IN THE MATTER OF AN ARBITRATION

PURSUANT TO the agreement dated July 27, 2010 between the parties to submit a dispute to arbitration before JJ McIntyre:

Between:

L[redacted] T[redacted] Co. Ltd.

Claimant

and:

A[redacted] S[redacted] Ltd.

Respondent

RE: "GM V[redacted] "

Decision

I, J.J. McIntyre having been duly appointed arbitrator in the dispute existing between L[redacted] T[redacted] Co. Ltd. and A[redacted] S[redacted] Ltd. having received and heard the evidence of the parties between March 14 - 18, 21 - 25, 31 and April 1, 2011 and having received the submissions of counsel, Mr. D[redacted] Mc[redacted] QC on behalf of the Claimant, Mr. C[redacted] G[redacted] on behalf of the Respondent, both in writing and orally on April 19, 2011 after due deliberation, do hereby decide the matter as follows:

1. This Arbitration involves the consequences of a fire loss that took place on May 19, 2009. The Claimant's vessel, the "*G.M. V*[redacted]", (the "*GMV*") was undergoing repairs and upgrades by the Respondent at their premises when the fire occurred. The GMV suffered extensive damage due to the fire.

2. After a lengthy negotiation, the parties agreed, on or about July 9, 2010 in a settlement agreement which included their respective insurers, to refer to me as Arbitrator, the quantification of any loss suffered by the Claimant as a result of the loss of use of the *GMV*, until it was repaired and returned to the Claimant and the Claimant's business rebuilt to the level it was prior to the fire.

3. It was contemplated by that settlement agreement that the repairs necessary to get the *GMV* back in the hands of the Claimant would be carried out by the Respondent and would take no more than three months, i.e. by October 15, 2010.

4. At the time of the hearing, the work on the *GMV* still had not been completed and the vessel was still in the custody of the Respondent. During the course of the hearing, the Respondent, on March 16, 2011, delivered a notice to the Claimant

that the work on the GMV was complete and was now available for acceptance and delivery. The Claimant disputed the work on the GMV was in fact completed.

5. An application by the Claimant was made to me following the conclusion of the submissions to re-open the hearing in order to receive new evidence as to the Completion and Delivery dates and the state of the *GMV* following the same. After hearing submissions and considering the matter, in a decision rendered on June 10, 2011 I declined to re-open the hearing. I disabuse myself of any statements or documents of counsel regarding the nature of the new evidence sought to be considered by me.

6. There is no issue before me as to the cost of and obligation to make repairs. It is for another arbitrator to decide which repairs were occasioned and necessitated due to the fire. However my task in assessing the loss of profit due to loss of use will intrude on that jurisdiction somewhat in that I need to consider the greater issue as whether the owner of the *GMV* faced with a catastrophic loss was acting reasonably when it decided to repair the vessel rather than replace it, in order to determine what delays, if any, ought to be attributed by me to the actions of the Claimant versus those of the Respondent.

7. Broadly speaking it is the position of the Claimant that it is entitled to be compensated for the loss of profits it would have received from the use of the *GMV* from the time the original repairs to the vessel should have been completed (agreed by the parties as being June 15, 2009) to the date the *GMV* is returned to the Claimant and for a period of six months thereafter while the Claimant restores his business. According to the Claimant it was reasonable for the Claimant to elect to have the *GMV* repaired. While, those repairs have taken longer than originally anticipated, that is submitted to be the fault of the Respondent.

8. The Claimant's accountant has calculated the gross loss of income as being in the range of $920,000 to the end of February 2011. That person did not testify and his calculations were based on the Claimant's summary of lost trips. However, it has been admitted as a fact in the proceedings that the average monthly net income for the three years preceding 2009 is $25,000. Thus, depending on my finding in relation to the return date of the *GMV* to the Claimant, the loss of profits on the loss of use based on the assumption that the average monthly net income of the GMV would have been the same, is in the range of $675,000 - $750,000.

9. It is the position of the Respondent that the Claimant should have purchased a replacement tug as the value of the tug at the time of the fire was exceeded by the cost of repairs. Therefore the Claimant is only entitled to loss of profits to the time period when the Claimant ought to have purchased a replacement vessel. In the alternative, it is submitted that the Claimant failed to mitigate its damages by not chartering another vessel, in particular, the *Raider* to carry out the work that the *GMV* would have performed.

10. The Respondent has provided calculations and submissions for why the Claimant's loss of profits, if I find that the Claimant was not required to purchase a replacement tug, ought to be limited to a 3 - 5 month time period amounting to $35,000 to $55,000.

11. In stating what the broad issues are, I do not discount all of the sub-issues that have arisen including: 1) the value of the *GMV* before the fire loss; 2) whether replacement vessels suitable for the work the *GMV* did were available; 3) how the time period between the fire loss and the settlement agreement to refer this matter to arbitration ought to be dealt with; 4) the handling of stability issues relating to changes to the *GMV* necessitated by the repairs; and 5) the apportionment of time to complete the work on the *GMV* due to owner's upgrades to the *GMV* during the course of those repairs. There are in addition allegations by each side as to whether the witnesses for the other side can be believed.

12. On the Claimant's side I have heard evidence as to the apparent uniqueness of the *GMV* to do certain work. There is no doubt that Bob L[redacted], the principle owner of the Claimant and the operator of the *GMV* believed that to be so. He had an emotional attachment to his boat - he knew it and knew how to operate it in all weather conditions. Bob L[redacted] has believed and acted throughout in his dealings with the fire loss on the basis that as his boat was damaged while in the Respondent's possession, it was their responsibility to get him a replacement and/or to repair his boat.

13. On the Respondent's side, there is no emotional attachment to the *GMV*. Rather the Respondent's witnesses could not understand why the Claimant did not seek to replace the *GMV* with another utilitarian vessel in order to continue in business; why the claimant insisted that the Respondent carry out the repairs; and why the Claimant was choosing to fight about repairs and deficiencies rather than getting either the vessel or a replacement vessel in the water and back to work as soon as possible. The Respondent was happy to do the repairs on the *GMV* as long as they were going to be paid for them.

14. With all of the issues and sub-issues it is understandable that the parties have been unable to resolve their dispute and why it is that this case proceeded to an arbitration. The length of time the arbitration hearing has taken has been a surprise to all concerned. A lot of evidence was heard by me. The relevance of that evidence may best be considered in terms of the applicable law relating to the proper measure of damages in the case of a damaged or destroyed chattel.

<u>The Law</u>

15. Both parties have provided me with numerous case authorities and text summaries. The parties are not in disagreement as to the law so much as the application of the law to the case in hand. Having reviewed those case authorities including those cited by the texts, I accept the principle to be applied in assessing the measure of damages in the case of a damaged chattel is one of

restitution, restoring the Claimant, so far as money can do, to the position it would have been in, had the fire not occurred. This principle was expressed by the British Columbia Court of Appeal in the case of *Lengert v Gladstone*, [1970] B.C.J. No. 625; 11 D.L.R. (3d) 726, a case involving an appeal of an assessment made at trial of damages suffered when a vessel specially designed for the purchasers was dropped by the Defendant's crane as the completed vessel was about to be launched. The Court stated at para. 6 and 7:

> 6. What is the correct measure of damages to be awarded as compensation for a damaged chattel? I think it is well established that the principle to be applied is expressed in the phrase *restitutio in integrum*, i.e to restore the injured party, so far as money can do so, to the position he would have been in had the damage not occurred. While in many cases the award of cost of repair will accomplish this result, and special problems may arise in the case of unique or irreplaceable chattels, restitution is still the basic principle. (My underlining)
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> 7. In *Darbishire v. Warran*, [1963] 1 W.L.R. 1067, Pearson, L..J., observed that there should be an element of flexibility in determining value to the owner since "it may not be appropriate to take the exact figure of the market place" in the sense of the standard price of an average vehicle of similar make, type and age to that of a damaged motor vehicle. He proceeded to refer to "*Liesbosch" Dredger v. S.S. "Edison"* [1933] A.C. 449, and to *Admiralty Commissioners v. S.S. "Chekiang",* [1926] A.C. 637, as follows at p. 1077:
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> > In the *Liesbosch* case Lord Wright quoted Lord Sumner in *Admiralty Commissioners v. S.S. Chekiang (Owners)*: "The measure of damages ought never to be governed by mere rules of practice, nor can such rules override the principles of law on this subject." Lord Wright went on to say, "Lord Sumner also distinguishes a 'rule of thumb' from what is binding law. In these cases the dominant rule of law is the principle of restitution in integrum, and subsidiary rules can only be justified if they give effect to that rule."

16. In the *Lengert* case, the Court of Appeal referred to its earlier decision in *Dewees v. Morrow,* [1932] 2 WWR 228 (BCCA) as being a demonstration of the application of the principle. The Respondent relies on *Dewees* for the proposition that the owner of a damaged chattel (car) cannot recover more than the cost of replacement when the cost of repairs exceed the market value of the chattel (car). The *Dewees* case however involved a case in which "*it is admitted that cars equal in class and second-hand condition can be bought on the market and are constantly sold on the market at a much lower price than this car would have cost to repair."* No such admission is involved in this Arbitration.

17. In *Lengert* the ship owners elected not to repair the damaged vessel and put it out of their ability to do so by selling some time after the loss, the hulk. The appropriate measure of damages in such circumstances was determined to be the difference between the value of the vessel immediately before it fell and the value immediately after. The Court noted as well that in that case, there was *"no accompanying claim for loss of use or anything of that kind"* (para. 13).

