PRIORITIES AND BANKRUPTCY IN ADMIRALTY

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Introduction

This paper is about the interaction of two ancient systems of law; Admiralty and Bankruptcy. Both systems come into play when a shipowner becomes insolvent. Unfortunately, the two systems use different courts and procedures to determine those priorities and may assess priorities differently. These differences, particularly in foreign bankruptcies, can have very significant ramifications for creditors and have recently come into sharp focus with the bankruptcy of Antwerp Bulkcarriers N.V., the owner of the ship "Brussel". This bankruptcy resulted in a voluminous amount of litigation in the Federal Court of Canada Trial Division, Federal Court of Canada Appeal Division, Quebec Superior Court, Quebec Court of Appeal, and finally in the Supreme Court of Canada. The two decisions of the Supreme Court of Canada (2001 SCC 90 and 2001 SCC 91) are the impetus for this paper.

This paper will first review the procedures followed in an *in rem* priorities action in the Federal Court of Canada and briefly compare this procedure with that followed in a bankruptcy proceeding. This paper will then review the usual order of priorities under Canadian maritime law. Finally, this paper will review the decisions of the Supreme Court of Canada in The "Brussel" and will consider the implications of those decisions for future cases.

Admiralty Procedure

The procedure followed in the Federal Court of Canada in a priorities action is dictated, in part, by the Rules of court and, in part, is well established practice. The procedure begins with the commencement of an *in rem* action by an *in rem* claimant and the arrest of the defendant vessel. Where the owner of the defendant vessel is insolvent, the arrest of the vessel will usually result in the filing of a multitude of caveats by other *in rem*

claimants, both foreign and domestic. Unless security for the release of the defendant vessel is posted by the shipowner or someone on its behalf (which is unlikely in cases of insolvency), one of the *in rem* claimants will eventually apply to the Court for an order that the vessel be appraised and sold. This application is often, but not always, made by the mortgagee. Where neither the shipowner nor anyone on its behalf has appeared in the action, the Court will usually allow the order of sale. This is because ships are depreciating assets and because the costs and expenses of maintaining a ship under arrest can be very large. If allowed to accumulate, these costs and expenses can significantly erode the proceeds available to creditors.

The order of appraisement and sale will, as its name suggests, set the terms of the appraisement and sale of the arrested vessel. Such orders also set a procedure for identifying potential claimants to the proceeds from the eventual sale. In particular, the order for sale will usually provide for notice to be given to creditors that any claim against the ship by *in rem* creditors must be filed by Affidavit by a specified date, failing which the claim will be barred.[1]

Following the filing of Affidavits of Claim by the *in rem* creditors the Court will usually make a series of further orders leading up to the priorities hearing, including orders which provide for:

1. requests for production of specific documents and the timing for production of such documents;

2. filing of additional factual affidavit evidence;

3. timing of cross-examinations on the Affidavits of Claim and any additional evidence;

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[1] For example, a recent order for sale provided, *inter alia*, that:

> 19. Any claim against the *Golden Trinity* by *in rem* creditors and mortgagees must be filed by Affidavit in the Federal Court of Canada, on or before a date to be inserted in the advertisement [for sale] which shall be 31 March 1999, failing which the claim shall be barred. The time for filing additional Affidavit evidence such as that required for the proof of foreign law shall be reserved for the further direction of the Court.

4. filing of Affidavits of foreign law and the timing for cross-examinations thereon; and

5. timing of the priorities hearing itself.

The entitlement of the various claimants to share in the proceeds of sale and their relative rankings are determined at a priorities hearing at which each claimant participates. In addition to presenting their own claimants for payment the claimants might also attack the claims of the other claimants.

It is possible in a priorities action for there to be a payment out to claimants in advance of a priorities hearing. This can occur where the proceeds of sale are sufficient to pay the claims of all *in rem* creditors ranking before and after the mortgagee but not sufficient to satisfy the mortgage in full. In such circumstances the mortgagee might apply for an order that the amount by which the sale proceeds exceeds the claims of all other creditors (plus interest and costs) be paid to the mortgagee. The obvious advantage of this is that the mortgagee receives immediately a part of the funds it will ultimately be awarded at the priorities hearing in any event. In addition, because in this scenario the mortgagee will receive the balance of the funds after payment to secured *in rem* creditors, the mortgagee is in a position to settle claims with the other *in rem* creditors. Such settlements must be approved by the Court but since, in the usual case, the other creditors have no interest in opposing a settlement with one of their number,[2] the Court will usually make the order. The result is that the time required for the priorities hearing may be significantly reduced as claimants with a clear priority over the mortgagee, as well as those claimants with uncertain priority who are also able to make a settlement with the mortgagee, may be paid out early.

