Federal Court  Cour fédérale

Date: 20220421

Docket: T-1080-17

Citation: 2022 FC 575

Ottawa, Ontario, April 21, 2022

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

YVES DUVAL

Plaintiff

and

THE SHIP SEAPACE AND THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP SEAPACE AND COURTESY SHIPPING INC. AND THENAMARIS SHIP MANAGEMENT INC.

Defendants

JUDGMENT AND REASONS

I. Overview

[1] The Plaintiff, Mr. Duval, is a stevedore. The Plaintiff's claim stems from injuries suffered due to an accident that took place during the discharge operations of the Defendant vessel,

Seapace, at the Port of Bécancour on August 13, 2014. As a result of his injuries, the Plaintiff was on medical leave, following which he progressively returned to work.

[2] The Plaintiff has received workers' compensation from the Commission des normes, de l'équité, de la santé et de la sécurité du travail [CNESST]. In the present action, the Plaintiff seeks compensation for alleged losses in excess of the amounts of compensation he received from the CNESST. The Plaintiff's employers, the Association of Maritime Employers and Quebec Stevedoring Limited, are not parties to the present proceedings.

[3] The Plaintiff invokes the maritime law jurisdiction of this Court. The Plaintiff's claim is based on Canadian maritime law, and in particular maritime negligence law. It is an action for personal injury caused by a ship. The Defendants are the vessel, her registered owners, and her managers.

[4] The Defendants move for summary judgment pursuant to Rules 213 to 215 of the *Federal Courts Rules*, SOR/98-106 [the Rules] on the basis that: (1) the Plaintiff is estopped from claiming a loss of revenue and future earning potential after the date upon which the CNESST declared that the Plaintiff was no longer entitled to receive a salary replacement benefit and had regained his full earning capacity; and (2) the Plaintiff's attempt to re-litigate an issue that has been determined by the CNESST is an abuse of process.

[5] It is of note that there are other components of the Plaintiff's claim that are not at issue in the present motion, and a trial on the merits has been set down for November 2022.

[6] The Plaintiff opposes the motion and submits that (1) the common law theories of issue estoppel and abuse of process are not applicable in the present case on the basis of the Supreme Court's judgment in *Desgagnés Transport Inc v Wärtsilä Canada Inc*, 2019 SCC 58 [*Wärtsilä*]; (2) the decision of the CNESST that terminated his salary replacement benefit does not preclude the Plaintiff from recovering from the Defendants at law; and (3) a motion for summary judgment is not appropriate, and certainly not so at this stage of the proceedings.

[7] For the reasons that follow, the Defendants' motion for summary judgment is denied. Given the disposition of this motion and that this matter is scheduled for trial in November 2022, I will restrict my comments as much as possible, so as not to influence the parties as to the view a trial judge may take of the issues after a full trial.

II. Background

[8] Prior to the accident, the Plaintiff, in his role as a stevedore, operated numerous types of machinery, including cranes that loaded or discharged vessels at the Port of Bécancour and the Port of Trois-Rivières.

[9] On the day of the accident, the Plaintiff was operating equipment onboard the Vessel, specifically one of the shipboard cranes, in order to discharge a cargo of salt at the Port of Bécancour. During the operation of the crane, the Plaintiff was located inside the operator's cab.

[10] As the Plaintiff was operating the crane, it collapsed and the cab of the crane fell into cargo hold number 5. As a result of the collapse, the Plaintiff suffered numerous injuries,

including several fractures in his right leg and foot. Following a period of hospitalization, the Plaintiff underwent physical therapy and then progressively returned to work.

[11] From August 13, 2014 through February 22, 2016, the Plaintiff was not at work, save for a period of time in the summer of 2015. Commencing February 23, 2016, the Plaintiff progressively returned to work, increasing the number of days worked per week. On July 4, 2017, the Plaintiff returned to work five days per week.

[12] Following the Accident, the CNESST worked with the Plaintiff's employer to ensure that the Plaintiff was provided with adapted personal protective equipment and covered the costs of this process. The CNESST further worked with the Plaintiff's employer to ascertain what tasks the Plaintiff could perform following his injury. Following the assessments, the CNESST determined that the Plaintiff could work as a payloader operator, stacker operator and/or a forklift driver. Currently, the Plaintiff works as an operator of a payloader.

[13] On March 28, 2017, the CNESST determined that the Plaintiff was entitled to $30,163.34 as compensation for the permanent disability resulting from his injuries, including pain and suffering.

[14] Between the date of the accident and July 4, 2017, the CNESST also provided the Plaintiff with compensation for lost income. On July 4, 2017, the date the Plaintiff returned to work five days per week, the CNESST determined that the three positions mentioned above were available on a fulltime basis, that the hourly wage was the same as the hourly wage earned by the

Plaintiff prior to the accident, and thus the Plaintiff had the capacity to earn the same salary as prior to the accident. On July 5, 2017, the CNESST issued a decision that the Plaintiff was no longer entitled to the salary replacement benefit on the basis that there was a suitable fulltime position available and the Plaintiff would earn an equal or greater salary than the one he earned at the time of the accident [CNESST Decision].

[15] On August 1, 2017, the Plaintiff filed a request for review of the CNESST Decision. On August 28, 2017, the Direction de la Revision Administrative of the CNESST rendered a decision determining that the Plaintiff was not entitled to income replacement on the basis that he had a suitable employment, with the same benefits and seniority as prior to the accident [CNESST Review Decision].

