

1959  
Jan. 8 & 9  
May 6

BETWEEN:

OWNER, MASTER AND CREW  
OF M/V *KETA* AND IRON  
ORE COMPANY OF CANADA  
LIMITED .....  
(*Plaintiffs*)

APPELLANTS;

AND

THE SHIP *IRENE M* AND HER  
CARGO AND FREIGHT .....  
(*Defendants*)

RESPONDENTS.

*Shipping—Salvage—Principles on which salvage is awarded—Value of property saved—Perils of salvaging ship.*

In an action for the salvage of the SS. *Irene M* by the M/V *Keta* from an icefield in the lower St. Lawrence River, the value of the salvaged steamer and her cargo was \$576,228 and that of the salvaging motor vessel \$150,000. The trial court awarded \$6,000 for the salvaging services rendered which included a reasonable allowance for expenses incurred and such damages, if any, the salvaging ship may have sustained due to the extraordinary strain on her engines. On an appeal from this decision:

*Held:* That in addition to the factors upon which the trial court based its award, a consideration of the evidence as a whole led to the conclusion that the *Keta's* master by the use of his ship as an improvised ice-breaker had imperilled both his ship and a highly profitable charterparty; that the fact that it was found necessary within two weeks thereafter to replace two of her clutches must be attributed, at least in part, to the heavy and continuous strain placed upon the *Keta's* engines during her manoeuvres to free the *Irene M* from the ice. The appeal was therefore allowed and the award raised to \$12,000.

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APPEAL in a salvage action by the owners, master and crew and the charterers of the salving ship from the decision of the Honourable Mr. Justice A. I. Smith, District Judge in Admiralty for the Quebec Admiralty District.

The appeal was heard by the Honourable Mr. Justice Dumoulin at Quebec.

*Léopold Langlois* for appellant.

*J. P. A. Gravel, Q.C.* for respondent.

DUMOULIN J. now (May 6, 1959) delivered the following judgment:

This is an appeal from a judgment, rendered June 5, 1958, by the Quebec District Judge in Admiralty, the Honourable Mr. Justice Arthur I. Smith.

The owners, master and crew of Motor Vessel *Keta*, and nominally at least, her charterers, the Iron Ore Company of Canada Ltd., instituted an action for salvage in an amount of \$31,150 against the ship *Irene M*, her cargo and freight.

The learned trial judge allowed this claim, on a salvage basis, to the extent of \$6,000. From this decision, plaintiffs asserted an appeal for the whole reward prayed for.

I conceive of the case and its ensuing problems as raising mainly factual questions which, if accurately solved, would leave but little room for any serious dissent as to the applicable law. I must therefore relate those facts at some length.

Salvor ship *Keta* is a steel screw motor vessel of 456 gross registered tonnage and 368.22 net registered tonnage; measuring 153 feet in length and 27.6 in breadth, equipped with a Diesel engine of 530 h.p. and having a cruising speed of 9 knots per hour. She usually carried a crew of eight.

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S.S. *Irene M*, the allegedly salvaged vessel, is a steamer of 804 net tons register and at all material times, i.e. December 25, 26 and 27, 1956, was freighted with approximately 466 tons of heavy mining machinery, partially stowed on deck, and general cargo. On December 13, she weighed anchor in Montreal Harbour bound for Tilt Cove, Newfoundland.

On December 17, the *Irene M* reached Lauzon, a few miles below Quebec, where a persistent run of unfortunate incidents began. Her master and several of the ship's hands deserted; engine trouble broke out, bunkers were allowed to remain depleted due to a shortage of funds, so that she resumed her course down-river at 0630 hours, December 23, in precarious conditions, poorly manned by a makeshift, insufficient crew.

A reference to exhibits P-6 (Survey Report of the London Salvage Association) and particularly P-6A, a Survey Report emanating from Messrs. Hayes, Stuart & Co. Ltd., Montreal Marine Surveyors, dated December 31, 1956, bears out these deficiencies. The above experts, at page 4, para. 5, write:

5. Vessel grossly undermanned—crew on board:—4 in engine room, 3 on deck, Master and two Mates, Stewart and Mess boy, a total of 12 men instead of a minimum of at least 17 and a maximum of 21 crew members.

Doubly hampered by a lack of hands and of motor fuel, the *Irene M* was in a sorry condition indeed to weather the severe buffetings of oncoming winter.

With the assistance of an ice-breaker, the *Irene M* reached the neighbourhood of Cape Salmon, east of Rimouski, dropped her pilot, and proceeded on her own power. This attempt, however, was short-lived; by December 24, at 1420 hours, she encountered ice packs of considerable size, that brought her to a standstill. A temporary let-up facilitated additional headway until the vessel again meeting with ice, early on Christmas morning at 0220 hours, became jammed and developed a bad list of 25 to 30 degrees.

