

Federal Court



Cour fédérale

**Date: 20151202**

**Docket: T-709-13**

**Citation: 2015 FC 1339**

**ADMIRALTY ACTION IN REM AGAINST  
THE SHIP EX “HMCS ANNAPOLIS”  
AND IN PERSONAM**

**BETWEEN:**

**WESLEY ROOTS  
DOING BUSINESS AS  
W.R. MARINE SERVICES**

**Plaintiff/  
Defendant by Counterclaim**

**and**

**ARTIFICIAL REEF SOCIETY  
OF BRITISH COLUMBIA,  
THE SHIP EX “HMCS ANNAPOLIS” ,  
THE OWNERS AND ALL OTHERS  
INTERESTED IN THE SHIP  
EX “HMCS ANNAPOLIS”**

**Defendants/  
Plaintiffs by Counterclaim**

**REASONS FOR ORDER**

**LAFRENIÈRE P.**

[1] By Order dated October 14, 2015 issued pursuant to Rule 385(2) of the *Federal Courts Rules*, the Plaintiff was directed to show cause by written submissions, to be served and filed no

later than November 9, 2015, why the action should not be dismissed for failure to comply with the Court's directions and for delay ("Status Review Order").

[2] There is no record of any submissions being filed by the Plaintiff in response to the Status Review Order. In the circumstances, I conclude that the action should be dismissed, with costs in favour of the Defendants.

### I. Background Facts

[3] The action was commenced on April 24, 2013 by the Plaintiff against the Artificial Reef Society of British Columbia (the "Reef Society") and *in rem* against the ex *HMCS Annapolis* (the "Annapolis"). The issues raised in the action relate to the parties' involvement with preparing the Annapolis to be sunk as an artificial reef at Gambier Island, British Columbia.

[4] The Reef Society is a society incorporated under the *Society Act*, RSBC 1996, c 433. Its mission is to create and promote sustainable artificial reefs in British Columbia and around the world for the enjoyment of scuba divers and the protection of marine habitat.

[5] In 2008, the Reef Society purchased the Annapolis, a decommissioned helicopter carrying destroyer escort, from the Government of Canada for \$20,000.00 for the purpose of sinking the ship as an artificial reef in Canadian waters. In June 2008, the Annapolis was moved from the federal facility in Esquimalt, BC to Port Graves Bay, Gambier Island, to be prepared for sinking as an artificial reef.

[6] In 2008 and 2009, the Reef Society canvassed potential sinking sites for the Annapolis. Halkett Bay Marine Provincial Park was selected as the sinking site because of its ideal water depth, sea bed characteristics, and proximity to Vancouver.

[7] Various preparations were required before the vessel could be sunk as an artificial reef. Generally speaking, the process involved selecting a sinking site with the necessary sea bed, current, and access requirements, developing a plan to fund the project through the re-sale of the vessel's equipment and salvage materials, cleaning and removing residual hydrocarbons from the vessel, making various modifications to the vessel for diver access and egress, coordinating with volunteers and contractors to perform all the necessary preparatory work, obtaining all the required regulatory authorizations, preparing an anchoring system at the sink location, and making arrangements for the final towing of the vessel to its sinking site and safe scuttling through pre-flooding and controlled explosives. Much of this work could be done by volunteers.

[8] The Reef Society initially engaged Canadian Artificial Reef Consultants Inc. ("CARC") as a contractor to assist with preparing the ship to be sunk as an artificial reef. CARC then engaged the Plaintiff, Wesley Roots through his company, W.R. Marine Services ("W.R. Marine"), as its sub-contractor to help with the project. The relationship between the Reef Society and CARC was initially cooperative; however, it deteriorated in 2010 after CARC threatened to commence an action against the Reef Society.

[9] The Reef Society, CARC, and W.R. Marine entered into an agreement on January 25, 2012 under which CARC formally ended its involvement with the Annapolis project. It was a term of the agreement that CARC assigned its account receivable of \$32,132.10 to

W.R. Marine, representing the amount owed by the Reef Society to CARC for its work on the project. It was further contemplated under this agreement that the Reef Society would engage W.R. Marine directly to assist with the project.

