Federal Court of Appeal  Cour d'appel fédérale

Date: 20130918

Docket: A-541-12

Citation: 2013 FCA 217

CORAM: **SHARLOW J.A.**
WEBB J.A.
NEAR J.A.

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ALBERTA as represented by THE MINISTER OF SUSTAINABLE RESOURCES DEVELOPMENT

Appellant

and

ALAN TONEY, YVONNE TONEY and COURTENAY TONEY & REBECCA TONEY as represented by their litigation guardian ALAN TONEY

Respondents

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA in the name of THE ROYAL CANADIAN MOUNTED POLICE and THE CANADIAN SHIP BEARING LICENSE NO. AB 1275024

Defendants in action, not party to appeal

Heard at Vancouver, British Columbia, on June 3, 2013.

Judgment delivered at Ottawa, Ontario, on September 18, 2013.

REASONS FOR JUDGMENT BY:	NEAR J.A.
CONCURRED IN BY:	WEBB J.A.
DISSENTING REASONS BY:	SHARLOW J.A.

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REASONS FOR JUDGMENT

NEAR J.A.

[1] Her Majesty the Queen in right of Alberta ("Alberta") appeals from the December 3, 2012 Order of the Federal Court (2012 FC 1412) in which the judge determined, as a question of law in advance of trial, that the Federal Court has *in personam* jurisdiction over Alberta in the underlying action.

[2] The action arises from the death of five-year-old Janessa Toney, daughter and sister to the plaintiffs, following a boating incident on Lake Newell in southern Alberta. It is alleged that the Toney family was out on their boat on Lake Newell on September 27, 2008, and encountered a malfunction in their steering equipment. They called for help and, in the course of the rescue, the rescue vessel, owned and operated by Alberta, capsized. All of the members of the rescue team and of the Toney family, except for Janessa, were taken to shore. It is believed that she was pinned under the rescue vessel and died of drowning.

[3] The Statement of Claim sets out a series of allegations against Alberta at paragraph 63, including "failing to identify and utilize the reasonably safest method, means and route for retrieving the Plaintiffs" and "overloading the [rescue] Vessel given the wind and wave conditions, and otherwise operating [it] in such a manner as swamping and/or capsizing of the Vessel was likely, and did in fact occur."

[4] Alberta has consistently objected to the Federal Court's exercise of *in personam* jurisdiction over it in these proceedings.

I. ISSUES

[5] The sole issue to be decided is whether the Federal Court has *in personam* jurisdiction over Alberta in this matter. As a question of law, the judge's determination in this regard is reviewable on the standard of correctness: *Housen v. Nikolaisen*, 2002 SCC 33 at paragraph 8; *Trainor Surveys (1974) Ltd. v. New Brunswick*, [1990] 2 F.C. 168 at paragraph10.

II. ANALYSIS

A. Basic Principles

[6] Four basic principles will frame my analysis. First, Parliament and the provincial legislatures have "unequivocally adopted the premise that the Crown is *prima facie* immune" from legislation: *R. v. Eldorado Nuclear Ltd.*, [1983] 2 S.C.R. 551 at 558. Alberta's statutory directive on this point is found in section 14 of its *Interpretation Act*, R.S.A. 2000, c. I-8, and governs the approach to Alberta's statutes (emphasis mine):

> 14. No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, unless the enactment expressly states that it binds Her Majesty.

"Her Majesty" is defined in section 28 of the same Act as "the Sovereign of the United Kingdom, Canada and Her other realms and territories, and Head of the Commonwealth." The federal equivalent, found in section 17 of the *Interpretation Act*, R.S.C., 1985, c. I-21, and applicable to federal statutes, states (emphasis mine):

> 17. No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except as mentioned or referred to in the enactment.

"Her Majesty" is defined identically as in the provincial statute.

[7] The Supreme Court of Canada has cautioned that courts are not entitled to question the basic concept of Crown immunity (Eldorado at 558), and has emphasized that, in light of the language in the *Interpretation Act*s, a clear Parliamentary intention to bind the Crown – federal or provincial – is required to displace it: *Alberta Government Telephones v. Canadian Radio-television and Telecommunications Commission*, [1989] 2 S.C.R. 225 [*AGT*] at paragraphs 130-131. While certainly helpful, such an intention need not necessarily be expressed with such words as: "This Act shall bind Her Majesty". As set out in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 [*Oldman River*] at page 53, "a contextual analysis of a statute may reveal an intention to bind the Crown if one is irresistibly drawn to that conclusion through logical inference" (emphasis mine).

[8] Second, where Parliament has the authority to legislate in an area, a provincial Crown will be bound if Parliament so chooses: *AGT* at paragraph 116.

[9] Third, the Federal Court, created by Parliament pursuant to section 101 of the *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.) obtains its jurisdiction from statute. In order for the provincial Crowns to be sued in this Court, there must be "some legislative provision permitting suits": *Trainor Surveys*, at paragraph 13.

[10] Fourth and finally, the Court must have jurisdiction over both the subject matter of the dispute and the parties: *Kusugak v. Northern Transportation Co. et al.*, 2004 FC 1696 at paragraph 42. There is no dispute that the claim relates to maritime law, and thus falls within the subject matter jurisdiction of the Federal Court pursuant to section 22 of the *Federal Courts Act*, R.S.C., 1985, c. F-7. The contest is strictly about whether Parliament has shown a clear intention to grant the Federal Court *in personam* jurisdiction over Alberta in this matter.

