

Federal Court



Cour fédérale

**Date: 20190723**

**Docket: T-1453-16  
(T-745-16)**

**Citation: 2019 FC 977**

**Ottawa, Ontario, July 23, 2019**

**PRESENT: Case Management Judge Mireille Tabib**

**ADMIRALTY ACTION *IN REM* AND *IN PERSONAM***

**BETWEEN:**

**THE ADMINISTRATOR OF THE  
SHIP-SOURCE OIL POLLUTION FUND**

**Plaintiff**

**and**

**THE OWNERS AND ALL OTHERS INTERESTED IN  
THE SHIP CORMORANT, THE PORT OF  
BRIDGEWATER INCORPORATED, A BODY  
CORPORATE, 3092714 NOVA SCOTIA LIMITED, A  
BODY CORPORATE, CORMORANT MARINE  
SERVICES CORPORATION, A BODY CORPORATE  
and NEIL S. HJELLE**

**Defendants**

**AND BETWEEN:**

**PORT OF BRIDGEWATER**

**Plaintiff**

**and**

**CORMORANT MARINE SERVICES  
LIMITED, A BODY CORPORATE  
AND NEIL S. HJELLE**

**Defendants by Counterclaim**

**AND BETWEEN:**

**PORT OF BRIDGEWATER**

**Plaintiff**

**and**

**CORMORANT MARINE SERVICES CORPORATION  
and THE OWNERS AND ALL THOSE INTERESTED IN  
THE MV CORMORANT AND THE SAID CORMORANT**

**Defendants**

**ORDER AND REASONS**

[1] The vessel Cormorant has been moored at the Port of Bridgewater, Nova Scotia, since 2000. She has been unattended, essentially abandoned since 2013. The Administrator of the Ship Source Oil Pollution Fund ( “the Administrator”) and the Port of Bridgewater (the “Port”) have brought these actions against her and “her owners”, the Administrator claiming reimbursement of pollution response expenses, and the Port claiming for berthage, pollution countermeasures, salvage and damages.

[2] By this motion, the Port seeks an order allowing it to arrange for the immediate judicial sale of the Cormorant. For the reasons that follow, the Port’s motion is dismissed.

I. BACKGROUND

[3] The Cormorant is a former Canadian navy warship, decommissioned in 1997. She has since had several owners, but for the purpose of these reasons, it is sufficient to trace her history from 2009, when she was sold by judicial sale through an order of this Court to Cormorant Marine Services Corporation (“CMS”), a Nevada corporation whose president was Neil Hjelle. The Cormorant remained at the Port of Bridgewater while CMS carried out work to return her to service.

[4] In 2013, CMS discontinued attempts to recommission the vessel and an agreement was reached between Mr. Hjelle, acting for CMS, and Mr. Richard Welsford, acting either as sole director of 3092714 Nova Scotia Limited (“NSL”), or as sole director of the Port, for the vessel to be sold for the sum of \$10. A bill of sale was executed but the sale was never registered. Neither CMS nor NSL were in good corporate standing in their respective jurisdiction of incorporation at the time.

[5] In 2015, the Cormorant sank at her moorings, causing pollution and a public hazard. She was raised and the pollution incident was cleaned up through the efforts of the Port and of the Canadian Coast Guard. The Administrator reimbursed the Coast Guard for its expenses and became subrogated in its rights to recover those costs against the responsible owners of the vessel.

[6] A threshold issue in resolving both actions is the matter of the ownership of the vessel. The Port alleges that no sale of the vessel by CMS was ever effective because CMS's corporate status had lapsed, and that CMS remained the lawful owner of the vessel until it ceased to exist and its property escheated to the province of Nova Scotia. CMS and Hjelle argue that the sale of the vessel was validly affected and that the ownership of the vessel was transferred to NSL and/or the Port.

[7] Motions for summary judgment to resolve the issue of ownership were brought in the summer of 2018 by the parties, but were dismissed on April 30, 2019, the Court (Heneghan J.) considering that the matter was not appropriate for determination as a summary judgment.

## II. THE PRESENT MOTION

[8] The Port seeks an order allowing the vessel to be sold *pendente lite*, whether it be by private sale or by auction and subject to whatever conditions the Court might impose; to authorize the Port to take any reasonable step to effect or facilitate that sale; and for the proceeds of sale to be paid into Court, less reasonable legal fees and Marshall fees, to be available to satisfy claims that may be made against the vessel following notification to potential claimants.