In the afternoon of December 24, her master radioed the first of five messages:

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TO SEALAKES SHIPPING CORPORATION, MONTREAL.  
JAM IN ICE. UNABLE TO PROCEED FURTHER WITHOUT ASSISTANCE. LONG. 68-29 W; LAT. 48-40 N. MASTER—IRENE M.

In the forenoon of the 25th, four other calls for help issued, of which the last amounted to an urgent distress request worded thus:

SITUATION MORE SERIOUS. SHIP LEAKING AND LISTING. NOW IMPOSSIBLE TO PROCEED THROUGH ICE WITHOUT AID OF ICE-BREAKER. KETA STANDING BY ALONGSIDE TO TAKE OFF CREW IF NECESSARY. MASTER—IRENE M.

At midday, December 25, the *Keta* was moored alongside Rimouski wharf, while her owner, Captain Borromée Verreault, was spending the Christmas holiday at his home in Méchins, some 60 miles further down, where these rescue signals were relayed to him. Verreault communicated directly with the *Irene M*, boarded his ship at 1615 hours, December 25, setting out immediately for the disabled vessel which was reached at 1720 hours. The entry in the *Keta's* log book (ex. P-9), as she stood by reads:

Stand-by. Leaving Rimouski to assist Irene M in distress outside of Ste-Luce. 4 miles.

Though not built for ice breaking purposes, the *Keta* managed to ply through a sheet of ice, 4½ inches thick, opened up a furrow of clear water, gradually relieving the *Irene M* from the possibility of drifting against the Ste-Luce shoals. On this point, I would again quote from exhibit P-9, the *Keta's* log book, December 26, at 0115 hours:

Commençons à transporter et installer une pompe à gasoline sur le Irene M. avec l'équipage du Keta. Commençons à travailler encore et avancer vers le nord; le vent est 15 m. nord et nous drivons à terre très vite. Nous ne sommes qu'à un mille trois quarts de terre mais progressons lentement pour élargir. Irene M. est toujours à court de steam et prend plus de liste.

Two hours later, at 0305:

Travaillons toujours pour s'éloigner de terre, mais le Irene M. manque souvent de steam et prend plus de bande. Devons retourner souvent pour déprendre le Irene M.

The Montreal Marine Surveyors' Report, previously mentioned, at page 4, states that the *Irene M* ". . . had listed due to approximately 150 tons of slack water in

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double bottom tanks and . . . had encountered difficulty in ice due to failing boiler pressure and resulting in vessel's speed being as low as  $2\frac{1}{2}$  knots per hour; the steam pressure could not be maintained due to vessel being grossly undermanned."

I am satisfied the weight of evidence shows that the *Keta's* repeated efforts resulted initially in safeguarding the *Irene M* against a likely contingency of being driven ashore. At 2032, on December 26, when the Government ice-breaker *N. B. MacLean* arrived, in response to emergency calls, both other vessels lay seven miles off-shore well beyond that danger zone.

Such is also the finding of the learned trial judge who, at page 3 of his written opinion says: ". . . the *Keta* remained with the *Irene M* from the time she arrived alongside at 1720 hours on December 25th until 1245 hours on December the 26th, when she left for Father Point due to the illness of her captain, and I am satisfied that, at least during a substantial portion of this time, the *Keta* did her utmost to free the *Irene M* from the ice. *In fact, the proof is that during this period the Irene M was able, due to the efforts of the Keta, to progress some four miles in a North-Easterly direction.*"

During the *Keta's* emergency stop at Father Point wharf, December 26, the *Irene M* flashed this urgent request:

IRENE M IN DANGER. TAKING HEAVY LIST, CALLING FOR KETA RIGHT AWAY. SAYS MAKING WATER IN ENGINE ROOM IN EVERYWHERE. KETA AT THIS WHARF NOW TAKING FUEL.

The salvor ship complied and by 2030 hours, again cruised alongside the disabled *Irene M*, both vessels resuming their route towards Rimouski with the added assistance of the *N. B. MacLean*.

Quoting anew from the decision below: "At 2150 hours, the (three) vessels were abeam of Rimouski, but the draft of the *N. B. MacLean* prevented her from entering the harbour, so that the *Irene M* remained outside the harbour's entrance, with the *MacLean* standing by, until the following morning. The *Keta*, however, proceeded to Father Point where she spent the night, returning to Rimouski at about 0700 hours on December the 27th to

break the ice in the harbour and assist the *Irene M* to enter and tie up at the wharf which was eventually accomplished at 1048.”