B. Has Parliament shown a clear intention to bind the Province?

[11] In their text, *Government Liability: Law and Practice*, looseleaf (Toronto: Thomson Reuters, 2011), Horsman and Morley point out that the Crown is presumptively not bound by legislation unless (i) it is expressly named; (ii) it is bound by necessary implication; or (iii) it has waived its immunity. This is a useful rubric for assessing the parties' arguments in this case, being ever mindful that the starting presumption is that the Crown is not bound.

i. Expressly Named

(a) Section 22 of the *Federal Courts Act*

[12] Section 22 of the *Federal Courts Act* reads, in relevant part, as follows:

22. (1) The Federal Court has concurrent original jurisdiction, between subject and subject as well as otherwise, in 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 within the class of subject of navigation and shipping, except to the extent that jurisdiction has been otherwise specially assigned.	22. (1) La Cour fédérale a compétence concurrente, en première instance, dans les cas — opposant notamment des administrés — où une demande de réparation ou un recours est présenté en vertu du droit maritime canadien ou d'une loi fédérale concernant la navigation ou la marine marchande, sauf attribution expresse contraire de cette compétence.

[13] The Respondents submit that the phrase "between subject and subject as well as otherwise" expressly grants *in personam* jurisdiction over provincial Crowns. Relying primarily on *National Association of Broadcast Employees and Technicians v. The Queen in right of Canada*, [1980] 1 F.C. 820 [*N.A.B.E.*], the Respondents argue that "as well as otherwise" can only refer to public authorities, which includes provincial and territorial governments: *Kusugak* at paragraph 50.

[14] I do not find the authorities relied on by the Respondents persuasive for two reasons: First, *N.A.B.E.* was decided in a purely federal context, without regard to the potential difference between levels of government. For its part, the Court in *Kusugak* did not consider the phrase "as well as otherwise", limiting itself only to a consideration of the meaning of "between subject and subject".

[15] Second, the fact that the Crown is defined in section 2 of the *Federal Courts Act* as "Her Majesty in right of Canada" is contraindicative of a clear intention to bind the provinces. In *Canadian Javelin Ltd. v. Newfoundland*, [1978] 1 F.C. 408, the Court noted at paragraph 5 that "where the *Federal Court Act*, [R.S.C. 1970 (2nd Supp.), c. 10] contemplates conferring jurisdiction in claims against Her Majesty, it does so (*e.g.*, section 17(1)) by express reference to claims against the 'Crown', which is defined, for purposes of the *Federal Court Act*, by section 2 thereof as 'Her Majesty in right of Canada'". When compared with other statutes that contain express language of an intention to bind the provinces, such as section 5 of the *Species at Risk Act*, S.C. 2002, c. 29 ("This Act is binding on Her Majesty in right of Canada or a province"), I am not convinced that the words "as well as otherwise" are sufficiently express to convey Parliament's clear intention to bind

the provinces. While language as explicit as that in the *Species at Risk Act* is not strictly required, my view is supported by the absence of any indication of a Parliamentary intention to confer on the Federal Courts *in personam* jurisdiction over the provinces in the legislative history of section 22 of the *Federal Courts Act*.

[16] This interpretation is equally consistent with the case law that explicitly dealt with whether similar provisions in the *Federal Courts Act* and its predecessors intended to bind the provinces. In *Javelin*, for example, this Court held that section 23 of the *Federal Court Act* did not confer jurisdiction in respect of Her Majesty in right of Newfoundland. While it related to bills of exchange and promissory notes, section 23 of the former *Federal Court Act* contained similar language as section 22 of the current *Federal Courts Act*. The Court's holding flowed from then-section 16 of the federal *Interpretation Act*, which provided that Her Majesty is bound by an enactment only where she is therein mentioned or referred to: *Javelin* at paragraph 4. No mention or reference to Her Majesty was found.

[17] In *Trainor Surveys*, the Federal Court adopted the *Javelin* reasoning that "it is clear law that the Crown cannot be impleaded in a court in respect of a claim against the Crown except where statutory jurisdiction has been conferred on the court to entertain claims against the Crown of a class in which the particular claim falls": *Trainor Surveys* at paragraph 12; *Javelin* at paragraph 3. While *Trainor Surveys* was a case related to copyright infringement pursuant to section 20 of the *Federal Courts Act*, the language at issue was again the same as in our case. The Court held that a general description of subject matter of concurrent jurisdiction was insufficient to displace the traditional immunity enjoyed by provincial Crowns from suits in the Federal Court (emphasis mine):

> 13. In my opinion, the mere fact that the Federal Court has concurrent jurisdiction with provincial courts to hear and determine civil actions for copyright infringement is insufficient to vest the Court with jurisdiction to entertain the present suit impleading the provincial Crowns and the Crown agencies named as defendants in the absence of some specific provision to that effect, whether contained in federal legislation or in the respective Crown proceedings statutes of the three provinces. I concur with the reasoning of Collier J. in *Avant Inc. v. R.*, *supra*, and, paraphrasing his words, conclude that "for the provincial Crown[s] to be sued in this court, there must, … be some legislative provision permitting suits", and here there is none. I am also of the opinion that the traditional immunity of the provincial Crowns and their agencies from suits in the Federal Court is not abrogated in the present case by the general descriptions of subject matter of concurrent jurisdiction with respect to copyright contained in the *Federal Court Act*, on the principle of *Union Oil Company v. The Queen*, *supra*.

See also *Greeley v. Tami Joan (The)*, [1996] F.C.J. No. 739, particularly at paragraph 21.

[18] I am of the same mind with respect to section 22 of the *Federal Courts Act*: it deals with subject matter jurisdiction, and I see nothing in the provision, or in the remainder of the statute (other than section 19 of the *Federal Courts Act*), that irresistibly draws me to the conclusion that Parliament clearly intended to bind the provincial Crown by express language or through logical inference: see *Manitoba v. Canadian Copyright Licensing Agency (c.o.b. Access Copyright)*, 2013 FCA 91 at paragraph 48; *Oldman River* at pages 52-53.

