Federal Court | Cour fédérale

Date: 20121001

Docket: T-761-11

Citation: 2012 FC 725

Vancouver, British Columbia, October 1, 2012

PRESENT: Roger R. Lafrenière, Esquire
Prothonotary

BETWEEN:

THE ADMINISTRATOR OF THE SHIP-SOURCE OIL POLLUTION FUND

Plaintiff

and

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA AS REPRESENTED BY THE MINISTER OF FINANCE

Defendant

and

J. PAUL THOMAS AND THE ATTORNEY GENERAL OF CANADA

Third Parties

REASONS FOR ORDER AND ORDER

[1] The Plaintiff, the Administrator of the Ship-Source Oil Pollution Fund (the Administrator), seeks to recover from the Defendant, Her Majesty the Queen in Right of the Province of British Columbia, as represented by the Minister of Finance (the BC Crown), costs it paid to Her Majesty the Queen in Right of Canada (Canada) for cleaning up oil pollution leaking from the

Vessel “Seaspan Chinook”, also known as “La Lumiere” (the “Seaspan Chinook”), which sank at Britannia Bay, British Columbia on May 9, 2008.

[2] After filing its statement of defence and issuing third party claims against Canada and Mr. J. Paul Thomas (Thomas), the BC Crown brought the present motion pursuant to Rule 221(1)(a) of the *Federal Courts Rules* for an order that all claims against it be struck for want of jurisdiction. The BC Crown submits that, as a matter of statutory interpretation, the Federal Court does not have *in personam* jurisdiction over the BC Crown. In the alternative, the BC Crown submits that since the action is significantly dependent on whether the BC Crown is the owner of the ship based on provincial law, the Federal Court does not possess subject matter jurisdiction.

[3] Both the Administrator and Canada oppose the motion, while Mr. Thomas takes no position.

FACTS

[4] The allegations made in the Statement of Claim issued on May 3, 2011 may be summarized as follows.

[5] The registered and beneficial owner of the “Seaspan Chinook” was the Maritime Heritage Society of Vancouver (Society) until the Society was dissolved on June 23, 2006.

[6] Since the Society’s assets were not transferred to another charitable society prior to its dissolution, the Society’s assets, including the “Seaspan Chinook”, are alleged to have passed to the

BC Crown by operation of section 73 of the *Society Act of British Columbia* [*BC Society Act*], RSBC 1996, c 433.

[7] The BC Crown served a notice on the Society on August 15, 2007 that several vessels registered to the Society, including the "Seaspan Chinook", were trespassing at Britannia Beach. Mr. Thomas, a representative for the defunct Society, wrote to the Minister of Finance of British Columbia on November 29, 2007, and formally delivered all the Society's vessels to the BC Crown.

[8] The "Seaspan Chinook" was in a seriously deteriorated condition and contained a substantial amount of diesel fuel and other pollutants prior to her sinking at Britannia Bay on May 9, 2008. The Administrator claims that the BC Crown took no action before the sinking to preserve the "Seaspan Chinook", or any other steps to prevent pollution damage to the environment.

[9] The Canadian Coast Guard took remediation steps to minimize damage from the pollution caused by the "Seaspan Chinook", and Canada incurred costs of $127,149.07.

[10] Canada submitted a claim to the Administrator under subsection 51(1) and sections 84 and 85 (now subsection 77(1), and sections 101 and 103 respectively) of the *Marine Liability Act*, SC 2001, c 6 [*MLA*]. On December 12, 2010, the Administrator made an offer to pay $85,641.19 to compensate Canada for the remediation costs. Canada accepted the offer on April 1, 2011.

[11] The Administrator claims to be subrogated to the rights of Canada in accordance with paragraph 87(3)(c) (now paragraph 106(3)(c)) of the *MLA* to recover the oil pollution remediation costs from the owner of the "Seaspan Chinook". The BC Crown is alleged to be, at all material times, the owner of the "Seaspan Chinook".

SUBSEQUENT PLEADINGS

[12] In her Statement of Defence, the BC Crown denies ownership of the "Seaspan Chinook". Instead, she alleges that the Society had abandoned the vessel at Britannia Beach prior to June 23, 2006 when the Society was dissolved. The BC Crown maintains that Canada was the owner of the "Seaspan Chinook" at the time of her sinking pursuant to section 226 of the *Canada Shipping Act*, SC 2001, c 26.