[16] On September 5, 2017, the Plaintiff lodged an appeal with the Tribunal Administratif du Travail [Tribunal]. The appeal was withdrawn prior to the matter being heard because the Plaintiff and his employers entered into a transaction [Settlement Agreement] pursuant to articles 2631 *et seq.* of the *Civil Code of Québec*, CQLR c CCQ-1991 [*Civil Code*]. The Settlement Agreement provided that the CNESST Review Decision is final and binding. Furthermore, it provided that the employers would not oblige the Plaintiff to prolong his shifts should his condition prevent him from doing so. Finally, the settlement was a complete and final resolution of the dispute between the Plaintiff's employers and the Plaintiff.

[17] The foregoing events are not in dispute. The Plaintiff's claim is that he has suffered damages in an amount in excess of what he received from the CNESST for which he claims the Defendants are liable.

[18] During the hearing, and for the purposes of this motion, the Plaintiff's claim was divided into three general components. The first is his claim for lost income during the period of time during which the CNESST was providing him with a salary replacement benefit (August 13, 2014 – July 4, 2017). For this period of time, the Plaintiff is seeking the difference between what he received from the CNESST and what he claims he would have earned but for the accident. This first component of the claim is not at issue in the present motion.

[19] For the second component of the claim, the Plaintiff seeks damages for permanent disability in excess of the $30,163.34 paid by the CNESST. This second component of the claim is not at issue in the present motion.

[20] The third component of the claim and the one at issue in this motion for summary judgment is the Plaintiff's claim for loss of revenue from July 5, 2017 onwards. The Defendants plead that the CNESST Review Decision is a final and binding decision on the issue of lost revenue and diminished future earning potential after July 5, 2017. The Defendants submit that an administrative decision-maker considered this exact cause of action and the same claim for damages, and found that there was no loss of salary after July 4, 2017. Accordingly, the Defendants plead that (1) the Plaintiff is estopped from re-litigating this issue (issue estoppel),

and (2) alternatively, that re-litigating this issue in light of the CNESST Review Decision is an abuse of process.

[21] The Plaintiff pleads that the common law principles of issue estoppel, *res judicata*, and abuse of process do not apply to the present proceedings. Rather the civil law concept of *chose jugée (res judicata)* as codified in article 2848 of the *Civil Code* applies by virtue of the Supreme Court's decision in *Wärtsilä*. The Plaintiff submits that, in any event, neither the criteria of article 2848 of the *Civil Code* nor the common law principles have been met in this case. Moreover, the Plaintiff submits that the CNESST Review Decision does not preclude him from seeking to recover damages from the Defendants at law in this Court. Finally, the Plaintiff takes issues with the appropriateness of this motion at this stage of the proceedings and seeks costs on a solicitor-client basis.

III. Test for a Motion for Summary Judgment

[22] The purpose of summary judgment is to allow the Court to summarily dispense with cases that should not proceed to trial because there is no genuine issue for trial, and thus conserving judicial resources and improving access to justice (*Milano Pizza Ltd v 6034799 Canada Inc*, 2018 FC 1112 at para 25 [*Milano Pizza*]; *Canmar Foods Ltd v TA Foods Ltd*, 2021 FCA 7 at para 23 [*Canmar Foods*]; *Manitoba v Canada*, 2015 FCA 57 at paras 15-17; *Hryniak v Mauldin*, 2014 SCC 7 [*Hryniak*] at para 34).

[23] Summary judgment is "a valuable tool for striking sham claims and defences", however it is "not intended to deprive a litigant of the right to a trial unless there is a clear demonstration

that there is indeed no genuine issue material to the claim or defence which the trial judge must resolve." (*Oriji v Canada*, 2006 FC 1539 at para 31 [*Oriji*]). Recently, in *Canmar Foods*, the Federal Court of Appeal stated that the rationale and goal of summary judgments have been well summarized in the following paragraph by the Supreme Court in *Canada (Attorney General) v Lameman*, 2008 SCC 14:

> [23] […] The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and costs on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial. (*Lameman* at para. 10)

[24] Rule 215(1) of the Rules provides that the Court shall grant summary judgment where the Court is satisfied that "there is no genuine issue for trial with respect to a claim or defence". The test on a motion for summary judgment is not whether a party cannot succeed at trial, but rather "whether the case is clearly without foundation" (*Canmar Foods* at para 24) or that "the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial" (*Oriji* at para 35; *Milano Pizza* at para 33; *Kaska Dena Council v Canada*, 2018 FC 218 at para 21 [*Kaska*]; *Canmar Foods* at para 24). As such, claims that are "clearly without foundation should not take up the time and incur the costs of a trial" (*Oriji* at para 35).

[25] The foregoing test "obviously translate(s) into a heavy burden on the moving party" (*Canmar Foods* at para 24). The onus is on the party seeking summary judgment to establish the absence of a genuine issue for trial, however, Rule 214 of the Rules requires the responding party

to set out specific facts and adduce evidence showing that there is a genuine issue for trial. In other words, while the burden is on the Defendants in the present matter, both parties must put their best foot forward (*Canmar Foods* at para 27; *Milano Pizza* at para 34; *Oriji* at para 33).