(b) Section 19 of the *Federal Courts Act*

[19] Section 19 of the *Federal Courts Act* does grant jurisdiction to the Federal Court over the provincial crowns in cases of intergovernmental controversies if the particular province involved has adopted legislation accepting such jurisdiction. Alberta has accepted such jurisdiction (section 27 of Alberta's *Judicature Act*, R.S.A. 2000, c. J-2).

[20] In *Union Oil Co. of Canada v. Canada*, [1974] 2 F.C. 452 the plaintiff had sold fuel oil to the Province of British Columbia who claimed an exemption from the tax imposed under the *Excise Tax Act*, R.S.C. 1970, c. E-13. The Federal government did not agree that the exemption was applicable. The plaintiff commenced an action against both the Federal government and the Province of British Columbia. In striking the claim against the Province of British Columbia, Collier J. made the following comments in relation to the argument that the Federal Court had jurisdiction over the Province of British Columbia as a result of the provisions of section 19 of the then *Federal Court Act*:

> 15 In my opinion section 19 has no application to this case. There is no doubt there is a dispute or disagreement between Canada and British Columbia as to whether the diesel fuel was exempt from tax. Assuming that dispute or disagreement to be a "controversy", it seems to me the jurisdiction of the Federal Court can only be invoked by Canada or by the Province, and not by the commencement of legal proceedings by a private citizen.

[21] In dismissing the appeal by Union Oil Co. of Canada Limited, the Federal Court of Appeal ([1976] 1 F.C. 74) stated that:

> 3 The jurisdiction of the Federal Court is entirely statutory and, accepting that it lies within the powers of the Parliament of Canada, when legislating in a field within its competence, to give the Federal Court jurisdiction to implead the Crown in right of a province, we do not think any of the statutory provisions to which we were referred, or any others of which we are aware, authorize the Court to entertain a proceeding at the suit of a subject against the Crown in right of a province.

[22] The Supreme Court of Canada, in brief reasons (16 N.R. 425) also dismissed the company's appeal and noted that:

> …the appellant has failed to show any ground of jurisdiction in the Federal Court over the Crown in right of British Columbia in this case.

[23] In *Fairford Band v. Canada*, [1995] 3 F.C. 165 (affirmed on appeal [1996] F.C.J. No. 1242 (FCA)), the courts distinguished the *Union Oil* case and held that section 19 of the *Federal Court Act* could be invoked if the Federal government (against whom a claim was being made) commenced a third party proceeding against a provincial Crown. Therefore it seems to me that section 19 of the *Federal Courts Act* cannot be invoked if an individual or a company commences an action against both the Federal government and a provincial government but may be invoked if the action is commenced against the Federal government and the Federal government then commences a third party proceeding against the provincial Crown.

[24] Even though it may be necessary or desirable to have both the Federal government and the province of Alberta before the Federal Court without the necessity of first commencing an action against the Federal government and then, if the Federal government should so choose, having the federal government commence a third party proceeding against the province of Alberta, as noted by the Supreme Court of Canada in *Newfoundland v. Québec (Commission Hydro Électrique)*, [1982] 2 S.C.R. 79:

> … As Collier J. rightly stated in *Union Oil Co. of Canada Ltd. v. The Queen in right of Canada* (1974), 52 D.L.R. (3d) 388, in a note at the foot of p. 393:
>
> > The fact that one defendant is properly before the Court, and another party may be a necessary or desirable defendant, does not confer jurisdiction.

[25] As a result, since this action was commenced by the Toney family against the province of Alberta and the Federal government, section 19 of the *Federal Courts Act* does not apply to grant the Federal Court jurisdiction over the province of Alberta.

> (c) Alberta's *Proceedings Against the Crown Act* + section 22 of the *Federal Courts Act*.

[26] The Respondents argue that, even if section 22 of the *Federal Courts Act* merely grants the Federal Court subject matter jurisdiction, a clear intention to grant *in personam* jurisdiction is evident when it is read in conjunction with sections 4 and 8 of Alberta's *Proceedings Against the Crown Act*, R.S.A. 2000, c. P-25 [APACA]. This is particularly so, they posit, when compared with the equivalent provisions in the Crown proceedings legislation in other provinces, which specify in which courts proceedings against the Crown must be brought (generally the superior courts of the province in question). The Respondents submit that had the Alberta legislator intended to exclude the jurisdiction of the Federal Courts over proceedings commenced by individuals or companies against it, it would have included language to that effect.

[27] I am not persuaded by this line of reasoning. Section 4 of APACA grants the right to substantive relief against the Crown, and reads as follows:

> 4 A claim against the Crown that, if this Act had not been passed, might be enforced by petition of right, subject to the grant of a fiat by the Lieutenant Governor, may be enforced as of right by proceedings against the Crown in accordance with this Act, without the grant of a fiat by the Lieutenant Governor.

[28] Section 8 of APACA describes the forum and procedural rules that will govern proceedings against Alberta commenced in accordance with APACA, and reads as follows (emphasis mine):

> 8 Except as otherwise provided in this Act, all proceedings against the Crown <u>in any court</u> shall be instituted and proceeded with in accordance with the relevant law governing the practice in that court.

[29] By way of comparison, the equivalent provision in British Columbia's ("B.C.") *Crown Proceeding Act*, R.S.B.C. 1996, c. 89 reads as follows:

> 4 (1) Subject to this Act, all proceedings against the government in the Supreme Court must be instituted and proceeded with under the *Supreme Court Act* and, if applicable, under the *Class Proceedings Act*.