[13] The BC Crown claims in the alternative that Thomas represented to the BC Crown that he was actively taking steps to restore the Society, and had exercised possession and control of the "Seaspan Chinook", and was therefore the owner at the time of sinking.

[14] As a further alternative, the BC Crown alleges that if it was the owner, Canada had a private law duty of care to the BC Crown to minimize the risk of damage by the "Seaspan Chinook" to provincial property (the waters at Britannia Beach). The BC Crown alleges that this duty arises from Canada's exclusive statutory and constitutional jurisdiction over abandoned vessels. The BC Crown further alleges that Canada failed to mitigate the remediation costs incurred.

[15] The BC Crown filed third party claims against Thomas and Canada on June 20, 2011 based on the above allegations. On October 24, 2011, Canada filed a motion to strike the third party claim on the basis that the third party claim by the BC Crown contains no material facts or particulars to support its obligations. Specifically, Canada denied being the owner of the "Seaspan Chinook", arguing that the dispute of ownership was between the Society and the BC Crown.

[16] On November 1, 2011, Canada's motion to strike the third party claim was stayed pending disposition of the present motion by the BC Crown.

PRINCIPLES APPLICABLE ON A MOTION TO STRIKE

[17] There is no dispute between the parties that the test upon a motion to strike is whether it is plain and obvious that the claim discloses no reasonable cause of action, as set out by the Supreme Court of Canada in *Hunt v Carey Canada Inc* [1990] 2 SCR 959.

[18] For the purpose of a motion to strike under Rule 221(1)(a), all allegations of fact in the impugned pleading must be accepted as proved, unless patently ridiculous or incapable of proof. The "plain and obvious" test applies to the striking out of pleadings for lack of jurisdiction in the same manner as it applies to the striking of a claim on the ground that it discloses no reasonable cause of action: *Hodgson v Ermineskin Indian Band No 942* 2000 CanLII 15066 (FC), (2000) 180 FTR 285 at para 10, aff'd (2000), 267 NR 143 (FCA) at para 4.

[19] The BC Crown submits that the onus is on the Administrator in the present motion to establish that the Federal Court has jurisdiction over both the parties and the cause of

action. I disagree. Although the Administrator will ultimately have to establish this Court's jurisdiction to succeed at trial, the fundamental rule is that, on a motion to strike, the Court is narrowly limited to assessing the threshold issue of whether a genuine issue exists as to material facts requiring a trial: *Edell v Canada*, 2010 FCA 26. It follows that the BC Crown bears the burden on this motion of demonstrating the lack of a genuine issue based on the facts as pleaded in the Statement of Claim.

ISSUES TO BE DETERMINED

[20] The BC Crown and the Administrator have framed the issues of jurisdiction in different ways. Their arguments can neatly be broken down into two issues: (a) personal jurisdiction; and (b) subject matter jurisdiction.

(a) *In personam* jurisdiction over the BC Crown

[21] The BC Crown submits that the Federal Court does not have a statutory grant of *in personam* jurisdiction over the BC Crown for the following reasons.

[22] First, section 17(1) of the *Federal Courts Act*, RSC 1985, c F-7 [*FCA*] confers concurrent jurisdiction on the Federal Court in all claims against the Crown. However, it is settled law that the "Crown" within the *FCA* does not include a province.

[23] Second, section 19 of the *FCA* only confers *in personam* jurisdiction on the Federal Court in cases regarding "controversies between Canada and a province" if that province has passed

legislation agreeing that the Federal Court has jurisdiction. Although British Columbia has enacted the *Federal Courts Jurisdiction Act*, RSBC 1996, c 135 [*BC-FCJA*] [1], the BC Crown argues that the Administrator is not Canada within the meaning the *BC-FCJA*: see *Canada v Ship Source Oil Pollution Fund (Administrator of)*, 2007 FC 548, [2007] FCJ no 742 (QL) at para 16; *Administrator of the Ship-Source Oil Pollution Fund v MV Anangel Splendour (The)*, 2005 FC 942, [2005] FCJ No 1198 (QL) at para 5.

[24] Third, according to the BC Crown, there is no statutory provision which confers the Federal Court with jurisdiction to hear a claim from a party against a province. Although section 22 of the *FCA* gives the Federal Court concurrent jurisdiction with respect to maritime law and matters concerning navigation and shipping, the jurisdiction is limited as "between subject and subject as well as otherwise". In *Lubicon Lake Indian Band v Canada*, [1981] 2 FC 317, [1980] FCJ No 272 (QL) at par. 8 [*Lubicon*], Mr. Justice Addy concluded, based on the common rule of provincial immunity from general enactment, that "by no stretch of the imagination could the Crown in right of Alberta be considered as a "subject" of the Crown in right of Canada." The BC Crown submits that section 22 of the *FCA* does not apply to her as she is not a "subject" of Canada.

