CANADA	**COUR SUPÉRIEURE**
PROVINCE DE QUÉBEC	
DISTRICT DE MONTRÉAL	
N°: 500-05-049773-995	Montréal, le 7 juillet 1999
	PRÉSIDANT: L'HON. JOHN BISHOP, J.C.S.
	ÉCHAFAUDAGES FAST (MONTREAL) INC. Demanderesse -vs- **SOCIÉTÉ MARITIME CANADA STEAMSHIP LINES INC.** -et- **BANQUE LAURENTIENNE** -et- **PIERRE BOISCLAIR** Défendeurs -et- **ARTHUR ANDERSON INC.** Mise-en-cause

JUGEMENT

I. LES PROCÉDURES:

Le 28 mai 1999, la demanderesse ("Fast") a obtenu de la Cour supérieure un bref de saisie avant jugement sous l'art. 734(5) C.P.C., afin de saisir le navire "Ferbec" (le "Navire" ou le "Ship") appartenant à la défenderesse ("C.S.L."). L'autorisation de la Cour n'était pas requise pour la

délivrance de ce bref.

Le 31 mai 1999, Fast a saisi le Navire dans les mains de C.S.L. à Tracy, lorsqu'il n'était plus dans la possession de la compagnie qui l'avait réparé, Montreal Tankers Inc.

Le 1er juin 1999, C.S.L. a signé une requête en cassation de la saisie sous l'art. 738 C.P.C.

Le 11 juin 1999, C.S.L. a présenté cette requête devant le soussigné, juge en chambre, pour obtenir l'annulation de la saisie à cause de l'insuffisance des allégations des affidavits.

II. LES AFFIDAVITS DE FAST:

Deux affidavits excessivement prolixes du 28 mai 1999 ont servi de base pour l'émission du bref de saisie avant jugement. On y trouve les allégations essentielles qui suivent:

1. Le 18 janvier 1999, Fast s'est engagée envers Montréal Tankers Inc. à fournir, entre le 25 janvier et le 19 mars, des échafaudages, la main-d'œuvre pour les monter et démonter, et d'autres matériaux pour permettre à des soudeurs de réparer les cales du Navire.

2. Vers la même date, Montréal Tankers s'est obligée envers C.S.L. de faire certaines réparations au Navire.

3. Le Navire appartient à C.S.L.

4. Fast a fourni à Montréal Tankers des matériaux et services pour le bénéfice du Navire se chiffrant à $140,802, moins un paiement de $30,000, laissant un solde impayé de $110,802.

5. Vers le milieu d'avril 1999, Montréal Tankers a fait une cession volontaire de ses biens en

vertu de la Loi sur la faillite en faveur de la mise-en-cause.

III. LA QUESTION EN LITIGE:

L'art. 734(5) C.P.C. se lit:

> "**734**. Le demandeur peut aussi faire saisie avant jugement
>
> ...
>
> (5) le bien meuble qu'une disposition de la loi ("provision of law") lui permet de faire saisir pour assurer l'exercice de ses droits sur celui."

Les parties ne contestent pas le fait que le Navire est un bien meuble.

C.S.L. prétend qu'aucune disposition de la loi permet à Fast de saisir le Navire avant jugement.

Selon Fast, les principes de droit maritime canadien applicables au Québec comprennent le privilège de celui qui a fourni des services et/ou matériaux, ou qui a fait des travaux de réparation, à un navire, de le saisir et de le faire vendre à défaut de paiement de ces travaux. L'ancien art. 2383 C.C., abrogé par le nouveau Code à partir du 1er janvier 1994, confirmait ce privilège. Fast invoque aussi les art. 22(2)(m) et (n), et 43(2) de la Loi concernant la Cour fédérale du Canada (S.R. Can. F-7). Donc, ces principes de droit maritime canadien, tels que mentionnés auxdits articles de cette Loi, constituent une "disposition de la loi" autorisant la saisie avant jugement.

Donc, la question en litige est: existe-il une "disposition de la loi", ou "provision of law", permettant à un sous-entrepreneur, qui fournit pour le compte d'un entrepreneur des matériaux et services requis afin de réparer un navire, de faire saisir ce navire pour assurer l'exercice de ses droits?

IV. DOES A PROVISION OF LAW AUTHORIZE THE SEIZURE OF THE SHIP?

Plaintiff specifically invokes secs. 22(2) and 43 of the Federal Court Act and former art. 2383(5) C.C.

Secs. 22(2)(m) and (n) of the Federal Court Act read as follows:

> "**22**.(2) Without limiting the generality of subsection (1), it is hereby declared for greater certainty that the Trial Division has jurisdiction with respect to any one or more of the following:
>
> (m) any claim in respect of goods, materials or services wherever supplied to a ship for the operation or maintenance of the ship...;
>
> (n) any claim arising out of a contract relating to the construction, repair or equipping of a ship;"

It is evident that these sections confirm the jurisdiction of the Federal Court with respect to the claims referred to in (m) and (n). However, in themselves, they do not create or confirm any right of the persons therein mentioned to seize the ship in question to assure the exercise of their rights upon it.