[30] In *Athabasca Chipewyan First Nation v. Canada (Minister of Indian Affairs and Northern Development)*, 2001 ABCA 112 [*Athabasca*], the Alberta Court of Appeal held that the Alberta courts had no jurisdiction over the B.C. Crown by virtue of subsection 4(1) of B.C.'s *Crown Proceeding Act*, R.S.B.C. 1996, c. 89.

[31] The Alberta Court of Appeal in *Athabasca* recognized that the B.C. Crown had largely waived its historical immunity with respect to tort liability (particularly in paragraph 2(c) of the *Crown Proceeding Act*), but reasoned that the B.C. Crown maintained part of its procedural immunity by virtue of subsection 4(1) (emphasis mine):

> 19. Second, there is a presumption that "the legislature does not intend to make any change in the existing law beyond that which is expressly stated in, or follows by necessary implication from, the language of the statute". P. St. J. Langan, *Maxwell on the Interpretation of Statutes*, 12th ed. (London: Sweet & Maxwell, 1969) at 116. At common law, the general rule is that the Crown cannot be sued. *Young v. S.S. "Scotia"*, 13 C.R.A.C. 168, [1903] A.C. 501 at 505 (P.C., Can.); *Can. Javelin v. The Queen Nfld.*, [1978] 1 F.C. 408 at 409 (F.C.A.). The Crown can be sued, of course, in a court that has been granted jurisdiction over it by statute. The B.C. Act does not expressly give jurisdiction over the B.C. government to the Alberta Court of Queen's Bench. While it does not give express jurisdiction over the government to the B.C. Supreme Court either, it does so by implication of s. 4(1). Absent more explicit language (such as that found in the similar federal legislation), the above principle suggests that s. 4(1) should not be interpreted as granting jurisdiction to any court other than the B.C. Supreme Court. In the result, while British Columbia has largely waived its substantive immunity through s. 2(c), it has only partly waived its procedural immunity through s. 4(1).

[32] In *Medvid v. Saskatchewan (Ministry of Health)*, 2012 SKCA 49, the Saskatchewan Court of Appeal dealt with the issue of the interpretation of section 8 of the APACA. The decision of the Saskatchewan Court of Appeal was released on April 25, 2012 which was over four months before the motion that is under appeal was heard by Mactavish J. on September 4, 2012. However there is no indication that this case was brought to her attention and this case was not included in the Joint Book of Authorities that was submitted to this Court. Counsel for the Medvids and Coreen Hardy before the Saskatchewan Court of Appeal were E. F. A. Merchant, Q.C. and Nicholas Robinson.

[33] The Saskatchewan Court of Appeal endorsed the interpretation of section 8 of the APACA adopted by Dawson J. and repeated this interpretation in paragraph 39:

> … Section 8 of the Alberta Act leads to the inevitable conclusion that the Alberta Legislature intended that actions against Alberta can only proceed when brought in a court in Alberta. The *Proceedings Against the Crown Act* of Alberta does not open the door for an action against Alberta in another jurisdiction.

[34] Section 27 of Alberta's *Judicature Act*, also supports the conclusion that Alberta Legislature has not generally granted jurisdiction to the Federal Court over Alberta but rather has only granted jurisdiction in specific circumstances:

> 27 The Supreme Court of Canada and the Federal Court of Canada, or the Supreme Court of Canada alone, according to the *Supreme Court Act* (Canada) and the *Federal Court Act* (Canada) have jurisdiction
>
> (a) in controversies between Canada and Alberta;
>
> (b) in controversies between Alberta and any other province or territory of Canada in which an Act similar to this Act is in force;
>
> (c) in proceedings in which the parties by their pleadings have raised the question of the validity of an Act of the Parliament of Canada or of an Act of

> the Legislature of Alberta, when in the opinion of a judge of the court in which they are pending the question is material, and in that case the judge shall, at the request of the parties, and may without request if the judge thinks fit, order the case to be removed to the Supreme Court of Canada in order that the question may be decided

[35] Given the interpretation of section 8 of the APACA adopted by the Saskatchewan Court of Appeal in *Medvid* and absent more explicit language to the contrary in any other provincial statute, there is no basis to find that the Province of Alberta has granted the Federal Court jurisdiction over the Province of Alberta other than as provided in section 27 of the Alberta *Judicature Act*.

ii. Necessary Implication

[36] The Respondents rely on various provisions that prohibit *in rem* proceedings against ships owned by a province – primarily subsections 43(7) of the *Federal Courts Act* and 79(3) of the *Marine Liability Act*, S.C. 2001, c. 6 – to argue that, because a statutory right *in rem*, without a maritime lien, does not lie without the liability of the ship owner, the only logical interpretation of the prohibitions is to imply that the Federal Court has *in personam* jurisdiction over the provinces as the owners of vessels. Otherwise, they posit, these provisions would have no meaning. The Federal Court judge accepted this line of argument: see reasons at paragraphs 41-49. However, as noted above, the Federal Court does have jurisdiction over the provinces in intergovernmental disputes where the province has accepted such jurisdiction.

[37] The Supreme Court of Canada recognized in *AGT* that the common law doctrine of necessary implication elaborated in *Bombay (Province) v. Bombay (Municipal Corporation of the City of)*, [1947] AC 58 (PC) remains applicable with the advent of modern *Interpretation Act*s. An intention to bind the Crown may be found "where the purpose of the statute would be 'wholly

frustrated' if the government were not bound, or, in other words, if an absurdity (as opposed to simply an undesirable result) were produced": *AGT* at paragraph 130.

[38] I fail to see how the purpose of the *Federal Courts Act – i.e.* to advance the better administration of the Laws of Canada in accordance with section 101 of the *Constitution Act, 1867* – is "wholly frustrated" if Alberta is not bound. This is particularly so given that the plaintiffs in the underlying action are not without remedy in this case – they could bring their action in the Alberta Court of Queen's Bench.