[26] It is well established that cases involving issues of credibility are not to be decided on motions for summary judgment. As Justice Mactavish in *Milano Pizza* explains:

> [37]…Generally, a judge who hears and observes witnesses giving evidence orally in chief and under cross-examination will be better positioned to assess the witnesses' credibility and to draw the appropriate inferences than a judge who must depend solely on affidavits and documentary evidence.
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> [38] Without hearing oral evidence, a motions judge faced with a genuine issue for trial cannot properly assess credibility or sift through and weigh the evidence. Consequently, cases should go to trial where there are serious issues with respect to the credibility of witnesses (Citations Omitted).

[27] That being said, the mere existence of an apparent conflict in the evidence does not preclude granting summary judgment, however, judges must take a "hard look" at the merits if there are issues of credibility that need to be resolved (*Milano Pizza* at para 39; *Oriji* at para 32). Finally, I am mindful of the guidance provided by Justice Mactavish as to the care and caution that must be exercised when considering a motion for summary judgment:

> [40] Judges dealing with motions for summary judgment must, moreover, proceed with care, as the effect of the granting of summary judgment will be to preclude a party from presenting any evidence at trial with respect to the issue in dispute. In other words, the unsuccessful party will lose its "day in court" (Citations Omitted).
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> (*Milano Pizza* at para 40; See also So*urce Enterprise Ltd v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 966 at para 21)

IV. Applicable Law

[28] As noted above, the Plaintiff's claim is based on Canadian maritime law. The parties disagree, however, as to the law applicable to the issue of the impact, if any, of the CNESST Review Decision on the claim for lost revenue from July 5, 2017 onwards. The Defendants submit that it is issue estoppel and abuse of process that are applicable, while the Plaintiff turns to article 2848 of the *Civil Code* for *res judicata* (*chose jugée*) and abuse of process as codified in articles 51 *et seq.* of the Quebec *Code of Civil Procedure*, CQLR c C-25.01 [*Code of Civil Procedure*].

[29] The Plaintiff submits that following the decision of *Wärtsilä*, in the absence of an enacted federal law or regulation that regulates an aspect of a claim under Canadian maritime law, the provisions of the *Civil Code* or any other provincial legislation will apply (*Wärtsilä* at paras 103-106). Given that the accident took place in the Province of Quebec and the Plaintiff had obtained worker's compensation from the CNESST, the Plaintiff submits that the principles as codified in the *Civil Code* and the *Code of Civil Procedure* apply to the issue of the impact, if any, of the CNESST Review Decision on the portion of the claim seeking lost revenue from July 5, 2017 onwards. This is so, in the Plaintiff's submission, even though the claim for lost revenue is based on the tort of maritime negligence.

[30] The Plaintiff argues that the "judge-made nuances of the common law theories of estoppel" may apply in other matters, but not where there is "business arising out of Quebec involving a question of Canadian maritime law". During the hearing the Plaintiff stated that

while it is unfortunate from the perspective of uniformity of Canadian maritime law, it is now the law that a maritime case that touches on Quebec will be treated differently from a maritime case elsewhere in Canada.

[31] The Defendants take issue with the Plaintiff's interpretation of *Wärtsilä*. They plead that the Supreme Court in *Wärtsilä* dealt with a contractual issue whereas the present case is based on the tort of negligence in the maritime context. The Defendants highlight that the Supreme Court acknowledged in *Wärtsilä* that maritime negligence is at the core of the federal power over navigation and shipping and underscored the importance of uniformity and consistency in this area:

> [96] The core of navigation and shipping was defined to include issues of maritime negligence in *Ordon Estate [v Grail,* [1998] 3 SCR 437]. As explained by Iacobucci and Major JJ., maritime negligence is at the core of the federal power over navigation and shipping because it is essential to establish a consistent, uniform body of specialized rules to regulate the behaviour of those who engage in marine activities:
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> > This more general rule of constitutional inapplicability of provincial statutes is central to the determination of the constitutional questions at issue in these appeals. Maritime negligence law is a core element of Parliament's jurisdiction over maritime law. The determination of the standard, elements, and terms of liability for negligence between vessels or those responsible for vessels has long been an essential aspect of maritime law, and the assignment of exclusive federal jurisdiction over navigation and shipping was undoubtedly intended to preclude provincial jurisdiction over maritime negligence law, among other maritime matters. As discussed below, there are strong reasons to desire uniformity in Canadian maritime negligence law. Moreover, the specialized rules and principles of admiralty law deal with negligence on the waters in a unique manner, focussing on concerns of "good seamanship" and other peculiarly maritime

> issues. Maritime negligence law may be understood, in the words of Beetz J. in *Bell Canada v Quebec*, as part of that which makes maritime law "specifically of federal jurisdiction". [Citation omitted; para 84.]

[32] The Defendants distinguish the facts from those in *Wärtsilä,* pleading that this is a matter of maritime negligence law and should not be so restricted as argued by the Plaintiff (*Wärtsilä* paras 96-97). The Defendants submit that uniformity is essential, as the Vessel's equipment could have easily been used for discharging salt in ports outside Quebec, such as those in Ontario. Moreover, the Defendants plead that not all elements of this claim are Quebec-based. They highlight that the Vessel is a Maltese flagged vessel, her owners are a Monrovian company, her operators are based in Piraeus, and the maintenance of the Vessel took place outside of Quebec. Consequently, the Defendants submit that neither the *Civil Code* nor the *Code of Civil Procedure* apply.

