Date: 20061222

Docket: T-504-03

Citation: 2006 FC 1553

Ottawa, Ontario, the 22nd day of December 2006

PRESENT: THE HONOURABLE MR. JUSTICE LEMIEUX

BETWEEN:

LAURENTIAN PILOTAGE AUTHORITY

Plaintiff

and

GESTION C.T.M.A. INC.
NAVIGATION MADELEINE INC., the owners
and others having an interest in the ship C.T.M.A. VOYAGEUR
and M/V C.T.M.A. VOYAGEUR

Defendants

and

CORPORATION DES PILOTES DU BAS ST-LAURENT

Intervener

REASONS FOR JUDGMENT AND JUDGMENT

[1] The following reasons are further to the disposition of the judgment dated June 10, 2005, of Décary J.A. of the Federal Court of Appeal, in which Desjardins J.A. and Pelletier J.A. concurred, in *Laurentian Pilotage Authority v. Gestion C.T.M.A Inc.*, 2005 FCA 221. The disposition reads as follows:

> ¶ 38 I would allow the appeal, overturn in part the judgment of the Federal Court delivered on June 30, 2004, dismiss the action without costs in regard to Gestion C.T.M.A. Inc., dismiss the action taken against the other defendants pertaining to any claim prior to March 30, 2000 and return the matter to Mr. Justice Lemieux for him to rule on the requests made to him by counsel for the parties on July 5 and 7, 2004.
>
> ¶ 39 I would not award any costs on appeal, as each party has been partially successful.

[2] On June 30, 2004, I rendered a decision on the action brought by the Laurentian Pilotage Authority (the Authority) in which it claimed $1,860,265.34 from the defendants for unpaid pilotage charges from 1987 to 2002 in connection with the ship M/V C.T.M.A *Voyageur* (the *Voyageur*) under section 44 of the *Pilotage Act*, which reads as follows:

44. Except where an Authority waives compulsory pilotage, a ship subject to compulsory pilotage that proceeds through a compulsory pilotage area not under the conduct of a licensed pilot or the holder of a pilotage certificate is liable, to the Authority in respect of which the region including that area is set out in the schedule, for all pilotage charges as if the ship had been under the conduct of a licensed pilot. [Emphasis added]	44. Sauf si une Administration le dispense du pilotage obligatoire, le navire assujetti au pilotage obligatoire qui poursuit sa route dans une zone de pilotage obligatoire sans être sous la conduite d'un pilote breveté ou du titulaire d'un certificat de pilotage est responsable envers l'Administration dont relève cette zone des droits de pilotage comme si le navire avait été sous la conduite d'un pilote breveté.

[3] The judgment I rendered on June 30, 2004, reads as follows:

> For all these reasons, the plaintiff's action is dismissed with costs on the ground that the claim made is prescribed. The Court did not receive sufficient particulars to decide whether during the years when the *Voyageur* was operating there were unpaid pilotage charges that were not prescribed. I invite the parties to contact the Court on this point, if necessary.

[4] On July 5, 2004, counsel for the Authority wrote to the Court in accordance with the last paragraph of its judgment dated June 30, 2004, asking the Court to schedule a half-day for the hearing to make his submissions on the following points:

(1) the quantum of the Authority's claim for unpaid pilotage charges which were not prescribed and were enforceable under section 44 of the Act when the *Voyageur* was operating in the Authority's area of the St. Lawrence River after March 30, 2000;

(2) the determination of the interest which must be calculated and added to complete the judgment on this point;

(3) a declaration to the effect that the *Voyageur* could be released from seizure upon payment to the Authority of the amount in principal and interest specified in the decision of the Court; and

(4) costs.

[5] On July 7, 2004, counsel for the defendants responded to the letter dated July 5, 2004, from counsel for the Authority. Counsel for the defendants submit that, under its judgment dated June 30, 2004, this Court became *functus officio* with respect to any other application on the merits of the case, except as regards the question of the release from seizure, on which the Court had not ruled.

[6] On September 27, 2004, the Authority filed an appeal against my decision. In the circumstances, this appeal led me to take no further action on the letters from counsel dated July 5 and 7, 2004.