18. The *Lenghert* and *Dewees* cases can be seen as examples of the courts tempering the loss of the Plaintiffs with what was reasonable in all of the circumstances. This was confirmed as the standard for the measurement of damages in tort by the British Columbia Court of Appeal in the case of *Nan v. Black Pine Manufacturing Ltd.* (1991) 55 BCLR (2d) 241. At para 20 and 21 the court stated.

> 20. I do not find anything ... that would require this court now to resile from the long established general principles to damages in tort actions. The first of those principles is reflected in the maxim *restitutio in integrum*, the damages will be such as will, so far as money can, put the plaintiff in the same position he would have been in had the tort not occurred. The second is that the damages awarded must be reasonable both to the plaintiff and the defendant.
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> 21. The result of the application of these principles in most cases involving the tortious loss of or damage to property, will be that replacement costs will at least be the starting point for the assessment of damages. Whether or not the damages based on such costs should be adjusted, either for pre-loss depreciation or post-reinstatement betterment will depend on what is reasonable in the circumstances. No rules can be fashioned by which it can invariably be determined when such allowances should be made. It must, in all cases, turn on the facts peculiar to the case being considered.

19. In this arbitration we are dealing with a claim for loss of use of a chattel alleged by the Claimant to have been unique and having a special value to the owner. It is necessary to consider how the law has treated the measure of damages for such chattels.

20. Both counsel have cited to me the case of *O'Grady v. Westminster Scaffolding,* [1962] 2 Lloyd's Reports 238 (Q.B.). The case involved a calculation of damages suffered by the owner of motor car. The owner named his car "Hortensia" and spent on an annual basis more on maintenance than cars of similar make, model and year were worth on the open market. After being damaged the estimate of the cost of the repairs exceeded the market value for such other cars.

21. The Claimant cites the case for the proposition that it may be reasonable for the owner of a unique chattel to spend more than the theoretical market value to repair the chattel.

22. The Respondent cites the case for the proposition that even in such cases, there is an onus on the Claimant to proceed with dispatch to effect such repairs and the owner was only entitled to a reasonable period of time for the hire of a replacement vehicle and not the actual time taken to effect the repairs.

23. Of more recent vintage is the case of *Omega Salmon Group Ltd. v. Pubnico Gemini (The)*, 2006 BCSC 59; varied on other issues 2007 BCCA 33. The case involved damage to one section of a fish pen. Each fish pen was made up of six sections. After quoting from the *Black Pine* case above, the court stated at para. 20.

> 20. ...Logically, property completely destroyed cannot be repaired and must be replaced. The tortfeasor will be liable to the plaintiff for reasonable replacement costs. When the property is damaged however, the decision to repair or replace depends on what is reasonable in the circumstances, and the tortfeasor will be liable for reasonable repair or replacement costs.

24. The evidence in the *Omega Salmon* case showed that there were no readily available replacement sections that could be obtained on the market. Sections were normally manufactured as part of a whole unit. In order to reduce the time delay for being out of business, a section of another fish pen that was under construction was obtained at some considerable cost. The Defendants conceded during the trial that it was reasonable for the Plaintiff to replace the damaged section to ensure the timely return to normal operations of the whole fish farm. Having made that concession they could not then argue they should only have to pay for the cost of repairs as opposed to the actual replacement costs.

25. In the case of chattels totally destroyed, an owner may be able to recover damages based on the value to the owner, which sum could be greater than the actual cash value and would reflect capital improvements expended by the owner. Examples of this can be found in the cases of *Rawson v. Maher* (1982), 15 Man R. (2d) 6 (MCA) and *Yakimishyn v. Manitoba Hydro* (1985) 38 Man. R. (2d) (MCA). The amounts awarded in those cases reflected the fact that the vehicle owners in those cases, similar to the plaintiff in *O'Grady* had spent and were willing to spend greater sums to maintain their vehicles to a very high standard. However, while the amounts awarded were higher than the actual cash value according to the property insurers, it was not the full amount invested over the years by the owners of the vehicles in question.

26. More recently, the Manitoba Court of Appeal again had the opportunity to consider the issue in the case of *Skyward Resources Ltd. v. Cessna Aircraft Co.,* 2007 MBCA 3. In this case a jet aircraft that had been modified for use as an air ambulance was badly damaged due to the failure of an emergency drag chute to properly deploy during an aborted take-off. The loss was found to be due to the negligence of the Defendant in the manufacture of the canister containing the emergency drag chute. The Defendants appealed on the basis that the trial judge awarded an excessive amount for loss of use of the aircraft from the date of its destruction to the time a replacement aircraft was acquired. The Plaintiff cross appealed for the failure of the trial judge to include in the award of damages the cost of certain attributes of the destroyed jet aircraft which resulted in it having a higher value to its owner than its market value.

27. In *Skyward Resources* the Plaintiff advanced a loss of use claim at trial in excess of $870,000 based on the loss of use of the destroyed jet over a 30 month time period based on the length of time it took to obtain a replacement. The delay was occasioned in part by a change in government regulations which prohibited the use of jet aircraft on small gravel-based landing strips. The Plaintiff tried without success to have the rules changed. In the end the Plaintiff purchased a

turbo-prop aircraft to replace the destroyed jet aircraft. Although somewhat slower the replacement aircraft was a suitable replacement for the work. During the interim between loss and replacement, the Plaintiff was able to deploy other aircraft in its fleet so did not in fact lose any business. However, the re-deployed aircraft were not as efficient resulting in higher costs of $30,000 a month. The Defendants objected to the 30 month time period for loss of use as being unreasonable. The trial judge awarded 18 months loss of use. On appeal the Defendants claimed the period for loss of use was still unreasonable given that on discovery, the Plaintiff advanced a claim only for six months loss of use. The Court of Appeal was not prepared to interfere with the trial judge's discretion to award more than six months loss of use.

28. On the cross-appeal, the Court of Appeal found the trial court in error on the value of the destroyed jet. The evidence showed that *Skyward Resources* had the good fortune when it purchased the jet of purchasing a jet already modified for its particular needs as a medevac plane. The cost of such modifications were found to be in the amount of US$135,046. These items had value to the Plaintiff. The evidence was that a prudent buyer at the time of the loss might reasonably have paid US$725,000 for a similar make of jet without modifications. The Court of Appeal found that the Plaintiff was entitled to the cost of modifications it would have had to pay. The Court found:

> 29. Skyward is entitled to damages which will restore it to the position it would have been in had the accident not happened - *restitutio in integrum*.
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> 31. In this case the damages to which Skyward is entitled were calculated on the basis of the value of what was lost rather than the cost of replacement. Skyward is also entitled to the reasonable cost of enlarging the cargo door and installing medevac equipment. This is the case where the circumstances support the assessment of damages on the basis of "value to the owner". This has been an accepted method of calculating damages in many cases - *Rawson v. Maher...;Yakimishyn v. Manitoba Hydro...*; *Buchanan and Buchanan v. Cook*, (1958) 11 D.L.R. (2d) 638 (S.C.A.); and *Oakville Storage and Forwarders Ltd. v. Canadian National Railway Co.,* [1987] O.J. No. 572 (H.C.J.) (Q.L.)
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> 33. The measure of damages in this case which best conforms to the concept of *restitutio in integrum* is the market value of the destroyed aircraft at the time of the accident, plus the cost that one would have to expend to modify the aircraft to suit the particular needs of Skyward. While the ordinary purchaser would not see the value in these modifications, they were of value to the owner Skyward, and it is therefore entitled to be compensated....

29. The Trial Judgment in *Skyward Resources Ltd. v. Cessna Aircraft Co.*, 2005 MBQB 158 (CanLII) is sparse on details as to the Judge's reasoning for reducing the claim for loss of use from the 30 months claimed to the equivalent of 18 months. He simply finds the latter amount to be reasonable (para. 138).

30. Thus the principles to be applied by me in this arbitration on a determination of the loss of use claim is firstly restitution - putting the Claimant in the position he would have been in had the loss not occurred; and second that amount so determined must be tempered by what is reasonable in all the circumstances. In making an assessment as to damages, I am also guided by the judgment of Lord Diplock in *Mallett v. McMonagle,* [1970] A.C. 166 at 176:

> The role of the court in making an assessment of damages which depends on its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past the court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the past, the court must make an estimate as to what the chances are of a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages it awards.

Findings of Facts - Principles

31. Not all facts in this arbitration are in dispute. Indeed as mentioned earlier two agreed statements of agreed facts have been filed. However, for those facts that are contentious, in an arbitration as in civil litigation, the standard of proof for a fact in issue is one of a balance of probabilities. Has the proponent of a fact in issue demonstrated that it is more likely than not that such fact is true?

32. It is for the Claimant to prove its damages on a balance of probabilities. Once the Claimant has proven the fact of damage (here admitted) and quantum of damage, the burden of proof moves to the Respondent to prove on a balance of probabilities, that the Claimant could have and should have mitigated his loss. See *Janiak v. Ippolito,* [1985] 1 S.C.R. 146, 16 D.L.R. (4th) 1 at para. 32.

33. In order to determine truth, it may be necessary to consider the credibility or reliability of the evidence of the witnesses. As a trier of fact, I can accept or reject any portion of a witness's evidence. I am not required to accept or reject all of a witness's evidence. Their evidence may be reliable for some matters and not reliable on others. It is up to me to decide. Those witnesses with an interest in the outcome of the proceedings may require more scrutiny than those witnesses that have no axe to grind.

34. Documents by themselves can be evidence of certain facts. Documents generated contemporaneously may also assist in determining the reliability of a witness's testimony but the absence of any documentation should not be taken as proof against the fact being true.

