

Federal Court



Cour fédérale

**Date: 20100901**

**Docket: T-1378-10**

**Citation: 2010 FC 865**

**Ottawa, Ontario, September 1, 2010**

**PRESENT: The Honourable Mr. Justice Shore**

**BETWEEN:**

**ARTIFICIAL REEF SOCIETY  
OF NOVA SCOTIA**

**Plaintiff**

**and**

**HER MAJESTY THE CROWN IN RIGHT  
OF CANADA, THE MINISTER OF NATIONAL  
DEFENCE, AND THE SHIP EX HMCS FRASER,  
HER OWNERS AND ALL OTHER INTERESTED IN HER**

**Defendants**

**REASONS FOR ORDER AND ORDER**

**I. Introduction**

[1] [6] It is clear that the purported arrest of the freights and sub-freights of the *G.T.S. Katie* is not valid. Property in the hands of the Crown, whether belonging to the Crown or another, cannot be arrested, placed under lien, or otherwise seized in any way...

*(Third Ocean Marine Navigation Co., LLC v. "GTS Katie" (2000), 195 F.T.R 22, [2000] F.C.J. No.*

*1704 (QL), penned by Justice Paul Rouleau, citing section 14 of the Crown Liability and*

*Proceedings Act, R.S.C., 1985, c. C-50 (CLPA)).*

[2] In that case, a company owning a ship had contracted to ship goods with another company, who in turn sub-contracted with the Department of National Defence to ship military equipment from Greece to Canada. When a dispute arose between the non-governmental contracting parties, the ship owner had a warrant of arrest issued for the military equipment under Rule 481 of the *Federal Courts Rules*, SOR/98-106, as amended. Justice Rouleau set that warrant aside as being contrary to the Crown immunity set out in section 14 of the CLPA. *Third Ocean* applies directly to the present case. Although *Third Ocean* applied to the "any cargo or other property belonging to the Crown" clause in paragraph 14(b) of the CLPA, it is equally and identically applicable directly to the "any Crown ship" clause of the same section.

## II. Background

[3] The Artificial Reef Society of Nova Scotia (Plaintiff) obtained possession of the HMCS *Fraser*, a decommissioned Navy vessel, pursuant to an arrangement with the Department of National Defence, with the intention that it be used as a museum. When that prospect failed to materialize the Society proposed that the vessel be sunk to serve as an artificial reef. When the vessel fell into disrepair, the Society transferred it back to the Crown with an agreement that if the Crown decided to scrap the vessel, the Reef Society would be allowed to make an alternate proposal.

[4] When the Crown decided to have the ship broken up for scrap, it first gave the Plaintiff the right to make a proposal pursuant to clause 9 of the agreement. The Plaintiff was given six weeks to

make the proposal. The Plaintiff indicated its desire to transform the ship into an artificial reef, most likely in the Caribbean. The Plaintiff proposed that DND pay the cost of readying the ship for “ocean disposal”, at a cost estimated at \$1.5 million. The Crown specified that it has been informed by experts who have dismantled over 100 ships that the cost would be more likely in the range of \$5-6 million. Subsequently, Grenada had offered to receive the ship for use as an artificial reef, but would not pay for its transport; and, the Plaintiff had no viable plan to fund the towing.

[5] After two months of correspondence and further queries, the Crown rejected the proposal on July 14, 2010. DND then made a contract with SNC Lavalin to have the ship transported to Ontario and broken up. The ship was scheduled to leave Halifax on Sunday August 29<sup>th</sup>, 2010. The Plaintiff commenced an action against the vessel (*in rem*) and others, and caused a warrant to be issued by the Federal Court for the arrest of the vessel on August 27<sup>th</sup>, 2010.

[6] Due to an approaching hurricane, a small window of opportunity exists to move the ship from Halifax in time to meet the deadline at a recycling facility. According to the Crown, the ship recycler has other ships in its queue, and will not be able to take the *Fraser*, subsequently, leading to the frustration of the contract and several hundred thousand dollars in damages. In addition, as tugs are waiting to move the ship, the Crown has stated that the recycler has specified that every day that the ship is detained costs are incurred by the Crown in the sum of approximately \$25,000.