Issues

[7] The parties agreed that the amount of $438,817.63 represents the unpaid pilotage charges which are not prescribed and which are enforceable under section 44 of the Act for trips made by the *Voyageur* between Escoumins and Montréal during the years 2000, 2001 and 2002. The *Voyageur* was withdrawn from service on the St. Lawrence River on June 1, 2002.

[8] However, while admitting that the amount agreed upon represents the unpaid pilotage charges calculated according to the applicable rates, counsel for the defendants submits that the Authority is not entitled to claim this amount, pleading the equitable notion of *fin de non-recevoir* as recognized by the Supreme Court of Canada in *National Bank of Canada v. Soucisse et al.*, [1981] 2 S.C.R. 339. According to this judgment, one possible legal basis for a *fin de non-recevoir* is the wrongful conduct of the party against whom the *fin de non-recevoir* is pleaded. Counsel relies on some of the paragraphs of my decision dated June 30, 2004, especially paragraph 80, in which it is stated that the fact the Authority did not discover the true net tonnage of the *Voyageur* before 2002 was its own fault.

[9] Counsel for the Authority replies that the submission made by the defendant is inadmissible, because the Court of Appeal has limited my reconsideration such that I may rule on only those requests which had been made to me by counsel for the parties in their letters dated July 5 and 7, 2004. He adds that this is a disguised appeal from my decision and from the decision of the Court of Appeal.

[10] The defendants, however, are of the opinion that when a hearing is reopened, the case is not withdrawn from the Court, the decision has not yet been rendered, and the Court may admit any evidence it considers relevant. Furthermore, the defendants submit that their right to make full answer and defence entitles them to present this argument.

[11] As far as interest is concerned, the Authority claims prejudgment and post-judgment interest. In its statement of claim dated March 31, 2003, the Authority requested that this Court order the payment of interest from the date on which the ship should have accepted licensed pilots in each of the Authority's compulsory pilotage areas and did not do so, in accordance with articles 1617, 1619 and 1620 of the *Civil Code of Québec*.

[12] According to the Authority, the applicable rate of interest is 11.81%. This figure represents the average of the interest rates charged by the Authority to its clients on delinquent pilotage invoices from 2000 to 2005. The rate used for a given year is the base rate of Canadian banks on January 1 of that year plus 6%. This rate would be used for the rest of that year. According to a letter from the Authority's Director, Administrative Services, dated August 19, 2005, the rate established by this method is comparable with the one used by the Great Lakes Pilotage Authority and those applied by major Canadian public utilities such as Bell Canada, Hydro Québec and Gaz Métropolitain.

[13] The total amount of interest claimed by the Authority on the agreed-on quantum is $228,982.96. The Authority also submitted for my consideration another average interest rate of

8.23%, which was the average from the years 2000 to 2005. According to the Authority, this average rate represents the interest set out in the *Civil Code of Québec*. Calculated on the agreed-on amount of principal, the interest according to this method adds up to $159,527.68.

[14] The defendants submit that the Authority is not entitled to any prejudgment interest, because the Authority was at fault. Moreover, the provisions of the Civil Code concerning interest do not apply, since Canadian maritime law and the jurisprudence arising from it govern the issue of payable interest.

[15] In the alternative, the defendants submit that the starting point for calculating prejudgment interest is either the date of the judgment of the Federal Court of Appeal or, at worst, the date of the Authority's letter of default. The appropriate interest rate is 5%, which is the legal rate.

[16] The Authority asks that my order be adjusted with respect to costs in the cause, given the success to a certain degree in recovering the unpaid pilotage charges owed under section 44 of the Act. Counsel for the defence submits that no adjustment of my order as to costs is necessary in the circumstances.

[17] The parties agree that the *Voyageur* must be released from seizure upon payment to the Authority of the amount which I will determine in this decision.

