

Federal Court



Cour fédérale

Date: 20190430

**Dockets: T-1453-16
T-745-16**

Citation: 2019 FC 552

St. John's, Newfoundland and Labrador, April 30, 2019

PRESENT: The Honourable Madam Justice Heneghan

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

Defendants by Counterclaim

ORDER AND REASONS

I. INTRODUCTION

[1] By Notice of Motion filed on March 5, 2018, the Port of Bridgewater (the “Port”) sought a summary trial pursuant to the *Federal Courts Rules*, SOR/98-106 (the “Rules”), seeking the following relief:

- a) Summary trial for Judgment against the MV Cormorant and all those interested in the MV Cormorant in the amount of \$258,000.00 for outstanding moorage;
- b) The Claim of the Defendant by Counterclaim for damages to the pier Expenses of Costal Action Network, attendances with the Canadian Coast Guard and any liability with the Administrator of the Ship Source Oil Pollution Fund be adjourned generally;
- c) Costs against the MV Cormorant.

[2] By Notice of Motion filed on April 26, 2018, the Administrator of the Ship-Source Oil Pollution Fund (the “Administrator”) sought the entry of summary judgment to determine the ownership of the Ship “Cormorant” (the “Defendant Ship”) between March 18 and May 26, 2015.

[3] By notice of motion filed on April 26, 2018, Cormorant Marine Services Corporation (“CMS”) and Mr. Neil S. Hjelle (“Hjelle”) sought the entry of summary judgment seeking the following relief:

- i) a dismissal of the claims of the Plaintiff The Administrator of the Ship-Source Oil Pollution Fund against the Defendants CMS and Hjelle in Court File T-1453-16;
- ii) a dismissal of the counterclaims of the Defendant/Plaintiff by Counterclaim The Port of Bridgewater Incorporated (the “Port”) against the Defendants CMS and Hjelle in Court File T-1453-16;
- iii) a dismissal of the claims of the Plaintiff/Defendant by Counterclaim The Port against the Defendants/Plaintiff by Counterclaim CMS and Hjelle in Court File T-745-16; and
- iv) costs on this motion and on the actions.

II. CONTEXT

[4] The within actions arise from the presence of the Defendant Ship at the Port of Bridgewater, Nova Scotia.

[5] According to the pleadings and affidavits filed, the Defendant’s ship was sold by a judicial sale, in cause number T-1324-07, by Order dated October 20, 2009, and a Bill of Sale was executed showing Cormorant as the owner.

[6] In March-April 2015, the Defendant Ship listed while at the wharf in Bridgewater. Shortly afterwards, signs of hydraulic oil were seen in her vicinity. The Canadian Coast Guard was called.

[7] On or about March 20, 2015, the Defendant Ship sank at the dock in Bridgewater. Efforts to refloat her were successful.

[8] An investigation was conducted by the Canadian Coast Guard and ultimately, a claim for clean-up and other costs related to the capsizing of the Defendant Ship and environmental clean-up costs, was presented to the Administrator, pursuant to the provisions of the *Marine Liability Act*, S.C. 2001, c. 6 (the “Act”).

[9] The Administrator has the right to subrogate her claim and in that regard, commenced the action in cause number T-1453-16.

[10] The Port commenced its action in cause number T-745-16 to recover mooring fees.

[11] The Administrator’s claim lies against the owner of the Defendant Ship, pursuant to the Act, or against a ship owner, as defined in the *International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001*; Schedule 8 of the Act (the “Bunkers Convention”).

[12] The motions were heard at Halifax, Nova Scotia on June 26 and 27, 2018; supplementary submissions were heard at Halifax, Nova Scotia on March 5, 2019.

III. PROCEDURAL BACKGROUND

[13] By a Statement of Claim issued on May 9, 2016, in cause number T-745-16, the Port commenced an action *in personam* and *in rem* against CMS and the Owners and all those interested in the MV Cormorant and the said Cormorant, as Defendants.

[14] The Port seeks the following relief:

1. Damages for Moorage;
2. Damages for cost of salvage;
3. Prejudgment interest at rates set by Canadian Maritime Law;
4. A declaration that the actions of the Defendants give rise to maritime lien in favour of the Plaintiff;
5. Condemnation of the Defendant ship MV Cormorant;
6. An interim interlocutory injunction;
7. Costs;
8. Such further and other relief as granted by this Honourable Court.