[33] I acknowledge that the landscape of constitutional analysis in terms of Canadian maritime law may have shifted somewhat following *Wärtsilä* but certainly not to the extent that the Plaintiff claims. It cannot be said that, following *Wärtsilä,* all non-statutory Canadian maritime law is consigned to the dustbin of history should a case have a connection with Quebec.

[34] The Supreme Court in *Wärtsilä* reaffirmed that "Parliament's authority over navigation and shipping, and consequently the scope of Canadian maritime law, is broad" (para 5). The majority confirmed that Canadian maritime law is a comprehensive body of federal law, uniform throughout Canada, that deals with all claims in respect of maritime and admiralty matters, subject only to the scope of federal power over navigation and shipping under subsection 91(10)

of the *Constitution Act, 1867* (para 9), while also acknowledging that a valid provincial enactment will be permitted to have incidental effects on a federal head of power such as navigation and shipping, unless either interjurisdictional immunity or federal paramountcy is found to apply (paras 87-88).

[35] Before considering in further detail the Supreme Court's judgment in *Wärtsilä*, it is helpful to briefly expand on the definition of Canadian maritime law in the preceding paragraph. Canadian maritime law is a broad and comprehensive body of federal law. As noted by the Supreme Court, Canadian maritime law is the progeny of English maritime law as administered by the High Court of Admiralty in England until 1874 and then the High Court of Justice thereafter (*Wärtsilä* at para 11). Although reference tends to be made to the Admiralty Courts and admiralty jurisdiction, contemporary Canadian maritime law (and the term maritime law in general) is significantly broader in scope than the areas traditionally addressed by admiralty law (Chircop A. et al., *Canadian Maritime Law*, 2nd Ed (2016) Irwin, at 1 [*Canadian Maritime Law*]).

[36] While Canadian maritime law is rooted in English maritime law, to simply equate it to common law would not be accurate (*Wärtsilä* at para 12). English maritime law developed in an English context since the 14th century, however, "the law was heavily civilian in nature, despite strong influences from the common law" (*Canadian Maritime Law* at 168). The law that was administered by the High Court of Admiralty was distinct from the general common law of England, and civil law sources and comparative law played a significant role in the development of maritime law (*QNS Paper Co v Chartwell*, [1989] 2 SCR 683 [*Chartwell*] at 715, per Justice

L'Heureux-Dubé in concurring reasons). Indeed, until 1858, pleading before the Admiralty Court in England was restricted to doctors of civil law (*Canadian Maritime Law* at 168).

[37] The body of law that is Canadian maritime law is derived from a long international tradition that draws in large part from both the common law and the civil law (*Chartwell* at 691-692, per Justice McLachlin in concurring reasons; See also *Wärtsilä* at para 19; *Ordon Estate v Grail*, [1998] 3 SCR 437 [*Ordon Estate*] at para 71). It is also international in nature and ought to be interpreted within the modern context of commerce and shipping (*Chartwell* at 691-692, per Justice McLachlin in concurring reasons). The importance of uniformity between jurisdictions in maritime matters has long been recognized (*Ordon Estate* at paras 71 and 79; *Wärtsilä* at paras 55-56).

[38] Ultimately, there is no simple answer to the question of what is Canadian maritime law. The sources of Canadian maritime law have been summarized in *Canadian Maritime Law*, and include:

> - Federal statutes, including the *Federal Courts Act*, the *Admiralty Act 1890*, and the *Admiralty Act 1934*, and any other maritime law statute enacted by the Parliament of Canada, such as the *Canada Shipping Act 2001* and the *Marine Liability Act*;
> - Caselaw, namely, jurisprudence of English courts until 1934, the jurisprudence of Canadian courts before 1934 and since then, both federal and provincial;
> - Principles of civil law and the common law as may be determined as applicable through a comparative methodology in a maritime law setting by the courts;
> - International maritime law conventions.
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> (at 173).

[39] In *Ordon Estate* and *Wärtsilä*, the Supreme Court highlighted that Canadian maritime law has sources that are both statutory and non-statutory, national and international, common law and civilian, and such sources include but are not limited to the specialized rules and principles of admiralty, and the rules and principles applied in admiralty cases, first as administered in England, and since then as amended by the Canadian Parliament and developed by judicial precedent to date (*Wärtsilä* at para 21; *Ordon Estate* at para 75).

[40] Turning back to *Wärtsilä*, in that case, the central issue was whether a manufacturer and supplier of marine engines, Wärtsilä Nerderland B.V. and its Canadian division [Wärtsilä Canada], was entitled to rely on the limitation of liability clause in its contract with Transport Desgagnés Inc. [TDI]. TDI had purchased marine engine parts for one of its vessels. Several years after the parts were installed, the engine failed causing loss and damage. The question on appeal was whether Canadian maritime law or the *Civil Code* governed TDI's contractual claim. The choice of law clause in the contract provided for the "laws in force at the registered office of the Supplier", which the trial judge interpreted as Wärtsilä Canada's place of business in Montreal, Quebec (at para 6).

[41] The majority of the Supreme Court stated that the constitutional analysis was only necessary in *Wärtsilä* because "the choice of law clause in the agreement (clause 15.1) does not indicate whether Canadian maritime law or Quebec civil law governs the contract" (para 6). The majority held that notwithstanding that the sale of marine engine parts for use on a commercial vessel is governed by Canadian maritime law, the *Civil Code* article pertaining to warranties in contracts of sale (article 1733) was also directed at the same factual situation, thereby giving rise

to a double aspect scenario (para 5). The fact that Canadian maritime law extended to the matter at issue, did not mean that the overlapping provincial rule, article 1733 of the *Civil Code*, could not also validly govern the sale (paras 80-81).