35. A fact may also be inferred by circumstantial evidence of other facts found to be reliable.

The Evidence

36. The evidence consists of both oral testimony, written documents, expert reports and two Agreed Statement of Facts. The written evidence consists of four volumes of documents with 199 tabs. There are not 199 documents as it was ordered by me early in the arbitration that documents which relate to or are governed by "Without Prejudice" communications relating to settlement discussions were not admissible and they were ordered removed from the document binders. In addition to the foregoing documents there were six other exhibits introduced in evidence.

37. The Claimant called as witnesses Captain Bob L[redacted], Captain Don L[redacted], Captain Donald S[redacted] (tow boat owner and operator), Patrick M[redacted] (manager of forest products division for S[redacted] International Ltd.), Tom W[redacted] (marine consultant) and Captain Donald R[redacted] (marine surveyor and consultant).

38. The Respondents called Gary H[redacted] (marine broker), Terrence H[redacted] (professional and marine engineer), Captain John D[redacted], Mark M[redacted] (marine surveyor), Stephen P[redacted] (General Service Manager for C[redacted] D[redacted] Power), Jaime G[redacted] (manager of D[redacted] S[redacted] for the Respondent), Chuck K[redacted] (Vice President of operations with Respondent), Danny F[redacted] (Assistant Manager of the S[redacted]) and Malcolm M[redacted] (President of the Respondent)

39. I will not recite the evidence of each witness in the arbitration. To parrot their evidence serves no purpose but to add length to my reasons and costs to the parties. Rather, I find that the facts following are either not in dispute or have been proven to me on the requisite standard.

Value of the G.M. V[redacted] on May 19, 2009

40. Prior to the fire a vessel condition survey was carried out on the *GMV* by K[redacted] Marine Services Ltd. That survey report, dated October 23, 2006 rated the vessel overall as being in fairly good condition. He estimated the fair market value of the vessel at that time as being $460,000 with the replacement cost at $1,850,000.

41. Captain Donald R[redacted] was in the process of carrying out a survey of the vessel, and had in fact attended the vessel earlier on the date of the fire. His opinion was that the *GMV* after completion of the repairs and modifications that were underway at the shipyard would have had a fair market value of $693,000. He actually re-attended the shipyard and met the L[redacted]s there on the night of the fire and completed his report subsequent to the fire. It was his opinion that the value on the day of the fire ought to be reduced to $653,000. His opinion, based on conversations he had with Malcolm M[redacted], was that the replacement value of the vessel was $2,225,000.

42. The *GMV* was insured for $463,000 on the date of the fire.

43. Mr. M[redacted] provided his opinion that assuming the *GMV* to be in very good condition that the vessel had a value at the time of the fire of $390,000 and a replacement cost of $1,050,000. However, he thought deductions were required for the fact that the engines and reduction gear were at the end of their useful lives.

44. Mr. H[redacted] provided his opinion that the *GMV* had a value prior to the fire of somewhere between $250,000 and $325,000. His opinion was based on no personal knowledge of the *GMV* but what the market place was willing to pay for vessels of similar age and size. His opinion was affected by the condition of the engines and the nature of the repairs being carried out on the Vessel.

45. Mr. H[redacted]`s report cautions that *"it is very unusual for two vessels to be built exactly the same, therefor each Vessel is in fact an individual piece of equipment and making comparisons becomes a judgment call supported by the knowledge of similar type vessels, with similar characteristics and the industry they are working in".*

46. Mr. H[redacted]`s knowledge of the characteristics was limited to the power trains in the vessels and not to the uses to which the tugs were put. He had no knowledge of the use to which Mr. L[redacted] put the *GMV.* His opinion is based on two assumptions, firstly that all tugs could be used for all purposes and secondly that the Claimant would be a motivated and willing seller. He acknowledged in his evidence that some tugs sell quickly and others are constantly on the market.

47. It seems obvious to me that the reasons for the speed of sale of a particular tugboat must extend beyond the condition of the vessels to their suitability for a particular use in the towing industry. I am satisfied by all the evidence I have heard from the captains that testified in this arbitration that not every vessel will behave the same in the tide, sea and weather conditions encountered or that there is an equal capacity to tow or assist other vessels in such conditions. The particular use to which a tug will be put will influence its saleability in the market place.

48. I find that I am unable to place any weight on Mr. H[redacted]`s evaluation of the *GMV*.

49. As between Mr. M[redacted]`s opinion and that of Captain R[redacted] the latter had the advantage of not only having operated the vessel when it was part of the R[redacted] Marine Ltd. fleet of tugs, but also had occasion to be assisted by her when towing log tows through Yaculta Rapids. He was also on board the vessel on a number of occasions prior to his survey of May 19, 2009 and was familiar with the level of trim and fittings with which Mr. L[redacted] had equipped his wheelhouse.

50. Mr. M[redacted] had the advantage of hindsight based on the analysis of the engines and reduction gear in the vessel post-fire as well as the latent defects discovered during the course of the repairs to the *GMV,* also post-fire.

51. However, Mr. M[redacted]`s methodology to calculate a value for the *GMV* was based on the assumption that the condition of the various components were halfway through their rebuild cycle, and lifetime components are estimated based on the likely percentage of useable life left. He applies this method regardless of whether a component is brand new. He believes his valuation will thus remain true for a longer period of time.

52. Mr. M[redacted]`s draft opinion, produced in preparation for his cross-examination, provided a valuation of the vessel $100,000 less than that set out in his report. His explanation for the variation was unconvincing.

53. I note that Mr. M[redacted] when he testified did not contest that the replacement cost for the *GMV* was as reported by Captain R[redacted]. Given that Mr. M[redacted]`s replacement cost evaluation was less than half of that amount, it does cast further doubt on the reliability of Mr. M[redacted]`s opinion evidence.

54. In all the circumstances, I am satisfied that at the time of the fire on May 19, 2009, the *GMV* was under-insured and that its true value on that date was close to the amount expressed by Captain R[redacted], i.e. $650,000.

Suitable Replacement Vessels

55. The Claimant delivered a notice to the Respondent dated May 27, 2009 that it considered the fire damage to the *GMV* to be due to the negligence of the Respondent and that the latter was thus responsible for all consequent damage including damages suffered by the Claimant for loss of use.

56. The Respondent contends that the Claimant could have and should have purchased a replacement tug after the fire as the cost of repairs were likely to exceed the market value of the *GMV.* Counsel for the Respondent confirmed their position on behalf of the Respondent in a letter dated June 24, 2009. The letter also denied liability for the fire on behalf of their client; pointed out that the Claimant had a duty to mitigate its damages and that the Claimant should bring the letter to the attention of his underwriters and/or counsel.

57. The Respondent provided on June 26, 2009 a cost estimate for the repairs necessitated by the fire of $483,500. With taxes, the cost of repairs was estimated at $541,520. The estimate for the repairs was based on the Claimant contributing their replacement re-built engines to the repairs at no cost to the Respondent. The time to complete the repairs was estimated to be three months.

58. In an email exchange between counsel for the respective underwriters of the Claimant and Respondent on July 7, 2009, counsel for the Respondent noted that the Claimant disagreed with the position that the cost of repairs would exceed the value of the tug and the Claimant believed it economical to effect repairs. Mr. G[redacted] advised that the Respondent considered any delay in purchasing a replacement tug or to proceed with repairs to be unreasonable. The Respondent was willing to proceed with repairs without any admission of

liability providing the Respondent was paid for the work. No offer to contribute to those costs was tendered.

59. The Claimant has always maintained the position that as the Respondent damaged his boat it ought to be the Respondent's responsibility to arrange a replacement while the Respondent took the position that it knew nothing about the usage of tow boats and it was the Claimant's responsibility to do so.

60. In preparation for the Arbitration, the Respondent served expert reports both dated February 14, 2011 from Captain D[redacted] and Mr. H[redacted] as to tug boats available for sale or lease subsequent to the fire. Both of these witnesses provided orally and in writing their opinions as to the suitability of other tugs to do the work that the *GMV* was used for by the claimant, *i.e*. general towing and the towing of barges.

61. The Claimant responded with its own expert report from Captain R[redacted]. His opinion was that only a few of the vessels listed as for sale or lease, the *West Venture,* the *Tugger,* the *Seymour Crown* and the *Promoter,* were capable of doing the work the *GMV* was used for. The *GMV* was principally used by the Claimant to tow the large 500 series S[redacted] barges with a typical loaded weight of 3000 tons. It was also used as an assist tug for transits of tugs and tows through the navigationally tricky waters of Yuculta Rapids, Seymour Rapids and Discovery Passage. The *GMV* was known to be a "one of" design and to have an unusually deep draft and to be beamy for its length which made it particularly suited to withstand the wind, weather and sea conditions encountered during such tows.

62. Mr. M[redacted] confirmed in his own evidence that the *GMV* was an unusually deep boat, and that it was deeper than a standard west coast tug.

63. Captain R[redacted] was supported in his evidence as to the ability of the *GMV* to operate in adverse sea and weather conditions by Captain S[redacted]. He testified that there were many occasions that his tugs were forced to stay tied up at the dock while the *GMV* went out in bad weather. Further he testified that the *GMV* was a tug he would like to own.

64. One of the areas of dispute among the experts was the suitability of Vito hull design boats to do the same work as the *GMV*. The Vito Steel Boat and Barge Construction Ltd. company built a popular design of tug for the towing industry in the 1970's and perhaps later. These tugs were cheaper to build than the *GMV* and had a shallower draft.