[2] The other creditors have no interest in opposing a settlement because even after payment of the settlement amount there will remain in trust sufficient funds to satisfy the claims of all remaining *in rem* creditors able to establish priority over the mortgagee.

Bankruptcy Procedure

The procedure in a bankruptcy proceeding is very different from that set out above. The procedures are set out in the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c.B-3 (the "BIA") in respect of bankruptcies involving Canadian companies. For bankruptcies of non-Canadian entities, the procedures would be set out in a similar enactment in their country of residency.

It is beyond the scope of this paper to consider the procedures involved in a bankruptcy, either domestic or foreign, in detail. It is sufficient to know that under the BIA, jurisdiction is given to the superior courts of the provinces but not the Federal Court of Canada.[3] The BIA and similar enactments in other countries provide for the appointment of a trustee in bankruptcy to administer the assets of the bankrupt. Claims by creditors are lodged with the trustee in bankruptcy and one of the functions of the trustee is to bring in and sell the assets of the bankrupt and to distribute the proceeds

The BIA provides for an automatic stay of proceedings against the bankrupt in order to allow the trustee to administer the bankrupt's estate.[4]

A very important aspect of bankruptcy law and procedure in Canada is that the rights of secured creditors are generally unaffected by the bankruptcy.[5] Thus, notwithstanding the bankruptcy, secured creditors are generally free to take whatever steps are deemed necessary to realize upon their security.

It is the fact of the appointment of a trustee in bankruptcy with the mandate to realize upon the assets of the bankrupt that brings bankruptcy law into conflict with admiralty law. In the performance of its duties the trustee will, of course, want to realize upon all assets of the bankrupt, including any vessels owned by the bankrupt that are the subject of *in rem* proceedings.

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[3] *Bankruptcy and Insolvency Act*, s. 183

Order of Priorities in Admiralty

The usual order of priorities is well established under Canadian maritime law to be as follows[6]:

1. Court costs[7] and marshal's expenses[8];

2. Possessory liens predating other liens[9];

3. Statutory liens (including the statutory liens for master's and seaman's wages and master's disbursements under the *Canada Shipping Act*[10]);

4. Maritime liens (including foreign maritime liens);

5. Possessory liens arising after other maritime liens;

6. Mortgages; and

7. Statutory rights *in rem*, including claims for the supply of necessaries,[11] which rank *pari passu* among themselves.

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[4] *Bankruptcy and Insolvency Act*, s. 69

[5] *Bankruptcy and Insolvency Act*, s. 69.3

[6] *The Nel* [2001] 1 F.C. 408 at 419-420. See also *The Frank and Troy* [1971] F.C. 556 (FCTD), *The Ionnis Daskalelis* [1974] 1 Lloyd's 174 (SCC), *The Lowell Thomas Explorer*, [1980] 1 F.C. 339 (FCTD), *The Atlantis Two* (1999) 170 F.T.R. 1 (FCTD) and *The Alarissa* (commonly known as *The Edmonton Queen*) [1996] 2 F.C. 883 (FCTD), aff'd (1997) 125 F.T.R. 284.

[7] Regarding the legal costs of a claimant, generally no legal costs are awarded in a priorities hearing except those costs relating to the arrest and appraisement and sale of the vessel. Such costs are paid out of the sale proceeds and are given the highest priority on the ground that they are incurred for the benefit of all the claimants: see *The Atlantis Two* [1999] 170 F.T.R. 1, varied [1999] F.C.J. No. 1212 and *The Brussel* [2000] F.C.J. No. 197.

[8] Third parties who provide necessaries (for example, diesel fuel) or services (for example, moorage facilities) to a vessel after the vessel has been arrested will on application to the court usually be granted a priority equivalent to marshal's expenses, provided the order is made before the necessaries or services are supplied: see *The Atlantis Two* [1999] 170 F.T.R. 1, varied [1999] F.C.J. No. 1212; cf. *The Ships Aquarius, Sagran and Admiral Arciszewski* (March 26, 2001) No. T-16-01 (FCTD), where an agent who supplied services to a vessel subsequent to its arrest was granted priority equivalent to marshal's expenses even though the application for priority was brought after the services were supplied.

[9] A ship repairer in possession has a common law possessory lien that ranks in priority ahead of mortgages and subsequent maritime liens to the extent of the value of the repairs plus interest, but does not include storage, moorage or other charges related to the preservation of the repairer's interest: *The Barkley Sound* (March 4, 1999) Vancouver Reg. No. A983054 (BCSC).

[10] *The Brussel* [2000] F.C.J. No. 197 at para. 10.

[11] Note that a term in a contract which purports to give a supplier a maritime lien cannot alone give the supplier priority against third parties: *The Brussel* [2000] F.C.J. No. 197 at para. 81.

