrally connected to, and therefore, in pith and substance related to the operation and navigation of the ship. The fact that the ship at the time of the provision of the materials and services plied only intra-provincial waters does not change the character of those services to debt claims solely within provincial jurisdiction: ships plying navigable waters in Canada or even within a province are subject to one navigable network with uniform laws;

- The seamen's wages, if proven, constitute a maritime lien;

- The claims of Allied and PSI are statutory claims and Allied and PSI should have the opportunity to argue that the labour and material enhanced the value of the ship and therefore elevated all or part of their claim to rank *pari passu* with the maritime liens;

- The secured claims of the lien holders are secured claims within the meaning of s. 136 and s. 2 of the ***BIA*** and therefore the scheme of distribution under the ***BIA*** will not apply to the secured lien claims, if proven in Federal Court.

- The ranking of the priorities, and the proof of, the maritime claims is a matter for the Federal Court of Canada to determine pursuant to the principles of Canadian maritime law.

DISPOSITION

[54] The Mortgagee applied for:

(a) a declaration that Captain Lars Friis and all affected crew members, Kurt Henderson and Douglas Griffiths are unsecured creditors in the bankruptcy with preferred status under s. 136(d) with respect to their wage claims, that they are unsecured creditors in the bankruptcy with respect to any severance claims, and that the stay of proceedings under ss. 69 and 69.3 of the ***BIA*** remain in effect;

(b) a declaration that Allied Shipbuilders and PSI are unsecured creditors in the bankruptcy and that the stay of proceedings under ss. 69 and 69.3 of the ***BIA*** remain in effect.

[55] I believe the appropriate disposition of the Mortgagee's application is to adjourn it pending the resolution of the Federal Court proceedings. There may be portions of the Mortgagee's application which should be allowed depending upon the outcome of the Federal Court proceedings. Consequently, the Mortgagee's application is adjourned generally. As this issue was not canvassed at the hearing before me, counsel are at liberty to speak to the appropriate disposition of the terms of the adjournment of the Mortgagee's application if necessary.

[56] Allied and PSI applied for orders pursuant to s. 69.4 of the ***BIA*** that the statutory stay of proceedings in s. 69.3 of the ***BIA*** shall not apply to:

a) Federal Court Action No. T-319-06, admiralty action *in rem* against the Ship "Harbourlynx" and in Personam, with Allied Shipbuilders as Plaintiff and Nanaimo Harbour Link Corporation, the Ship

"Harbourlynx" and the owners and all others interest in the ship "Harbourlynx" as Defendants; and

b) Federal Court Action No. T-380-06, admiralty action *in rem* against the Ship "Harbourlynx" and in Personam, with PSI as Plaintiff and Nanaimo Harbour Link Corporation, the Ship "Harbourlynx" and the owners and all others interest in the Ship "Harbourlynx" as Defendants.

[57] The application of PSI and Allied is granted on the terms applied for.

[58] Captain Lars Friis and other crew members of the vessel applied for a similar order in respect to admiralty action T-1372-06. That application is granted.

[59] The Lien Claimants are entitled to costs of this proceeding at Scale C.

"N. Garson, J."
The Honourable Madam Justice N. Garson