[42] The majority highlighted that "a valid provincial enactment will be allowed to have incidental effects on a federal head of power – in this case navigation and shipping – unless either interjurisdictional immunity or federal paramountcy is found to apply" (para 87). The majority held that the contractual issue raised in the case was not at the core of navigation and shipping, with the result that the doctrine of interjurisdictional immunity was not applied so as to render article 1733 of the *Civil Code* inapplicable to the matter (paras 5, 94 and 97). In considering the issue of interjurisdictional immunity, the majority, as relied upon by the Defendants, affirmed that maritime negligence is a core element of maritime law because it is essential to establish a consistent, uniform body of specialized rules to regulate the behaviour of those who engage in marine activities (para 96).

[43] The majority distinguished the contractual issues raised by TDI's claim from issues of maritime negligence. The majority noted that sophisticated parties to a sale contract for marine equipment could have determined in advance that the "federal body of rules tailored for the practical realities of commercial actors in the maritime sector" (i.e. Canadian maritime law) applied to their contract (para 97). Just as "had the parties referred explicitly to the CCQ in the clause of their contract dealing with the choice of law, there would be no question that it would govern the dispute and therefore no division of powers analysis to undertake" (at para 97). The majority explained its reasoning as follows:

> [97] As Laskin C.J. wrote in Tropwood, it is indeed possible that, in the exercise of its concurrent jurisdiction over maritime matters, the Federal Court might apply foreign law as elected by contract (pp. 166-67). In our view, this is a clear indication that, contrary to what was necessary for maritime negligence, it is not essential for the exercise of federal competence over navigation and shipping that only one body of law — Canadian maritime law — regulate such contracts.

[44] As noted by the majority, the Federal Court can apply foreign law in the exercise of its concurrent jurisdiction over maritime matters, and thus by extension provincial law as well. The application of provincial law, where there is a double aspect scenario with Canadian maritime law, does not oust the jurisdiction of the Federal Court.

[45] In the present matter, not only do issues of maritime negligence fall within the core of navigation and shipping, the Plaintiff and the Defendants had no such contractual relationship that would have opened the door, so to speak, to the possibility of another body of law being applicable.

[46] In considering the issue of federal paramountcy, the majority declined Wärtsilä Canada's invitation "to render art. 1733 CCQ inoperative based on a conflict with the rule expressed in the *Sale of Goods Act*, 1893 (UK), 56 & 57 Vict, c 71, that allows for the limitation of the seller's liability" (para 103). The majority rejected Wärtsilä Canada's position that "rules set out in English statutes could be paramount to valid provincial laws for the sole reason that they were applied by Canadian or English admiralty courts until 1934" (para 103). The majority concluded that article 1733 of the *Civil Code* was operative and governed the dispute, prevailing over the Canadian non-statutory maritime law pleaded by Wärtsilä Canada (paras 103-106). In so finding,

the majority expressed concerns about and rejected Wärtsilä Canada's argument that section 2 of the *Federal Courts Act*, RSC 1985, c F-7, describing the substantive content of Canadian maritime law, much of which is non-statutory, had the effect of rendering Canadian maritime law as a whole paramount to provincial legislation (para 104). The majority stated that "we cannot infer from the exercise of Parliament's jurisdiction in a particular area the intention to occupy the entire field exclusively, absent very clear statutory language" and thus section 2 of the *Federal Courts Act* did not trigger the application of the doctrine of federal paramountcy in the manner in which Wärtsilä Canada submitted.

[47] The section of the judgment in *Wärtsilä* upon which the Plaintiff relies is the majority's analysis of the application of the doctrine of federal paramountcy. In particular, the statements to the effect that rules of non-statutory Canadian maritime law do not trigger the doctrine of federal paramountcy so as to prevent the operation of, or prevail over, valid provincial legislation (paras 101, 103, 106).

[48] One must be cautious taking the statements made by the majority, made in the context of rejecting Wärtsilä Canada's arguments on federal paramountcy, and extrapolating them for broader application. Much of Canadian maritime law is indeed non-statutory law. It cannot be said however that maritime matters such as salvage, general average, charterparties, to name but a few, are now to be governed by provincial statutory law. Any such provincial statute may raise issues of the constitutional power to legislate in an area that is exclusively federal.

[49] I do not fault the parties for jockeying for the application of the law that provides them with an advantage or strengthens their position in a dispute. Commentators have noted that a measure of uncertainty as to the application of certain areas of Canadian maritime law has resulted from the statements made by the Supreme Court in *Wärtsilä* (Raymer, E. "Provincial rather than maritime law applies to marine engine contract: SCC", 28 November 2019, Canadian Lawyer Magazine online; Fernandes, R. "Uniformity of Canadian Maritime Law Takes a Hit", December 7, 2019, Fernandes Hearn LLP online; Pollack G. "*Desgagnes Transport v Wärtsilä Canada*: Canadian Maritime Law Enters Uncharted Waters", December 4, 2019, Davies Ward Phillips & Vineberg LLP online; Harrington, S. "*Transport Desgagnes Inc v Wärtsilä Canada Inc.* A Case Comment", December 2019, Canadian Maritime Law Association online; Constantine D. "Provincial Law Voids Limitations of Liability in Contract for Ship's Engine Parts", January 7, 2020, Stewart McKelvey LLP online; Kazaz, C. "The Little Engine that Couldn't: SCC Rules on Limitation of Liability for Sale of Ship Engine Parts", December 4, 2019, Blake, Cassels & Graydon LLP online). Naturally, such uncertainty encourages both forum shopping and debates on the applicable law. Nevertheless, the Court should not permit the ripples of uncertainty to spread through an unrestricted application of the language used in *Wärtsilä* without a careful consideration of its context and of the actual *ratio decidendi* of *Wärtsilä*.

