Federal Court  Cour fédérale

Date: 20160920

Docket: T-392-16

Citation: 2016 FC 1063

Ottawa, Ontario, September 20, 2016

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

MCKEIL MARINE LIMITED

Applicant

and

ATTORNEY GENERAL OF CANADA
AND FOSS MARITIME COMPANY

Respondents

JUDGMENT AND REASONS

[1] The Chief, Marine Policy and Regulatory Affairs Seaway and Domestic Shipping Policy of Transport Canada [Transport Canada] made a decision on February 5, 2016, that the towage of two decommissioned vessels from British Columbia via the Panama Canal to Nova Scotia, to be dismantled, would not constitute engaging in the "coasting trade" as defined in the *Coasting Trade Act*, SC 1992, c 31 and thus there was no impediment to a foreign ship performing part of this journey without having first obtained a licence under the Act.

[2] At the hearing, McKeil Marine Limited [McKeil] sought the following relief from the Court:

> A. A declaration that the towage of vessels between British Columbia and Nova Scotia constitutes engaging in the "coasting trade" , as that term is used in the *Coasting Trade Act*;
>
> B. A declaration that any ship engaged in the towage of vessels from British Columbia bound for Nova Scotia, and which is a foreign ship, is in violation of the *Coasting Trade Act*;
>
> C. An Order in the nature of mandamus requiring Transport Canada to require that the towage of vessels from British Columbia to Nova Scotia be a Canadian ship or otherwise have a license [*sic*] pursuant to the *Coasting Trade Act*; [and]
>
> D. An Order in the nature of prohibition prohibiting any vessel which is not a Canadian ship or otherwise licensed under the *Coasting Trade Act* from engaging in the towage of vessels from British Columbia to Nova Scotia.

Background

[3] McKeil is a Canadian tug and barge/ship owning company based in Ontario with operations through the Great Lakes, St. Lawrence Seaway and the east coast of Canada. From time to time, the McKeil also engages in partnerships with west coast vessel operators.

[4] Two Canadian naval vessels, the HMCS PROTECTEUR and the HMCS ALGONQUIN, were decommissioned and were to be dismantled. The ships were based in Esquimalt, British Columbia and were to be scrapped at a shipyard in Liverpool, Nova Scotia by R.J. MacIsaac Construction Ltd. [RJM]. RJM entered into a contract with Atlantic Towing [Atlantic] to tow the vessels from Esquimalt, British Columbia to Liverpool, Nova Scotia.

[5] The towage of these two vessels was to occur in two stages. They would first be towed from Esquimalt, British Columbia to Panama. Then they would be towed from Panama to Liverpool, Nova Scotia. Atlantic engaged the Respondent, Foss Maritime Company [Foss] an American shipping company, to provide a tugboat to tow each of the vessels from British Columbia to Panama. The US flagged vessels used for the first portion of the towage did not have a licence under the Act for this operation.

[6] Whether this operation constituted engaging in the "coasting trade" as that term is defined in the Act is the critical issue. If the activity does not fall within the definition of coasting trade, then a foreign ship does not require a licence to carry out the activity. If the activity falls within the definition of coasting trade, then the ship involved must be a Canadian duty-paid ship or a licence must be obtained by making an application to the Canadian Transportation Agency.

[7] An application to the Canadian Transportation Agency initiates a process in which the Agency determines whether there are Canadian flagged ships which are "suitable and available" to carry out the activity. It is only if there are no Canadian flagged ships which are "suitable and available" that a licence is issued to the foreign flagged ship to carry out the activity.

[8] On January 18, 2016, McKeil brought to the attention of Transport Canada that the US flagged ships being used to tow the decommissioned vessels did not have a licence and questioned whether there was a violation of the Act.

[9] On January 20, 2016, Atlantic received an email from RJM which stated that Transport Canada had contacted it regarding the towing of these two vessels from Esquimalt, British Columbia to Liverpool, Nova Scotia via the Panama Canal. The email recites that Transport Canada pointed out that under the Act "the tow of [these decommissioned] vessels meets the definition of coasting trade under clause 2(1)(f) of the Act." The email goes on to recite the options given to it by Transport Canada:

> She told us that to meet the requirements of the act [*sic*] and have Foss do the tow we have two options:
>
> 1) Have Foss/Atlantic apply for a coasting trade licence with the Canadian Transportation Agency (she told me this can take some time)
>
> 2) Have a Canadian tug tow the navy vessels out of Esquimalt to 12 miles off the Canadian coast for transfer to Foss, or to US waters for transfer all the way to Panama for transfer to Atlantic.