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Opening an access to the shelter of Rimouski, an all important task which required more than four hours, extended another needed assistance to respondents' ship, and strongly enhances the effectiveness of the *Keta's* endeavours two days previous. Captain B. Verreault testified the ice surrounding Rimouski Harbour, December 27, was “. . . very hard, maybe 18 inches thick.” Since his ship succeeded in making headway through it she surely achieved some helpful result on the 25th and 26th while contending against floes no thicker than four or five inches. As for the time devoted to these combined salvage operations, it amounted to exactly thirty-nine and one half hours (39½).

Such are the facts, which led the trial judge to find that:

- (a) . . . the *Irene M* was in a position of some danger at the time of, prior to and subsequent to the arrival alongside of the *Keta*.
- (b) *There was some evidence as to the alleged danger that the Irene M might be carried ashore in her helpless condition by the wind and shifting ice.* While this development in the circumstances would appear to have been unlikely unless there had been a considerable change in the force and direction of the wind, it was nevertheless a remote possibility.
- (c) . . . moreover . . . the *Keta* rendered services of a beneficial nature. Arriving alongside the crippled vessel at 1720 hours, on December 25th, the *Keta* remained with the *Irene M* continuously until she left to go to Father Point on the following day at 1245 hours. During that time the *Keta*, by breaking the ice around and ahead of the *Irene M* made it possible for the latter to progress under her own power for a distance of approximately four miles in a North-Easterly direction and away from ashore.
- (d) That . . . the *Keta* transferred a pump to the *Irene M* and assisted her in getting it into operation and when she was not actually attempting to break ice around the crippled vessel, she stood by ready to render all possible assistance and take off the crew should it become necessary to do so, as indeed it might have done.

And, lastly:

- (e) However the following day, December the 27th, the *Keta* returned to the *Irene M* and spent about four hours breaking the ice in Rimouski harbour, so that the *Irene M* was able to dock . . .

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With this, I fully agree; the essential elements of salvaging: danger, voluntariness, success, all concur in this instant case.

A theoretical definition of salvage is one thing, but another and more complex inquisition alone can afford a practical appreciation of its worth.

Kennedy in his classical treatise on *Civil Salvage*, 4 Ed. 1958, at pages 173 and 174, classifies as follows these material circumstances “. . . which Dr. Lushington, in his judgment in *The Charlotte*, calls ‘the many and diverse ingredients of a salvage service’ . . .

A. As regards the salvaged property:

- (1) The degree of danger, if any, to human life.
- (2) The degree of danger to the property.
- (3) *The value of the property as salvaged.*

B. As regards the salvors:

\* \* \*

- (3) *The degree of danger, if any, to property employed in the salvage service and its value.*
- (4) The time occupied and work done in the performance of the salvage service.
- (5) Responsibilities incurred in the performance of the salvage service, *such, e.g., as . . . liability to . . . freighters through deviation or delay. . . .*”

\* \* \*

The conclusion, at page 174, reads:

Where all or many of these elements are found to exist, or some of them are found to exist in a high degree, a large reward is given; where few of them are found, or they are present only in a low degree, the salvage remuneration awarded is comparatively small.

Adverting once more to the decision below, we note a dual statement of facts which, apparently, suggested the measure of salvage reward granted, i.e. \$6,000.

These highly significant paragraphs are quoted in an inverted sequence with especial emphasis on the second.

- (a) There is evidence that some weeks after the services were rendered it was found necessary to replace one of the *Keta's* clutches and it was suggested that this was the result of the heavy strain placed upon the vessel's engines during her manoeuvres to free the *Irene M* from the ice. The Master

of the *Keta* admitted however that between the time at which the services were rendered to the *Irene M* and the replacement of the damaged clutch, the *Keta* had navigated in ice and I find that the proof is insufficient to justify the conclusion that the *Keta* sustained damage in the course of her efforts on behalf of the *Irene M*.

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(b) *The Master of the Keta admitted in the course of his testimony that the assistance rendered to the Irene M did not involve risk or danger to his vessel or crew.*

Actually, this appeal wholly depends upon the accuracy of the latter assertion.

With utmost deference and after lengthy consideration, I am unable to reconcile my interpretation of Borromée Verreault's evidence on this matter with that of the learned trial judge.

The salvor boat may have incurred merely a secondary risk of destruction, but, on the other hand, Verreault's testimony stresses another and likely kind of jeopardy to his vessel, a contingency which we shall see, apart from its ever present potential threat, probably materialized to some extent.

Leading up to this point is exhibit P-8, dated October 18, 1956, at Montreal, the *M/V Keta's* charterparty with Iron Ore Company of Canada, for a three-month period ". . . commencing first half December, 1956, which, as testified to, was continued until April 21, 1957, at a hire price of \$525 . . . per day commencing on and from the day of her delivery, as aforesaid, and at and after the same rate for any part of a day; hire to continue until the hour of the day of her redelivery . . . to the Owners (unless lost) at Seven Islands, P.Q."