[10] According to the Reef Society, W.R. Marine agreed to be responsible for harvesting salvageable materials from the Annapolis and attending to the sale of those materials to generate revenue to fund the project. It was further agreed that W.R. Marine's compensation for its work on the project would be 50% of the proceeds from any sale of salvaged materials and that the balance would be paid to the Reef Society. It was also a term of the agreement that W.R. Marine would provide secure moorage for the Annapolis at Port Graves Bay for a monthly fee of \$2,800.00 plus applicable taxes.

[11] By the fall of 2012, the Reef Society had received authorizations from Transport Canada and the Department of Fisheries and Oceans (DFO) for the proposed sinking; however, the project could not be completed at the time because the Reef Society still required authorizations from Environment Canada and the BC Ministry of Environment. The Province of British Columbia had expressed its support for the project but it would not formally authorize the project until Environment Canada provided its approval.

[12] An environmental inspection was planned for November 2012. It was hoped that Environment Canada would authorize the project following this inspection. Concerns were raised about the potential existence of polychlorinated biphenyl ("PCBs") on the ship a short time before the inspection was scheduled to proceed. Environment Canada then decided to postpone its inspection as a result of those concerns.

[13] Concerned about the mounting moorage fees and delay, the Plaintiff commenced the underlying action against the Reef Society and the Annapolis on April 23, 2013, seeking damages for breach of contract. The Plaintiff also caused the Annapolis to be placed under arrest.

[14] On June 10, 2013, the Defendants filed their Statement of Defence. By way of counterclaim, the Defendants sought damages against Mr. Roots, a declaration that W.R. Marine is in breach of its agreement with the Reef Society, and an accounting of all scrap and other materials removed from the Annapolis and the proceeds derived from the sale or use of such materials.

[15] On May 27, 2014, the action and counterclaim were ordered to continue as specially managed proceedings.

[16] On October 28, 2014, the Reef Society filed a motion seeking orders to release the Annapolis from arrest so the Reef Society could proceed with the necessary preparations to carry out the sinking. The motion was granted on November 4, 2014, with costs to the Reef Society on an elevated scale in the amount of \$10,000.00 on the basis that the Plaintiff had been “highly adversarial in both opposing the motion by the Reef Society and bringing its own motion, therefore increasing the costs unnecessarily.”

[17] On January 6, 2015, Save Halkett Bay Marine Park Society (SHBMPS) filed a Notice of Application bearing Court File No. T-10-15 seeking judicial review of a Disposal at Sea Permit granted by the Minister of the Environment to Reef Society. An interim injunction was issued on

January 12, 2015 staying the removal of the vessel until a decision was rendered in the application.

[18] On February 6, 2015, following the hearing of a motion brought by the Reef Society in relation to moorage for the Annapolis, the Court once again ordered costs to the Reef Society on an elevated scale in the amount of \$2,500.00 on the basis that the Plaintiff had been highly adversarial, therefore increasing costs unnecessarily.

[19] The application by SHBMPS was dismissed by Judgment of the Chief Justice dated March 10, 2015.

[20] The Reef Society successfully carried out the sinking of the Annapolis at Halkett Bay, Gambier Island, on April 4, 2015.

[21] In the absence of any steps being taken by the Plaintiff since the Fall of 2014, the Court issued a Direction on July 21, 2015 requiring the Plaintiff to file a status report and a proposed timetable for advancing the litigation after consulting with the Defendants and by September 8, 2015. The Plaintiff failed to comply with the Direction.

[22] On September 15, 2015, the Court asked Plaintiff's counsel to provide dates and times of availability for a case management conference. The Plaintiff failed to provide the information requested by the Court.

[23] On September 21, 2015, the Court, on its own motion, scheduled a case management conference for September 23, 2015 in light of the Plaintiff's failure to comply with the Direction of July 21, 2015 and to provide dates and times of availability.