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1 Section 1(1) of the Federal Courts Jurisdiction Act, RSBC 1996, c 135 [BC-FCJA] provides as follows:

1 (1) The Supreme Court of Canada and the Federal Court of Canada, or the Supreme Court of Canada alone, according to the Acts of the Parliament of Canada known as the Supreme Court Act and the Federal Court Act, have jurisdiction in the following cases:

(a) controversies between Canada and British Columbia;

(b) controversies between British Columbia and any other province of Canada that has passed an Act similar to this Act;

(c) suits, actions or proceedings in which the parties to them, by their pleadings, have raised a question as to the validity of an Act of the Parliament of Canada, or of an Act of the Legislature, if, in the opinion of the court in which the suits, actions or proceedings are pending, the question is material.

[25] Fourth, the Administrator has claimed damages which cannot be maintained against the BC Crown in the Federal Court. Although section 2(c) of the *Crown Proceeding Act*, RSBC 1996, c 89 (*BCCPA*) provides that the BC Crown is liable for damages claims, the provision is said to be inoperative where the *BC-FCJA* applies.

[26] Finally, the BC Crown challenges the Administrator's reliance on section 106(3)(d) of the *MLA* to confer jurisdiction on the Federal Court to hear this claim against the BC Crown. It argues that section 106 does not confer jurisdiction on the Admiralty Court (designated as the Federal Court in section 2) over the BC Crown. The BC Crown argues that in light of the consent required for jurisdiction under the *FCA*, much clearer language is required in the *MLA* to subject the province to the suit of a federal organization, agent or tribunal in the Federal Court.

ANALYSIS

[27] The BC Crown is asking this Court to engage in a complex exercise of statutory interpretation, which it contends will lead to an inevitable conclusion that would justify the draconian measure of striking the Administrator's statement of claim. I conclude that a motion to strike is not the proper forum to make a final determination of such weighty matters.

[28] Although the BC Crown may ultimately prevail, the issue of provincial immunity from suit in the Federal Court for matters arising from its ownership or interest in a vessel has not been settled. In the recent case of *Toney v Canada (Royal Canadian Mounted Police)*, 2011 FC 1440, [2011] FCJ No 1740 [*Toney v RCMP*], Mr. Justice Sean Harrington dismissed a

motion by Her Majesty the Queen in Right of Alberta (Alberta Crown) to strike a statement of claim filed by the plaintiffs, Alan Toney, his wife and two daughters (the Toneys) for lack of jurisdiction.

[29] The underlying proceeding in *Toney v RCMP* was an action brought in this Court against the Alberta Crown and the RCMP for damages arising from the death of the Toneys' young daughter and sister after the vessel then owned and operated by the Province of Alberta capsized during a rescue operation. Mr. Justice Harrington refused to strike the Toneys' statement of claim. At paragraph 5 of his Reasons for Order and Order, Mr. Justice Harrington concluded as follows

> The cause of action is grounded in sections 6 and following of the *Marine Liability Act*, SC, 2001, c 6. The fact that the ship has been sold by the provincial crown does not shield it from personal liability. This action falls within the federal legislative class of action of navigation and shipping, there is actual federal law to administer, and the administration of that law has been confided to this Court pursuant to section 22 of the *Federal Courts Act* (*ITO-Internatinal Terminal Operators Ltd v Miida Electronics Inc*, 1986 CanLII 91 (SCC), [1986] 1 SCR 752). The fact that one of the Defendants is a provincial crown is irrelevant as this is not an action against the crown as such under section 17 of the *Federal Courts Act*.

[30] After the hearing of the present motion, the Federal Court of Appeal released reasons for judgment in *Her Majesty the Queen in Right of Alberta v Toney*, 2012 FCA 167 (*Alberta v Toney*) dismissing an appeal by the Alberta Crown from Mr. Justice Harrington's decision. The Federal Court of Appeal concluded that it was not plain and obvious that the Federal Court did not have personal jurisdiction over the Alberta Crown in the matter. At paragraph 5 of the Court's Judgment, Madam Justice Johanne Gauthier observed that the arguments presented by the Toneys in response to the Alberta Crown's motion based on the wording of section 22 and subsection 43(7) of the *FCA*

had not been considered expressly in the past. She also noted that the impact of exclusive grants of jurisdiction to the Federal Court in respect of certain matters had yet to be considered.