[10] Atlantic made efforts to contact Transport Canada regarding its message and also began to make arrangements to involve Seaspan ULC, a Canadian company, in the towing operation from Esquimalt, British Columbia.

[11] By email dated January 29, 2016, and contrary to its initial position, Transport Canada informed RJM that the operation did not seem to meet the definition of "coasting trade" in subsection (2)(1)(f) of the Act:

> With respect to the towing activity, this is considered a marine activity of a commercial nature in Canadian waters as defined in definition 2(1)(f): *the engaging, by ship, in any marine activity of a commercial nature in Canadian waters*. However, certain elements of the service that will be undertaking [*sic*] in your specific case impact how to best interpret the application of the *Coasting Trade Act*. The main considerations include: the activity

> is not limited to a local area (not localized); the main portion of the activity is international nature; and, the policy intent of the Act as it relates to commercial marine activities in Canadian waters (localized activity).
>
> Given these considerations, a United States registered vessel as described would not seem to meet the definition of coasting trade found in 2(1)(f).
>
> Please note that this is not meant to be a legal opinion as it is not Transport Canada's role to provide legal opinions on the application of Acts but to provide information on the potential application of legislation in specific cases. It remains the responsibility of each proponent to ensure that they are compliant with all applicable laws and regulations while operating in Canada.

[12] Following the receipt of this email, Atlantic proceeded as it had planned. On or about February 12, 2016, Atlantic entered into a contract with Foss to tow the decommissioned HMCS PROTECTEUR from Esquimalt, British Columbia to Panama. On or about April 1, 2016, Atlantic entered into a second contract with Foss to tow the decommissioned HMCS ALGONQUIN from Esquimalt, British Columbia to Panama.

[13] On February 5, 2016, Transport Canada responded to McKeil's concerns about a potential violation of the Act providing reasons similar to those it had given to RJM above.

[14] A Foss tugboat towed the HMCS PROTECTEUR from Esquimalt, British Columbia on or about February 24, 2016 to Cristobal, Panama, arriving on or about March 23, 2016. An Atlantic tugboat towed the vessel from Cristobal, Panama on or about March 24, 2016, to Liverpool, Nova Scotia, arriving on April 22, 2016.

[15] A Foss tugboat towed the HMCS ALGONGUIN from Esquimalt, British Columbia on May 9, 2016, to Cristobal, Panama, arriving on June 8, 2016. An Atlantic tugboat towed the vessel from Cristobal, Panama on or about June 8, 2016, to Liverpool, Nova Scotia, arriving on June 27, 2016.

[16] This application was heard on July 13, 2016, in Toronto. By that date, the towage of the decommissioned vessels had been completed.

Issues

[17] McKeil raises an interesting issue as to the proper interpretation of the Act in the towage situation described above. Firstly, it submits that the towage was "the carriage of goods by ship … from one place in Canada or above the continental shelf of Canada to any other place in Canada or above the continental shelf of Canada, either directly or by way of a place outside Canada" and thus was coasting trade as defined in subsection 2(1)(a) of the Act [emphasis added]. Foss and apparently Transport Canada are of the view that the towing of a ship cannot be properly characterized as the "carriage of goods" by ship.

[18] Unlike subsection 2(1)(a), subsection 2(1)(f) does not expressly provide that the commercial marine activity referenced therein may be by way of a place outside Canada. Rather, it provides that coasting trade is "the engaging, by ship, in any other marine activity of a commercial nature in Canadian waters." McKeil submits that the towage here, via the Panama Canal, was one tow beginning and ending in Canadian waters and thus was coasting trade within the meaning of this subsection. Foss and apparently Transport Canada are of the view that it was

two towing operations neither of which was entirely within Canadian waters and thus not a "marine activity of a commercial nature in Canadian waters."

[19] However, before the merits of the application are engaged, the Court must deal with two issues raised by Foss: Standing and mootness.

[20] Foss submits that McKeil lacks standing to bring this application because it is not directly affected by the decision as required under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. It further submits that McKeil should not be granted public interest standing to challenge the decision.

[21] Foss submits that even if McKeil has standing to challenge the decision of Transport Canada, the issue before the Court is moot because the towage of the two ships has been completed and the Court ought not to exercise its discretion to hear the matter.