The 1956-57 season was the second one during which the *Keta* successfully met the rigorous requirements of wintry navigation between Rimouski and the north shore port of Seven Islands. A duration of 127 days, from December 15, 1956, to April 21, 1957, at a daily rate of \$525 would, and did, assure her owner gross returns of \$66,675, with, it is reasonable to infer, quite an appreciable margin of net profits. It should be said this vessel, albeit earning her stipulated hire, was not under sailing orders but momentarily idle, when she set out to assist the *Irene M*.



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And now, a close scrutiny of Captain Verreault's examination before the Court of first instance must be resorted to.

Q. Now, Captain, when you first saw the *Irene M*, do you consider that she was in a position of danger?

A. Yes, according to the wind. The ship was stuck in the ice and she can't move at all. She can't go astern or go ahead; she can't do nothing and on account of the winds we had that night [Dec. 25 to 26], I suppose she were in a very bad position.

On page 68, second line from top:

Q. Now, Captain, what dangers did your vessel encounter during the salvage operation? Do you understand my question? Was your vessel in danger at the time?

A. Oh, well, *with the Keta alone in that ice*, she was not in very big danger unless we had stronger winds.

The *Keta*, however, was not alone in that shifting ice pack, but unceasingly exerting the utmost power to release the *Irene M* and therefore in constant proximity to her, as explained by this witness.

Q. What risk did you take when you went out to get the *Irene M* out of the ice—what risk?

A. I took the risk in breaking my ship that I could be stuck and lose my charter for the winter. If I break my ship in the ice *or come into collision with the Irene M.*, I could break the *Keta* and lose my charter because at that time of the year it is pretty near impossible to reach a place where we could get repaired because Quebec was closed.

Verreault adds that due to heavy ice in the Gulf, he would also have been precluded from bringing his ship into Halifax harbour.

He then goes on to say:

A. . . . we were ahead of the ice and we stopped and that is where there was very great danger for the *Irene M* to break our stern. We had to be very careful. We had to take the radio telephone and take care of it.

Q. You said that there was danger of the *Irene M* breaking your stern?

A. Well, we go ahead and we are stuck and the other ship is coming slowly behind and if we don't capsize and if she doesn't stop very quickly, she could break our stern; and that is where a very great danger for that.

A peril of this kind cannot be dismissed as unreal, and on the evidence it is impossible to construe it as an admission that, at no time, was the *Keta* imperilled.

We next read, on page 80:

- Q. Apart from that risk incurred, was there any other risk that you encountered? Was your ship a light ship or was she loaded? 1959  
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- A. With that ship when she is light, *there is always danger to work in the ice on account of the rudder and the propeller* because the rudder is about level with the water. Now every time we go astern, we are taking a risk to break it.

This possibility of a crushed rudder or a fouled propeller or both in the course of protracted assaults against hardening floes should not be overlooked. It did not escape Verreault's expert consideration, still he nonetheless shouldered the responsibility of jeopardizing a charterparty whose lapse might well have spelled ruination.

A few lines above I alluded to an eventuating damage sustained by the *Keta* in consequence of her unwonted labours as an improvised ice-breaker.

The transcript of evidence, at pages 27 and 28, ascribes these explanatory precisions to the salvor's chief engineer, Valère Verreault.

- Q. Lorsque vous êtes sorti de Rimouski, est-ce que le capitaine du KETA ou son propriétaire vous a donné des ordres spéciaux quant à la manoeuvre?
- R. Quand on a sorti de Rimouski, j'ai eu les ordres de faire virer le moteur à pleine révolution, tout ce qu'il y avait moyen de le faire tourner.
- Q. Est-ce que c'est plus que normal, ça?
- R. Oui, certainement que c'est plus que normal.
- Q. Est-ce que vos moteurs ont viré très longtemps?
- R. Ah oui, tout le temps qu'on a été là.
- Q. A quelle force à peu près ont-ils viré durant ce temps-là, normale ou moins que normale?
- R. Ils ont viré plus que normal . . . parce que la première fois, on tournait 1,600,—on a tourné à 1,800.
- Q. 1,800 tours?
- R. Oui.
- Q. Vous souvenez-vous, à peu près combien de temps par 24 heures vos moteurs ont tourné durant les 25, 26 et 27 décembre . . . quand vous étiez en mer?
- R. Quand on était en mer ils ont tourné continuellement.
- Q. Ca veut dire ça, 60 minutes dans l'heure?
- R. Oui.
- Q. A peu près quel était l'état de vos moteurs le 27 décembre lorsque vous êtes revenu au quai avec le *Irene M*, après que le *Irene M* a été attaché là?
- R. Le moteur, il a fallu qu'il soit "re-settlé" par rapport qu'il avait trop viré; le "reduction gear" [embrayage de réduction, to which Borromée Verreault will later on refer] avait chauffé par rapport au surplus d'ouvrage qui n'était pas normal.