65. Captain D[redacted] considered a shallow draft to be of some advantage in towing large barges. He was not supported in his evidence by those with actual experience in such tows, Captains Don L[redacted], Captain R[redacted] and Captain S[redacted]. Their experience satisfies me that while Vito type design boats might be able to handle such tows in the Fraser River and shallow inlets, even that use was not a sure thing. There have been a number of Vito design boats that have

rolled over pulling barges, including in the Fraser River. At least one of these resulted in tragic consequences.

66. While Captain D[redacted] is qualified to operate tug boats up to 500 tons, his experience has been limited to operating approximately 17 - 18 tugs, primarily wooden tugs to tow barges and fish pens used in the aquaculture industry. A lot of the boats he identified in his report as capable of doing the same work as the *GMV* were identified as being temporary solutions. It was his evidence in response to the suggestion that no reasonable tug owner would buy a boat on a temporary basis that, to keep the work a tug owner would have to do whatever was necessary to keep that business.

67. The vessels identified by Captain D[redacted] as temporary solutions would require the expenditure of money and time to bring those vessels up to a condition to do the work such as the addition of a winch or movement of the winch to a more forward position.

68. Another area of dispute among the experts concerns the suitability of the *Inlet Challenger* as a substitute tug. Captain D[redacted], Mssrs. H[redacted] and M[redacted] all identified this vessel owned by General Towing Ltd. of Campbell River as a suitable replacement. Mr. M[redacted] had the advantage of surveying the vessel on behalf of the owner. Transport Canada required the addition of sponsons to the hull due to stability concerns with the vessel. The method chosen to do this resulted in the addition of sponsons that were cut back and not faired into the existing hull. Captain R[redacted] described them as the crudest that he had ever seen. It was his belief that the sponsons were added in such a way that they would hang up on loaded barges and other low floating objects that she might come along side. He further thought that the vessel would be likely to pound violently in a head sea condition.

69. Transport Canada required the *Inlet Challenger* to meet Stab 3 guidelines. In his evidence Mr. M[redacted] indicated that the method chosen by the owner of the tug to deal with Transport Canada's stability concerns was a technical solution to the problem. As the owner tended to tow his own barges with a high freeboard, the concerns expressed by Captain R[redacted] were not considered by Mr. M[redacted] to be a problem for the owner. Further, to have extended the sponsons forward might have increased the pounding effect on the hull.

70. There are two aspects to the determination of whether or not a vessel is a suitable replacement vessel for the *GMV.* The first is the capacity to do the work that the *GMV* does. The second is the efficiency in doing the job. A vessel that costs twice as much to operate to do the same job is not in my opinion a suitable replacement.

71. Patrick M[redacted] of S[redacted] was a completely independent witness. He manages over 100 chip barges. He made it abundantly clear that he and the company he works for are very particular about who and what vessel will be towing their barges. They do not let just any operator with a tug boat transport them. In

order to service his customers, he needs to be able to rely on contractors such as the Claimant to deliver barges as and when needed to where they are needed. They have over the years developed a trust with the Claimant that he and his vessel can not only competently handle and be trusted with their floating assets but also to deliver those in a timely manner to S[redacted]'s customers.

72. The importance of being able to handle tows in all conditions is demonstrated by what happened with the *Inlet Rover.* This tug was used by its owner to tow Lafarge barges of cement and gravel which I understand can weigh up to 4000 tons loaded. The *Inlet Rover* lost control of its tow in late 2008 off of Victoria resulting in the beaching of the barge *Warrior*. While it may not have been the tug's fault that the beaching occurred, it was never used again by Lafarge. The *Inlet Rover* was put up for sale with Mr. H[redacted] in September 2010. Apparently, one loss of control of a tow was too many for the owner.

73. As mentioned previously in these reasons, Captain R[redacted] has had the advantage of having operated the *GMV* and having been assisted by her as an assist tug through the waters above mentioned. Captain R[redacted] is a qualified master mariner able to operate steamships under 350 tons gross tonnage and tugboats of any size. He has had 37 years experience as a master of tugs in British Columbia and has operated over 100 tugs.

74. One does not need to be an expert in tugboats to say that the *Inlet Challenger* and the *GMV* were not comparable in appearance. The photographs of the two vessels out of the water shows the *GMV* to have a much deeper hull. As to performance that is the province of the experts. I have already found that not all tugboats will behave the same in the tide, sea and weather conditions that can be expected on the west coast. I prefer the evidence of Captain R[redacted] to that of Captain D[redacted], Mr. M[redacted] and Mr. H[redacted] as to those vessels that had the capacity to do the same job as the *GMV* including his opinion as to the lack of capacity of the *Inlet Challenger* in particular.

75. As far as the four vessels identified by Captain R[redacted] as having the capacity to do the same job as the *GMV* are concerned, the *Promoter* was for sale for $1,250,000 in June 2009. The *Seymour Crown* appears not to have been for sale but may have been available for charter at a cost of at least $20,000 per month. The *West Venture* could have been bought by the Claimant at a cost of $1,000,000 or leased at a cost of $20,000 per month. The *Tugger I* could have been bought by the Claimant at a cost of $450,000.

76. The Claimant thought the price being sought for the *Tugger I* by its owners was way out of line. He did not want to pay even $200,000. He estimated that it would cost him at least $100,000 in modifications in order to bring the vessel up to a standard that it could be used for the work of the *GMV*.

77. The Claimant at no time contacted a ship's broker in order to assist him in a search for replacement vessels.

78. The Claimant became aware of the availability for purchase of the *West Venture* and the *Tugger I* by phoning their owners. They were not listed for sale. One of the tug owners the Claimant made inquiries of was Ron G[redacted], of G[redacted] Marine Services Ltd., the owner of the *R[redacted] II.* This vessel has similar characteristics as the *GMV* and the Claimant knew it could do the work of the *GMV*. The Claimant offered to buy that vessel for $750,000. However, according to Bob L[redacted], Mr. G[redacted] had no interest in selling it, as it was his best money-maker.

79. As for the other vessels on Mr. H[redacted]'s list indicated as available for purchase by the Claimant, I am satisfied that these vessels were either not capable of doing the same work as the *GMV* or if they were capable of being modified, they would have required the expenditure of an uncertain amount of money and time to render them suitable for some purposes.

80. Counsel for the Respondent has submitted that the availability of money to acquire a replacement vessel was not an issue for the Claimant. No evidence was adduced in the arbitration to support that position. Indeed, the evidence is contrary as Bob L[redacted] testified that the cost of acquiring a replacement was indeed a concern. He was not prepared to go in debt at his age to acquire a replacement vessel. He stated that as it was, he had to keep going to the bank to increase his line of credit.

81. The only evidence as to the Claimant's capacity to purchase a replacement vessel that has been adduced in this arbitration is that the Claimant's offer to purchase the *R[redacted] II* is inconsistent with his other statements about not wanting to go into debt in order to acquire a replacement vessel. Thus, it appears that he was willing to go into debt if it was for the right vessel.

82. I note that the admitted evidence before me is that the *GMV* provided net earnings of $300,000 per year to the Claimant. However, it would be entirely speculative for me to infer that the Claimant therefor must have had the resources to fund the purchase of a replacement vessel without going to the bank for funding.

83. As for the decision to repair, Mr. M[redacted] himself recognized that while it was a substantial fire, the *GMV* was not destroyed. It still looked like a tug. He asked Jaime G[redacted] to prepare the estimate to repair on the basis that the vessel was not a constructive total loss.

84. Since the Respondent was not offering to contribute in anyway to the financing of a replacement vessel or repairs the Claimant was left with the option of either repairing the *GMV* or taking his own insurance money available from the *GMV* and then going to the bank to seek additional funds to purchase and modify a replacement vessel with such modifications unlikely to provide him a vessel with the same abilities as the *GMV.* Given its actual value and its particular use to the Claimant, in all the circumstances, I find that it was reasonable for the Claimant to have strived towards having the *GMV* repaired.

85. Ultimately the Respondents and their underwriters agreed with the choice to repair as they reached the settlement agreement on July 9, 2010 which allowed those repairs to proceed. That agreement included the provision submitting this issue as to the amount of the Claimant's pecuniary losses to me. While the settlement agreement expressly contained a recognition by the Claimant that other than the admission that the fire was caused by the negligence of the Respondent, nothing else in the agreement was to be taken as an admission of liability for loss of use damages, their quantum or duration, there is something unsettling about the Respondent now contending that the choice of the Claimant to repair the vessel was unreasonable.

Delays in Commencing Repairs

86. The first delay was occasioned by the disagreement of the parties and their respective underwriters to agree on the decision to repair the vessel. It took over a year to negotiate the settlement agreement. During the course of those discussions the parties had to determine whether the engines and reduction gear that were in the vessel at the time of the fire could be re-used or replaced.

Engines and Reduction Gear

87. The estimate as to the cost to repair the vessel made by the Respondent in June 2009 was on the basis that the Claimant would contribute its rebuilt engines that they had in reserve to the cause. The Claimant was unwilling to do so without compensation for them.

88. Mr. M[redacted] was aware from his discussions with the brothers L[redacted] prior to the fire that rebuilt engines were available and would be swapped out when it became necessary to rebuild the engines then in the *GMV.*

90. On the parties reaching an impasse as to the extent of the damage to the engines and gear, they were sent for examination to C[redacted] D[redacted] Power Ltd. in July 2009. Mr. P[redacted], the Service Manager from C[redacted] D[redacted] produced a report on August 12, 2009 relating to his opinion on the service life of the engines and reduction gear. It was his opinion that the engines were near the end of their service life and in need of a complete overhaul. While it was possible to replace the melted jewellery from those engines, given their vintage, it was not considered economical. Of greater consequence to the Claimant was his opinion that the Falk reduction gear was too damaged and the components could not be re-used. Any attempt to rebuild the gear would not be considered as warrantable work by Cullen Diesel. The damage to the reduction gear pre-existed the fire and was not caused by the fire.