[9] An appraisal report completed in 2017 shows that while the vessel had an appraised value of between \$100,000 and \$150,000 back in 2009, prior to her sinking, her maximum value in 2017 was of \$40,000, and that, only by assuming favourable conditions for a buyer (i.e., cheap costs to move her from her current location and good scrap steel value). The appraisal report, however, states that it is "unlikely that the vessel would be sold for even \$40,000".

[10] All parties at the hearing agreed that any order for sale should impose conditions that would ensure that the vessel be safely and effectively removed from the Port and either disposed of or removed from Canada within a specific delay.

[11] The Port has led no evidence as to the existence of an interested buyer, let alone a buyer having the capacity to assume the cost of safely moving and disposing of the vessel.

[12] The reasons stated to justify the immediate sale of the vessel is that she remains a threat to navigation, that the Coast Guard has recently requested to inspect her as a “vessel of concern” and that it appears likely that she could be the subject of measures to forcibly remove and/or dismantle her pursuant to the *Wrecked, Abandoned or Hazardous Vessels Act* SC 2019 c 1, assented to February 28, 2019 (“*WAHVA*”) (while the parties expected *WAHVA* to come into force in late July 2019, it had still not been proclaimed in force at the time of the hearing).

[13] Richard Welsford, for the Port, states in his affidavit in support of the motion for sale that he has the following concerns:

- a. that a sale or disposal of the Cormorant pursuant to *WAHVA* is likely to be less favourable to the creditors than a sale that the Port might be able to arrange pursuant to a Court order, and
- b. that if the Court were to find that the Port is, at law, the owner of the Cormorant, it could be held liable for the additional costs of any measures taken under *WAHVA*.

[14] Mr. Welsford further mentions that the Port has obtained a writ of seizure and sale for two other vessels that had been abandoned at the Port, and that he believes that if a suitable offer

cannot be obtained for the Cormorant, then there could be an opportunity to market all three vessels for sale to take advantage of “economies of scale and the economic practicality of towing more than one ship at a time”.

[15] Implicitly referring to the list of elements set out in paragraph 53 of *Franklin Lumber Ltd. v Essington II (The Ship)* 2005 FC 95 as elements to be considered in deciding whether to sell a vessel *pendente lite*, the Port argues that such a sale should be ordered here because:

- (1) The claims of the Administrator and of the Port vastly exceed the value of the vessel.
- (2) No one has claimed ownership in the vessel.
- (3) The vessel is likely to be sold at some point.
- (4) Any owner may have a good defence to the Administrator’s claim, given that the sinking was likely caused by the acts of an unknown third party.
- (5) The vessel can be inspected to ascertain the cause of her sinking before the sale.
- (6) The vessel can only lose further value over time.
- (7) The vessel is occupying a moorage that has commercial value and is not currently generating value for the Port.
- (8) Liability might accrue pursuant to *WAHVA* to whoever is the owner of the vessel.

[16] The Administrator, CMS and Hjelle all oppose the order sought by the Port on two principal grounds.

[17] First, they say that the overarching principles in the Court’s exercise of its powers to order the judicial sale of a vessel *pendente lite* is the protection of creditors from the devaluation

of the ship as a common asset to satisfy the claims of creditors. Given that it is unlikely that a sale would generate any material proceeds, the measure will not protect the creditors. They add that any threat of additional liabilities accruing on the vessel cannot further devalue a property that has no value.

[18] Second, they argue that the Port's real purpose in selling the vessel is to avoid and deflect to a new owner any liability that the Port or its affiliated company, NSL, might have for the costs of measures that might be taken pursuant to *WAHVA*, should they be determined to be the owners of the vessel. This, they say, is not a valid use of the Court's discretion under Rule 490. Rather, they argue, the Court should decline to order the judicial sale of derelict or abandoned vessels, and instead defer to the greater expertise of the authorities to whom Parliament, through *WAHVA*, have delegated the task of dealing with such vessels.

[19] The Administrator, CMS and Hjelle subsidiarily argue that if the Court were to order the sale of the vessel, it should impose various conditions to ensure that a buyer will, immediately following acquisition, either deconstruct the ship or remove her from Canada, that the costs incurred by the Port not be adjudged or paid out of the proceeds of sale until it has been determined that the Port is not the owner, and other logistical and procedural safeguards.

### III. ANALYSIS

[20] This Court, in *The Essington II*, above, after reviewing the jurisprudence and the circumstances in which it has been recognized that there was "good reason" for the Court to

exercise its powers to order the sale of a vessel before judgment, extracted the following elements to be considered in deciding on a sale *pendente lite*:

1. The value of the vessel compared with the amount of the claim;
2. Whether there is an arguable defence;
3. Can the owner carry on: is it reasonable to assume that there must be a sale of the vessel at some point;
4. Whether there will be any diminution in the value of the vessel or of the sale price by the delay, including the cost of keeping a man or a crew aboard the vessel, the cost of maintaining the vessel and the cost of insuring the vessel;
5. Whether the vessel will depreciate by further delay;
6. Whether there is any good reason for a sale before trial.