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And lower down that same page 28:

- Q. . . . Alors vos moteurs ont fourni des efforts considérables?  
 R. Oui.  
 Q. Est-ce qu'ils ont été ébranlés vos moteurs?  
 R. Oui.

To this should be joined the chief engineer's assertion on pages 29 and 30, that a pathway was opened up for the *Irene M.*

A sequence to overtaking the *Keta's* engines and clutching apparatus is described in Borromée Verreault's own words at page 81 of his testimony.

- A. . . . the engines had damage into the clutch on account of working all the time back and forth. Those engines are not able to stand for a very long period like that because of the oil that is coming too hot.  
 Q. Now was there extensive damage?  
 A. We had to change the clutches [note the plural number] on the ship two (2) weeks afterwards at Baie Comeau.  
 Q. Do you think it could have been due to this working of the engines when you were off Father Point?  
 A. Part of it was due to that, but we had to work after, for ourselves, after that; but part of it is due to that heavy work we did without any stops at times.  
 Q. And how much is a clutch worth?  
 A. One complete clutch costs two thousand three hundred dollars (\$2,300.00).

It would seem the Court of first instance readily enough foresaw the wasting effects of a comparable experience a fortnight later. How then an initial and probably more severe trial could avoid wearing out, partially, the self-same machinery, two weeks before, is not apparent to my mind. No specified damages are sought on this account, yet I believe a reasonable point has been made which strengthens my determination to increase the salvage reward.

The evidence clearly points to manifold and beneficial succour extended the *Irene M.*, as she lay under some impending danger; it now remains to apply norms and criterions of civil salvage germane to this instant set of facts.

In the *Traveller* case<sup>1</sup>, Sir John Nicholl expressed the following view: "*The primary object is the danger of the property saved and its value, and the assistance actually*

<sup>1</sup>(1837) 3 Hagg 370, 371.

received; *the secondary, the risk to the salvors and their property; the skill, the time employed, and other collateral circumstances.*"

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In the *Werra*<sup>1</sup> the President, Sir James Hannen, said: "*The first thing to be considered is the value of the property saved; by that I do not mean that it is to be taken as absolutely the most important element, but that it is the subject-matter in respect of which the action arises. It is the fund which has to be dealt with . . .*"

Lindley L.J. in his speech in *The City of Chester*<sup>2</sup> said: "The first matter for consideration is the nature of the service rendered, the danger from which the one ship has been saved *and the danger to which the other ship has been exposed.*" At page 203, Mr. Justice Lindley continues thus: "Another circumstance to be considered is the importance of so remunerating salvors as to make it worth their while to succour ships in distress . . . The salving vessel is often herself exposed to imminent peril; the risk of loss or damage to her is often very great; . . ."

The Privy Council, in *The "De Bay"*<sup>3</sup>, held that an allowance given by the Court below for the loss of a profitable charterparty was right in point of principle, but that the salvors had failed to prove such a loss.

True, the *Keta's* highly "profitable" charterparty was not lost, but it undeniably ran into a very real hazard of becoming void through injury to the salving vessel's manoeuvring parts, rudder or propeller. The precedents above are at one in appraising risks to the salvors. Such chances may remain pecuniarily unspecified but they nevertheless serve as basic ingredients of the aggregate award. To a more actual peril corresponds a greater recompense.

Kennedy, *supra*, at page 205, writes that: "*Just as danger to the property used in effecting a salvage service is considered, according to its degree, in the assessment of the reward, whether damage to the property has, or has not, in fact resulted, so, also, is the hazard or responsibility which the salvor incurs in regard either to pecuniary interests affecting his own property, or to his obligations of*

<sup>1</sup> (1886) 12 P.D. 52, 53.

<sup>2</sup> (1884) 9 P.D. 182 at 202, 203.

<sup>3</sup> (1883) 8 App. Cas. 559.

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*contract or duty to other persons, although fortunately the hazard, or the responsibility, has not eventuated in an actual loss to him."*

Two unmarked affidavits of value regarding the *Irene M's* cargo and her own mercantile worth appear in the record.

The first was sworn to by Gordon Lennox Moore of Toronto, in his capacity as Treasurer of Maritimes Mining Corporation Limited, shipper ". . . of certain cargo laden on board the Steamship *Irene M*, at the time of the alleged salvage service". Paragraph 4 is as follows:

4. That in my opinion the outside value of the said cargo was \$476,228.84 of which sum \$402,610.00 represented the value of general cargo purchased by Maritimes Mining Corporation Limited and \$73,618.84 represented the value of general cargo purchased by its Agent, Foundation Maritime Limited, and no more, and that if the same were compulsorily sold at that time or at the present time, I believe that it would not realize more than the said sum of \$476,228.84.