[15] On July 29, 2016, CMS filed a Defence and Counterclaim in cause number T-745-16. In its Defence, it denied ownership of the “Cormorant” and recounted some history of her ownership. CMS denied any liability to the Port.

[16] In its Counterclaim against the Port, CMS sought the following relief:

- a) a declaration that NSL is the owner of the Cormorant;

- b) a declaration that the sale of the Cormorant from CMS to NSL cleared all liabilities for any moorage charges;
- c) a declaration that NSL is responsible for all moorage charges incurred by the Cormorant;
- d) a declaration that NSL is responsible for all salvage costs incurred by the Cormorant;
- e) CMS' costs of defending the main action on a substantial indemnity scale; and
- f) CMS' costs of this crossclaim.

[17] The Port filed a Reply and Defence to the Counterclaim on August 5, 2016. In that pleading, the Port denied the allegations against it and made certain admissions in response to the Defence filed by CMS. It otherwise denied most allegations set out in the Counterclaim filed on behalf of CMS.

[18] By a Statement of Claim issued on September 1, 2016, in cause number T-1453-16, the Administrator commenced an action *in personam* and *in rem* against the Owners and all those interested in the Defendant Ship, the Port, 3092714 Nova Scotia Limited ("NSL"), a body corporate, CMS and Hjelle. The Administrator seeks the following relief:

The Plaintiff claims against the Defendants, jointly and severally, for the following relief:

- (a) Judgment in the amount of FIVE HUNDRED THIRTY-FOUR THOUSANT THREE HUNDRED FORTY DOLLARS SEVENTY-SIX CENTS (\$534,340.76), Canadian currency;
- (b) Interest in Admiralty on the said amount, from such date and at such rate as shall seem just to this Honourable Court;
- (c) An Order for appraisalment and sale of the Defendant Ship;

- (d) Costs of this Action, including an Order that costs of any successful Defendant(s) be paid by unsuccessful Defendant(s); and
- (e) Such further and other relief as the nature of the case may require and as shall seem just to this Honourable Court.

[19] A warrant for the arrest of the Ship “Cormorant”, together with a copy of the Statement of Claim, were served upon the Defendant Ship on September 12, 2016 as appears from the affidavit of Richard Samsford, Deputy Sheriff, sworn on September 12, 2016.

[20] On October 10, 2016, the Port filed a Defence and a Counterclaim on its behalf and on behalf of NSL against Hjelle and CMS. In that Counterclaim, the Port and NSL disputed the ownership of the “Cormorant” and attributed responsibility for the costs related to her sinking, recovery, oil spill and remediation of the oil spill to Hjelle and CMS. The Port sought the following relief in its Counterclaim:

- a) Judgment in the amount of \$1,083,658.76 (ONE MILLIOM [sic] EIGHTY THREE THOUSAND SIX HUNDRED AND FIFTY EIGHT FOLLARS AND SEVENTY SIX CENTS);
- b) In the alternative an Order that the Defendants indemnify and save harmless the Port of Bridgewater from any claim of the Administrator of the Ship Source Oil Pollution Fund;
- c) Interest in Admiralty on the said amount, from such date and such rate as shall seem just to this Honourable Court;
- d) An Order for the appraisement and sale of the Defendant Ship;
- e) Costs of this action;
- f) Such further and other order for relief as the nature of the caser [sic] may require and as seem just to this Honourable Court.

[21] In its Defence filed on October 21, 2016 responding to the claim of the Administrator, the Port denied ownership of the Defendant Ship, among other things, and denied liability for the Administrator's claim.

[22] CMS and Hjelle filed a Defence and Counterclaim in cause number T-1453-16. They denied ownership of the Defendant Ship and denied liability for any claims against them. They sought the same relief in their Counterclaim against the Administrator as they set out in their Counterclaim against the Port, in cause number T-745-16.

[23] By Order made on December 2, 2016, the two actions were consolidated pursuant to Rule 105(a) of the Rules and cause number T-1453-16 was designated the lead action.