Foreign Maritime Liens

Canadian maritime law recognises the same limited number of maritime liens as English law, that is, the traditional liens for salvage, collision, bottomry and respondentia, seaman's wages and master's disbursements[12] as well as the statutorily created maritime lien for master's wages. Regarding the liens for wages and disbursements, these appear to rank ahead of other maritime liens. [13]

Canadian law differs fundamentally from English law in that Canadian law also recognises foreign maritime liens even if the underlying claim would not give rise to a maritime lien under Canadian law.[14] Moreover, Canadian law accords such foreign maritime liens the same priority it would give a Canadian maritime lien even if the foreign maritime lien would not be granted such a high priority by its own law. That is, Canadian law recognises all foreign maritime liens, whatever the underlying claim, and accords them the priority of a Canadian maritime lien in Canadian proceedings.[15]

In every instance where a foreign maritime lien is asserted two primary questions must be answered. First, the law governing the claim must be determined. Second, it must be determined whether the circumstances of the particular transaction or incident give rise to a maritime lien under that governing law.[16] The answers to these questions depend on,

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[12] *The Bold Buccleugh* (1851) 13 E.R. 884 (P.C.)

[13] Maritime liens for master's disbursements rank *pari passu* with the master's and seaman's lien for wages, and both rank ahead of other maritime liens. A lien for master's disbursements is rare because it is a requirement that the master must have been unable to communicate with the owner before making the disbursement. In *The Atlantis Two* [1999] 170 F.T.R. 1, varied [1999] F.C.J. No. 1212 the owner abandoned his vessel in Vancouver and disbursements for victuals made by the master were held to have given rise to a maritime lien which ranked equally with the seaman's lien for wages (para. 27).

[14] *The Brussel* 2001 SCC 90, para. 41, *The Strandhill* [1926] S.C.R. 680, *The Ionnis Daskalelis* [1974] S.C.R. 1248, *The Har Rai* (1984) 4 D.L.R. (4th) 739 (FCA), aff'd [1987] S.C.R. 57. English law only grants priority to foreign maritime liens if the claim underlying the foreign maritime lien would give rise to a maritime lien under English law: *The Halcyon Isle* [1980] 2 Lloyd's Rep. 325 (P.C). That is, under English law, whether or not a claim gives rise to a maritime lien and has the priority of a maritime lien is a matter for the *lex fori*.

[15] *The Brussel* 2001 SCC 90, para. 43.

[16] In *The Brussel* [1997] 3 F.C. 187 MacKay J said at para. 23 that "Where a right in the nature of a maritime lien exists under foreign law *which is the proper law of the contract giving rise to the lien*, this Court is bound to recognise it and to give it priority which such a maritime lien has under Canadian maritime law" (emphasis added). See also *The Brussel* 2001 SCC 90 at para. 42. Cf. *The Nel* [2001] 1 F.C. 408, in which Prothonotary Hargrave, when discussing the ways a supplier of bunker fuel may secure priority over a mortgagee, said at 453 "Among the ways that a maritime lien may be obtained are through supplying fuel in a jurisdiction favourable to the fuel supplier". This may suggest that when a supplier

first, the choice of law rules of Canadian maritime law[17] and second, on expert evidence from foreign legal experts.

In many cases the application of the Canadian rule is straightforward. For example, under American law a necessaries supplier has a maritime lien for his claim. Canadian courts have recognised and granted such American suppliers priority over mortgagees in a number of cases.[18] However, because Canadian conflicts of laws rules require that the nature of the claim/lien be determined by the law with the closest and most real connection to the transaction and that the ranking of the claim/lien be determined by the law of the forum, ie. Canada, anomalous situations may arise. For example, in *The Atlantis Two*[19] the Federal Court of Canada recognised an American maritime lien in favour of a sub-charterer for breach of charterparty. The Court further acknowledged that if the priorities were to be determined according to American law the sub-charterer's lien would rank behind the prior registered mortgage. However, because the priorities were to be determined according to Canadian law, the sub-charterer received a higher priority in Canada than it would have been given by an American court

The advantage of the Canadian recognition rule to certain classes of foreign maritime lien claimant is readily apparent. Where the claimant has a maritime lien according to the applicable foreign law but not according to English law, he is well-advised to arrest a vessel burdened with debts (that is, a vessel whose owner is unlikely to defend the claim) in Canada rather than in England, Hong Kong, Singapore, the Bahamas or any other jurisdiction which follows the English rule regarding recognition of maritime liens. In addition, if by the applicable foreign law the foreign maritime lien ranks behind the claim of a mortgagee or some other maritime lien holder, the foreign lien claimant is also better

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furnishes necessaries in a country where such an act gives rise to a maritime lien, the maritime lien will be recognised in Canada, whatever be the proper law of the supply contract.