In the second affidavit dealing with the ship's value, one W. A. Shaw, Ship-Owner and Operator, Halifax County, is the deponent. He states that:

5. In my opinion the value of the said ship at the time she was arrested in this action was about \$100,000.00, and if she were compulsorily sold at that time or at the present time, I believe she would not realize more than the said sum of \$100,000.00.

It can be properly assumed that the *Irene M*, and her freight represented an aggregate amount of \$576,228.84, when she sent the distress calls with which the salvor vessel complied.

The *Keta*, when purchased for \$8,000 (cf. Transcript, p. 91) at a sheriff's sale, lay in Halifax harbour. But, from then on, her owner's uncontradicted statement shows that she underwent extensive repairs, was equipped and provided with up-to-date navigating machines and appliances costing more than \$100,000, a breakdown of which will be found in the transcript at pages 88, 89, 90, 91, 92, 93 and 115, this latter concerning a \$10,000 reinforcement job at Vickers' Montreal Marine yards in 1955. Whatever the *Keta's* plight may have been, when bought in Halifax by Captain Verreault, it can't be gainsaid that, from 1954 on, she attained seaworthiness commensurate with the rigours, extremely severe at times, of winter navigation in the Lower St. Lawrence, and this affords a sure test.

In December, 1955, the *Keta* carried insurance coverage in a sum of \$150,000. I would be inclined to hold that her mercantile worth at least, when this issue arose, was something like \$150,000, rather than \$100,000 as considered by the learned trial judge. The over-all values at stake would therefore average \$726,000.

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Among several precedents, four Canadian decisions were cited, of which two have some points in common with the case at bar. In re: *Humphreys et al and The M/V Florence N° 2*<sup>1</sup>, the Honourable Mr. Justice Sidney Smith, District Judge in Admiralty for the British Columbia Admiralty District, held that:

3. . . . the factors which go to the making of a salvage award are the degree of the danger to the property salvaged, its value, the effect of the services rendered and whether other services were available; *the risks run by the salvors*, the length and severity of their efforts, the enterprise and skill displayed, *the value and the efficiency of the vessel they used and the risks to which they have been exposed.*

Such are the governing tenets which the present decision strove to apply throughout.

Lastly, and in the guise of a rebuttal to respondents' contention that the Government ice-breaker, *N. B. MacLean*, performed most of the necessary work, a view unsubstantiated by the evidence, I would quote the Supreme Court's finding in the matter of: *Gulf and Lake Navigation Co. Ltd. and M/V Woodford*<sup>2</sup>, more frequently called *The Birhton* case. The proposition set forth in *The Dart*<sup>3</sup> was applied:

If a salvor is employed to complete a salvage and does not, but, without any misconduct on his part, fails after he has performed a beneficial service, he is entitled also to salvage award.

The Supreme Court of Canada concluded:

If the trial judge had not considered himself bound by what he wrongly conceived to be the applicable principle he would have allowed more than the \$12,000 fixed by him.

The *Birhton* appeal was allowed and the amount increased to \$20,000.

It will be remembered, of course, that not only did the *Keta* "complete the salvage" permitting of an entry and safe mooring in Rimouski Harbour, but that she initiated

<sup>1</sup> [1948] Ex. C.R. 426, 434.

<sup>2</sup> [1955] S.C.R. 829.

<sup>3</sup> (1899) 8 Asp. M.L.C. 481 at 483.

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salvage operations on December 25, stood alongside the disabled *Irene M* to extend further assistance as circumstances might require, beneficially contributing to extricate the badly crippled vessel out of her predicament. And during the entire span of 39½ hours, the salvor laboured under a constant risk of damage which, had it accrued, would have entailed for her owners dire consequences indeed.

For the above reasons the salvage award should be raised from \$6,000 to \$12,000.

Therefore, this appeal will be allowed with costs, and in lieu of the decree below, judgment should go for the appellants in the sum of \$12,000, and costs.

*Judgment accordingly.*

Smith, D.J.A.:

This is an action for salvage by the owners, master and crew of the M/V *Keta* against the ship *Irene M*, her cargo and freight.

The alleged salvage services were rendered in the month of December 1956, in the St. Lawrence River, near St. Luce and Rimouski.

The proof is that the *Irene M*, a steamship of 804 net tons register with about 466 tons of general cargo, including heavy mining machinery, some of which was stowed on deck, left Montreal on December 13, bound for Tilt Cove, Newfoundland.

The *Irene M* proceeded to Lauzon where she arrived on December 17 and where certain engine repairs or adjustments were effected. She left Lauzon at 0630 hours on December 23, and with the assistance of an ice-breaker proceeded down-river almost as far as Cape Salmon, where her pilot and the ice-breaker left her, it being considered that the channel was sufficiently free of ice to permit the vessel to proceed without further assistance.