In I.T.O. vs. Miida Electronics (1986) 1 S.C.R. 752, the majority opinion of the Supreme Court of Canada stated at p. 772

> "That section (22(2)) does no more than grant jurisdiction and it does not create operative law. One must still be able to point to some applicable and existing federal law which nourishes the grant of jurisdiction."

Secs. 43(1), (2) and (3) of the Federal Court Act read:

"**43**. (1) Subject to subsection (4), the jurisdiction conferred on the Court by section 22 may in all cases be exercised *in personam*.

(2) Subject to subsection (3), the jurisdiction conferred on the Court by section 22 may be exercised *in rem* against the ship, aircraft or other property that is the subject of the action, or against any proceeds of sale thereof that have been paid into court.

(3) Notwithstanding subsection (2), the jurisdiction conferred on the Court by section 22 shall not be exercised *in rem* with respect to a claim mentioned in paragraph 22(2)(e), (f), (g), (h), (i), (k), (m), (n), (p) or (r) unless, at the time of the commencement of the action, the ship, aircraft or other property that is the subject of the action is beneficially owned by the person who was the beneficial owner at the time when the cause of action arose."

The action in rem referred to in sec. 43(2) is taken directly against a ship and its owner, and may be defended only by the owner (Federal Court Rules 1998, secs. 477(4) and 480). After the filling of plaintiff's statement of claim, a warrant may be issued by a designated officer of the Court for the arrest of the ship on the filling of an appropriate affidavit (F.C.R. sec. 481). The procedure is summarized in Maritime Liens, infra at pp. 997 to 1000.

In Coastal Equipment vs. Comer 1970 Ex. Ct. 13, the Exchequer Court of Canada considered an earlier and similar version of sec. 43(2). The Court (Noel J.) citing English admiralty decisions at pp. 19 to 29, held, at pp. 27 to 31, that such a statutory provision granting jurisdiction to the Canadian Admiralty Court did not create maritime liens or privileges in favour of suppliers furnishing necessaries thereto.

In the Courts opinion, sec. 43 merely creates or confirms the jurisdiction of the Federal Court under sec. 22 to hear actions in personam, and, within the stated limitations, actions in rem. It does not create or confirm the jurisdiction of the Superior Court to hear an action in rem; nor does it create or confirm any right of the persons mentioned in secs. 22(2)(m) and (n) to exercise any action in rem, or privilege, against a ship before any Court other than the Federal Court.

Furthermore, in the present case, the action taken by Fast is not an action in rem against the Ship.

Art. 2383(5) C.C. granted a privilege upon vessels for the payment of sums due for repairing it "on her last voyage". As of January 1, 1994, when the new Quebec Civil Code came into effect, this article was repealed, and has not been replaced. It has presumably been so repealed because of lack of jurisdiction pursuant to the Miida decision, supra, at p. 782.

In summary, these three statutory provisions are the only specific ones invoked by Fast. They do not authorize it to seize the Ship under a writ issued by the Superior Court in order to secure the exercise of Fast's rights upon the Ship.

However, Fast argues that, in the absence of specific Quebec or federal legislation creating maritime liens or privileges, the common law jurisprudential principles of maritime law apply. These would include the right of a person who repairs a ship to exercise a maritime lien or privilege against it to secure his claim.

In his article "L'hypothèque et les privilèges maritimes", contained in "Droit spécialisé des contrats", vol. 2, ed. Y. Blais, François Lebreux states at p. 226, no. 65:

> "Au Canada, le privilège (maritime) a une assise jurisprudentielle et non législative."

In Q.N.S. Paper vs. Chartwell (1989) 2 S.C.R. 683, at p. 698, on a Quebec appeal, the majority opinion of the Supreme Court of Canada confirmed the decision in I.T.O., supra, in concluding that "Canadian maritime law is a body of federal law encompassing certain common law principles, and that this law in uniform throughout Canada ... whatever court may exercise jurisdiction in a particular case."

Applying this conclusion, at least two questions must then be answered if this argument of

Fast is to prevail. Firstly, does Canadian maritime law grant a lien or privilege to a person repairing a ship or furnishing materials or services with respect thereto? Secondly, if so, does the jurisprudential principle creating such a maritime lien or privilege constitute a "provision of law" within the meaning of art. 734(5)

As regards the second question, in the undersigned's opinion, such a jurisprudential principle does not constitute a "provision of law" or a "disposition de la loi", expressions which often refer to the laws or statutes enacted by Parliament or the legislatures, and/or to regulations adopted thereunder.