91. As no replacements for the reduction gear were available, the Claimant was left in the position that it would be necessary to re-power the *GMV* with either the rebuilt engines, replacement used engines or new engines. I am uncertain from the evidence that I heard whether the rebuilt engines were of any use. In any event, the Claimant decided that it wished to proceed with a repair which would

include the installation of new engines and the necessary ancillary reduction gear and tailshaft assembly that would go with them.

92. The Claimant and its witnesses dispute the honesty of the opinion of Mr. P[redacted]. He was subject to rigorous cross-examination. His draft reports were produced in preparation for his cross-examination in this arbitration. His draft reports started with the opinion that the remaining service life of the Falk reduction gear was 30%. That opinion is removed from a subsequent draft and final report. The contention on the part of the Claimant is that the removal of this estimate must have been at the behest of Mr. K[redacted] of the Respondent. The inference is that the latter had requested this change in order for the Respondent to minimize its liability by being able to claim that the power plant in the *GMV* was at an end and needed to be changed in any event of the fire.

93. The Respondent's contact with C[redacted] D[redacted] was with Mr. B[redacted]. Mr. B[redacted] is a customer representative. He did not testify. At the time they were generated, the draft reports on the engines and reduction gear were provided to Mr. K[redacted] of the Respondent by Mr. B[redacted]. Those draft conclusions were discussed between them and Mr. B[redacted]t then relayed the comments to Mr. P[redacted].

94. None of the draft reports were shared with the Claimant when they were prepared although it was the Claimant's engines and reduction gear that were being analyzed. Mr. K[redacted] was also subject to a rigorous cross-examination as to whether he sought to and did influence Mr. P[redacted] (through Mr. B[redacted]) in the writing of his report. He denied all such influence. I believed him.

95. I can understand the Claimant not having been privy to the draft reports of C[redacted] D[redacted] being suspicious of collusion on the part of the latter with the Respondent. However, at the end of the day I was satisfied that the opinions expressed in his report were indeed those of Mr. P[redacted] and that he honestly concluded as more facts became known to him through the further examination of the engines and reduction gear that the latter was indeed at the end of its useful life.

96. The engines and reduction gear were working when the *GMV* came to the Respondent for scheduled repairs. They could have continued to work for one hour or 1600 hours or longer after those repairs and modifications were completed. A swap out of engines at some time in the future was discussed among the L[redacted]s and Mr. M[redacted] before the vessel was brought to the Respondent for repairs. It would be speculation for me to say at this stage that the engines and gear would have been examined and condemned as not reparable had the fire not occurred.

97. Given that the engines and reduction gear were headed for an inevitable replacement in the *GMV* at some stage in the near future the costs associated with their replacement are not due to the fire and the wrongful acts of the Respondent.

Stability Concerns

98. The parties were on the cusp of reaching a settlement agreement in early March, 2010 when a major issue arose relating to the inherent stability of the *GMV.* The issue came about when the Respondent in preparation for reaching the agreement to repair, did an inclining test on the *GMV* in its then state (winch, engines, reduction gear and wheelhouse components removed). The results of that test raised alarm bells that the vessel did not and would not meet the stability requirements of Transport Canada for tugs.

99. Very quickly, it was agreed by Mr. W[redacted] on behalf of the Claimant and Mr. M[redacted] on behalf of the Respondent to contact T[redacted] H[redacted] to confirm the inclining test results. Mr. H[redacted] was retained by the Respondent to conduct a simplified inclining experiment to estimate the vessel's lightship weight and centre of gravity prior to the fire. He confirmed the vessel to be very tender during the course of his experiment. His experiment determined that there was indeed an issue as to whether the *GMV* met with Transport Canada stability requirements for tugboats. Assuming those requirements to be applicable, the *GMV* in its current configuration did not comply.

100. As a result of Mr. H[redacted]'s findings, a halt was called to the conclusion of the settlement agreement pending a resolution of the stability concerns. Within a relatively short period of time, one - three weeks, a solution was reached on changes that could be made to the *GMV* in order to make sure it approximated Transport Canada requirements. Those changes included adding a 7 long ton steel bar under the keel to lower the centre of gravity and reducing the tankage capacity for fuel oil and fresh water in order to offset the increased weight. A further requirement was a change in operating procedure while the vessel was underway to make sure the engine room access hatch and wheelhouse doors were kept closed.

101. Despite an agreement being reached relatively quickly as to changes needed to bring the *GMV* into compliance with Transport Canada stability requirements, the parties were unable to conclude a settlement for another four months. The settlement agreement provided for a cost sharing to meet the stability requirements of Transport Canada on the basis that 40% of the cost would be borne by the Claimant and 60% by the Respondent. I am not bound by that agreement when it comes to a determination of delays in the loss of use.

102. Bob L[redacted] with over 20 years experience in handling the *GMV* was absolutely convinced of the inherent stability of his vessel. He suspected that the issue raised by the Respondent as to the stability of his vessel was another delaying tactic by them. He had never heard of a tug of the size and age of the *GMV* being required to meet the Stab 3 criteria. He had never heard of a shipyard requiring an inclining test to be performed prior to undertaking the repairs. He questioned whether the issue was genuine as the subject had not been raised when he initially brought his vessel in for repairs prior to the fire.

103. Vessel stability is a fundamental component of seaworthiness. Transport Canada defines vessel stability as the measure of its ability to withstand high winds, waves and other forces resulting from its operations (lifting, trawling, towing, etc) and resist capsizing by returning to an upright position after being heeled over. Vessel owners are recommended to assess their vessel's stability periodically and to have all significant modifications verified by a naval architect to determine their effect on the stability of the vessel. Owners are warned to be particularly careful with any modifications that might have an impact on the weight of the vessel or the watertight integrity of the hull and superstructure.

104. The applicable Transport Canada standard for ships converted to towing is known as Stab 3. These were interim standards introduced in 1975. The interim standard did not apply to existing ships unless Transport Canada requested a stability test or there were significant modifications being made to a vessel. As noted previously in these reasons, according to Mr. M[redacted] Transport Canada did require changes to the *Inlet Challenger* which resulted in the decision by its owner to add the much maligned sponsons to that vessel in order to comply with Stab 3.

105. The intention of the Respondent to carry out an inclining experiment was set out in the draft work orders provided to the Claimant in early March 2010. The latter never bothered to respond to either this draft work order or any of the other draft work orders prepared from time to time by the Respondent nor did the Claimant provide any input on the work proposed.

106. Mr. M[redacted] on behalf of the Respondent raises the point that it would be foolish for the shipyard to undertake repairs of a vessel in the face of knowledge that such repairs did not address known stability concerns. While there might be no liability of the shipyard to the owner in such circumstances where the owner elected to carry out repairs without addressing the stability concerns, the same could not be said of the widows and family of anyone on board the vessel who perished as a result of that vessel flooding.

107. It might very well be true that when the *GMV* arrived at the shipyard in early 2009 for repairs and modifications it neither met nor was it required to meet Stab 3 criteria for vessels despite prior changes in the engines and horsepower of the vessel. However when the decision was made to change the engines and ancillary gear, it was both prudent and in my view necessary that an inclining experiment be undertaken at that time to determine the effect of those changes on the vessel. The existing condition of the vessel prior to the fire had to be determined.

108. The results of the inclining experiments conducted on the *GMV* led to the discovery of a stability problem that existed in the vessel regardless of the fire loss.

Negotiation of Settlement Agreement

109. From the time the *GMV* ought to have been returned to the Claimant agreed as being June 15, 2009 to the date of the settlement agreement relating to the repairs, July 9, 2010, 55 weeks (approximately 13 months) elapsed.

110. The Respondent submits that the delay in reaching the settlement agreement ought not to be counted against them. The suggestion is that upon counsel delivering the notice of June 24, 2009 that the Claimant was then obligated within a few days of that letter to proceed with repairs. That letter did not admit liability. Nor did the subsequent email exchange of July 7, 2009. The latter was the first notice which cautioned the Claimant to proceed with repairs expeditiously. The position taken on behalf of the Respondent before was that as the cost of repairs would exceed the pre-fire value of the vessel that a replacement tug ought to have been obtained at the Claimant's own cost. No offer of financial assistance for either step was ever made although they were requested by Bob L[redacted].

111. In support of its position, the Respondent relies on the case of *Russell v. M.F. Esson & Sons Ltd.* (1986) 183 A.P.R. 55 (NBQB). The plaintiff in that case had his truck damaged by the Defendant's forklift. The Defendant admitted the damage and hired an appraiser that determined the damage could be repaired at a cost of $3500 and would take three weeks. The Plaintiff was unhappy with that estimate and proceeded to advance a claim against his own insurers. As a result of that claim a further evaluation was done on behalf of the Plaintiff's insurers some 9 months later which produced an opinion that the cost of repairs was in the range of $5200 and would take four weeks. The Court accepted the latter estimate of damage and granted a loss of use claim for the time it took to complete the actual repairs - 6 weeks, as being reasonable.