### III. Issue

[7] Is the Court to set aside the Warrant of Arrest due to a lack of jurisdiction to arrest a Crown ship at law?

#### IV. Pertinent Legislation

[8] The CLPA, section 3 creates a statutory right to pursue claims against the Crown, and sets out limitations on those liabilities. Unless a cause of action is expressly authorized by the CLPA or another Act of Parliament, no action lies against the Crown. Claims against the Crown are to be pursued *in personam*; that is, for damages against the Crown as a personal entity and not against Her Majesty's property. Section 3 of the CLPA states: “The Crown is liable for the damages for which, if it were a person, it would be liable...” (emphasis added)).

[9] Section 14 of the CLPA expressly precludes any action, *in rem*, that is actions directly against the property of Her Majesty the Queen itself. In recognition that section 5 of the CLPA authorizes claims in civil salvage against the Crown, it also addresses remedies against Crown maritime property, by expressly precluding the arrest or detention of a Crown ship or a lien on a Crown ship. Section 14 of the CLPA states:

**14.** Nothing in this Act

(a) authorizes proceedings *in rem* in respect of any claim against the Crown;

(b) authorizes the arrest, detention or sale of any Crown ship or aircraft, or of any cargo or other property belonging to the Crown; or

(c) gives to any person any

**14.** La présente loi n’a pas pour effet :

a) d’autoriser les actions réelles visant des demandes contre l’État;

b) d’autoriser la saisie, détention ou vente d’un navire, d’un aéronef, d’une cargaison ou d’autres biens appartenant à l’État;

c) de conférer à quiconque

lien on, or cause of preference on or in respect of, any ship, aircraft, cargo or other property belonging to the Crown.

un privilège sur un navire, un aéronef, une cargaison ou un autre bien appartenant à l'État, ou une cause de préférence sur ceux-ci ou à leur égard.

[10] Under the CLPA, maritime claims against the Crown for claims relating to Crown ships must be pursued by way of damages only. The Crown and Crown ships are immune from arrest, lien, or any other form of seizure. This immunity has been clearly recognized by this Court.

#### V. Analysis

[11] The Court is in agreement with the arguments of the Defendants.

[12] In the present case, the ex HMCS *Fraser* is a "Crown ship" as defined in the CLPA and the *Canada Shipping Act*, S.C. 2001, c. 26 (s.140). The clear and plain wording of section 14 of the CLPA and the judicial authority in *Third Ocean Marine* and *Hislop* is clear. No warrant for arrest can issue against the ex HMCS *Fraser* and any warrant and subsequent arrest of that ship is invalid.

[13] This Court recognizes that in *Hislop v. Canada (Attorney General)*, [2002] O.J.U. No. 2799, 115 A.C.W.S. (3d) 593 (Ont. Sup. Ct.), Justice Cullity reinforced the exclusion of any *in rem* remedy which would apply against ships as part of the plain meaning attached to that section. He held

49. Counsel for the Attorney General relied on the decision of the Federal Court in *Third Ocean Marine Navigation Co., LLC v. "GTS Katie" (The)*, [200] F.C.J. No. 174 (Fed. T.D.) in which it was said (paragraph 6) "Property in the hands of the

Crown, whether belonging to the Crown or another, cannot be arrested, placed under lien, or otherwise seized in any way."

50. This very broad statement was not necessary to the decision of the court and I find it difficult to reconcile with the words of the section. While the term "Crown ship" is defined as including ships in the exclusive possession of the Crown, no other authority - statutory or judicial - was cited for the proposition that "other property belonging to the Crown" is to be read as meaning "other property in the hands of the Crown whether belonging to the Crown or another". (Emphasis added).