[39] I also fail to see how the purpose of the *in rem* provisions referred to by the Respondents would be "wholly frustrated" if Alberta were not bound. Indeed, the Federal Court judge suggested that the purpose of the provisions is to prevent the arrest of ships engaged in government service: reasons at paragraph 42. Given that the starting presumption is that the Crown is immune from such proceedings, both at common law and in the various applicable statutes, it is not apparent that this purpose would be "wholly frustrated" if Alberta were not bound.

iii. Waiver

[40] In their written submissions, the Respondents argue that Alberta has waived its immunity by its past conduct. By attorning to the Federal Court's jurisdiction in *Scott Steel Ltd. v. The Alarissa*, [1996] 2 F.C. 883, they posit, Alberta took the benefit of the *Federal Courts Act* and the *Federal Court Rules*, S.O.R./98-106, and therefore cannot now deny the burden of the same statutes.

[41] The facts of the *Scott Steel* case, however, do not support the Respondents' proposition. Indeed, the Alberta entity that purportedly took the benefit of the *Federal Courts Act* and *Rules* was Alberta Treasury Branches. Pursuant to subsection 2(4) of the *Alberta Treasury Branches Act*, RSA 2000, c. A-37, it is clear that the corporation established as the "Alberta Treasury Branches" is to be treated, for the purposes of *in personam* jurisdiction, as if it were a private party, and not as an agent of the Crown in right of Alberta. In my view, the *Scott Steel* case is of no assistance to the Respondents in seeking to establish that Alberta has in any way waived its immunity by virtue of its conduct. Indeed, this case would seem to indicate the contrary, given the operation of subsection 2(4) of the *Alberta Treasury Branches Act*.

III. CONCLUSION

[42] For the reasons above, I would allow the appeal, set aside the Order of the Federal Court, and, rendering the judgment that should have been rendered, grant the Appellant's application for a determination on a point of law that the Federal Court has no jurisdiction in this matter over Her Majesty the Queen in right of Alberta.

"David G. Near"

J.A.

"I agree
Wyman W. Webb J.A."

SHARLOW J.A. Dissenting Reasons

[43] I regret that I am unable to agree with my colleagues on the disposition of this appeal. I would dismiss the appeal.

[44] This is the second time in this case that the jurisdiction of the Federal Court has been put in issue by Alberta. The subject of this appeal is the Federal Court's dismissal of Alberta's application for a determination before trial on a question of law, specifically, that the Federal Court does not have the jurisdiction to determine the Toney family's claim against Alberta. That application was dismissed, and this appeal by Alberta followed.

[45] Alberta had previously applied to strike the Toney family's claim against Alberta for want of jurisdiction. In a decision that was upheld by this Court (2012 FCA 167), Justice Harrington dismissed that motion. He concluded that "the 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-International Terminal Operators Ltd. v Miida Electronics Inc.*, [1986] 1 SCR 752)." He also concluded that it was irrelevant that one of the defendants is the Crown in right of a province because this is not an action against the Crown as such under section 17 of the *Federal Courts Act*.

[46] I might have been sympathetic to the argument that the matter of the jurisdiction of the Federal Court in this matter was settled by Justice Harrington. However, that argument was not made, so I will say no more about it.

[47] Alberta's position is rooted in the Crown's common law immunity, which includes immunity from legal claims and immunity from the operation of statutes. Alberta's position is that Alberta legislation permitting claims against the Crown in right of Alberta is not broad enough to encompass maritime law claims brought in the Federal Court. In my view, that position is based on the incorrect premise that the question of the jurisdiction of the Federal Court in relation to the claims of the Toney family against Alberta depends upon the laws of Alberta.

[48] In my view, the jurisdiction of the Federal Court in this matter depends solely on federal legislation. The relevant legal questions are as follows: (1) Is the Toney family's claim based on federal legislation? (2) Is that federal legislation binding on the provinces? If the answer to both questions is yes, then no Alberta legislation can prevent the Federal Court from exercising its statutory jurisdiction.

[49] As to the first question, it is clear that the Toney family's claims are based on two federal statutes. At the risk of oversimplifying, it could be said that the substantive aspects of their claims are governed by the *Marine Liability Act*, and the procedural aspects are governed by the *Federal Courts Act*. In determining the answer to the second question – whether those enactments are binding on the provinces, it is necessary to consider section 17 of the federal *Interpretation Act*, which reads as follows:

17. No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except as mentioned or referred to in the enactment.	17. Sauf indication contraire y figurant, nul texte ne lie Sa Majesté ni n'a d'effet sur ses droits et prérogatives.

[50] In section 17 of the federal *Interpretation Act*, "Her Majesty" includes the Crown in right of Canada and the Crown in right of a province or territory (see *AGT* (cited in the majority reasons) at pages 270-275). Thus, a province is immune from the application of a federal enactment "except as mentioned or referred to in the enactment".

[51] There is a long line of jurisprudence relating to the interpretation of section 17 of the federal *Interpretation Act*, and in particular the meaning of the phrase "except as mentioned or referred to in the enactment". That jurisprudence was recently considered by this Court in *Manitoba v. Access Copyright)* (cited in the majority reasons), which followed the most recent case in the Supreme Court of Canada, *Oldman River* (also cited in the majority reasons).

[52] According to *Oldman River*, the Crown is bound by a federal statute if it meets any of the following tests:

(a) the statute contains a provision stating that the Crown is bound,

(b) a purposive and contextual analysis of the statute discloses a clear parliamentary intention to bind the Crown, or

(c) the purpose of the statute would be wholly frustrated unless the Crown is bound.