112. It should be noted that the Plaintiff in the *Russell* case continued to operate his truck in a damaged condition until the repairs were undertaken. There was thus no loss of use for the time period between the two estimates or subsequently until repairs were commenced. After the repairs were completed, he refused to accept the truck back as he was unhappy with the repairs and did not operate it. The loss of use claim post repairs was denied.

113. Counsel for the Respondent cites the *Russell* case for the proposition that there was a failure to mitigate on the part of the Plaintiff. The delay between the two estimates of the extent of damage in the circumstances of the case was not relevant to any issue of a failure to mitigate as there was no suggestion of damages having been exacerbated by that delay. The case does refer to a failure to mitigate but that was solely in relation to the failure of the Plaintiff to accept his vehicle back and operate it after the repairs had been completed. I do not find the *Russell* case to be of any assistance to the Respondent.

114. The other cases cited by counsel for the Respondent, *MacKenzie v. Doucet,* (1974) 11 N.S.R. (2d) 716 (NSSC), *Blair's Plumbing & Heating Ltd. v. McGraw,*

(1981) 88 A.P.R. 501 (NBQB), *Armstrong Cartage Co. v. Peel*, (1913) 10 D.L.R. 169, (O.S.C.), *Underwood v. Fonstad*, [1997] CarswellSask 285 (S.Q.B.), *Vardy v. Baird* (1957) 40 M.P.R. 1 (Nfld.S.C.) and *Carter v. Elm Mercury Sales (1976) Ltd.,* (1990) 257 A.P.R. 130 (Nfld.S.C.) are all specific examples, mostly involving damages to motor vehicles, in which the courts involved determined what was a reasonable time in the circumstances of each case to allow for loss of use. I do not find the cases in question to be generally useful as each of them are fact specific. While the amount of damages suffered to the chattels in question in those cases appears pale in comparison to the amount of the anticipated cost of the repairs in this case, given the value of currency in the time periods when those cases were tried, it may not be safe to assume that the amounts awarded were not significant for their time period.

115. In the *Armstrong Cartage Co.* case the only loss of use allowed by the court in that case was 33 days (of 82 days claimed), which the evidence shows was likely comprised of 19 days from injury to the estimate of cost of repairs plus two weeks to effect the repairs. The decision makes reference to one of the delays in effecting repairs to the plaintiff's damaged truck, which added to the loss of use claim, as being due to negotiations for settlement between the plaintiff and the insurer of the truck which resulted in no benefit either to the plaintiff or the defendant. In this arbitration we are not concerned with negotiations between the Claimant and the insurer of the *GMV* but among not only those parties, also the Respondent and its liability insurer as well. There was indeed a benefit to the Claimant at the end of the day in concluding the settlement agreement of July 9, 2010. There was also a benefit to the Respondent as it was determined who was going to pay it for necessary work to the Vessel.

116. What is reasonable period of time for a claimant to either commence repairs or replace a damaged chattel is not dependent on a claimant being placed on a notice that it has a duty to mitigate by pressing on with repairs or replacement of the chattel. The financial capacity of a claimant to press on with necessary repairs, if the choice is made to repair, or replacement, if the choice is made to replace, must be affected by the anticipated costs of either step and where the money is going to come from to fund the repairs or replacement. What is a reasonable action for a claimant is dependent on the facts of each case, including whether the claimant has the financial resources to work around or accommodate for the loss of the chattel.

117. In this arbitration we are dealing with anticipated costs of repair of half a million dollars. Until the settlement agreement was executed, the Respondent denied liability. The denial of liability, while it had no air of reality as the Respondent was always going to be found liable to the Claimant for the fire loss to the *GMV,* did put economic pressure on the Claimant.

118. The Claimant was pressing and persistent, through the brothers L[redacted] and Mr. W[redacted], its consultant, that the Respondent should get on with repairs absent finalization of a settlement agreement. In order to expedite the issue, the Claimant sued the Respondent.

119. To some extent the Claimant felt that it was reasonable for it to carry on with its importations of the Respondent to repair the *GMV* as Mr. M consistently stated that the Respondent would be happy to do the repairs as long as its underwriters agreed and, I infer, as long as the Respondent was paid for the work. The Respondent did not really care who was paying it as long as it was going to be paid.

120. As between the Claimant and Respondent, the Claimant was the innocent party.

121. In order to put the Claimant in the position that it ought to have been in had the fire loss not occurred, it is not reasonable to dismiss its claims for loss of use during the time period that the settlement agreement was being negotiated. Rather, if any of that time period can be attributed as the responsibility of the Claimant, then there should be no compensation to the Claimant for loss of use during such time period.

122. I do not find that the decision by the owners to re-power the vessel with new engines caused or contributed to any of the delay between the date the Respondent should have delivered the *GMV* to the Claimant and when the settlement agreement was reached. The disagreement relating to whether the vessel would be repaired does not appear to have been hung up on the type of engines or gear assembly to go into a repaired *GMV*. Rather, on the sparse evidence before me setting out the terms of the settlement, the length of time it took to negotiate the settlement agreement appears to have been as a result of a disagreement as to whose funds would be used to fund the necessary repairs or improvements to the *GMV*.

123. Conversely, I find there was a clear linkage between the stability issue and the conclusion of the settlement agreement. The Claimant's representative, Mr. W dealt with the issue quickly when it came to light. The results of the inclining experiments conducted on the *GMV* led to the discovery of a stability problem that existed in the vessel regardless of the fire loss. While it is an issue that may have been discovered because of the fire loss, any delays due to dealing with the stability problem are attributable to the owner.

124. In order to put the Claimant back to the position he ought to have been in, I find that as between the Claimant and the Respondent, the Claimant is responsible for 5 weeks of loss of use due to the delay in undertaking repairs due to addressing the inherent stability issues. Thus the Respondent is responsible for 11 ½ months (50 weeks) of loss of use before the settlement agreement was concluded.

Delays in Effecting Repairs

125. The settlement agreement anticipated that the repairs to the *GMV* to return the vessel to its operational state before the fire would be completed by October 1, 2010, approximately two and one-half months. Mr. W, who has some experience with these matters through his involvement with BC F

considered 4 months as a reasonable length of time to complete the repairs to the *GMV.*

126. The repairs and changes were still being carried out at the commencement of this Arbitration, a period of nine months, although the end was in sight and was considered reached by the Respondent.

127. How the length of time to effect the repairs ought to be apportioned is the further subject of dispute. Evidence has been introduced in the case which indicate that the Respondent attributed certain tasks to fire damage work and other tasks to owner's work, including the completion of the fo'c'sle refit that was underway at the time of the fire loss.

128. Based on the Respondent's categorization, to March 19, 2011 the amount of labour hours spent by the Respondent on doing fire damage repairs amounts to 7,358 hours actually spent (4,654 were estimated) and a further 4,245 hours were actually spent on owner's work. To March 16, 2011 the Respondent submitted invoices totalling (inclusive of taxes) for the fire damage repairs $612,640 and for the owner's work $411,604.

129. The settlement agreement provided for a cost sharing formula in relation to the costs associated with dealing with the stability issue. The agreement provided that the costs of T[redacted] W[redacted] and the Respondent for analyzing and altering the *GMV* would be borne 60% by the Respondent and 40% by the Claimant. The Claimant submits that the same formula applies to loss of use. The Respondent disagrees. What may have been expedient for the parties in reaching their settlement agreement as far as apportioning the hard costs of making the physical changes to the *GMV* to deal with the stability issue does not bind me in determining the loss of use claim.

130. I have already found that the stability issue may have been discovered as a result of the fire but it pre-existed the fire. Consequently, any delay associated with addressing the stability problems with the *GMV* ought to be to the owner's account. This work includes the forward fuel tank modification, the fo'c'sle water tank structure, the installation of the ballast keel and ballast keel fairing plates. The fo'c'sle work includes the modifications that were requested prior to the fire. To the best that I am able to determine from the exhibits, the work to deal with stability issues took approximately 730 hours.

131. The settlement agreement also contained a cost sharing formula relating to the new engines to be installed in the repaired *GMV.* Again, I am not bound by that agreement as far as attributing loss of use due to this work. I find that any delays ancillary to the engine and gear replacement ought to be to the owner's account. The Respondent recorded as part of the fire damage repairs the cost of the installation of the new main engines and gear as taking 406 hours when 210 hours were estimated. These hours ought to be attributed to non-fire damage hours.

132. As a result of the engine replacement it was necessary to check the adequacy of the keel coolers. Mr. K[redacted] found in early August 2010 that the new engines would require a much greater cooling capacity. The existing keel coolers on the vessel were inadequate and could not be modified to do the job. Without checking with the Claimant, Mr. K[redacted] had the existing keel coolers cut off and new ones installed. The total time required to deal with the keel coolers was five weeks and was completed by the first week of September 2010. Because some of this work was hot work, in the fourth week, very little other work was done or capable of being done on the vessel. The Respondent's records indicated 804.5 hours were charged to the keel cooler modifications.

133. The Claimant and his witnesses considered the keel cooler work as part of the fire damage repairs. Their estimate for the non-fire damage work to the *GMV* was therefore that all such work added only one month to the repair time.

134. The Respondent takes the position that the non-fire damage work to the vessel insisted on by the owner added 2 ½ months to the repair time. As I calculate the total hours for owner's work, the number of hours for such work ought to be increased to 4651 hours. This translates to 600 man days at 7.75 hours per day. An eight man crew would require 15 weeks at 5 days a week to complete such work.

135. Fire damage work and non-fire damage work were carried out on the vessel during the course of the repairs at the same time. According to the Respondent's bar graph most of the non-fire damage work was completed by mid to late November 2010.

