DECEMBER 4, 2019

Desgagnés Transport v Wärtsilä Canada: Canadian Maritime Law Enters Uncharted Waters

Authors: George J. Pollack, Joseph-Anaël Lemieux and Michael H. Lubetsky

The Supreme Court of Canada has plotted a new course for Canadian maritime law in *Desgagnés Transport v Wärtsilä Canada*, 2019 SCC 58. Distinguishing over 30 years of precedent, the Court held that provincial legislation that regulates private law matters (such as the *Civil Code of Québec*, or sales of goods legislation in common law provinces) can apply to contractual claims governed by Canadian maritime law. Parties to such contracts can no longer rely on the uniformity of Canadian maritime law; they will instead need to take particular care to ascertain and specify which province's private law will govern any claims that may arrive.

Background

Wärtsilä manufactured a component for a cargo vessel owned by Desgagnés Transport. The contract of sale included a limitation of liability clause, which was the subject of considerable negotiation. Over two years later, the component failed on the open water, causing considerable damage to the vessel. Desgagnés Transport's insurer repudiated the limitation of liability clause and sued to recover the full amount of the damage, which greatly exceeded the value of the component. The trial judge found that the component contained a latent defect for which the supplier was responsible.

Under Articles 1729 and 1733 of the *Civil Code of Québec*, a manufacturer cannot contractually limit its liability for latent defects. The trial judge therefore found Wärtsilä liable for the full amount of the damage done to the vessel. On appeal, the Québec Court of Appeal, in a 2-1 decision, reversed the decision and found that the claim was governed by Canadian maritime law, which allowed parties to contractually limit their liability and excluded application of the *Civil Code of Québec*. The Court of Appeal also held that it could have come to a different conclusion than the trial judge about the existence of a defect but left her conclusion undisturbed.

Decision and Change

In the decision on November 28, 2019, the Supreme Court justices all agreed that Desgagnés Transport's appeal should be allowed, and the trial judgment restored; however, they disagreed sharply over the reason for allowing the appeal. Basically, the majority held that Canadian maritime law applied to Desgagnés Transport's claim, but that the *Civil Code of Québec* would apply incidentally and bar release on the limitation of liability clause. The minority, on the other hand, accepted the uniformity of Canadian maritime law, but held that Canadian maritime law did not apply to Desgagnés Transport's claim.

The majority's reasoning represents a very stark departure from the Supreme Court's precedents on Canadian maritime law. In a line of cases dating back over 30 years, the Supreme Court has repeatedly upheld the uniformity of Canadian maritime law, noting that uniformity was essential given the international nature of navigation and shipping and the need for Canada's legal regime to be harmonized with that of the rest of the world. Consequently, the Supreme Court had consistently held that when a claim was governed by Canadian maritime law, it precluded application of provincial legislation that would create a lack of uniformity. *Desgagnés Transport* makes clear that this is no longer the case.

In coming to this conclusion, the majority held that the doctrine of interjurisdictional immunity – which historically served as the constitutional basis for excluding the application of provincial law to claims governed by Canadian maritime law – did not apply to contractual claims. The majority remarked that "sophisticated parties to a contract of sale for commercial marine equipment can

generally determine in advance which body of law will govern their contract should a dispute arise," and that if the parties did not want their contract to be governed by particular province's law, they could choose to designate another one.

The majority also considered the doctrine of paramountcy, distinguishing the aspects of Canadian maritime law set down in federal statutes (such as the *Marine Liability Act*) and those that are judge-made. The majority held that only the former can pre-empt application of provincial legislation. Since in this case, the principle of Canadian maritime law that allows a manufacturer to limit its liability for latent defects was judge-made, it could not pre-empt the application of the *Civil Code of Québec*. The majority did point out, however, that the "analysis would have been different if Parliament had enacted a valid law or regulation to regulate the matter."

Consequences

It remains to be seen whether Parliament will take up the Court's invitation to enact a commercial code applicable to marine contracts so as to ensure the ongoing uniformity of Canadian maritime law.

Until then, the decision emphasizes the importance of clearly specifying a governing law in contracts to provide supplies, equipment or other necessaries to a marine operation. This is particularly important in contracts with a Québec nexus, given the particularity of its rule categorically forbidding manufacturers to limit their liability for latent defects.

Key Contact: George J. Pollack