[17] Cf. *The Atlantis Two* [1999] 170 F.T.R. 1, varied [1999] F.C.J. No. 1212, where the Federal Court of Canada accepted affidavit evidence from American attorneys as to the governing law of a charterparty. The approach taken by the Court in this case may be inconsistent with recognised authorities (including *The Federal Calumet*, [1992] 1 F.C. 245 at 252, affirmed on appeal (1993) 150 N.R. 149 (FCA)) which suggest that the determination of the applicable law of the contract is to be made according to the conflict of laws rules of the forum deciding the dispute, that is, Canadian law.

[18] See, for example, *The Atlantis Two* [1999] 170 F.T.R. 1, varied [1999] F.C.J. No. 1212 and *The Brussel* [2000] F.C.J. No. 197.

[19] [1999] 170 F.T.R. 1, varied [1999] F.C.J. No. 1212.

off pursuing the claim in Canada, where his maritime claim will be accorded the same priority as any traditional Canadian (or English) maritime lien.

Priorities in Bankruptcy

In Canadian bankruptcies involving Canadian shipowners the priorities are determined by Canadian maritime law regardless of whether the claim is pursued in the Federal Court of Canada or in a superior court of one of the provinces. Both courts apply the same law in such situations. However, when a foreign shipowner and a foreign bankruptcy is involved the situation has the potential to be very different. In cases involving foreign bankruptcies there is always a possibility that a secured claim under Canadian maritime law will not be recognized as a secured claim under the bankruptcy law of the foreign state. It is this possibility combined with the mandate of the trustee to realize upon the bankrupt's assets that has given rise to recent jurisdictional disputes between secured *in rem* claimants and trustees for bankrupt shipowners. Specifically, in *The Brussel*,[20] the issue was the right of secured *in rem* claimants to pursue their *in rem* claims in the Federal Court notwithstanding the bankruptcy proceedings commenced in shipowner's home country.

Facts of The Brussel

In *The Brussel*[21] an American stevedoring company, pursuant to an arrest warrant issued out of the Federal Court, arrested the "Brussel" at Halifax claiming in excess of US $400,000 for unpaid stevedoring and related services supplied to the vessel in US ports. A week after the arrest the owner was judged to be bankrupt by the Commercial Court of Antwerp. The Antwerp court appointed trustees to the bankruptcy of the owner and a number of affiliated companies[22] and these trustees were in due course added as party defendants to the Canadian *in rem* proceedings.

In the discharge of their responsibilities under Belgian law, the trustees sought to take possession of all the assets of the bankrupt owner, wherever situated, for the purpose of

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[20] *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)* 2001 SCC 90.
[21] [1997] 3 F.C. 187 (FCTD), aff'd [1999] F.C.J No. 337 (FCA), aff'd 2001 SCC 90.
[22] The owner of the "Brussel" was part of a group of affiliated companies which owned six vessels in total, and at the time of the bankruptcy order at least five of the vessels, including the "Brussel", were under arrest in ports around the world.

orderly liquidation and distribution of the proceeds to the creditors of the owner in accord with Belgian bankruptcy law. The bankrupt owner's principal asset was, of course, the vessel then under arrest in Halifax.

Predictably, the owner did not defend the claim within the time required by the Federal Court Rules and the American stevedoring company made the usual application to the Court for appraisal and sale of the vessel. The sale was vigorously opposed by the trustees, who went so far as to bring an *ex parte* application before the Quebec Superior Court sitting in Bankruptcy for an order requiring that the "Brussel" be delivered to the trustees. This order was in fact made but following a series of applications to both the Federal Court and the Quebec Superior Court the vessel was sold in any event and the proceeds were paid into court.[23]

The trustees then applied to the Federal Court for an order that the whole of the proceeds from the sale of the vessel be paid out to them for distribution to all creditors of the owner according to Belgian bankruptcy law. The Federal Court rejected the trustees' application, holding that the validity and priority of claims made by secured[24] *in rem* claimants were to be determined by the Federal Court exercising its *in rem* jurisdiction[25]

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[23] A summary of the most relevant motions and applications before the Federal Court and the Quebec Superior Court, Civil Chamber and then the Quebec Superior Court sitting in Bankruptcy is set out at para 10 judgment (2001 SCC 90) and in the Appendix to a related decision of the Supreme Court of Canada in *Re Antwerp Bulkcarriers, N.V.* 2001 SCC 91.

[24] Regarding unsecured *in rem* claimants, MacKay J said at para. 84: "Creditors with unsecured claims, in my preliminary view, must look to the trustees in another court for satisfaction, but I acknowledge that issue has not been argued before me" ([1997] 3 F.C.187). In the event, the proceeds of sale were not enough to satisfy the claims of the secured *in rem* creditors, including the mortgagee, and so there was nothing left for the unsecured creditors (or the trustees in bankruptcy on their behalf): *The Brussel* [2000] F.C.J. No. 197, para. 6 (FCTD).