Analysis

Standing

[22] McKeil submits it has standing in this application because it is directly affected by the decision in two ways. First, it says that it has lost the opportunity to object to an application for a licence under the Act being issued to a foreign vessel and to offering its equipment to perform the marine activity as provided for in the Act. Second, it submits that it is directly affected by the negative precedential effect that the decision has on it and other members of the Canadian shipping industry in that the decision allows tows to be split into smaller international voyages

without violating the Act. In this respect on cross-examination (Questions 146 and 147) McKeil frankly acknowledged that it was principally concerned with the impact of the decision in this case to its operations in the Great Lakes:

> We're very concerned with the ruling because we do a lot of towages here on the Great Lakes. One side of the Great Lakes is American and one side of the Great Lakes is Canadian.
>
> There are many American tug operators and during my conversation with Ms. Laflamme [of Transport Canada] we broached the idea of what would happen in the event that there was a dead ship coming from Thunder Bay that had to go to Montreal which would be the same situation we're in now, just a shorter transit and we were very concerned with this ruling it would open the door for an American tug operator to pick that tug up or that ship up in Thunder Bay, tow it to Detroit, clear it into Detroit and then another either Canadian or a second American company to pick up the tug, sorry the ship, in Detroit and take it to Montreal and bypass the whole process because essentially that's what's going on. Foss picked up an American --- a Canadian vessel in a Canadian port, towed it to a foreign port where it was going to be picked up by a Canadian operator to take it to a Canadian port but the transport of that ship is from one Canadian port to another Canadian port.

[23] An applicant is "directly affected" if the matter at issue directly affects that applicant's legal rights, imposes legal obligations on it, or prejudicially affects it in some manner: *Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 245, 246 ACWS (3d) 191.

[24] McKeil provided no evidence demonstrating any direct advantage to it if its application succeeds or any direct disadvantage if it fails. Its interest in the matter at issue is, at best, an indirect one, namely its concern that the decision may have precedential effect on its business in the Great Lakes. The only entities that were directly affected by the decision were Atlantic, Seaspan, and Foss.

[25] While McKeil submits that it has lost the opportunity to object to a licence being granted under the Act and its ability to offer its equipment to perform the marine activity; the record establishes that it would have never had the opportunity to do so even if Transport Canada found that the Act applied to this tow. Foss provides emails in which arrangements are being made with Seaspan, a Canadian company, to participate in the towing operation when it appeared that it was Transport Canada's position that Foss required a licence. Because Seaspan is a Canadian company, the process McKeil describes would not have been triggered. No notification process would be initiated and McKeil could not have offered its equipment.

[26] I find that McKeil's fear that the decision is directly affecting them by the negative precedential effect on it and other members of the Canadian shipping industry due to its precedential effect to be speculative. No evidence has been led to suggest their economic interests will be directly affected in the future – whether negatively if the decision stands or positively if the decision is quashed.

[27] For these reasons, McKeil does not have direct standing. I turn now to its submission that it ought to be granted public interest standing.

[28] In *Downtown Eastside Sex Workers United Against Violence Society v Canada (Attorney General)*, 2012 SCC 45 at para 2, [2012] 2 SCR 524 [*Downtown Eastside*], the Supreme Court of Canada advised that the following were to be considered when determining whether to grant public interest standing: "whether the case raises a serious justiciable issue, whether the party bringing the action has a real stake or a genuine interest in its outcome and whether, having

regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court." It was also recognized that the "courts exercise this discretion to grant or refuse standing in a 'liberal and generous manner'."

[29] The issue of the interpretation of the meaning of coasting trade in the Act as it applies to the facts in this case is far from frivolous, and was not brought by a "busybody" litigant. In my view, there is a serious justiciable issue in this case.

[30] Foss submits that McKeil has not demonstrated a continuing interest in the subject of this application. The subject of the application is clearly within the business of McKeil. While it may be the case that they have not previously actively demonstrated their interest, they demonstrate this interest as a participant in the Canadian shipping industry. I am prepared on this basis to find that McKeil has a "real stake or a genuine interest in its outcome."

[31] In *Downtown Eastside* at paragraph 51, the Supreme Court of Canada identified a number of factors a court may find useful when assessing whether the proposed suit is a reasonable and effective way to bring the issue before the courts. In my view, the most relevant of these to the facts at hand is "whether there are realistic alternative means which would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination."