[50] I therefore find that the Supreme Court's decision in *Wärtsilä* does not have the effect of making *res judicata* and abuse of process as codified in the *Civil Code* and the *Code of Civil Procedure*, applicable to the component of the Plaintiff's maritime negligence claim at issue in the present motion. The applicable law is that of issue estoppel and abuse of process.

[51] Issue estoppel has been considered and applied by this Court in numerous instances in the context of motions for summary judgment (*Oriji*; *Apotex Inc v Merck & Co*, 2002 FCA 210; *Google LLC v Sonos Inc*, 2021 FC 1462) and in the context of maritime matters (*Fingad Shipping Ltd v Ningbo Arts & Crafts Imp & Exp Co Ltd*, 2015 FC 851; *Royal Bank of Canada v Seamount Marine Ltd*, 2019 FC 1043; *Offshore Interiors Inc v Worldspan Marine Inc*, 2016 FC 27; *Canpotex Shipping Services Limited v Marine Petrobulk Ltd*, 2019 FC 89).

[52] The doctrine of abuse of process, as pleaded by the Defendants, is well established in this Court. Judges at common law have an inherent and residual discretion to prevent an abuse of the court's process (*Toronto (City) v C.U.P.E., Local 79*, 2003 SCC 63 [*Toronto City*] at para 35; *Oriji* at para 63). This Court has broad plenary powers to regulate the proceedings before it and address actual or potential abuses of its process (*Fabrikant v Canada*, 2018 FCA 171). This doctrine permits the Court to prevent relitigation where the same issue has previously been determined (*Oriji* at paras 63-64; *Lebrasseur v Canada*, 2011 FC 1075 at para 36). This doctrine of abuse of the Court's process is also a ground for ordering that a pleading be struck where it is *res judicata* (Rule 221(f) of the Rules; *Beattie v Canada*, 2001 FCA 309).

[53] A final point is that the application of *Wärtsilä* was pleaded by the parties in the context of the subject matter of the claim (i.e. maritime negligence) and has thus been analyzed accordingly. It was common ground at the hearing that issues of issue estoppel and *res judicata* are issues of substantive law and thus fall to be decided in line with the law applicable to the action (Canadian maritime law), albeit in the Plaintiff's submission this aspect of the case attracts the application of the *Civil Code* on the authority of *Wärtsilä*.

[54] Placing that aside, I would also state, considering the issue from a different angle, that I am not prepared to find that *Wärtsilä* has such a far reaching application that it overrides this Court's broad plenary powers to address actual or potential abuses of its process in the context of a maritime matter. In addition, I do not consider that the issues raised in the present motion attract the application of Rule 4 of the Rules, commonly referred to as the "gap rule", that permits the Court to fill a gap of a procedural nature by adopting the practice of a superior court of the province. To the extent that issues raised by the parties may be considered procedural, I do not find there to be a gap that would enable, from a procedural perspective, the practice of the Quebec Superior Court to apply to the matter at hand.

V. Analysis

[55] It is common ground between the parties that the compensation provided by the CNESST impacts the Plaintiff's action against the Defendants. Win or lose, the compensation received from the CNESST is a factor that must be taken into account.

[56] The parties disagree, however, on the impact of the CNESST Review Decision, both factually and legally, on the component of the Plaintiff's claim that is at issue in the present motion. This component being whether the Plaintiff has suffered a loss of income and a reduction of future earning potential from July 5, 2017 onwards as a result of the alleged negligence of the Defendants. Furthermore, the parties disagree as to the impact on the present dispute of the Settlement Agreement between the Plaintiff and his employers, and the language used therein.

[57] The Defendants submit that the CNESST determined, in both the CNESST Decision and the CNESST Review Decision, that the Plaintiff has not suffered a loss of income after July 4, 2017. As a result, the Defendants plead that issue estoppel applies with respect to the CNESST Review Decision such that the matter cannot be re-litigated before this Court. The Defendants submit that they meet the three criteria for issue estoppel to apply, that: (1) the same question has been decided; (2) the judicial decision which is said to create the estoppel was final; and (3) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies (*Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 [*Danyluk*] at para 25) As for the last criteria of mutuality, the Defendants plead that it is satisfied where there is a sufficient degree of interest between the parties (*Danyluk* at para 60), namely, the Defendants and the Plaintiff's employers. Alternatively, the Defendants submit, the doctrine of abuse of process should be applied to preclude the reopening of litigation in circumstances such as these where the strict requirements of issue estoppel, and specifically the privacy and mutuality requirements, have not been met (*Toronto City* at para 37; *Oriji* at paras 63-64).