[25] It will be noted that by s. 183 of the *Bankruptcy and Insolvency Act* RSC 1985, c. B-3, only the superior courts of the provinces, and not the Federal Court of Canada, can sit as a bankruptcy and insolvency court. On the other hand, the Federal Court of Canada is the country's primary maritime court exercising *in rem* jurisdiction. The superior court of only one of the provinces (British Columbia) has enacted Rules which provide for the arrest of ships, although there is some Ontario case authority to support the argument that all superior courts have inherent jurisdiction to issue warrants for the arrest of ships and to determine priorities among *in rem* claimants. Thus almost all disputes between courts exercising *in rem* jurisdiction and courts sitting as bankruptcy courts are in facts disputes between the Federal Court and a superior court of one of the provinces. Another reason why the Federal Court is most often involved in cases of this sort is that by s. 209(2) of the *Canada Shipping Act* seafarers' claims for wages must be brought in Federal Court. (It will be noted that s. 209(1) expressly provides that seamen may *only* bring a claim for wages in the Federal Court for less than $250 in the case where, *inter alia*, "the owner of the ship is insolvent within the meaning of the *Bankruptcy and Insolvency Act*"; the natural implication of this provision is that the seamen may also bring claims in excess of $250 where the shipowner is insolvent.)

notwithstanding that bankruptcy proceedings were continuing elsewhere.[26] Moreover, it was held that whether an *in rem* claimant is "secured" or not is a matter to be determined by Canadian maritime law. The Federal Court was of the view that a maritime lien is a secured *in rem* claim and that "a maritime lien created under applicable foreign law is a secured claim under the laws of Canada".[27]

The decision of the Trial Division was appealed to the Federal Court of Appeal and the decision of the Quebec Superior Court was appealed to the Quebec Court of Appeal.

The Federal Court of Appeal[28] dismissed the appeal holding that a legitimate legal advantage would accrue to the stevedoring company if its claim was adjudicated in the Federal Court since it was unlikely the Belgium courts would recognise the secured *in rem* claim. Further, the Federal Court of Appeal held that there was a "real and substantial connection" with Canada in that Canada was where the ship was arrested. The Federal Court of Appeal was also critical of the trustee's use of the Quebec Superior Court to obtain an order enjoining the Federal Court from releasing the arrested ship. They said the trustee should have sought the assistance of the Federal Court. The Quebec Court of Appeal[29] held that even if the matter was properly characterized as one of bankruptcy and not maritime law, the Superior Court did not have any jurisdiction to make an order against the Federal Court. Both decisions were appealed to the Supreme Court of Canada.

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[26] In *The Ships Aquarius, Sagran and Admiral Arciszewski* (No. T-16-01), a case currently before the Federal Court of Canada, a trustee in bankruptcy was appointed by the Polish court in respect of the bankruptcy of the owner of three vessels already under arrest at Vancouver. The vessels were subsequently sold by court order. As required by the Federal Court's procedure, all *in rem* claimants having a claim against the vessels then filed affidavits of claim within a time ordered by the Court. The trustee in bankruptcy filed an affidavit of claim in which it stated that it was entitled to be paid the full amount of the sale proceeds on behalf of all the creditors of the owner of the vessels. One of the other claimants then made an application to the Court for an order that the trustee's affidavit of claim be struck on the ground, *inter alia*, that the trustee did not have an *in rem* claim and therefore was not entitled to participate in the distribution of the sale proceeds. The application was successful and the trustee's affidavit of claim was struck out on this and other grounds: 2001 FCT 1311 at paras. 18-26.

[27] *The Brussel* [1997] 3 F.C. 187 at paras. 81 and 83, affirmed 2001 SCC 90 at paras. 41 and 51.

[28] (1999) 173 D.L.R. (4th) 493.

[29] (2000) 187 D.L.R. (4th) 106.

Supreme Court Decisions

The appeal to the Supreme Court of Canada from the Federal Court of Appeal was dismissed on the narrow ground that the trial judge did not err in exercising his discretion to deny the trustee's application for a stay of the proceedings in the Federal Court. In doing so the Supreme Court recognised that the Federal Court could order the sale of an arrested vessel and distribute the proceeds to secured claimants notwithstanding the existence of foreign bankruptcy proceedings. The Supreme Court held that the Federal Court was not obliged to stay the *in rem* proceeding in every case where the owner of the *res* was subject to foreign bankruptcy proceedings.