[32] Foss submits that there will be cases in the future where the issue can be more effectively raised between parties that are more directly opposed. It provides the following example:

McKeil in competition with an American company for a project between two points in Canada through American waters in the Great Lakes with the American company being chosen to do the work.

[33] McKeil cites *Sierra Club of Canada v Canada (Minister of Finance)*, [1999] 2 FC 211, 157 FTR 123 and *Alberta v Canada (Wheat Board)*, 1998 2 FC 156, 2 Admin LR (3d) 187 for the importance of granting public interest status to prevent the immunization of legislation or public acts from any challenge. It argues that that there is no other way to challenge the decision of Transport Canada or seek to enforce the terms of the Act by its intended beneficiaries. If Transport Canada rules that the activity is not engaging in the coasting trade, then the foreign ship does not require a licence and there is no engagement of the process that would lead a Canadian operator such as McKeil to have a direct interest. It submits that other interested beneficiaries have no recourse, do not make submissions to Transport Canada, and cannot appeal the decision of Transport Canada. Focusing on the third consideration for granting public interest standing, the McKeil submits there is no one who could reasonably be expected to litigate the issues other than it.

[34] Given the considerations in granting public interest standing and primarily relying on the consideration that the present case is not one closely reflecting McKeil's real concern, I do not think this is the appropriate case to grant it public interest standing. In this respect, I agree with Foss that it is a better use of judicial resources to address McKeil's real concern which rests in Great Lakes towing if there is a future situation where that issue can be more effectively raised between parties that are more directly opposed.

[35] This finding will not, however, bar McKeil from being granted public interest standing in the future (when a more appropriate case arises) since the first two considerations in granting public interest standing are met in my opinion and it will always be the case that McKeil arguably lacks direct standing.

Mootness

[36] Even if I had granted McKeil standing in this application, I am of the view that the matter is moot and I would not exercise my discretion, on the facts here, to hear the matter.

[37] A matter has become moot if the tangible and concrete dispute has disappeared and the issues have become academic. McKeil submits that there is still a live controversy as the Act provides for an offence where a ship contravenes subsection 3(1) and for detention of ships where an enforcement officer believes on reasonable ground that an offence under the Act has been committed by or in respect of a ship. I do not accept this submission.

[38] The evidence shows that there is no longer a live controversy as the Foss vessels have completed the tugging operations and the decommissioned ships have arrived in Liverpool, Nova Scotia. A determination that the Act applies and requires Foss to obtain a licence would not serve a purpose since the Foss vessels have already completed the tugging operations.

[39] The Federal Court of Appeal in *Amgen Canada Inc v Apotex Inc*, 2016 FCA 196 at para 16, 269 ACWS (3d) 154, recently summarized the matters a court ought to consider when determining, notwithstanding the mootness finding, to exercise its discretion and hear the matter:

> To guide that discretion, the Supreme Court in *Borowski* [*v Canada* ,[1989] 1 SCR 342, 57 DLR (4th) 231 [*Borowski*]] offered three considerations:
>
> 1. *The absence of adversarial parties*. If there are no longer parties on opposing sides that are keen to advocate their positions, the Court will be less willing to hear the matter.
>
> 2. *Lack of practicality; wasteful use of resources*. If a proceeding will not have any practical effect upon the rights of the parties, it has lost its primary purpose. The parties and the Court should no longer devote scarce resources to it. Here, the concern is judicial economy. However, in exceptionally rare cases, the need to settle uncertain jurisprudence can assume such great practical importance that a court may nevertheless exercise its discretion to hear a moot appeal: *M. v. H.*, [1999] 2 S.C.R. 3, 171 D.L.R. (4th) 577 at paragraphs 43-44.
>
> 3. *The court exceeding its proper role*. In some cases, pronouncing law in a moot appeal in the absence of a real dispute is tantamount to making law in the abstract, a task reserved for the legislative branch of government not the judicial branch.

[40] Regarding the first consideration, the Supreme Court of Canada in *Borowski* stated that collateral consequences of the outcome may provide the necessary adversarial context. One of the examples cited in *Borowski* is *Vic Restaurant Inc v City of Montreal*, [1959] SCR 58, 17 DLR (2d) 81. The restaurant, for which a renewal of a liquor licence had been sought, had been sold leaving the issue moot. There were however prosecutions outstanding against it for violation of the municipal by-law which was the subject of the legal challenge. The determination of the validity of the by-law was a collateral consequence which provided the appellant with a necessary interest. In the present case, there are no collateral consequences as a result of hearing the application. There may be impacts on McKeil or other marine businesses in the future; however these impacts are more remote than what was envisioned by the Supreme Court of Canada in *Borowski*.