[58] The Defendants highlight that the fact that the Plaintiff's expert used a methodology to calculate future revenue that is more favourable to the Plaintiff than the one used by the CNESST does not detract from the final and binding nature of the CNESST Review Decision. The Defendants submit that there is no evidence that the process before the CNESST was limited or restricted in any way. In other words, the Defendants plead that the Plaintiff is inappropriately seeking to get a second kick at the can (*Danyluk* at para 18).

[59] The Defendants submit that the CNESST, a specialized administrative decision maker, considered the material elements of this component of the Plaintiff's claim and then conclusively determined the very same issue that is currently before the Court. The Plaintiff had lodged an appeal of the CNESST Review Decision at the Tribunal, but then withdrew it before it was heard. The matter, in the Defendants' view, has been put to rest. The Defendants rely on, *inter alia*, *Oriji*, where Justice Layden-Stevenson concluded that "the principle of the finality of decisions requires that in the public interest, the possibilities for indirect challenges of an administrative decision be limited and circumscribed, especially when Parliament has opted for a procedure for direct challenge of the decision within defined parameters" (para 65).

[60] The Plaintiff does not dispute that the CNESST Review Decision is final. The Plaintiff pleads, however, that for a variety of reasons the decision does not preclude the Plaintiff from claiming lost revenue from July 5, 2017 onwards. The Plaintiff submits that the basis upon which the CNESST performed its analysis was more narrow, did not consider the same factors, and does not encompass what the Plaintiff is now claiming. In order words, the Plaintiff's position is that his claim for loss of revenue is broader under Canadian maritime law than it was under the CNESST process. The Plaintiff likens the CNESST regime to an insurance regime, which compensates plaintiffs but does not cover all his losses. The Plaintiff relies on his affidavit, an expert report dated June 12, 2019, and the language of the Settlement Agreement in support of his position that a loss of revenue occurred after July 4, 2017, and will continue to occur in the future notwithstanding the CNESST Review Decision.

[61] The Plaintiff further submits that in any event, the Defendants were not parties to, nor did they have any involvement with, the CNESST proceedings. The Plaintiff equally submits that the Settlement Agreement, which provided for the discontinuance of the appeal to the Tribunal, was between the Plaintiff, his employers and his union representative. The Defendants were, in the Plaintiff's view, strangers to that transaction and therefore not entitled to rely on any of its terms. The Plaintiff relies upon, among other things, the Supreme Court in *Danyluk* for the proposition that the Defendants, strangers to the earlier proceedings, are seeking to benefit from those proceedings even though they are not bound by them:

> (c) That the Parties to the Judicial Decision or Their Privies Were the Same Persons as the Parties to the Proceedings in Which the Estoppel Is Raised or Their Privies
>
> [59] This requirement assures mutuality. If the limitation did not exist, a stranger to the earlier proceeding could insist that a party thereto be bound in subsequent litigation by the findings in the earlier litigation even though the stranger, who became a party only to the subsequent litigation, would not be: Machin, supra; *Minott v O'Shanter Development Co (1999)*, 1999 CanLII 3686 (ON CA), 42 OR (3d) 321 (CA), per Laskin J.A., at pp. 339-40.

[62] The thrust of the Plaintiff's argument is that there is no mutuality as required under the doctrine of issue estoppel, and in any event, the issue is not the same because this component of his claim is based on Canadian maritime law rather than Quebec's *Act respecting industrial accidents and occupational diseases*, CQLR c A-3.001.

[63] Upon a careful review of the material filed by the parties, and upon considering the submissions made by counsel at the hearing, I am not convinced that the component of the claim at issue in the present motion is so clearly without foundation or so doubtful that it does not

deserve consideration by the trier of fact at the trial in November 2022 (*Canmar Foods* at para 24).

[64] Rule 214 of the Rules requires that the responding party, the Plaintiff, set out specific facts and adduce evidence showing there is a genuine issue for trial. Unlike in *Amankwah v Canada*, 2005 FC 900, at paragraph 10, to which the Defendants refer, the Plaintiff has not merely restated the alleged facts disclosed in the Statement of Claim; instead, he has submitted evidence in the form of his affidavit and his expert's report. The Plaintiff's position, based on the record before the Court, is not so devoid of merit that it does not deserve consideration at the trial. As noted in Section III of these reasons above, I am also mindful of the fact that the Defendants' motion, if it were granted, would preclude the Plaintiff from having his "day in court" (*Milano Pizza* at para 40).

[65] I note that the Court of Appeal cautions that when dismissing a motion for summary judgment one must be mindful that there will be a trial and not write more than is necessary (*Canmar Foods* at para 26). I therefore restrict my reasons to confirming that the Defendants have not met their burden, which is a heavy one (*Canmar Foods* at para 24), of demonstrating that there is no genuine issue for trial within the meaning of Rule 215(1) of the Rules with respect to the Plaintiff's claim for loss of revenue from July 5, 2017 onwards.

[66] Accordingly, whether the Plaintiff has suffered a loss of income and/or a decreased earning potential as a result of the alleged negligence of the Defendants after July 4, 2017, is an issue that will move on to trial. As will the question of what impact the CNESST Review

Decision has on the Plaintiff's claim for loss of income after July 4, 2017 and whether the Plaintiff is estopped from claiming such losses. The Defendants are not precluded from arguing at trial, as they have done in the context of this motion, that the CNESST, or the methodology used by it, was correct and no loss of income was suffered or will be suffered after July 4, 2017.