The Supreme Court said that the principles on which the discretion should be exercised were authoritatively settled in *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*[30]. According to *Amchem*, the court should ask whether there is "a more appropriate jurisdiction based on all the relevant factors". These relevant factors include "not only issues of public policy (as in this case[31]) but also the potential loss to the plaintiff of a juridical advantage sufficient to work an injustice if the proceedings were stayed, the place or places where the parties carry on their business, the convenience and expense of litigating in one forum or the other, and the discouragement of forum shopping."[32]

The Supreme Court went on to say, and there was nothing surprising in this, that within the overall framework of public policy, any injustice to the plaintiff in having its action stayed must be weighed against any injustice to the defendant if the action is allowed to proceed; what is required is that the relevant factors be carefully weighed in the balance.

The juridical advantage to the *Brussel* plaintiff of proceeding in Canada was clear: the plaintiff was an American supplier with an American maritime lien that would be given

[30] [1993] 1 S.C.R. 397.
[31] For example, international comity and cooperation (para. 75), minimizing the multiplicity of proceedings and the attendant costs and possibility of inconsistent decisions (para. 86).
[32] 2001 SCC 90, para. 91.

priority over the ship's mortgage in Canadian *in rem* proceedings but not in the foreign bankruptcy proceedings[33].

According to the Supreme Court, the trustees' strongest argument in favour of a stay was that the dispute between the plaintiff and the shipowner was but weakly connected to Canada.[34] The Supreme Court's answer to this argument, which has very important implications for future cases, is that "the lack of substantive connections to *any* particular jurisdiction, including its home port, is a feature of ships engaged in international maritime commerce".[35] The real and substantial connection test, said the Supreme Court, must take into account the "special lifestyle of ocean-going freighters".[36] In the case of *in rem* proceedings the defendant vessel's lack of a substantial connection with Canada is to be given little weight.

The trustees' argument that the American lien claimant was forum-shopping was similarly dismissed, with certain observations of Lord Simon being considered apposite:

> "Forum-shopping" is, indeed, inescapably involved with the concept of maritime lien and the action *in rem*. Every port is automatically an admiralty emporium. This may be very inconvenient to some defendants; but the system has unquestionably proved itself on the whole as an instrument of justice.[37]

The appeal to the Supreme Court of Canada from the decision of the Quebec Court of Appeal was dismissed on the grounds that the assertion of jurisdiction by the Canadian bankruptcy court did not oust the *in rem* jurisdiction of the Federal Court. The bankruptcy court had no power to deal with a ship already "captured" by competent order of the Federal Court and, in any event, the issuance of what amounted to an "anti-suit injunction" against the parties before the Federal Court improperly attempted to restrict that court's ability to exercise its *in rem* jurisdiction.[38]

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[33] 2001 SCC 90, para. 50.
[34] 2001 SCC 90, para. 93.
[35] At para. 93, referring with approval to its earlier decision in *Antares Shipping Corp. v. The Ship "Capricorn"* [1977] 2 S.C.R. 422.
[36] 2001 SCC 90, para. 93.
[37] At para. 94, quoting from the speech of Lord Simon, dissenting, in *The Atlantic Star* [1973] 2 All E.R. 175,179.
[38] *Re Antwerp Bulkcarriers, N.V* 2001 SCC 91.

In particular, regarding the proper steps to be taken by a trustee in this situation, the Supreme Court said:

> Once it determined that the Federal Court had maritime law jurisdiction to deal with the Ship, the Canadian bankruptcy court ought to have recognized that the Trustees' proper remedy was a stay application to that court. It ought not to have issued what amounted to an anti-suit injunction against the litigants in the Federal Court.

Implications of The Brussel

The conclusions which may be drawn from the *Brussel* decision seem to be:

1. The Federal Court (or any other court) exercising *in rem* jurisdiction is not obliged to stay the *in rem* proceedings in favour of foreign bankruptcy proceedings and in the usual case (the *Brussel* being a usual case) the court will not exercise its discretion to stay the *in rem* proceedings.

2. A court exercising *in rem* jurisdiction has primacy over the bankruptcy court in determining the distribution of the proceeds from the judicial sale of a bankrupt owner's vessel, at least so far as the claims are made by secured *in rem* creditors,[39] and the priorities will be determined according to Canadian maritime law, not in accord with the law of the bankruptcy.

3. Whether an *in rem* claimant is secured or not is to be determined by the recognition rules of Canadian maritime law.

There are also some practical issues regarding how a foreign trustee in bankruptcy can and should participate in Canadian *in rem* proceedings. The issue of standing needs to be considered. Once standing is achieved, the options open to a trustee are to apply for a stay of proceedings and/or to apply for payment of the proceeds of sale.

[39] Regarding unsecured *in rem* claimants, MacKay J said at para. 84 "Creditors with unsecured claims, in my preliminary view, must look to the trustees in another court for satisfaction, but I acknowledge that issue has not been argued before me": *The Brussel* [1997] 3 F.C.187).