On December 24, however, the *Irene M* encountered considerable ice which became so heavy at about 1420 hours as to make it impossible for the vessel to proceed. Conditions appear to have later improved so that at 0008 hours on December 25, the *Irene M* was steaming full ahead. Later however (around 0220 hours) the vessel became jammed in heavy ice and developed a bad list at about 0772 hours, she then being four miles off shore from St. Luce. A radio message was sent advising that the ship was leaking and required the services of an ice-breaker. The proof shows that thereafter during the forenoon of the 25th the *Irene M* radioed various appeals for assistance amongst which were the following addressed to the Department of Transport, at Quebec; at 1317 hours "Ship leaking badly and taking heavy list, need assistance immediately" and at 1420 hours "We are stuck in ice and unable to do anything without assistance". At 1601 hours the following message

was sent to Sealakes Shipping Corporation, Montreal, as follows:—“Ship leaking badly and taking heavy list, need assistance immediately”.

It appears that the *Irene’s* requests for assistance were relayed to those in charge of the *Keta*, which at that time was tied up at Rimouski, and that the *Keta*, after conferring direct with the *Irene M*, left Rimouski at 1615 hours on December 25 and proceeded to the *Irene M* arriving alongside at 1720 hours.

The *Keta* is a steel screw motor-vessel of 456 GRT tons and 368 NRT; 153 feet in length and 27.6 feet in breadth. She is proved by Diesel engine of about 530 horsepower and carried a crew of eight; her value appears to have been approximately \$100,000.00.

The evidence is that when the *Keta* came alongside the *Irene M*, the latter had a list of from 22° to 25° and was completely surrounded by ice and unable to move. The two masters conferred after which the *Keta* proceeded to break the ice around the *Irene M*. There is some conflict in the testimony as to whether the *Keta* continued her efforts to break ice throughout the ensuing night or whether she merely stood by.

The proof shows that at one stage a line was put aboard the *Irene M* and that the *Keta* transferred a gasoline pump to the *Irene M* and assisted her in installing it and getting it into operation.

The weight of the evidence indicates moreover that the *Keta* remained with the *Irene M* from the time she arrived alongside at 1720 hours on December 25 until 1245 hours on December 26, when she left for Father Point due to the illness of her Captain, and I am satisfied that, at least during a substantial portion of this time, the *Keta* did her utmost to free

the *Irene M* from the ice. In fact, the proof is that during this period the *Irene M* was able, due to the efforts of the *Keta*, to progress of some four miles in a north-easterly direction.

At 1240 hours on December 26 (the *Keta* at that time being at Father Point) the *Irene M* sent the following message to Sealakes Shipping Corporation:—“Situation more serious, ship leaking and listing more, impossible to proceed through ice without aid of an ice-breaker. The *Keta* standing by alongside to take off crew, if necessary”.

It appears that during the absence of the *Keta* at Father Point those on board the *Irene M* became alarmed at her position as a result of an increase in her list and her crew accordingly were put to work shifting her deck cargo. Efforts were also made to launch the life-boats, but it was found impossible to do so due to the fact that everything was frozen and the following message was sent to the *Keta*, at Father Point: “*Irene M* in danger, taking heavy list, calling for *Keta* right away. Says making water in engine-room in everywhere. *Keta* at this wharf now taking fuel”.

At 2032 on December 26, the ice-breaker *N. B. MacLean* arrived alongside the *Irene M* and proceeded to break the ice around and ahead of the crippled vessel, with the result that she was able to follow the ice-breaker at slow speed with the *Keta* trailing. At 2150 hours, the vessels were abeam of Rimouski, but the draft of the *N. B. MacLean* prevented her from entering the harbour, so that the *Irene M* remained outside the harbour’s entrance, with the *MacLean* standing by, until the following morning. The *Keta* however proceeded to Father Point where she spent the night, returning to Rimouski at about 0700 hours on December 27 to break the ice in the harbour and assist the *Irene M*

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to enter and tie up at the wharf which was eventually accomplished at 1048.

It appears that, contrary to what those in charge of the *Irene M* apprehended, she was not leaking, her list being due rather to the fact that she had 150 tons of slack water in her bilges and on her tank tops.

I am convinced nevertheless that the *Irene M* was in a position of some danger at the time of, prior to and subsequent to the arrival alongside of the *Keta*. Not only was she incapable of freeing herself from the ice that surrounded her, but her heavy list, particularly having regard to the nature and quantity of her deck cargo, consisting in part of heavy machinery, justified the fears of her Master that she might capsize. Moreover, the *Irene M* was considerably undermanned and for some reason could not maintain sufficient steam to enable her to make more than a fraction of her normal speed. There was some evidence as to the alleged danger that the *Irene M* might be carried ashore in her helpless condition by the wind and shifting ice while this development in the circumstances would appear to have been unlikely unless there had been a considerable change in the force and direction of the wind, it was nevertheless a remote possibility. The conclusion therefore is that having regard to all of the circumstances the *Irene M* was in a position of some danger prior to and subsequent to the arrival alongside of the *Keta*.