[67] To be clear, the issues raised by the Defendants in the context of this motion may be raised at trial and nothing in these reasons should be taken as determining the issues to be pursued at trial. As the parties are aware, and subject to any adjustments in the assignment schedule, I am set down to hear this matter in November 2022.

VI. The Appropriateness of the Motion for Summary Judgment

[68] The Plaintiff submits that the issue raised in the present motion is not appropriate for summary judgment and objects to the time and expense of such a motion when the trial has been set down for November 2022. The Plaintiff pleads that such a motion so close to trial ought to be considered an abuse of process. Consequently, the Plaintiff seeks dismissal of the motion and costs on a solicitor-client basis.

[69] The Defendants submit that this motion was brought following the exchange of affidavits of documents and examinations on discovery, but prior to the completion of the discovery phase of the action and before the trial had been set down. The Defendants plead that this was an appropriate time to bring the present motion, as the documentation relied on by the Defendants was obtained as a result of the undertakings provided during the examination on discovery of the

Plaintiff. Moreover, the Defendants submit that they acted promptly and within the timeframe set out in Rule 213 of the Rules.

[70] There is no doubt that the timing of the Defendants' motion for summary judgment was in conformity with Rule 213 of the Rules, which provides that such a motion may be brought at any time after a defence has been filed but before the time and place for the trial have been fixed. The motion for summary judgment was filed on December 10, 2021. On January 25, 2022, the motion was set down for hearing and the steps leading up to the hearing of the motion were scheduled. On March 25, 2022, the matter was set down for a five-day trial in November 2022. Accordingly, I do not find the timing of the motion to be inappropriate.

[71] The Defendants have not succeeded in their motion. It does not follow or necessarily mean that the motion was inappropriate. Had the motion been successful, then the question of whether there was a loss of income and diminished earning potential from July 5, 2017 onwards would have been resolved, with a resulting impact on the remainder of discovery, the expert reports, and potentially the allocation of time during the trial in November 2022. The issues would have been narrowed and the parties' attention would have been focused on the remainder of the points at issue then, namely and broadly speaking, the Plaintiff's claim for salary in excess of the compensation provided by the CNESST between the dates of August 13, 2014 and July 4, 2017, and the claim for compensation in excess of what was awarded by the CNESST for permanent disability.

[72] Issues such as issue estoppel, cause of action estoppel, *res judicata*, and abuse of process, should they arise, very much lend themselves to a careful consideration of whether a motion for summary judgment or trial would in fact be a proportionate, expeditious and less expensive way to proceed. In a number of instances, weeding out claims affected by those issues at an early stage is the appropriate way to proceed and is beneficial for the justice system (*Canmar Foods* at para 23). The same is true of issues arising from contractual or statutory time bars (*Labrador-Island Link General Partner Corporation v Panalpina Inc*, 2019 FC 740; *Lauzon v Canada (Revenue Agency)*, 2021 FC 431). While the Court certainly plays a role in controlling the risk that such motions be used inappropriately to cause delay or to disproportionately increase the cost (*Hryniak* at para 32; *ViiV Healthcare Company v Gilead Sciences Canada Inc*, 2021 FCA 122 at paras 22-23 [*ViiV Healthcare*]), the Court also plays a role in permitting such motions to move forward where they are proportionate and stand a chance of ultimately being the most expeditious and least expensive way to proceed (*ViiV Healthcare* at paras 17-18).

[73] In the present matter, I do not find that the Defendants' motion for summary judgment was inappropriate simply because it has not been granted. The subject matter lends itself to such a motion, and had it succeeded it would have narrowed the issues in dispute and reduced the time and cost of the next steps in the proceedings. There is no indication on the record that the motion was used inappropriately to cause delay or disproportionately increase the costs. Nor do I consider the motion to have been an abuse of process, as alleged by the Plaintiff. Moreover, given that the matter has been assigned to me, subject always to change of course, the time spent familiarizing myself with the case and the matters at issue therein has not been wasted.

[74] Solicitor-client costs are awarded on very rare occasions, including where a party has displayed reprehensible, scandalous or outrageous conduct. (*Heiltsuk Horizon Maritime Services Ltd v Atlantic Towing Limited*, 2021 FCA 26 at para 182). This is not the case here. Consequently, I decline to award solicitor-client costs. The Plaintiff is entitled to costs calculated in accordance with the mid-point of Column III of Tariff B of the Rules.

VII. Conclusion

[75] For the foregoing reasons, this motion for summary judgment is hereby dismissed, with costs, on the grounds that the Defendants have failed to meet their burden of demonstrating that there is no genuine issue for trial within the meaning of Rule 215(1) of the Rules.

JUDGMENT in file T-1080-17

THIS COURT'S JUDGMENT is that:

1. The Defendants' Motion for Summary Judgment is hereby dismissed;

2. Costs to the Plaintiff at the mid-point of Column III of Tariff B to the Rules.

"Vanessa Rochester"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1080-17
STYLE OF CAUSE:	YVES DUVAL v THE SHIP SEAPACE AND THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP SEAPACE AND COURTESY SHIPPING INC. AND THENAMARIS SHIP MANAGEMENT INC.
PLACE OF HEARING:	BY VIDEOCONFERENCE
DATE OF HEARING:	APRIL 6, 2022
JUDGMENT AND REASONS:	ROCHESTER J.
DATED:	APRIL 21, 2022

APPEARANCES:

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Me Jean-Marie Fontaine Me Nigah Awj	FOR THE DEFENDANTS

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