136. The Respondent was at all times in control of the staffing levels to complete the repairs to the *GMV.* The *GMV* was not the only vessel that the Respondent was repairing at its facilities from the date of the settlement agreement. There were fluctuations in the number of staff that it devoted to the project. I understand that given the relatively small size of the vessel it would not be possible to have too many workmen assigned at any one time to inside work on the vessel. Again, according to the bar graph prepared by the Respondent, at its peak the Respondent had 640 man hours recorded to all work on the vessel during one week which translates to two shifts of 8 men each during that one week time period.

137. At the beginning of this Arbitration, the Respondent delivered a notice that the work was complete and issued its invoices for the fire and non-fire repair work. The Claimant did not accept that delivery had been effected as there were deficiencies still be corrected. I heard submissions from the parties on April 19. Given the work left to be done, I find that delivery was likely to have been effected by the end of April, 2011. The time to complete the repairs from the date of the settlement agreement was thus 9 ½ months.

138. Given that the length of time to complete the fire and non-fire work was solely in the control of the Respondent and its assignment of staff to complete the job, I

find that a reasonable amount of time to complete the non-fire work was 2 months. The Respondent is thus responsible from the date of the settlement agreement to the end of April, 2011 for 7 ½ months loss of use of the vessel due to the length of time it took the Respondent to complete the fire damage repairs.

Post Delivery Loss of Use

139. Counsel for the Claimant seeks a further award of 25% of the historical net income per month for six months following the delivery of the *GMV* to the Claimant post repairs in order to allow the Claimant to rebuild its business.

140. Mr. M[redacted] indicated in his evidence that all of the S[redacted] work relative to servicing the east coast of Vancouver Island near Campbell River would be the Claimant's again as soon as the *GMV* was back in service. There is therefor no extra time required to build up that portion of the Claimant's business.

141. With the closing of the Catalyst Mill in Duncan Bay, the Claimant lost a lot of his work shifting barges for S[redacted]. He was forced to consider sources of other work which was the reason for the modifications being carried out by the Respondent prior to the fire. Had the fire loss not occurred, the Claimant would have spent some time re-building its sources of work in order to get back to the level of historical gross and net income it was making from the *GMV.* As it was, S[redacted]'s long term needs for barge movements did not really solidify until February 2010 as the remaining Vancouver Island mills worked out where and how they were going to transport their stockpiles of bark hogfuel, hemlock and cedar chips.

142. In the spring 2010, with the change to the positive in towing needs, and other towing company operators in Campbell River adding to their fleets, Bob L[redacted] of the Claimant contemplated the purchase of another vessel, the *Bering Straits* with the intention that it would be operated by his brother, Captain Don L[redacted]. However, with what he perceived to be uncertainty in the towing industry at that time, Don L[redacted] backed out of the plan.

143. Bob L[redacted] and his witnesses testified as to the special characteristics of the *GMV* which made it especially suited to tasks such as being an assist boat through the series of rapids north of Campbell River. At some stage after the fire loss of the *GMV*, the Claimant's phone quit ringing because everyone in the industry with a need for a tugboat knew that he did not have one.

144. As a result of the fire, the Claimant does not have to rebuild its business during a period of downturn in the towing industry. The delay in getting its vessel repaired and back in service has deprived the Claimant of the opportunity to have restored its business as much as possible in order to earn the income it could have expected. The Claimant is deprived of the maximum dollars it could earn as a result of the delay in the start to rebuilding its business. I am satisfied that once the *GMV* is back in service, the amount of time that it will take for the industry to know the Claimant to be back in business and for the Claimant to get

its share of those jobs other than S[redacted] barge runs between Campbell River and Powell River is much less than the 6 months claimed.

145. It is for the Claimant to prove its loss of use post delivery of the Vessel. A reasonable time for the Claimant to rebuild its other business is two months. The Claimant is entitled to the net amount after deduction of the S[redacted] business (the barge runs between Campbell River and Powell River) for that time period.

Mitigation

146. The Respondent submits that the Claimant failed to mitigate its damages, principally from its failure to charter a replacement tug, the *Raider* in September 2009. In contemplation of chartering that vessel, Bob L[redacted] added that vessel to his Master's Certificate in September 2009.

147. A draft Charterparty agreement was prepared in September 2009 for the charter of the *Raider* by the Claimant from that vessel's owners, Northwest Tug & Barge Ltd. The *Raider* was a "bolt-together" vessel, designed to be taken apart and put on a rail car. It was without accommodations, but could have been used as a day-boat to transport S[redacted]'s large barges between Powell River and Menzies Bay in good weather. The charterparty terms provided for the charter of the *Raider* for a period of two months with an option to extend the agreement to eight months at a cost of $8500 per month. Bob L[redacted] admitted that it may have been possible to extend the charterparty agreement past 8 months.

148. The charter of the *Raider* never took place as Bob L[redacted] had a conversation with Mr. M[redacted] of S[redacted] about his chartering a replacement vessel. Mr. M[redacted] never told Bob L[redacted] not to charter the vessel. However, he warned him at that time that he was not certain the math would work in order to justify entering into the agreement. Mr. M[redacted] advised him not to expect more than one voyage per week of barges between Powell River and Menzies Bay. Mr. L[redacted] understood from this conversation he was being told there may be insufficient work from S[redacted] to justify entering into a charterparty agreement.

149. Given that Bob L[redacted] tripped over a fire hose at Allied shipyards on the night of the fire and hurt his knee as a consequence, in September 2009, he was looking at having to hire a captain to crew any replacement boat as he could not do the work himself. Charitably, Bob L[redacted] cast no blame on A[redacted] for his injury. It was simply another factor that he had to consider in the decision as to whether to charter the *Raider* in terms of the net income the Claimant might earn. Bob L[redacted] decided against entering into the charterparty agreement.

150. The law regarding mitigation is summarized in *Janiak v. Ippolito,* [1985] 1 S.C.R. 146 @ para. 28, 30 and 32. There the Court stated;

> 28. In *Asamera Oil Corp. v. Sea Oil & General Corp.,* [1979] 1 S.C.R. 633, Estey J. stated at p. 649 that "A plaintiff need not take all steps to reduce his loss". He

> is only bound to act like a "reasonable and prudent man": *British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railways Company of London,* [1912] A.C. 673 (H.L.). The steps he takes, Lord Macmillan said in *Banco de Portugal v. Waterlow & Sons, Ltd.*, [1932] A.C. 452, at p. 506, "ought not to be weighed in nice scales".
>
> ...
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> 30. As a qualification to the general principle that a plaintiff's actions must not be subjected to an overly critical standard of review, the English courts have suggested that in determining what steps he ought to take the plaintiff should consider the defendant's interests as well as his own....It should be noted that this rule has never been adopted in Canada....
>
> ...
>
> 32. While a plaintiff has the burden of proving both the fact that he has suffered damage and the *quantum* of that damage, the burden of proof moves to the defendant if he alleges the plaintiff could have and should have mitigated his loss. That this is the law in Canada has been clearly stated by this Court in *Red Deer College v. Michaels,* [1976] 2 S.C.R. 324, and more recently affirmed by Estey J. in the *Asamera Oil* case, *supra.* In *Red Deer* Laskin C.J. said, at p. 331:
>
> > If it is the defendant's position that a plaintiff could reasonably have avoided some part of the loss claimed, it is for the defendant to carry the burden of that issue, subject to the defendant being content to allow the matter to be disposed of on the trial judge's assessment of the plaintiff's evidence on avoidable consequences.

151. The Respondent must show that the Claimant failed to act reasonably and must show how and to what extent the damage could have been minimized. At its best, the Respondent is able to point in the evidence that had the *Raider* been chartered, income could have been earned in the range of $17,000 to $23,000 which would have been sufficient to pay the monthly charter costs, insurance and cost of surveys. There is no evidence pointed to by the Respondent as to how much of that income would also have had to go to wages or fuel costs to arrive at a net profit based on loss of use. While I might have been able to infer these values from all of the evidence, it is not necessary for me to do so as the Respondent has not met the burden on it to show that the Claimant failed to act reasonably.

152. The Claimant was faced with a business decision as to whether the potential available work justified the charter of a replacement vessel in September 2009. Given the Respondent's denial of liability and unwillingness to contribute anything to the charter of a replacement vessel, the decision made by the Claimant at that time not to charter the *Raider* was that of a "reasonable and prudent man".

Valuation of Loss

153. The parties have agreed that the average monthly net income to the Claimant from the *GMV* for the years 2006, 2007 and 2008 was $25,000. Since I also have in the 2006 financial statements the comparisons for 2005, I can see that

the average monthly net income that year as well is in the same ball park. The financial statements indicate that the Claimant paid the owner a salary and distributed income via the declaration of dividends. They confirm there was no pot of money on hand for the Claimant to access to fund either the extensive repairs or replacement of the *GMV.*

154. The gross revenues over the same time period spanned by the financial statements is $506,100 in 2005; $463,823 in 2006; $537,556 in 2007; and $612,295.00 in 2008. This results in an average gross income of approximately $530,000. There is no evidence or any financial statements evidencing what the income earned by the *GMV* was in 2009 prior to it being brought to the Respondent for repairs on March 9, 2009.

155. Neither the Claimant nor the Respondent chose to adduce any accounting evidence apart from the financial statements and a mathematical summary of the value of the trips that Bob L[redacted] kept track of, for all the jobs he thought were available to the Claimant and were lost to it as a result of no longer having the *GMV.* The Claimant's accountant summed Mr. L[redacted]'s list arriving at a total of $921,118 in lost gross income for the period from June 15, 2009 to February 28, 2011.