Legislation

[18] Section 36 of the *Federal Courts Act* deals with prejudgment interest, while section 37 of that Act deals with judgment interest. Paragraph 22(1)(*l*) of that Act gives the Federal Court jurisdiction over pilotage. Section 2 of that Act defines "Canadian maritime law". I quote the relevant subsections of sections 36 and 37:

36. (1) Except as otherwise provided in any other Act of Parliament, and subject to subsection (2), the laws relating to prejudgment interest in proceedings between subject and subject that are in force in a province apply to any proceedings in the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that province.	36. (1) Sauf disposition contraire de toute autre loi fédérale, et sous réserve du paragraphe (2), les règles de droit en matière d'intérêt avant jugement qui, dans une province, régissent les rapports entre particuliers s'appliquent à toute instance devant la Cour d'appel fédérale ou la Cour fédérale et dont le fait générateur est survenu dans cette province.
. . .	**[. . .]**
Canadian maritime law	Droit maritime canadien
(7) This section does not apply in respect of any case in which a claim for relief is made or a remedy is sought under or by virtue of Canadian maritime law.	(7) Le présent article ne s'applique pas aux procédures en matière de droit maritime canadien.
Judgment interest -- causes of action within province	Intérêt sur les jugements -- Fait survenu dans une seule province
37. (1) Except as otherwise provided in any other Act of Parliament and subject to subsection (2), the laws relating to interest on judgments in causes of action between subject and subject that are in force in a province apply to judgments of the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that province. [Emphasis added]	37. (1) Sauf disposition contraire de toute autre loi fédérale et sous réserve du paragraphe (2), les règles de droit en matière d'intérêt pour les jugements qui, dans une province, régissent les rapports entre particuliers s'appliquent à toute instance devant la Cour d'appel fédérale ou la Cour fédérale et dont le fait générateur est survenu dans cette province. [Je souligne.]

[19] Paragraph 22(2)(*l*) and the definition of "Canadian maritime law" in section 2 of the *Federal Courts Act* read as follows:

"Canadian maritime law" means the law that was administered by the Exchequer Court of Canada on its Admiralty side by virtue of the Admiralty Act, chapter A-1 of the Revised Statutes of Canada, 1970, or any other statute, or that would have been so administered if that Court had had, on its Admiralty side, unlimited jurisdiction in relation to maritime and Admiralty matters, as that law has been altered by this Act or any other Act of Parliament;	« droit maritime canadien » Droit -- compte tenu des modifications y apportées par la présente loi ou par toute autre loi fédérale -- dont l'application relevait de la Cour de l'Échiquier du Canada, en sa qualité de juridiction de l'Amirauté, aux termes de la Loi sur l'Amirauté, chapitre A-1 des Statuts revisés du Canada de 1970, ou de toute autre loi, ou qui en aurait relevé si ce tribunal avait eu, en cette qualité, compétence illimitée en matière maritime et d'amirauté.
22(2) Without limiting the generality of subsection (1), for greater certainty, the Federal Court has jurisdiction with respect to all of the following:	22(2) Il demeure entendu que, sans préjudice de la portée générale du paragraphe (1), elle a compétence dans les cas suivants :
. . .	. . .
(l) any claim for pilotage in respect of a ship or of an aircraft while the aircraft is water-borne;	l) une demande d'indemnisation pour pilotage d'un navire, ou d'un aéronef à flot;

[20] Under articles 1617 to 1620 of the *Civil Code of Québec*, the rules applicable to prejudgment and post-judgment interest in the province of Quebec are as follows:

1617. Damages which result from delay in the performance of an obligation to pay a sum of money consist of interest at the agreed rate or, in the absence of any agreement, at the legal rate.	1617. Les dommages-intérêts résultant du retard dans l'exécution d'une obligation de payer une somme d'argent consistent dans l'intérêt au taux convenu ou, à défaut de toute convention, au taux légal.
The creditor is entitled to the damages from the date of default without having to prove that he has sustained any injury.	Le créancier y a droit à compter de la demeure sans être tenu de prouver qu'il a subi un préjudice.
A creditor may stipulate, however, that he will be entitled to additional damages, provided he justifies them.	Le créancier peut, cependant, stipuler qu'il aura droit à des dommages-intérêts additionnels, à condition de les justifier.
1618. Damages other than those resulting	1618. Les dommages-intérêts autres que ceux

from delay in the performance of an obligation to pay a sum of money bear interest at the rate agreed by the parties, or, in the absence of agreement, at the legal rate, from the date of default or from any other later date which the court considers appropriate, having regard to the nature of the injury and the circumstances.

résultant du retard dans l'exécution d'une obligation de payer une somme d'argent portent intérêt au taux convenu entre les parties ou, à défaut, au taux légal, depuis la demeure ou depuis toute autre date postérieure que le tribunal estime appropriée, eu égard à la nature du préjudice et aux circonstances.