[53] The subject matter of the claims of the Toney family against Alberta in respect of the death of Janessa is a matter of admiralty and maritime law, which is a matter within the legislative authority of Parliament. That conclusion is not disputed and it cannot be disputed.

[54] Nor can it be disputed that Part 2 of the *Marine Liability Act* applies to the claims of the Toney family against Alberta (see section 5). The *Marine Liability Act* states that it is "binding on her Majesty in right of Canada or a province" (see section 3). Therefore, Alberta does not and cannot dispute that it can be held liable for damages for such of the Toney family's claims as are proved at trial in a "court of competent jurisdiction" (see subsection 6(2) and the definition of "dependant" in section 4 of the *Marine Liability Act*). Indeed, Alberta admits that it would be liable for the damages claimed by the Toney family if the claims were proved at a trial in the Alberta Court of Queen's Bench, which is a court of competent jurisdiction for their claims.

[55] The position of Alberta essentially is that the Toney family's claims against Alberta cannot be heard in the Federal Court because Alberta is not bound by the provisions of the *Federal Courts Act* (sections 22 and 43) in which Parliament has given the Federal Court jurisdiction in claims under the *Marine Liability Act*. Thus, the key question is whether, in the words of section 17 of the federal *Interpretation Act*, there is anything "mentioned or referred to" in the *Federal Courts Act* that manifests an intention on the part of Parliament to bind the provinces to sections 22 and 43 of the *Federal Courts Act*.

[56] The Toney family, like most claimants in admiralty and maritime law matters, have a choice of forum. The jurisdiction of the Alberta Court of Queen's Bench is inherent. The jurisdiction of the Federal Court is statutory. It flows from subsection 22(1) of the *Federal Courts Act*, which reads as follows:

22. (1) The Federal Court has concurrent original jurisdiction, between subject and subject as well as otherwise, in all cases in which a claim for relief is made or a remedy is sought	22. (1) La Cour fédérale a compétence concurrente, en première instance, dans les cas — opposant notamment des administrés — où une demande de réparation ou un recours est présenté en

under or by virtue of Canadian maritime law or any other law of Canada relating to any matter coming within the class of subject of navigation and shipping, except to the extent that jurisdiction has been otherwise specially assigned.	vertu du droit maritime canadien ou d'une loi fédérale concernant la navigation ou la marine marchande, sauf attribution expresse contraire de cette compétence.

[57] This Court has held that the phrase "as well between subject and subject as otherwise" in the predecessor to section 23 of the *Federal Courts Act* (reworded in the current version of section 23 to read "between subject and subject as well as otherwise") is broad enough to refer to an action against a public authority (*N.A.B.E.*, cited in the majority reasons, at pages 824-5). I agree, and I see no reason to give it a different meaning in section 22 of the *Federal Courts Act*. I conclude that the similar phrase in section 22, read literally, is broad enough to include a claim against a province. Whether that literal meaning is the correct one depends upon a purposive and contextual interpretation of the rest of section 22 and the related provision, section 43.

[58] Subsection 22(2) of the *Federal Courts Act* provides a long list of the specific types of claims that fall within the scope of subsection 22(1). It is clear that the claims of the Toney family are within that list, specifically, paragraphs 22(2)(*d*) and (*g*):

22. (2) Without limiting the generality of subsection (1), for greater certainty, the Federal Court has jurisdiction with respect to all of the following:	22. (2) Il demeure entendu que, sans préjudice de la portée générale du paragraphe (1), elle a compétence dans les cas suivants :
…	[…]
(*d*) any claim for damage or for loss of life or personal injury caused by a ship either in collision or otherwise;	*d*) une demande d'indemnisation pour décès, dommages corporels ou matériels causés par un navire, notamment par collision;
…	[…]

(*g*) any claim for loss of life or personal injury occurring in connection with the operation of a ship including, without restricting the generality of the foregoing, any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment, or of the wrongful act, neglect or default of the owners, charterers or persons in possession or control of a ship or of the master or crew thereof or of any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of the ship are responsible, being an act, neglect or default in the management of the ship, in the loading, carriage or discharge of goods on, in or from the ship or in the embarkation, carriage or disembarkation of persons on, in or from the ship; …	*g*) une demande d'indemnisation pour décès ou lésions corporelles survenus dans le cadre de l'exploitation d'un navire, notamment par suite d'un vice de construction dans celui-ci ou son équipement ou par la faute ou la négligence des propriétaires ou des affréteurs du navire ou des personnes qui en disposent, ou de son capitaine ou de son équipage, ou de quiconque engageant la responsabilité d'une de ces personnes par une faute ou négligence commise dans la manoeuvre du navire, le transport et le transbordement de personnes ou de marchandises; [...]

[59] The scope of the Federal Court's section 22 jurisdiction in relation to claims for damages relating to ships and their operation is illustrated by subsection 22(3), which reads as follows:

22. (3) For greater certainty, the jurisdiction conferred on the Federal Court by this section applies	22. (3) Il est entendu que la compétence conférée à la Cour fédérale par le présent article s'étend :
(*a*) in relation to all ships, whether Canadian or not and wherever the residence or domicile of the owners may be;	*a)* à tous les navires, canadiens ou non, quel que soit le lieu de résidence ou le domicile des propriétaires;
…	[…]
(*c*) in relation to all claims, whether arising on the high seas, in Canadian waters or elsewhere and whether those waters are naturally navigable	*c*) à toutes les demandes, que les faits y donnant lieu se soient produits en haute mer ou dans les eaux canadiennes ou ailleurs et que

or artificially made so, including, without restricting the generality of the foregoing, in the case of salvage, claims in respect of cargo or wreck found on the shores of those waters….	ces eaux soient naturellement ou artificiellement navigables, et notamment, dans le cas de sauvetage, aux demandes relatives aux cargaisons ou épaves trouvées sur les rives de ces eaux […].