[24] During the case management conference, counsel for the Plaintiff undertook to comply with the Court Direction of July 21, 2015 by October 7, 2015. Nothing was received from the Plaintiff by the extended deadline, or at all.

[25] As noted above, the Status Review Order was issued on October 14, 2015. The Plaintiff failed to file any written submissions in response to the Status Review Order or in reply to the Defendants' written representations dated November 26, 2015.

## II. Analysis

[26] The Defendants submit that the Plaintiff's claim should be dismissed with costs payable to the Reef Society, and without prejudice to the Reef Society's ability to seek assistance from the Court to enforce cost orders made in the Reef Society's favour. For the following reasons, I conclude that the action should be dismissed.

[27] A party in receipt of a notice of status review (in this case a Status Review Order issued pursuant to Rule 385(2)) is required to address two questions: (1) is there a justification for the failure to move the case forward, and (2) what measures does the party propose to take to move the case forward: *Netupsky v Canada*, 2004 FCA 239 (CanLII); 323 NR 349 at para. 11 citing *Baroud v Canada (Minister of Citizenship & Immigration)* (1998), 1998 CanLII 8819 (FC),

160 FTR 91 (TD) and *Manson Estate v Canada (Minister of National Revenue)*, 2002 FCA 357 (CanLII), [2003] 1 CTC 13 (FCA) leave to appeal dismissed, [2002] SCCA No. 542. Moreover, where there are court orders or directions that have not been complied with by the time the status review is initiated, those outstanding matters must also be addressed.

[28] The law is clear that proceedings should only be dismissed on status review in exceptional circumstances, and where no other remedy would suffice. Given the draconian effect of dismissing a claim for delay, the focus should be on the overall interests of justice in the case. The overarching concern should be whether the party in default recognizes its responsibility to move the action along and is taking steps to do so.

[29] The Plaintiff had a reasonable opportunity to respond to the Status Review Order but offered no explanation for his conduct. His repeated non-compliance with court orders and directions is indefensible and quite serious.

[30] The Plaintiff's transgressions in this case are more than mere oversight or innocent mistakes, but rather demonstrate a continued pattern of ignoring his responsibilities to move the proceeding forward and a complete disregard of the case management process.

[31] In the circumstances, I consider dismissal of the action to be an appropriate remedy that is proportionate to the Plaintiff's conduct throughout this litigation. There is no alternative remedy that would suffice in the circumstances of this case.



**THIS COURT ORDERS that:**

1. The Plaintiff's action is dismissed, with costs to the Defendants.
2. The Defendants shall submit a status report and a proposed timetable for completion of the remaining steps in their counterclaim by January 15, 2016.

"Roger R. Lafrenière"  
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Case Management Judge

Vancouver, British Columbia  
December 2, 2015

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-709-13

**STYLE OF CAUSE:** WESLEY ROOTS, DOING BUSINESS AS, W.R.  
MARINE SERVICES v ARTIFICIAL REEF SOCIETY,  
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ANNAPOLIS, THE OWNERS AND ALL OTHERS,  
INTERESTED IN THE SHIP, EX "HMCS ANNAPOLIS”

**REASONS FOR ORDER:** LAFRENIÈRE P.

**DATED:** DECEMBER 2, 2015

**APPEARANCES:**

James Straith

FOR THE PLAINTIFF/  
DEFENDANT BY COUNTERCLAIM

Bryan Hicks

FOR THE DEFENDANTS/  
PLAINTIFFS BY COUNTERCLAIM

**SOLICITORS OF RECORD:**

Straith Litigation Chambers  
West Vancouver, British Columbia

FOR THE PLAINTIFF/  
DEFENDANT BY COUNTERCLAIM

Blake Cassels & Graydon LLP  
Vancouver, British Columbia

FOR THE DEFENDANTS/  
PLAINTIFFS BY COUNTERCLAIM