[31] The BC Crown submits that the decision in *Alberta v Toney* can be distinguished as the Federal Court of Appeal did not consider section 19 of the *FCA*, nor the express inapplicability of the *BCCPA* to proceedings to which the *BC-FCJA* applies. However, the fact that the Federal Court of Appeal did not specifically refer to s. 19 of the *FCA* or the *BCCPA* is irrelevant to the principle issue the determined on this motion – whether it is plain and obvious that the Federal Court does not have *in personam* jurisdiction over the BC Crown on the facts of this case. The decision in *Alberta v Toney* is dispositive and binding on me. In any event, on the facts of the present proceeding, I would also conclude that it is not plain and obvious that this Court is without jurisdiction.

[32] In order to found jurisdiction in this Court, a three-part test must be met: *ITO-International Terminal Operators Ltd v Miida Electronics Inc* 1986 CanLII 91 (SCC), [1986] 1 SCR 752 (*ITO*). First, there must be a statutory grant of jurisdiction by the federal Parliament. Second, there must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction. Third, the law on which the case is based must be "a law of Canada" as the phrase is used in s. 101 of the *Constitution Act*, 1867.

[33] Section 19 of the *FCA* is but one legislative source by which the Federal Court can be conferred jurisdiction over a province.

[34] Paragraph 22(2)(d) of the *FCA* grants the Federal Court jurisdiction with respect to "any claim for damage or for loss of life or personal injury caused by a ship either in collision or otherwise…" When determining whether a claim falls within par 22(2)(d) as damage caused by a ship, the Court must adopt a functional operational test. In *Outhouse v "Thorshavn"*, [1935] Ex CR 120; *The Eschersheim*, [1976] 2 Lloyd's Rep 1, Local Judge in Admiralty, Demers concluded that damage by a ship did not require that the ship must come in contact with the thing damaged, but could include "damage done by those in charge of the ship, with the ship as the noxious instrument". Accordingly, the sinking of a ship resulting in pollution of the surrounding water may, at least arguably, constitute "damage caused by a ship" within the meaning of the *FCA*.

[35] Subsection 22(1) of the *FCA* gives the Federal Court concurrent jurisdiction between "subject and subject as well as otherwise" over all cases in which a claim for relief is made or a remedy is sought under or by virtue of Canadian Maritime Law, or any other law of Canada relating to any matter coming with the class of subject of navigation and shipping.

[36] The BC Crown submits that she is not a subject of Canada based on the reasoning in *Lubicon*. She also asserts that she does not fall within the meaning of the phrase "as well as otherwise", as to hold otherwise would render section 19 meaningless. However, whether a province is captured by these words remains open for debate. The phrase "as well as otherwise" was considered by the Federal Court of Appeal in *National Association of Broadcast Employees v The Queen* (1979), 107 DLR (3d) 186, [1980] 1 FC 820 (FCA) [*NABE*]. At paragraph 9, Mr. Justice Pratte concluded that the words had to be given some meaning as, follows:

> In my opinion, as the only alternative to an action between subject and subject is an action between a public authority and a subject, the phrase "as well between subject and subject as otherwise" means "between subject and subject as well as between Her Majesty or the Attorney General or another public authority and a subject".

[37] The Court's reasoning in *Greeley v Tami Joan* (1996), 113 FTR 66 [*Greeley* 1996] and *Greeley v Tami Joan (The)* (1997), 135 FTR 290 (aff'd in 2001 FCA 238) [*Greeley* 1997] also support the Administrator's argument that this Court has jurisdiction over the BC Crown. The first case concerned an interlocutory motion where the Crown in Right of New Brunswick was removed as a BC Crown with respect to a tort claim as the claim was outside the jurisdiction of the Federal Court. However, the claim against the Crown in Right of New Brunswick as the mortgagee of the vessel was continued to trial in the second case. The two cases stand for the proposition that the Federal Court has jurisdiction over a claim against a province who is the owner or mortgagee of a vessel if the claim is a maritime claim.

[38] Section 43(7) of the *FCA*, which deals with ships owned by a sovereign power, and various provisions of the *MLA* also suggest legislative intent that an action *in rem* may be commenced against a ship owned by a province and the province itself in the Federal Court.