1619. An indemnity may be added to the amount of damages awarded for any reason, which is fixed by applying to the amount of the damages, from either of the dates used in computing the interest on them, a percentage equal to the excess of the rate of interest fixed for claims of the State under section 28 of the Act respecting the Ministère du Revenu over the rate of interest agreed by the parties or, in the absence of agreement, over the legal rate.

1619. Il peut être ajouté aux dommages-intérêts accordés à quelque titre que ce soit, une indemnité fixée en appliquant à leur montant, à compter de l'une ou l'autre des dates servant à calculer les intérêts qu'ils portent, un pourcentage égal à l'excédent du taux d'intérêt fixé pour les créances de l'État en application de l'article 28 de la Loi sur le ministère du Revenu sur le taux d'intérêt convenu entre les parties ou, à défaut, sur le taux légal.

1620. Interest accrued on principal does not itself bear interest except where that is provided by agreement or by law or where additional interest is expressly demanded in a suit.

1620. Les intérêts échus des capitaux ne produisent eux-mêmes des intérêts que s'il existe une convention ou une loi à cet effet ou si, dans une action, de nouveaux intérêts sont expressément demandés.

<u>Analysis</u>

<u>Preliminary considerations</u>

[21] At the outset, it is necessary to rule on the admissibility of the defendant's submission regarding the *fin de non-recevoir*. In the judgment dated June 30, 2004, I determined that any claim the Authority may have had against the defendants prior to March 30, 2000, was prescribed, and that the defendants had not obtained a waiver of compulsory pilotage for the *Voyageur*. It is obvious that I ruled on the merits of this matter, and my conclusions on this point were upheld by the Federal Court of Appeal.

[22] In this case, the *fin de non-recevoir* is a defence invoked by the defendants against the main claim along the same lines as the argument to the effect that compulsory pilotage had been waived. This argument does not depend on facts that arose after the decision dated June 30, 2004, and the judgment of the Court of Appeal had been rendered, and there is nothing to indicate that the defendants were in any way unable to submit that argument earlier.

[23] My role in this case was explicitly restricted by the Federal Court of Appeal. It is limited to the demands made by the parties in their letters dated July 5 and 7, 2004, which concern quanta, costs, interest and release from seizure. This is not a reopening of the hearing, and even if that were the case, the Court of Appeal determined in *Merck & Co. v. Apotex Inc*. [1996] F.C.J. No. 295 (QL) that when dealing with a reconsideration, the Court cannot rule on an issue which had not been mentioned or discussed during the trial or in the Court of Appeal, such as is the case with the *fin de non-recevoir*.

[24] Accordingly, I do not intend to consider the merits of the *fin de non-recevoir* argument.

Prejudgment interest

[25] The issue of prejudgment interest must be dealt with according to the principles of Canadian maritime law. In fact, even though provincial rules concerning prejudgment interest may apply under section 36 of the *Federal Courts Act*, subsection 7 of this section provides that provincial law does not apply when maritime law is involved.

[26] The rate suggested by the Authority for a given year is the base rate of Canadian banks on January 1 of that year plus 6%, which is the rate used throughout that year. According to a letter from the Authority's Director, Administrative Services, dated August 19, 2005, the rate arrived at by this method is similar to the rate of the Great Lakes Pilot Authority and those applied by major Canadian public utilities such as Bell Canada, Hydro Québec and Gaz Métropolitain.

[27] The Authority submitted for my consideration another average interest rate of 8.23% for the years 2000 to 2005. According to the Authority, this average rate represents interest provided for under the *Civil Code of Québec*.