[14] Subsection 43(7) of the *Federal Courts Act*, R.S.C. 1985 c.F-7, also prohibits an *in rem* action against certain categories of ships. Those prohibited ships with respect to which there can be no action *in rem* include warships, coast-guard ships, and police vessels, as well as any ship that is operated by Canada or a provincial government engaged in government service, and ships owned or operated by foreign states for non-commercial government purposes. Subsection 43(7) of the *Federal Courts Act* states:

Ship owned by sovereign power

(7) No action *in rem* may be commenced in Canada against

(a) any warship, coast-guard ship or police vessel;

(b) any ship owned or operated by Canada or a province, or any cargo laden thereon, where the ship is engaged on government service; or

(c) any ship owned or

Navire appartenant à un État souverain

(7) Il ne peut être intenté au Canada d'action réelle portant, selon le cas, sur :

a) un navire de guerre, un garde-côte ou un bateau de police;

b) un navire possédé ou exploité par le Canada ou une province, ou sa cargaison, lorsque ce navire est en service commandé pour le compte de l'État;

c) un navire possédé ou

<p>operated by a sovereign power other than Canada, or any cargo laden thereon, 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.</p>	<p>exploité par un État souverain étranger — ou sa cargaison — et accomplissant exclusivement une mission non commerciale au moment où a été formulée la demande ou intentée l'action les concernant</p>
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[15] Subsection 43(7) of the *Federal Courts Act* does not expressly address the situation of a ship owned by the Crown but not engaged in government service, as is the case here. As a result, subsection 43(7) of the *Federal Courts Act* does not override the immunity bestowed on a Crown ship in the circumstances granted by section 14 of the CLPA. While it would be open to Parliament to create an *in rem* remedy providing for the arrest of a Crown ship in those circumstances, it has not chosen to do so. Remedies against the Crown must be expressly granted by statutory grant. There is no authority to arrest a Crown ship, whether or not that ship is actively engaged in government service or decommissioned awaiting disposal.

[16] In addition, Rule 481 of the *Federal Courts Rules* cannot and does not create a right to arrest a Crown ship. That Rule authorizes designated court officers to issue warrants for arrest of property in *in rem* actions. It is under the authority of that Rule that the warrant in this case was issued; however, specific legislation providing the authority to arrest a Crown ship is required to overcome the exclusion of the remedy contained in section 14 of the CLPA. That authority is not contained in a Federal Courts Rule, absent an express statutory grant to arrest Crown ships.

## VI. Conclusion

[17] Therefore, the warrant issued is set aside as having no force or effect (*Federal Courts Rules*, R. 481).

### **ORDER**

#### **THIS COURT ORDERS:**

1. the warrant of arrest issued the 27<sup>th</sup> of August 2010 against the ex HMCS Fraser be quashed;
2. costs of this motion be granted in favour of the Defendants.

#### **Obiter**

An issue of importance was raised by the Plaintiff, that of preservation of the vessel, in the interim, as to the potential significance and importance of the ship to Canada's maritime heritage in conjunction with the 100<sup>th</sup> anniversary of the Canadian Navy. The issue of preservation of property would necessitate a hearing with a specific motion in reference to a specific rule within the jurisdiction of this Court to be pleaded in that regard by those concerned. It is recognized that the ship has been called "a Cadillac of the Cold War"; and it certainly appears to warrant more than a hasty decision on an urgent basis in that singular respect.

Therefore, further to the warrant of arrest, issued on August 27<sup>th</sup> 2010, being quashed by this court, the Court suggests that the vessel be preserved for the 12 day transfer period to Lake Erie, as was accepted, further to discussion within the context of the hearing, by the Defendant. That, to enable the preparation of the presentation of a new motion as requested by the Plaintiff on the preservation



of the property to be heard and concluded within the time-frame requested by the Plaintiff, as stated and signalled, during the above proceeding on the Defendant's motion which was before the Court.

“Michel M.J. Shore”

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Judge

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

**DOCKET:** T-1378-10

**STYLE OF CAUSE:** ARTIFICIAL REEF SOCIETY OF NOVA SOCIAT  
v. HER MAJESTY THE CROWN IN RIGHT OF  
CANADA, THE MINISTER OF NATIONAL  
DEFENCE, AND THE SHIP EX HMCS FRASER, HER  
OWNERS AND ALL OTHER INTERESTED IN HER

**PLACE OF HEARING  
BY TELEPHONE  
CONFERENCE:** Ottawa, Ontario

**DATE OF HEARING:** September 1, 2010

**REASONS FOR JUDGMENT  
AND JUDGMENT:** SHORE J.

**DATED:** September 1, 2010

**APPEARANCES:**

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