156. Most of the jobs claimed as 'lost' by Mr. L[redacted] were S[redacted] jobs. Indeed Mr. L[redacted] tracked available work by phoning S[redacted] on a regular if not daily basis as well as following what other work was available in the Campbell River area. The amount of gross lost income recorded for 2010, based on Mr. L[redacted]'s summary of Seaspan jobs was $597,518. In addition Mr. L[redacted] noted other work relating to the assist of a salt barges and the yarding of barges for Fraser River Pile & Dredge. The latter work he sub-contracted. The gross income for 2010 would then be in excess of that recorded for 2008, a banner year.

157. In addition to the Powell River runs, Mr. L[redacted] could have expected to be called upon by S[redacted] to assist tows of other S[redacted] barges loaded with coal or salt into Middle Point; used to assist barges into Elk Falls; to pick-up and transport injured or replacement crew to other S[redacted] vessels transiting the Campbell River area; and to assist their large barges through the Yuculta Rapids or Seymour Narrows. As well, over the course of many years, Mr. M[redacted] had asked the Claimant to provide quotes for the tow of barges in and out of Beaver Cove. The evidence was that this may have been considered unionized work and that the Claimant may never have got this work, although if he was able to square things with the union, Mr. M[redacted] could have and would have used the Claimant.

158. As well as the S[redacted] work, Mr. L[redacted] testified that the Claimant provided assist work for North Arm Transportation, Westview Navigation, Fraser River Pile & Dredge as well as being called upon to assist in salvage work. We know from the evidence of Captain R[redacted] and Captain S[redacted] that in addition to those entities the Claimant also provided assist work to Smit Towing (formerly Rivtow Towing) and Jarl Towing. All of this work has been labelled by the Respondent as *ad hoc* jobs.

159. Counsel for the Respondent submits that historically the *ad hoc* jobs amounted to no more than 5% of the Claimant's work. I do not recall evidence from any witness to this effect. In cross-examination Mr. L[redacted] agreed that 90% of his jobs before 2009 came from S[redacted]. The list of invoices for *ad hoc* jobs in 2008 show that there were other customers that the Claimant assisted in addition to those referred to in the preceding paragraph. The total amount of the *ad hoc* work in 2008 was approximately 5% of the gross revenues of $610,000 for that year. This evidence indicates that S[redacted] kept the Claimant hopping in that year with barge shifting so that it was unavailable to take on further *ad hoc* jobs.

160. In early 2009, the Catalyst Mill in Duncan Bay shut down. Most of the Claimant's income from S[redacted] related to the shifting of barges between the Catalyst Mill and Menzies Bay as well as Elk Falls to Menzies Bay. He did other work for the mill, which in 2008 resulted in a contribution of approximately 7% to his general revenues. The loss of all of this work would dramatically affect the Claimant. It is precisely because this work was disappearing that the Claimant decided it would be an appropriate time to restore the accommodation on the *GMV* so that the Claimant could take on other work further afield from Campbell River which would involve overnight or longer trips. This was the upgrade work the Respondent was engaged in doing at the time of the fire.

161. Due to the closure of the mill, the Respondent submits that the historical income earned by the Claimant prior to 2009 is of no significance to my decision.

162. The closure of the mill affected not only the Claimant but had a significant impact on S[redacted]. Mr. M[redacted] testified that his customers' needs for barges went from 16 a month to what is now 5. Initially, there was uncertainty as to whether any barges would be required. So, in early 2009 around the time of the fire loss, the number of barges required to be shifted by S[redacted] per month was down to two.

163. The dip in the work that S[redacted] had in the Campbell River area in 2009 relating to the movement of barges to service the pulp mills has recovered to about 1/3 of what it was. Short shifts of barges between Menzies Bay and Elk Falls/Duncan Bay have now been replaced with the longer hauls to and from Powell River. This work did not exist, at least on a regular basis, before 2009.

164. Mr. M[redacted] provided a list of all tows of S[redacted]'s barges from June 15, 2009 to March 18, 2011. The more recent data indicates an average of five tows per month of S[redacted] barges between Menzies Bay and Powell River. Mr. M[redacted] was willing to pay a higher rate to the Claimant than he was paying to W[redacted], in order to have a reliable contractor S[redacted] could count on in Campbell River. He thought $5000 per voyage to be a reasonable amount that the Claimant would be able to invoice for each voyage. This results in a gross of $25,000 per month from this one source of business.

165. According to Mr. M[redacted]'s evidence there were 63 voyages of S[redacted] barges between Menzies Bay and Powell River in the same time period. This would have resulted in a contribution to gross income in 2010 from this one source of work of $315,000 for the Claimant.

166. Cross examination of Mr. L[redacted] established exaggerations as to the jobs or amounts from those jobs that the Claimant could have earned in the preparation of his list of lost work. The list is not reliable for a determination of lost revenue.

167. The historical average of the Claimant's gross revenue was $530,000 per year. I find that it is safe to utilize the historical average for the gross monthly income ($44,160 per month) as a marker to determine the amount of the loss of use claim suffered by the Claimant.

168. In order to meet its historical gross monthly income average, would the Claimant have been able to earn an extra $19,000 per month ($44,000 - $25,000) from sources of work other than the Powell River runs for S[redacted]?

169. It is true that the *GMV* would have been available more days for this other work as the Powell River runs would have only taken 5 - 8 days per month. I am satisfied by all the evidence that Bob L[redacted] was no slouch when it came to the pursuit of jobs and work for the *GMV.* With the Catalyst Mill closing, he was doing what was prudent with the accommodation upgrade in order to maximize and replace any income lost directly or indirectly from that source.

170. I only have available to me the evidence of the sources of gross income of the Claimant from *ad hoc* and other S[redacted] assist work for the year 2008. Other than the Catalyst Mill, the contribution to gross income is approximately $4500 per month from these other sources. From the evidence, it appears that the *GMV* was only available 5 - 8 days a month to take on this other work. With the increase in its availability, and considering positive and negative contingencies, I find that during the time the *GMV* was out of service it would have grossed an extra $10,000 - $15,000 per month in excess of the revenue from the Powell River runs for a total gross revenue of $35,000 - $40,000 per month, less than its historical average.

171. For the purposes of calculating the Claimant's loss of profit, it is appropriate to take the average for gross monthly income that could have been earned of $37,500.

172. Counsel for the Respondent has suggested that the average margin of 49.5% representing the gross revenue less the variable costs over the time period of 2006 - 2008 ought to be used by me in calculating the loss of profit from loss of use. Considering the 2005 statements as well, I have determined that a 50% margin is appropriate. The loss of profit is 50% of the gross loss of income. On a monthly basis the loss is thus 50% of $37,500 or $18,750.

173. For the 11 ½ month pre-settlement of repairs delay and the 7 ½ month delay in effecting the repairs totalling together 19 months, the loss of profit on the loss of use is $323,000 (19 x $18,750). For the two month delay in getting its non-Seaspan Powell River run business up to speed, the loss of profit from loss of use is $12,500 (after applying the margin) for a total loss of profit of $368,750. This is the net amount the Claimant would have earned had the fire not occurred.

174. The Claimant in fact earned, as a result of subcontracting work available to it, over the time period spanning the loss of use of the *GMV*, profit in the amount of $13,068.58. This amount needs to be deducted from the total above, resulting in a net loss of profit of $355,681. I round this claim up to $356,000.

175. Harkening back to the Court of Appeal's decision in *Nan v. Black Pine Manufacturing Ltd.* case, is the amount of the Claimant's loss as I have determined it to be reasonable both to the Claimant and the Respondent? Subjectively the Claimant is likely to find the amount to be too little, and the Respondent is likely to find the amount to be too much. Objectively, the amount is reasonable. The damages in this case are similar to those in the *Skyward Resources Ltd. v. Cessna Aircraft Co.* case. The Court in that case was dealing with the loss of an asset in the range of the repair damages suffered by the Claimant in this arbitration. The loss of use claim allowed in *Skyward Resources* was 18 months when there was a 30 month loss claimed for replacement of the destroyed chattel. While each case turns on its own particular facts, there is a similarity in the time periods awarded.

176. I award the Claimant $356,000 as its loss of profit due to the loss of use of the *GMV* as a result of the tortious act of the Respondent. The Claimant is entitled to interest on that amount at admiralty rates, which I accept to be the prime rate as established by Canadian Maritime law.

177. As there are varying time periods for which the Claimant and Respondent are liable for the loss of use, and an overlapping of time periods of responsibility, for ease of calculations of the interest amount on the monthly loss of profit of $18,750, I direct and award the Claimant interest each month on its loss of profit from June 15, 2009 to March 6, 2010. There is to be no interest to be calculated on any new loss of income from March 7, 2010 until April 10, 2010. Interest on loss of monthly income is to start again on April 11, 2010 to July 31, 2010. No interest on any new loss of income for the time period from August 1, 2010 to the end of September 2010. Interest to start again on October 1, 2010 to April 30, 2011. The Claimant is entitled to interest on the lesser amounts of the loss of profit ($6,250) for May and June 2011. The interest component is to be calculated to the date of this decision. I will leave it to counsel to advise me as to the interest amount so determined in order that it can be included in my formal award. In the absence of agreement on the calculation, counsel may each make a written submission as to the interest so determined.

178. Counsel have requested the opportunity to address me on the issue of costs after the award in respect of damages and interest is delivered. I will hear from counsel on how and when they wish to make their respective submissions.

Dated, this 26th day of July, 2011 at Vancouver, British Columbia

J.J. McIntyre
Arbitrator