[60] It has not been suggested that any aspect of the claims of the Toney family, or any defence asserted by Alberta, is a matter in respect of which, in the words of subsection 22(1) of the *Federal Courts Act*, "jurisdiction has been otherwise specially assigned". Therefore, that exception to the scope of subsection 22(1) does not apply to this case.

[61] Section 43 of the *Federal Courts Act* specifies the circumstances in which the Federal Court may exercise its section 22 jurisdiction *in personam* (that is, against a person, such as the owner or operator of a ship), and when it may exercise its section 22 jurisdiction *in rem* (that is, against a ship). As noted by Justice Harrington, subsection 43(3) of the *Federal Courts Act* precludes the Toney family from pursuing an action *in rem* in the Federal Court against the rescue vessel because it was not owned by the same person when the cause of action arose and when the action was commenced. Subsection 43(3) reads as follows:

43. (3) Despite subsection (2), the jurisdiction conferred on the Federal Court by section 22 shall not be exercised *in rem* with respect to a claim mentioned in paragraph 22(2)(*e*), (*f*), (*g*), (*h*), (*i*), (*k*), (*m*), (*n*), (*p*) or (*r*) unless, at the time of the commencement of the action, the ship, aircraft or other property that is the	43. (3) Malgré le paragraphe (2), elle ne peut exercer la compétence en matière réelle prévue à l'article 22, dans le cas des demandes visées aux alinéas 22(2) *e*), *f*), *g*), *h*), *i*), *k*), *m*), *n*), *p*) ou *r*), que si, au moment où l'action est intentée, le véritable propriétaire du navire, de l'aéronef ou des autres biens en cause est le

subject of the action is beneficially owned by the person who was the beneficial owner at the time when the cause of action arose.	même qu'au moment du fait générateur.

[62] Justice Harrington also held that the Toney family can pursue their action in the Federal Court against the party that was the owner and operator of the rescue vessel when the cause of action arose –Alberta. Their *in personam* claim against Alberta is literally within the scope of the section 22 jurisdiction of the *Federal Court* by virtue of subsection 43(1) of the *Federal Courts Act* which reads as follows (my emphasis):

43. (1) Subject to subsection (4), the jurisdiction conferred on the Federal Court by section 22 may <u>in all cases</u> be exercised *in personam*.	43. (1) Sous réserve du paragraphe (4), la Cour fédérale peut, aux termes de l'article 22, avoir compétence en matière personnelle <u>dans tous les cas</u>.

[63] Subsection 43(1) is subject to subsection 43(4), which does not apply in this case but I reproduce it here for the sake of completeness. It reads as follows:

43. (4) No action *in personam* may be commenced in Canada for a collision between ships unless	43. (4) Pour qu'une action personnelle puisse être intentée au Canada relativement à une collision entre navires, il faut :
(*a*) the defendant is a person who has a residence or place of business in Canada;	*a*) soit que le défendeur ait une résidence ou un établissement commercial au Canada;
(*b*) the cause of action arose in Canadian waters; or	*b)* soit que le fait générateur soit survenu dans les eaux canadiennes;
(*c*) the parties have agreed that the Federal Court is to have jurisdiction.	*c)* soit que les parties aient convenu de la compétence de la Cour fédérale.

[64] The phrase "in all cases" in subsection 43(1) of the *Federal Courts Act* is broad enough to include an *in personam* claim for damages caused by a ship or its operation where the ship is owned by a province. In my view, given the statutory context, that is what this provision is intended to mean. I reach that conclusion because maritime claims against a province are specifically mentioned elsewhere in section 43, in paragraph 43(7)(*b*).

[65] Paragraph 43(7)(*b*) precludes an action *in rem* in the Federal Court against any ship owned or operated by Canada or a province where the ship is engaged on government service. Generally, in the absence of a maritime lien there is no statutory right *in rem* in the absence of personal liability of the ship owner (*Mount Royal/Walsh Inc. v. The Jensen Star*, [1990] 1 F.C. 199 (F.C.A.) at page 216). Therefore, the paragraph 43(7)(*b*) bar to an action *in rem* against any ship owned or operated by a province makes no sense if the Federal Court has no jurisdiction to consider a claim *in personam* against a ship owner that is a province.

[66] I conclude, based on sections 22 and 43 of the *Federal Courts Act* read in their entirety and in context, that Parliament intended to give the Federal Court complete and comprehensive jurisdiction in all claims under the *Marine Liability Act*, including the claims of the Toney family in this case against Alberta. The test in section 17 of the federal *Interpretation Act* is met (that is, the second branch of that test as explained in *Oldman River*), and therefore the provinces are bound by sections 22 and 43 of the *Federal Courts Act*.

[67] In my view, this conclusion is not inconsistent with any of the cases cited by Alberta in argument. None of those cases involve a claim for damages under the *Marine Liability Act*, or a

claim falling within the scope of sections 22 and 43 of the *Federal Courts Act* or a similar statutory scheme. I note as well that none of those cases refers to the purposive and contextual interpretation of section 17 of the federal *Interpretation Act* mandated by *Oldman River* and the cases upon which it relied.

[68] One of the main cases cited by Alberta is *Union Oil* (cited in the majority reasons). *Union Oil* involved a claim by a corporation against both Canada and British Columbia for reimbursement of federal taxes it had paid to the federal government in respect of diesel oil sold to the province. The position of the corporation was that it should have been entitled to the benefit of a tax exemption. The corporation also argued that its claim against British Columbia was based on maritime law, but that argument was rejected. Therefore, the Federal Court could have jurisdiction only under section 17 of the *Federal Courts Act*. That provision gives the Federal Court general jurisdiction in "all cases in which relief is claimed against the Crown". However, section 17 can apply only to claims against Canada because of the restrictive definition of "Crown" in the *Federal Courts Act*. Therefore, there was no statutory foundation for the argument that the Federal Court had jurisdiction against British Columbia in respect of the corporation's claim for reimbursement.