[28] This Court's case law acknowledges the Federal Court's discretionary power, in the exercise of its admiralty jurisdiction, to award prejudgment interest. I quote the reasons for judgment of Addy J. in *Bell Telephone Co. of Canada v. Mar-Tirenno (The),* [1974] 1 F.C. 294, at pages 311 and 312:

> ¶ 48 The plaintiff claims interest on the total amount of damages and the defendants dispute this amount.
>
> ¶ 49 It is clear that this Court, under its admiralty jurisdiction, has the right to award interest as an integral part of the damages suffered by the plaintiff regardless of whether the damages arose ex contractu or ex delicto.
>
> 50 The Admiralty Courts, in the exercise of their jurisdiction, proceeded upon different principles from that on which the common law authorities were founded; the principle in this instance being a civil law one, to the effect that, when payment is not made, interest is due to the obligee ex mora of the obligor. Refer Canadian General Electric Co. Ltd. v. Pickford & Black Ltd. [See Note 21 below]; Canadian Brine Limited v. The Scott Misener . . . and the authorities stated therein at pages 450 to 452. Since the principle is based on the right of the plaintiff to be fully

> compensated, including interest, from the date of the tort, I am not, however, prepared to hold, as seems to have been done in the Canadian Brine case, (supra), that the discretion to award or not to award interest should depend on whether the defendant was grossly negligent or not. Since the right to interest in admiralty law is considered as forming part and parcel of the damage caused for which the defendant is responsible, and is a right of the person harmed, flowing from the actual commission of the tort, I fail to see how, once the liability for the damage has been established, the question of whether or not there has been gross negligence on the part of the tortfeasor should be taken into consideration, in any way: interest in these cases is not awarded to the plaintiff as punitive damages against the defendant but as part and parcel of that portion for which the defendant is responsible of the initial damage suffered by the harmed party and it constitutes a full application of the principle of restitutio in integrum. See The Kong Magnus . . . ; The Joannis Vatis (No. 2) . . . ; and The Northumbria . . . . In the present case, although I find that there indeed was negligence, it is not a case of gross negligence. Yet, notwithstanding this, I am satisfied that the interest should be awarded unless there should be some reason flowing from the plaintiff's conduct or some reason to reduce or eliminate the claim for payment of interest, other than the question as to whether there was or was not gross negligence on the part of the defendants.

[29] In general, the case law recognizes that interest should be awarded unless the conduct of one of the parties or any other reason warrants a reduction of the amount or non-payment:

> ¶ 27 While in Canadian Brine the discretion was exercised in relation to the quality of the defendant's negligent act, it is now apparent that the conduct of a plaintiff in the litigation is also embraced. At page 312 of Bell Telephone, Addy J. expressed the view that a wider discretion exists, and gave as a general guide the following:
>
> > . . . I am satisfied that the interest should be awarded unless there should be some reason flowing from the plaintiff's conduct or some other reason to reduce or eliminate the claim for payment of interest . . .
>
> No case has been cited for including the conduct of counsel for a plaintiff, but I think the authorities contemplate that possibility as well. At the same time, given that prejudgment interest is viewed as an element or as part of the damages suffered, care in exercising

> the discretion is required lest a successful plaintiff be deprived of full compensation for his injury.
>
> *Carling O'Keefe Breweries of Canada Ltd. v. CN Marine Inc. (C.A.)*, [1990] 1 F.C. 483, paragraph 27.

[30] As shown by the letters from the Authority to the defendant dated April 9, 1991, and June 22, 1992, it was the Authority's conduct which led the owners of the *Voyageur* not to take licensed pilots on board for the Escoumins–Québec–Montréal trip and the return journey. For this reason, I am of the opinion that I must exercise my discretion and refuse to allow prejudgment interest in favour of the Authority.

Judgment interest

[31] As regards the rate for post-judgment interest, section 37 of the *Federal Courts Act* provides that the laws on this subject in force in the province where the cause of action arose apply, in this case, the province of Quebec.