Standing of the trustee

The issue of standing addresses how the trustee gets before the court to make an application for a stay of the proceedings and/or for payment out of the proceeds of sale.

In *The Brussel* the Supreme Court acknowledged the right of the trustee to participate in the *in rem* proceedings. "The Trustees", said the Court, "rightly demanded (and were accorded) rights of participation in the proceedings to protect the interest of the bankrupt shipowners".[40] In *The Brussel* the trustees achieved standing by being added as defendants after commencement of the action.[41]

In other cases, for example, *The Soledad Maria*[42]and *Ultramar Canada v. Pierson Steamships*[43], it appears that trustees were apparently accorded standing without being specifically named a defendant.[44]

The issue of the standing of a trustee was recently considered in *The Ships Aquarius, Sagran and Admiral Arciszewski*[45]. In this case a trustee in bankruptcy was appointed by the Polish court in respect of the bankruptcy of the owner of three fishing vessels already under arrest at Vancouver. The vessels were subsequently sold by court order. As required by the Federal Court's procedure, all *in rem* claimants having a claim against the vessels were required to file Affidavits of Claim within the time ordered by the Court. The trustee filed an Affidavit of Claim in which it stated that it was entitled to be paid the full amount of the sale proceeds on behalf of all the creditors of the owner of the vessels. One of the other claimants brought an application for an order that the trustee's Affidavit of Claim be struck on the ground, *inter alia*, that the trustee did not have an *in rem* claim and therefore was not entitled to participate in the distribution of the sale proceeds. The application was successful and the trustee's Affidavit of Claim was struck out on this and other grounds.

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[40] 2001 SCC 90, para. 66.
[41] [1997] 3 F.C. 187, para. 1.
[42] [1982] 1 F.C. 205.
[43] (1982) 43 C.B.R. 9 (FCTD).
[44] In *The Soledad Maria* the Court said at para. 9: The applicant in this motion is not one of the named defendants but "the Defendant Juan M. Ayo Revilla, in his capacity of Official Receiver in Bankruptcy of Naviera Letasa, S.A., the Owners of the ship".
[45] 2001 FCT 1311, paras. 18-26.

According to the Prothonotary:

> [I]n the present proceeding there seems to have been no service on the owner of the Trawlers, nor has the owner appeared and for good reason. We are left with a pure *in rem* proceeding, but there is no *in rem* facet to the [trustee's] affidavit of claim. This is no mere procedural difficulty, for the difference between the apparent *in personam* claim which the [trustee] makes by affidavit, and the *in rem* required in order to partake in the sale of proceeds, is a matter of substance …[46]

The Prothonotary did not see any inconsistency between this reasoning and the decision in the *Ultramar* case, which, in his view, "did not constitute participation by the trustee in bankruptcy in an *in rem* action, but merely the trustee acting, as could any owner, to post bail in order to obtain release of arrested ships".[47]

Given the difficulties that a trustee could have in obtaining standing as pointed out in *The Ships Aquarius, Sagran and Admiral Arciszewski*[48], a trustee would be well advised to be added as a defendant to the proceeding as occurred in *The Brussel*.

Stay of proceedings

The decisions in *The Brussel* now make it absolutely clear that a foreign trustee who wishes to have the Canadian *in rem* proceedings stayed and the arrested vessel or the proceeds of sale turned over to him, must make an application to the court exercising *in rem* jurisdiction and not to the bankruptcy court.

According to the Federal Court of Appeal in *The Brussel*:

> In our view, the [trustees], rather than seeking a stay of proceedings before the Federal Court on the basis of the release order issued by the Quebec Superior Court, should have proceeded as the moving party did in the *Soledad Maria* case [*Magnolia Ocean Shipping Corporation v. The Ship "Soledad Maria"* [1982] 1 F.C. 205 (T.D.)] which also involved an international bankruptcy and the arrest of a ship in Canadian waters, that is to say, the appellants should have immediately sought the assistance of the Federal Court which is the only Court that had jurisdiction over the arrested ship and the respondent's *in rem* claim.[49]

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[46] At para. 20.
[47] At para. 24.
[48] 2001 FCT 1311, paras. 18-26.
[49] *The Brussel* [1999] F.C.J No. 337, para. 13

Further, the trustee must *not* apply to a superior court of a province sitting in bankruptcy for an order which is inconsistent with the jurisdiction of a court exercising its *in rem* jurisdiction over a vessel.

Payment out of funds

Given the decision in *The Brussel*, it would seem that in the usual case a trustee in bankruptcy will not be able to take possession of the arrested vessel or the proceeds of sale which are subject to claims by secured *in rem* creditors without posting security in an amount sufficient to cover such claims in full.