[69] In *Javelin* (cited in the majority reasons), this Court held that the Federal Court does not have the jurisdiction to entertain a claim against a province involving one of the matters mentioned in section 23 of the *Federal Courts Act* – bills of exchange and promissory notes where the federal Crown is a party to the proceedings, aeronautics, and interprovincial or extraprovincial works and undertakings. Section 23 gives the Federal Court jurisdiction in such claims "between subject and subject as well as otherwise". I note that the meaning of that phrase apparently was not in issue in

Javelin, as it was two years later in *N.A.B.E.* (cited in the majority reasons). It is an open question whether *Javelin* would have been decided the same way after that case.

[70] The Federal Court has also determined that it has no jurisdiction to consider a claim against a province for infringement of a patent or copyright (*Avant Inc. v. Ontario*, [1986] 2 F.C. 91 (F.C.T.D.), *Trainor Surveys* (cited in the majority reasons), and *Dableh v. Ontario Hydro* (1990), 33 C.P.R. (3d) 544 (F.C.T.D)). The jurisdiction of the Federal Court in such matters is governed by subsection 20(2) of the *Federal Courts Act*, which does not include the phrase "between subject and subject as well as otherwise" or any analogous words.

[71] There is one case involving maritime claims where the action *in personam* against a province was struck for want of jurisdiction: *Greeley v. The "Tami Joan"* (cited in the majority reasons). That decision, which was not appealed, removed the province of New Brunswick, the mortgagee of a ship, as an *in personam* defendant in a maritime law claim by a lessee under a charterparty for wrongful seizure of a vessel, but the province remained as an *in rem* defendant by virtue of the mortgage. For reasons that are not entirely clear, the jurisdiction of the Federal Court in respect of the *in personam* claim against the province was determined on the basis of section 17 of the *Federal Courts Act* rather than sections 22 and 43, and neither subsection 43(1) nor paragraph 43(7)(*b*) was mentioned.

[72] For these reasons, I conclude that the Federal Court has the jurisdiction to determine the claims of the Toney family against Alberta.

[73] I add that I would have been inclined to reach the same conclusion on the basis of section 19 of the *Federal Courts Act*, which reads as follows:

> 19. If the legislature of a province has passed an Act agreeing that the Federal Court, the Federal Court of Canada or the Exchequer Court of Canada has jurisdiction in cases of controversies between Canada and that province, or between that province and any other province or provinces that have passed a like Act, the Federal Court has jurisdiction to determine the controversies.
>
> 19. Lorsqu'une loi d'une province reconnaît sa compétence en l'espèce, — qu'elle y soit désignée sous le nom de Cour fédérale, Cour fédérale du Canada ou Cour de l'Échiquier du Canada — la Cour fédérale est compétente pour juger les cas de litige entre le Canada et cette province ou entre cette province et une ou plusieurs autres provinces ayant adopté une loi semblable.

[74] Section 27 of the Alberta *Judicature Act* meets the conditions in section 19 of the *Federal Courts Act*. It reads in relevant part as follows:

> 27. The Supreme Court of Canada and the Federal Court of Canada, or the Supreme Court of Canada alone, according to the *Supreme Court Act* (Canada) and the *Federal Court Act* (Canada) have jurisdiction
>
> (a) in controversies between Canada and Alberta …

[75] Section 19 of the *Federal Courts Act* is applicable in an action for damages against the federal Crown and a province in relation to the same facts, if either of them were to make a cross-claim or a third party claim against the other. For example, if the Toney family had asserted their claim initially against Canada only, and Canada had made a third party claim against Alberta, the entire matter would have been within section 19 of the *Federal Courts Act* (see *Fairford Band*, cited in the majority reasons).

[76] In this case, the Toney family asserted their claims in the Federal Court against Canada and Alberta simultaneously. Later, Canada and Alberta each asserted a claim against the other, in the Federal Court, for contribution and indemnity. The claim of Canada against Alberta for contribution and indemnity raises a controversy between Canada and Alberta to which section 19 of the *Federal Courts Act* should apply, and the same could be said of the claim of Alberta against Canada for contribution and indemnity. In the face of section 19, the existence of either claim for contribution and indemnity precludes Alberta from disputing the jurisdiction of the Federal Court in this matter.

"K. Sharlow"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-541-12

APPEAL FROM AN ORDER OF THE HONOURABLE MADAM JUSTICE MACTAVISH DATED DECEMBER 3, 2012, NO. T-1577-11

STYLE OF CAUSE:	HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ALBERTA AS REPRESENTED BY THE MINISTER OF SUSTAINABLE RESOURCES DEVELOPMENT v. ALAN TONEY, YVONNE TONEY AND COURTENAY TONEY & REBECCA TONEY AS REPRESENTED BY THEIR LITIGATION GUARDIAN ALAN TONEY AND HER MAJESTY THE QUEEN IN RIGHT OF CANADA IN THE NAME OF THE ROYAL CANADIAN MOUNTED POLICE AND THE CANADIAN SHIP BEARING LICENSE NO. AB 1275024

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: JUNE 3, 2013

REASONS FOR JUDGMENT BY: NEAR J.A.

CONCURRED IN BY: WEBB J.A.

DISSENTING REASONS BY: SHARLOW J.A.

DATED: SEPTEMBER 18, 2013

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