[32] In the present case, interest is claimed for damages resulting from the defendants' delay in paying pilotage charges to the Authority. Accordingly, the matter of interest is governed by article 1617, which deals with interest without making any distinction between prejudgment and post-judgment interest. This article specifies that the applicable rate is the rate agreed between the parties, or in the absence of an agreement, the legal rate. Interest is calculated from the date of default.

[33] The defendants are correct in arguing that they had never consented to the 11.81% interest rate applied by the Authority to its clients on past-due invoices for pilotage. They add that they never received an invoice for the disputed claim. In the circumstances, I am of the opinion that the interest rate suggested by the Authority was never agreed on between the parties. Accordingly, the interest rate applicable is the legal rate specified under the *Interest Act*, R.S.C. 1985, c. I-15, which is five per cent per annum.

[34] The law applicable to prejudgment interest is governed by the principles of maritime law, and under these principles I decided to exercise my discretion to refuse to award prejudgment interest. Because the principles of civil law apply to post-judgment interest only, article 1617 does not create an entitlement to interest from the moment of default.

[35] Article 1619 of the *Civil Code of Québec* provides that an indemnity may be added to the amount of damages awarded for any reason, which is what I was requested to do. I will not rule on whether or not article 1619 establishes a legal rule regarding interest such as is provided under section 37 of the *Federal Courts Act* because I am of the view that this request must be refused on the basis of the fact that in acting as it did, the Authority led the defendants to not accept licensed pilots on board.

Costs

[36] Under Rule 400 of the *Federal Courts Rules, 1998*, the Court has discretionary power to determine the amount and allocation of costs and by whom they are to be paid.

[37] In my post-trial judgment, I dismissed the plaintiff's action with costs. The Federal Court of Appeal did not award costs on appeal because each party had been partially successful.

[38] I agree with counsel for the defendants that the judgment of the Federal Court of Appeal did not vary my decision as far as costs are concerned.

[39] Counsel for the Authority also relied on the principle of divided success before this Court following the judgment of the Federal Court of Appeal.

[40] The decision I am rendering today partially rejects the arguments made by counsel for the Authority and also dismisses the argument of counsel for the defendants concerning the *fin de non-recevoir*.

[41] Accordingly, I would vary my order as to costs to specify that no costs will be awarded to either party.

Release from seizure

[42] The owners of the *Voyageur* are entitled to have the ship released from seizure on payment of the unpaid pilotage charges, which amount to $438,817.63, with interest at the rate of 5% from the date of this judgment, unless the Authority should file an appeal.

JUDGMENT

THE COURT ORDERS:

1. The payment by the defendants to the plaintiff of the amount of $438,817.63, with interest at the legal rate of 5% from the date of this judgment.

2. The release from seizure of the *Voyageur* on payment of this amount.

3. Without costs.

"François Lemieux"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-504-03
STYLE OF CAUSE:	LAURENTIAN PILOTAGE AUTHORITY (Plaintiff) **And** GESTION C.T.M.A. INC. NAVIGATION MADELEINE INC., THE OWNERS AND OTHERS HAVING AN INTEREST IN THE SHIP C.T.M.A VOYAGEUR and M/V C.T.M.A. VOYAGEUR (Defendants) **And** CORPORATION DES PILOTES DU BAS SAINT-LAURENT (Intervener)
PLACE OF HEARING:	MONTRÉAL
DATES OF HEARING AND OF WRITTEN SUBMISSIONS:	**NOVEMBER 15, 2005, FEBRUARY 17, 2006, MARCH 8, 2006, AND MARCH 23, 2006**
REASONS FOR JUDGMENT AND JUDGMENT BY:	**THE HONOURABLE MR. JUSTICE LEMIEUX**
DATED:	DECEMBER 22, 2006

APPEARANCES:

GUY P. MAJOR	FOR THE PLAINTIFF
FRANCIS GERVAIS	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

GUY P. MAJOR MONTRÉAL, QUEBEC	FOR THE PLAINTIFF
DEVEAU LAVOIE BOURGEOIS LALANDE & ASSOCIÉS LAVAL, QUEBEC	FOR THE DEFENDANTS