[21] These elements, however, do not constitute a mechanical test to be applied, but elements that might assist the Court in balancing the two essential but competing considerations at play in ordering a sale before trial. These two opposing considerations are the interests of the creditors in preserving the value of the vessel and the ownership interests of the owners. The first three elements identified in *The Essington II* assess the strength of the owners' interest; elements 4 and 5 go to the creditors' interest, while the sixth reflects the open-ended nature of the list.

[22] Given that no one wishes to assert an ownership interest in the Cormorant, only two elements remain to be considered in this matter: those two that affect the creditors' interests, and the potential application of *WAHVA*, either as a component of the creditors' interest or as another "good reason" for a sale before trial.



[23] The Port has failed to bring evidence of the existence of any market for the vessel. The appraisal report completed in 2017 found no interest among local scrap metal dealers. Given the parties' agreement that a buyer should give sufficient assurances of a plan and ability to remove the vessel as an essential condition of any sale, the Court is struck by the absence of evidence of what it might cost a buyer to safely tow her to where she might be disposed of. The appraisal report of 2017 vaguely mentions that "substantial costs would be incurred for towing and hauling it out of the water". The Court is left with little evidence of the intrinsic value of the vessel, even for scrap, and no idea of the cost of realizing that value.

[24] The appraisal conducted two years ago doubted that the vessel would be sold "for even \$40,000" and recommended that the vessel be auctioned "for whatever price could be obtained". The 2017 appraisal report does not appear to have taken into account the effect on the sale price of a condition requiring a potential buyer to establish a plan and ability to safely remove the vessel. Two years later, and with the now very real likelihood that the vessel could be the subject of measures under *WAHVA*, the Court concludes that it is unlikely that a buyer could be found who would be willing to assume the potential liabilities associated with the vessel, at any price at all. As for the suggestion that the judicial sale of two other vessels left derelict at the Port might afford an opportunity, through "economies of scale and the economic practicality of towing more than one ship at a time", Mr. Welsford's qualifications to offer this opinion are neither stated nor apparent to the Court.

[25] As already mentioned above, the judicial sale of the vessel is not, in and of itself, a measure that would reduce or abate the costs or liabilities associated with her continued arrest,

including under *WAHVA*, unless the buyer were able to safely remove and/or dispose of the vessel. No evidence has been tendered that would support the reasonable likelihood that any buyer could be found who would be willing or able to do so.

[26] The Court is thus satisfied that it is unlikely that any significant proceeds can be obtained from the sale of the vessel, whether by auction or by any attempts at a private sale, and that ordering the sale of the vessel would not reduce liabilities or costs associated with her continuing arrest. A judicial sale is not a measure that would be effective in maximizing the value of the vessel for the benefit of the creditors.

[27] The Court is satisfied that the only material effect of a judicial sale would be to deflect and displace future liabilities arising from the ownership of the vessel from whoever her current owners are to a potential new owner. The Court is not satisfied that this is a valid reason for the exercise of the Court's discretion under the Rules.

[28] That conclusion is dispositive of the Port's motion. As such, and because *WAHVA* is not yet in force, the Court declines at this time to opine on the Administrator's submissions to the effect that the Court should defer to the process mandated under *WHAVA* wherever the judicial sale of an abandoned or derelict vessel is contemplated.

**ORDER**

**THIS COURT ORDERS that:**

1. The Port of Bridgewater's motion is dismissed, cost in the cause.

"Mireille Tabib"  
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Case Management Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-1453-16  
(T-745-16)

**STYLE OF CAUSE:** PORT OF BRIDGEWATER v. CORMORANT MARINE SERVICES CORPORATION and THE OWNERS AND ALL THOSE INTERESTED IN THE MV CORMORANT AND THE SAID CORMORANT

**PLACE OF HEARING:** BY VIDEO CONFERENCE: OTTAWA, ONTARIO, VANCOUVER, B.C., AND HALIFAX, N.S.

**DATE OF HEARING:** JULY 22, 2019

**ORDER AND REASONS:** TABIB P.

**DATED:** JULY 23, 2019

**APPEARANCES:**

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NEIL S. HJELLE AND CORMORANT MARINE SERVICES CORPORATION

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PORT OF BRIDGEWATER AND 3092714 NOVA SCOTIA LTD.

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