I am satisfied, moreover, that the *Keta* rendered services of a beneficial nature. Arriving alongside the crippled vessel at 1720 hours on December 25, the *Keta* remained with the *Irene M* continuously until she left to go to Father Point on the following day at 1245 hours. During that time the *Keta*

by breaking the ice around and ahead of the *Irene M* made it possible for the latter to progress under her own power for a distance of approximately four miles in a north-easterly direction and away from shore. Moreover, the *Keta* transferred a pump to the *Irene M* and assisted her in getting it into operation and when she was not actually attempting to break ice around the crippled vessel she stood by ready to render all possible assistance and take off the crew should it become necessary to do so, as indeed it might have done.

It is true that on December 26, when heavier ice was encountered, the *Keta* was unable to make much, if any, progress and that from 1245 hours when she left to go to Father Point until the following morning, she rendered no assistance, the *N. B. MacLean* having taken over. However the following day, December 27, the *Keta* returned to the *Irene M* and spent about four hours breaking the ice in Rimouski Harbour, so that the *Irene M* was able to dock at Rimouski wharf at 1048.

I am of the opinion that the services rendered by the *Keta*, at the request of those in charge of the *Irene M*, were in the nature of salvage services and that the *Keta* is entitled to be rewarded on that basis.

It is always a matter of some difficulty to determine the amount which, in the particular circumstances of each case of this nature, should be awarded. It is unnecessary to set out here the various elements, which the courts have long recognized, should be considered in determining the amount to be granted in such cases. (*Kennedy—The Law of Civil Salvage*, 2nd Edit. pages 129, 130 and 133).

The Master of the *Keta* admitted in the course of his testimony that the assistance rendered to the *Irene M* did not involve risk or danger to his vessel or crew.

There is evidence that some weeks after the services were rendered it was found necessary to replace one of the *Keta's* clutches and it was suggested that this was the result of the heavy strain placed upon the vessel's engines during her manoeuvres to free the *Irene M* from the ice. The Master of the *Keta* admitted however that between the time at which the services were rendered to the *Irene M* and the replacement of the damaged clutch, the *Keta* had navigated in ice and I find that the proof is insufficient to justify the conclusion that the *Keta* sustained damage in the course of her efforts on behalf of the *Irene M*.

Of the numerous decisions which were cited I propose to mention only two which, in particular, were relied upon by counsel for the plaintiffs in support of his argument that the award should be generous having regard to the comparatively high value of the *Irene M* and her cargo. The first of these is the case of the *Woodford*<sup>1</sup>, in which the salvors were awarded the sum of \$20,000.00 plus damage to the salving vessel and expenses amounting to \$2,199.82. It is necessary to point out however that the *Woodford*, which had been dangerously holed as the result of a collision and was taking water badly, was held to have been in a position of considerable danger and that the salvage services rendered involved risk to the salving vessel and danger to her cargo. Moreover, the combined value of the *Woodford* and her cargo amounted to more than \$2,000,000.00, so that the award represented one percent of salvaged

value, plus expenses. In the case of the *Seneca*, whose value was \$20,000.00, the court awarded the sum of \$2,000.00, plus expenses for services, comprising towing and standing-by in circumstances somewhat similar to those of the present case, but extending over a period of more than 10 days. Moreover, the salving vessel in that case was specially equipped to render salvage services and it is well recognized that in such circumstances salvage is granted at a higher rate than would be the case of a vessel not so equipped.

It is well established that, although the value of the salvaged property is an element to be considered in determining the amount of salvage to be awarded, this value should not be accorded such importance as to result in the award of salvage disproportionate to the services actually rendered.

*Amerique*<sup>2</sup>

Although the quantum of remuneration to salvors is to some extent to be affected by the value of the property salvaged, it must not be raised to an amount altogether out of proportion to the services actually rendered.

No proof was made in regard to the out-of-pocket expenses incurred by the *Keta* in rendering the said services. However, after a review of the cases and careful consideration of all of the circumstances, I have reached the conclusion that the sum of \$6,000.00 constitutes a fair and just reward for the salvage services rendered, including a reasonable allowance for expenses incurred and such damages, if any, as the *Keta* may have sustained due to extraordinary strain upon her engines.

Judgment for \$6,000.00 plus interest and costs.

*Judgment accordingly.*

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<sup>1</sup>[1955] S.C.R. 829.

<sup>2</sup>1 L.R. 6 P.C. 465.