[41] The second consideration is conservation of judicial resources. Factors to consider are whether the court's decision will have some practical effect on the rights of the parties, whether the case is likely to recur, whether the case is likely to be evasive of review (due to timing resulting in a moot issue), and whether there is an issue of public importance of which a resolution is in the public interest.

[42] A case with these particular facts is unlikely to reoccur, however this does not mean that a case questioning whether an operation is engaged in "coasting trade" will not reoccur – that is more likely. McKeil submits that due to the nature and timing of the issue, and the lack of notice given by the Canadian Transportation Agency (since the process is not triggered when coasting trade is not determined to be engaged), the dispute is evasive of review. Foss submits that there is no evidence presented that there would be insufficient time to challenge the tow.

[43] I accept that a marine towing business would not come to know directly of a foreign towing operation because there would be no notice issued if it was not seen to be coasting trade. Nonetheless, it appears that knowledge may well be obtained in another manner. Here McKeil submitted its query to Transport Canada after hearing "rumors [*sic*] that a US tug company will be towing either one or both of the above vessels [HMCS PROTECTEUR and ALGONQUIN] for a potion [sic] of the tow from Esquimalt, BC to Nova Scotia." While not entirely certain, it appears that this factor may weigh in favour of hearing the application.

[44] In the future, if McKeil were to hear of rumours of a US flagged vessel operating in the Great Lakes without a licence and raised similar concerns to Transport Canada, a judicial review

of Transport Canada decision could be brought on an urgent basis or an application could be made to the court for an interim injunction.

[45] I am of the view that the third consideration, the proper role of the court, weighs strongly against a ruling on the merits of this application.

[46] McKeil submits that the real issue is the proper interpretation of the meaning of "coasting trade" in the Act and that this is very much the proper role of this Court. I agree that statutory interpretation is a proper court function, but there can be no proper interpretation of the Act in the abstract that would apply to every conceivable scenario that might involve commercial towage. The real interest of McKeil, as it acknowledged, is the interpretation of the Act in Great Lake towing involving a stop-over in an American city. Those facts are so far removed from the facts here that it is my view that any decision here on the merits would be of little or of questionable value to McKeil and other Great Lake marine businesses.

[47] For these reasons, I decline to hear this application on its merits.

Costs

[48] Foss advised the Court that its fees and disbursements were $10,686.36 pursuant to Column III of the Tariff. It is entitled to be awarded its costs in that amount.

[49] In the usual case, those costs would be paid by McKeil; however, I am ordering that the costs are to be paid to Foss by the Attorney General of Canada, the other respondent in this Application. I make that award for the following reasons.

[50] Canada is a named Respondent. Canada filed a Notice of Appearance on March 11, 2016. Canada did nothing further to defend or support its decision that was under attack. Canada, improperly in my view, left it to its co-respondent Foss, to support Canada's decision. By the time this application came on for hearing Foss had no real interest in the application, its contract having been completed. Nonetheless Foss did fully participate and its submissions to the Court were most helpful.

[51] At the hearing, counsel for McKeil informed the Court that he had requested Canada to produce material relevant to this application pursuant to Rule 317 of the *Federal Courts Rules*. Canada never responded.

[52] The casual approach taken by Canada to the Court process cannot go without condemnation and sanction. The decision under review was its decision and it was surely the party who ought to have had the greatest interest in the outcome. Yet it chose to do nothing. It is for this reason that Foss's costs are to be paid to it by Canada.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed with costs fixed in the amount of $10,686.36 payable forthwith to Foss Maritime Company by the Attorney General of Canada.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Marc D. Isaacs	FOR THE APPLICANT
Rui M. Fernandes James Manson	FOR THE RESPONDENT FOSS MARITIME COMPANY

SOLICITORS OF RECORD:

Isaacs & Co. Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Fernandes Hearn LLP Barristers and Solicitors Toronto, Ontario	FOR THE RESPONDENT FOSS MARITIME COMPANY
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT ATTORNEY GENERAL OF CANADA