Sec. 61(10) of the Quebec Interpretation Act, ch. I-16, states that "the words ... 'law' ('loi') whenever used without qualification, mean the Acts, statutes or laws of Parliament". The word "Parliament" is defined as the Quebec Legislature by sec. 61(8).

In Barreau du Québec vs. Maroist 1985 S.C. 438, the Superior Court had to decide whether the word "loi" used in the Bar Act included regulations adopted thereunder by the Bar, which required government approval before becoming effective. The Court cited two decisions, Co-op. Committee on Japanese Canadians vs. A. G. Canada 1947 A.C. 87, at pp. 106 and 107, and P.G. Québec vs. Blaikie (1979) 2 S.C.R. 1016 and (1981) 1 S.C.R. 312, to support its conclusion that, using a liberal construction, the word "law" included these Bar regulations. None of these decisions suggested that the reference in a statute to the word "law" was intended to include jurisprudential principles.

Furthermore, a seizure before judgment is an exceptional remedy, and art. 734(5) C.P. should not be given a wide or liberal construction. If art. 734(5) is construed so as to include jurisprudential principles derived from common law, our Courts will be faced with a complex task, as many of these principles are unknown in civil law, and may also be imprecise or debatable under the common law.

Only three statutory provisions were cited by Fast as a basis for its seizure before judgment. These have been deemed inapplicable for the reasons set out above.

As regards the first question, there is some controversy as to whether or not a maritime lien or privilege exists in favour of Fast under Canadian maritime law.

In Coastal Equipment, supra, the Exchequer Court held that "a supplier of necessaries to a ship does not have a maritime lien on the ship, but at most an action in rem against the ship if it is still in the same owner's hands. That right of action gives no privilege, lien or preference of any kind, and the supplier is in the same position as an ordinary creditor."

In his work "Maritime Liens and Claims", 2nd ed. 1998 William Tetley states at p. 577:

> "By the conjunction of secs. 22(2)(m) and 43(3) of the Federal Court Act, the necessaries claimant in Canada does not benefit from a lien which travels with the ship. It is merely a statutory right in rem."

In support of this conclusion, Professor Tetley cites at pp. 577 and 578 the Coastal Equipment decision and five other decisions of the Federal Court, including two of the Federal Court of Appeal.

Professor Tetley concludes also at pp. 652 and 653, that the repairman has a similar statutory right in rem, as well as a possessory lien so long as it retains possession of the ship (p. 654).

François Lebreux, op. cit., supra, states at p. 244, no. 123:

> "En ce qui concerne le (privilège du) réparateur, ajoutons que la Cour protège son droit tant qu'il demeure en possession du bâtiment (navire). Dès qu'il se dessaisit du navire, il abandonne son privilège attaché à la possession du bien".

In the present case, the Ship, when seized, was no longer in the possession of the insolvent repairer, namely Montreal Tankers.

Professor Tetley also states at p. 659: "Privileges, now called legal hypothecs under the Quebec Civil Code ... can be granted for construction or renovation, but, because of the predominance of "Canadian maritime law" in respect of maritime matters over provincial law, one suspects a Quebec privilege could only be on unregistered ships ... of less than 20 tons ..."

In view of the Court's conclusion above on the second question that jurisprudential principles are not a "provision of law", the foregoing first question need not be answered.

Even if Fast had a maritime lien, such a lien is normally only enforceable by an action in rem against the Ship. Under our civil law system, there may be some question as to Fast's right to take such an action before the Superior Court, and as to the Court's accessory power to arrest the Ship.

This question of jurisdiction was not specifically argued by the parties' attorneys, and no decisions thereon have been submitted to the Court. No provision of law expressly grants to the Superior Court this jurisdiction or this power. However, the Court of Appeal and the Superior Court have not questioned the power of the Superior Court to authorize a seizure before judgment under art. 733 C.P. if the requisite circumstances are present (c.f. Gelig Shippinci vs. Danemar 1989 R.D.J. 465, C.A., and Med Coast vs. Cuba 1993 A.M.C. 2530, S.C.).

Since the present action has not been taken by Fast in rem against the Ship, the undersigned is not required to answer this question.

In summary, Fast has not established that a provision of law permits it to seize the Ship to secure the exercise of its rights thereon. Accordingly, the allegations of the affidavits in support of the fiat for the writ of seizure before judgment are insufficient in law.

V. CONCLUSIONS:

PAR CES MOTIFS, LE SOUSSIGNÉ accueille la requête de Société Maritime Canada Steamship Lines Inc. en cassation de la saisie avant jugement du navire "Ferbec" effectuée par la demanderesse vers le 31 mai 1999, à cause de l'insuffisance des affidavits, et annule ladite saisie, avec dépens.

JOHN BISHOP, J.C.S.

Me Élaine Bissonnette
(pour la demanderesse)

Me Richard L. Desgagnés
OGILVY RENAULT
(pour la défenderesse Société
Maritime Canada Steamship Lines Inc.)