IV. THE EVIDENCE

A. *T-1453-16*

[24] In cause number T-1453-16, the Administrator filed three affidavits in support of her Motion for summary judgment, that is the affidavit of Ms. Legars sworn on April 13, 2016; the affidavit of Mr. Michael Fegan sworn on April 19, 2016; and the affidavit of Mr. Kurt R. Bonds sworn on April 23, 2016.

[25] Ms. Legars is the Administrator, she referred to an affidavit sworn by Mr. Welsford in cause number T-586-15, an action between the Port against Hjelle, CMS and the Defendant Ship.

[26] The affidavit of Mr. Welsford sworn on May 5, 2015, was prepared in support of a warrant for the arrest of the Defendant Ship. In this affidavit, Mr. Welsford asserted an ownership interest in the Defendant Ship on behalf of the Port.

[27] Ms. Legars also referred to a document relating to the sale of the Defendant Ship in October 2009, pursuant to an Order of this Court. The document, marked as Exhibit B, contains a Bill of Sale naming CMS as the purchaser.

[28] Ms. Legars addressed the remediation work done by the Canadian Coast Guard in connection with the Defendant Ship, between February 27 and June 4, 2015. She referred to a “Narrative Report” that had been prepared by the Canadian Coast Guard. That document is Exhibit C to her affidavit.

[29] Mr. Michael Fegan is a surveyor. In his affidavit, sworn on April 19, 2018, he commented about his attendance after the listing sinking and reporting of the Defendant ship between May 11 and June 3, 2015.

[30] Mr. Kurt Bonds is an American attorney, practicing in the state of Nevada. He provided an opinion in response to certain questions posed by counsel for the Administrator about the corporate standing of CMS, its capacity to convey property and the date of any termination or impairment of CMS.

[31] Mr. Bonds attached various documents as exhibits to his affidavit, including his opinion letter dated April 20, 2018. In that opinion he said that the corporate existence of CMS was permanently resolved as of 10/01/16.

[32] Mr. Bonds also expressed the view that the conveyer by CMS of the Defendant Ship “to the Nova Scotia entity was proper and valid”.

[33] Mr. Bonds further made a distinction between “revocation” of the corporate charter of CMS on 10/01/2011 and its permanent revocation on 10/01/2016. At that time, CMS’ right to do business was forfeited.

[34] Finally, Mr. Bonds said that the conveyance by CMS “to the Nova Scotia entity was proper and valid”.

[35] Cormorant filed the affidavit of Mr. Neil S. Hjelle in support of its Motion. In that affidavit, sworn on April 25, 2016, Mr. Hjelle deposed to the history of his involvement with the Defendant Ship, beginning in 2009 when CMS took ownership.

[36] Mr. Hjelle recounted the history of his involvement with Mr. Welsford about the sale of the Defendant Ship in 2013 to NSL. He also commented on the Port’s claim for mooring and said that an agreement had been reached about settlement of that claim.

B. *T-745-16*

[37] The Port filed two affidavits of Mr. Richard Welsford in support of its Motion.

[38] In his affidavit sworn on March 3, 2018, in support of the Port's Motion for Summary Judgment, Mr. Welsford commented on the ownership of the Defendant ship. He also set out the basis of the Port's claim for mooring in the amount of \$258,000.00.

[39] Mr. Welsford also deposed to the circumstances about the sinking of the Defendant Ship and attributed it to the actions of an unknown third party.

[40] Mr. Welsford also deposed that CMS had "apparently ceased to exist prior to any purported transfer" of the Defendant Ship.

[41] In his affidavit, sworn on May 12, 2018, Mr. Welsford deposed that he is the President of the Port. He described the Port's claim against the Defendant Ship as being a claim *in rem* in respect of mooring, pollution and environmental clean-up costs, salvage, damage to the Port's pier.

[42] In its Memorandum of Fact and Law filed on May 18, 2018, responding to the Motion brought by the Administrator, CMS and Hjelle, the Port filed a second affidavit of Mr. Welsford.

[43] In his affidavit sworn on May 12, 2018, Mr. Welsford purported to "clarify" the ownership interest asserted by the Port in the Defendant Ship. He also outlined efforts made by NSL to sell the Defendant Ship.

[44] Mr. Welsford referred to other proceedings undertaken in this Court, specifically cause number T-586-18, and asserted an ownership interest in the Defendant Ship in priority to other claimants pursuant to its ownership of the wharf where the Defendant Ship has been moored since 2009.