[39] Section 43(7)(c) provides that, "No action in rem may be commenced in Canada against… (c) <u>any ship owned or operated by a sovereign power other than Canada</u>, or any cargo laden thereon, <u>with respect to any claim where, at the time the claim arises or the action is commenced, the ship is being used exclusively for non-commercial governmental purposes</u>. [underlining added]. The common law doctrine of sovereign immunity is preserved by section 43(7), but only

where the ship is being used exclusively for non-commercial government service. I agree with the Administrator that section 43(7)(c) would be unnecessary and meaningless if a provincial ship and a province as owner of a ship were generally exempted from the jurisdiction of the Federal Court.

[40] Another source of jurisdiction of the Federal Court over a province is the *MLA*, which is the principal legislation dealing with the liability of shipowners and ship operators in relation to passengers, cargo, pollution and property damage. The intent of the legislation is to set limits of liability and establish uniformity by balancing the interests of ship-owners and other parties. The *MLA* makes provision for the Ship-source Oil Pollution Fund and the appointment of the Administrator to administer that fund. Liability and compensation for ship-source oil pollution in Canada is governed by Part 6 of the *MLA*. In particular, section 77(1)(a) renders the owner of a ship liable for oil pollution damage from the ship.

[41] Section 3 of the *MLA* expressly provides that that the Act "is binding on Her Majesty in right of Canada or a province." Section 79(1) provides that "The Admiralty Court has jurisdiction with respect to claims for compensation brought in Canada under any convention under Division 1 and claims for compensation under Division 2." Section 2 of the *MLA* states that "Admiralty Court" means the Federal Court.

[42] The above provisions of the *MLA*, coupled with the broad jurisdiction of the Federal Court over Canadian maritime law granted in section 22 of the *FCA*, appear to confer onto the Federal Court personal jurisdiction over the BC Crown on the facts as alleged in the Statement of

Claim. At the very least, it is not plain and obvious that this Court does not have personal jurisdiction over the BC Crown.

[43] The Administrator and Canada submit in the alternative that the claim for compensation could have been brought either in the name of the claimant (Canada) or the Administrator under section 106(3)(d) of the *MLA* and that the nature of the proceeding remains the same. Both parties invite the Court to grant leave to amend the Statement of Claim to replace the Administrator with Canada as Plaintiff if there is any impediment to this action proceeding in the Federal Court. In light of my conclusion that it is not plain and obvious that this Court is without jurisdiction based on the legislation cited above, I decline to deal with the alternative argument that the facts in this case qualify as an intergovernmental dispute between the BC Crown and Canada within the meaning of section 19 of the *FCA*.

(b) Subject matter jurisdiction

[44] The second part of the *ITO* test states that there must be an existing body of federal law which is essential to the disposition of the case. BC Crown argues that the Administrator relies on the interpretation of the *BC Society Act* for the disposition of this matter instead of the definitions of the owner in the *Canada Shipping Act*, SC 2001, c 26. While acknowledging that the fact that the Federal Court may need to apply provincial law is not a bar to jurisdiction, the BC Crown argues that this case as pled by the Administrator is significantly dependant on whether the BC Crown is the owner of the ship by operation of a provincial law.

[45] Although some reference must be made in this case to the *BC Society Act*, claims for damage caused by a vessel are at the heart of Canadian maritime law. An ancillary application of provincial law does not affect the jurisdiction of the Federal Court as long as the issue is, in fact, "determined to some material extent by federal law": see *The Queen v Montreal Urban Community Transport Commission* (1980), 112 DLR (3d) 266, [1980] 2 FC 151 at 153, quoting *Bensol Customs Brokers Limited v Air Canada* [1979] 2 FC 575 at 583.

[46] In the circumstances, I reject the BC Crown's argument that this Court does not possess subject matter jurisdiction.

CONCLUSION

[47] For the above reasons, the motion to strike shall be dismissed. If the parties are unable to agree on costs of the motion, they are directed to serve and file brief written submissions, not exceeding three pages in length, within 7 days of the date of this Order.

ORDER

THIS COURT ORDERS that the motion is dismissed.

"Roger R. Lafrenière"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-761-11
STYLE OF CAUSE:	THE ADMINISTRATOR OF THE SHIP-SOURCE OIL POLLUTION FUND v HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA AS REPRESENTED BY THE MINISTER OF FINANCE ET AL
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