In *The Brussel* MacKay J. noted that:

> … if the trustees were prepared to provide security sufficient to meet the claims of secured creditors the Court would consider ordering payment of the proceeds of sale to a bankruptcy court in Canada for the account of the trustees. Just as it was open to the trustees to post security for release of the Brussel at an earlier stage, so it is still open to them to post security to meet the claims of secured creditors under maritime law. If no such security is paid, this Court will order payment of claims of secured creditors direct from the proceeds of sale before any payment to or on account of the trustees.[50]

This approach is consistent with that of the Federal Court in the domestic bankruptcy case of *Ultramar*[51]. In that case the Court ordered that the vessels belonging to the bankrupt owner would be released and the proceedings stayed upon the provision of security by the trustee in an amount sufficient to cover the claims of the secured *in rem* creditors.[52]

It is important to note that the trustee will probably be required to post security for all claimants who claim to have a maritime lien, whether or not they actually do. This is so because the court may not wish to decide the status of the various claimants at an early stage of the proceeding. The determination of the nature of the claims of the various claimants is usually reserved for the priorities hearing. An interesting example of the

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[50] [1997] 3 F.C.187 at para. 90.
[51] *Ultramar Canada Inc. v. Pierson Steamships Limited et al.* (1982) 43 C.B.R. 9 (FCTD) at 12-13.
[52] Of course, a trustee who posts security to obtain release of a vessel is taking a risk that the vessel will be arrested immediately after release by another secured creditor. For this reason, the trustee may be better advised to wait until the vessel is sold by court order and then post security to obtain payment out of the proceeds.

court making a premature determination of whether an *in rem* creditor was secured or unsecured is found in *Ultramar Canada Inc. v. Pierson Steamships Limited et al.*[53] In that case, the trustee applied, *inter alia*, to have the bankrupt's vessels released from arrest. At the hearing of the trustee's motion the Court attempted to determine which of the claimants had a maritime lien and required the trustees to post security in an amount sufficient to cover only the secured claims. The Court gave additional reasons two days later acknowledging that not all persons who had made claims or filed caveats were necessarily served with the notice of motion and was compelled to conclude the additional reasons with the comment that: "I am satisfied that the arguments presented by those who did appear were comprehensive and fairly representative of any that might have been made. There may, however, be others with maritime liens entitled to security in accordance with the reasons."[54]

Thus, the trustee can anticipate that, prior to obtaining payment of the proceeds from sale, security will have to be posted in an amount sufficient to cover the claims of all the claimants who allege a maritime lien. As this will generally be a large amount, it will be relatively rare that a trustee will want to go the expense of posting such security.

Bankruptcy and Insolvency Act Part XIII

The decisions in *The Brussel* should be considered in the light of changes made to the BIA subsequent to the events which gave rise to the *The Brussel*. Specifically, Part XIII of the BIA dealing with International Insolvencies was not in force at the material time. Part XIII provides a mechanism for the recognition of foreign bankruptcies and the appointment of foreign trustees in bankruptcy. It further authorizes the "court", which is elsewhere defined as meaning the superior courts of the provinces[55], to provide assistance to the foreign trustee.

Section 269 provides that a stay of proceedings ordered by a foreign court does not apply to creditors who reside or carry on business in Canada in respect to property in Canada.

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[53] (1982) 43 C.B.R. 9 (FCTD).
[54] At 13.
[55] Bankruptcy and Insolvency Act, s.183.

However, Section 271 provides that the foreign trustee may apply to the Canadian court for a stay of proceedings against the debtor or the debtor's property.

Given the enactment of Part XIII of the BIA and the express granting of jurisdiction to the superior courts of the provinces to recognize foreign bankruptcies, foreign trustees might be well advised to bring an application to the superior court in bankruptcy to have their appointment recognized before bringing any applications to the Federal Court[56].

The Supreme Court of Canada considered the provisions of Part XIII during the course of rendering reasons in *The Brussel*[57] but they did not specifically address this issue.

Conclusions

The decisions of the Supreme Court of Canada in *The Brussel* make it unlikely that a trustees in bankruptcy will want to become involved in *in rem* priorities proceedings . There are a number of reasons for this conclusion. First, the cost of the requirement that the trustee post security for all claimants who allege they have a secured claim will discourage early involvement by the trustee. Second, the trustee will only be successful in obtaining a stay of proceedings if all secured creditors received the same security in the trustee's jurisdiction as they do in Canada. This will be relatively rare as the Canadian approach to foreign maritime liens is relatively unique. Finally, it is very rare that there are any funds available for unsecured *in rem* creditors, and therefore for the trustee, following a judicial sale.

[56] This was the procedure the court seemed to suggest in The *Aquarius, Sagran and Admiral Arciszewski*, 2001 FCT 1311, para 29.
[57] 2001 SCC 90, para.82.