[45] Mr. Welsford deposed that he incorporated NSL “years previously”, to allow title to the Defendant Ship to be registered, prior to a sale in “an orderly commercial manner”.

[46] Mr. Welsford referred to an “agreement” with Hjelle that the outstanding mooring fees would be paid from the proceeds of sale.

[47] Mr. Welsford also deposed to his “understanding” that the agreement to purchase the Defendant Ship was “frustrated” since title lay with “government” after the dissolution of CMS.

[48] The Administrator filed the affidavit of Ms. Ann Legars in opposition to the Port’s Motion. In her affidavit sworn on March 8, 2016, Ms. Legars referred to certain documents, attached as exhibits to her affidavit, relating to communications between Mr. Welsford and Hjelle in September and October 2013 relating to the proposed sale of the Defendant Ship to NSL.

[49] Exhibit B to Ms. Legars’ affidavit is a copy of a Bill of Sale from CMS to NSL executed in Texas in October 2013.

[50] Exhibit C to Ms. Legars' affidavit is a copy of correspondence dated February 27, 2018 from counsel for the Administrator to counsel for CMS, concerning certain provisions of Nevada law.

[51] By letter dated May 14, 2016, the Administrator advised that it would not respond to the Motion filed on behalf of Cormorant and Hjelle.

[52] By motion record filed on May 14, 2014, Cormorant responded to the notice of motion filed by the Port on March 5, 2018.

[53] Mr. Hjelle, Ms. Legars and Mr. Bonds were cross-examined upon their affidavits and transcripts of those cross examinations were filed on June 6, 2018.

V. THE MOTIONS

A. *T-1453-16*

[54] In its Motion, the Administrator seeks determination of ownership of the Defendant Ship between March 18 and May 27, 2015. She seeks that determination for the purpose of recovering, as a subrogated claimant, the monies paid to the Canadian Coast Guard in connection with the sinking of the Defendant Ship at Bridgewater, Nova Scotia and subsequent discharge of oil pollutants.

[55] The Port seeks judgment *in rem* against the Defendant Ship in the amount of \$258,000.00 together with post-judgment interest at 3% to the date of payment.

[56] CMS and Hjelle seek dismissal of all claims against them, that is in cause number T-1453-16 taken by the Administrator and of the claims and counterclaims asserted by the Port in cause number T-745-16.

[57] The Administrator argues that all necessary evidence is available to the Court to justify a finding that either the Port and NSL are the “shipowners” for the purposes of the Bunkers Convention and were owners for the purposes of Division 2 of Part 8 of the Act.

[58] The Port argues that CMS lacked the corporate capacity to convey the Defendant Ship in October 2013. It also submits that the failure of the government of Canada to register the Defendant Ship when she was formerly a Canadian Government Warship.

[59] The Port pleads that as the result of the dissolution of CMS in its home jurisdiction, that is the state of Nevada, United States of America, its property in the Defendant Ship devolved upon the Crown in right of Nova Scotia pursuant to the operation of the principles of escheatment and the provisions of the *Corporations Miscellaneous Provisions Act*, R.S.N.S. 1989, c. 100.

[60] The Port argues that the failure of the Government of Canada to register the transfer of the change of ownership, pursuant to subsection 46(3) of the *Canada Shipping Act, 2001*, S.C. 2001, c.26 means that ownership was not validly transferred.

[61] The Port also argues that due to the failure of CMS to maintain its corporate filings up to October 2013, the purported sale of the Defendant Ship to NSL or any other party was ineffective.

[62] The Port further submits that since CMS was a dissolved corporation, then it lacked the capacity to sell the Defendant Ship and that pursuant to the provisions of the *Corporations Miscellaneous Provisions Act*, R.S.N.S. 1989, c 100, the interest of CMS had escheated to the Crown in right of Nova Scotia.

[63] CMS and Hjelle deny ownership of the Defendant Ship and submit that the Administrator does not allege ownership, on their part.

[64] CMS and Hjelle further argue that the Administrator considers ownership to be the determinative issue and concurrently acknowledge that they are not “owners”, there is no genuine issue for trial against them in cause number T-1453-16.

B. *T-745-16*

[65] The Port argues that the evidence about its claim for unpaid mooring, in the amount of \$258,000.00, is uncontradicted and supported by the affidavit of Mr. Welsford.

[66] The Administrator submits that the entry of *in rem* judgment, at this time, is premature and prejudicial to the rights of other potential claimants.

[67] As well, the Administrator argues that the entry of an *in rem* judgment “cannot be granted until the ownership issue is decided by the Court”.

[68] CMS and Hjelle submit that the facts necessary to show a conveyance of the Defendant Ship to NSL are in evidence and that this transfer was acknowledged by NSL, the Port and Mr. Welsford.

[69] CMS and Hjelle plead that the consideration for the conveyance to NSL was the release of the Port’s claim for mooring. They argue that the transfer of ownership took place in October 2013, long before the sinking and consequent pollution and environmental damage, and long after the change in ownership.

VI. DISCUSSION

[70] The Administrator, CMS and Hjelle seek summary judgment. The Port seeks a summary trial with the entry of judgment against the Defendant Ship.

[71] This Court may dispose of an action summarily where there is “no genuine issue for trial”, pursuant to Rule 215 of the Rules.

[72] In this matter, the question is whether there is a genuine issue for trial relating to the question of ownership of the Defendant Ship.

[73] A motion for summary judgment in the Federal Court is governed by Rules 213 to 218 of the *Federal Courts Rules*, SOR/98-106. Rule 215 allows for the entry of summary judgment and provides as follows:

<p>If no genuine issue for trial</p>	<p>Absence de véritable question litigieuse</p>
<p>215 (1) If on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.</p>	<p>215 (1) Si, par suite d'une requête en jugement sommaire, la Cour est convaincue qu'il n'existe pas de véritable question litigieuse quant à une déclaration ou à une défense, elle rend un jugement sommaire en conséquence.</p>
<p>Genuine issue of amount or question of law</p>	<p>Somme d'argent ou point de droit</p>
<p>(2) If the Court is satisfied that the only genuine issue is</p>	<p>(2) Si la Cour est convaincue que la seule véritable question litigieuse est :</p>
<p>(a) the amount to which the moving party is entitled, the Court may order a trial of that issue or grant summary judgment with a reference under rule 153 to determine the amount; or</p>	<p>a) la somme à laquelle le requérant a droit, elle peut ordonner l'instruction de cette question ou rendre un jugement sommaire assorti d'un renvoi pour détermination de la somme conformément à la règle 153;</p>
<p>(b) a question of law, the Court may determine the question</p>	<p>b) un point de droit, elle peut statuer sur celui-ci et rendre un jugement</p>

and grant summary judgment accordingly.

sommaire en conséquence.

Powers of Court

Pouvoirs de la Cour

(3) If the Court is satisfied that there is a genuine issue of fact or law for trial with respect to a claim or a defence, the Court may

(3) Si la Cour est convaincue qu'il existe une véritable question de fait ou de droit litigieuse à l'égard d'une déclaration ou d'une défense, elle peut :

(a) nevertheless determine that issue by way of summary trial and make any order necessary for the conduct of the summary trial; or

a) néanmoins trancher cette question par voie de procès sommaire et rendre toute ordonnance nécessaire pour le déroulement de ce procès;

(b) dismiss the motion in whole or in part and order that the action, or the issues in the action not disposed of by summary judgment, proceed to trial or that the action be conducted as a specially managed proceeding.

b) rejeter la requête en tout ou en partie et ordonner que l'action ou toute question litigieuse non tranchée par jugement sommaire soit instruite ou que l'action se poursuive à titre d'instance à gestion spéciale.

[74] Rule 216 governs motions for summary trial. Rule 216(1) and 216(5) are relevant to the motion brought by the Port and provides as follow:

Summary Trial

Procès sommaire

Motion record for summary trial

Dossier de requête en procès sommaire

216 (1) The motion record for a summary trial shall contain all of the evidence on which a party seeks to rely, including

216 (1) Le dossier de requête en procès sommaire contient la totalité des éléments de preuve sur lesquels une partie

	compte se fonder, notamment :
(a) affidavits;	a) les affidavits;
(b) admissions under rule 256;	b) les aveux visés à la règle 256;
(c) affidavits or statements of an expert witness prepared in accordance with subsection 258(5); and	c) les affidavits et les déclarations des témoins experts établis conformément au paragraphe 258(5);
(d) any part of the evidence that would be admissible under rules 288 and 289.	d) les éléments de preuve admissibles en vertu des règles 288 et 289.
Dismissal of motion	Rejet de la requête
(5) The Court shall dismiss the motion if	(5) La Cour rejete la requête si, selon le cas :
(a) the issues raised are not suitable for summary trial; or	a) les questions soulevées ne se prêtent pas à la tenue d'un procès sommaire;
(b) a summary trial would not assist in the efficient resolution of the action.	b) un procès sommaire n'est pas susceptible de contribuer efficacement au règlement de l'action.

[75] Although the Administrator, CMS and Hjelle seek summary judgment on the basis of the affidavits and materials filed, and the Port seeks judgment after a summary trial, the same general principles apply.

[76] According to the decision in *Moroccanoil Israel Ltd. v. Lipton*, 2013 FC 667, in a motion for summary judgment each party bears the burden of putting their “best foot forward”.

[77] The moving parties must show that there is no genuine issue for trial; see the decision in *Granville Shipping Co. v. Pegasus Lines Ltd. S.A.*, [1996] 2 F.C. 853.

[78] For the Administrator, she must show that there is no genuine issue for trial about the ownership of the Defendant Ship.

[79] CMS and Hjelle must show that there is no genuine issue for trial about their ownership of the Defendant Ship.

[80] The Port must show that there is no genuine issue for trial as to its entitlement to judgment for mooring charges against the Defendant Ship.

[81] Section 75 of the Act defines owner as follows:

owner means the person who has for the time being, either by law or by contract, the rights of the owner ⁰ of the ship with respect to its possession and use. (propriétaire)	propriétaire S'entend de la personne qui a, au moment considéré, en vertu de la loi ou d'un contrat, les droits du propriétaire du navire en ce qui a trait à la possession et à l'usage de celui-ci. (owner)
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[82] Article 1 of the Bunkers Convention provides as follows:

3 Shipowner means the owner, including the registered owner, bareboat charterer, manager and operator of the ship.	3 Propriétaire du navire signifie le propriétaire, y compris le propriétaire inscrit, l'affréteur coque nue, l'armateur gérant et l'exploitant du navire.
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[83] The Fund is created pursuant to Part 7 of the Act. The Act authorizes the CGC to respond to pending or actual pollution incidents and to present a claim to the Fund for repayment of the costs incurred in doing so.

[84] Paragraphs 77(1)(a) and (b) and subsection 77(2) of the Act set out the statutory basis for the liability of an owner and provide as follows:

Liability for pollution and related costs	Responsabilité en matière de pollution et frais connexes
77 (1) The owner of a ship is liable	77 (1) Le propriétaire d'un navire est responsable :
(a) for oil pollution damage from the ship;	a) des dommages dus à la pollution par les hydrocarbures causée par le navire;
(b) for the costs and expenses incurred by the Minister of Fisheries and Oceans, a response organization within the meaning of section 165 of the <i>Canada Shipping Act, 2001</i> or any other person in Canada in respect of measures taken to prevent, repair, remedy or minimize oil pollution damage from the ship, including measures taken in anticipation of a discharge of oil from it, to the extent that the measures taken and the costs and expenses are reasonable, and for any loss or damage caused by those measures; and	b) des frais supportés par le ministre des Pêches et des Océans, un organisme d'intervention au sens de l'article 165 de la <i>Loi de 2001 sur la marine marchande du Canada</i> ou toute autre personne au Canada pour la prise de mesures visant à prévenir, contrer, réparer ou réduire au minimum les dommages dus à la pollution par les hydrocarbures causée par le navire, y compris des mesures en prévision de rejets d'hydrocarbures causés par le navire, pour autant que ces frais et ces mesures soient raisonnables, de même que des pertes ou

	dommages causés par ces mesures;
Liability for environmental damage	Responsabilité: dommage à l'environnement
(2) If oil pollution damage from a ship results in impairment to the environment, the owner of the ship is liable for the costs of reasonable measures of reinstatement undertaken or to be undertaken.	(2) Lorsque des dommages dus à la pollution par les hydrocarbures causée par un navire ont des conséquences néfastes pour l'environnement, le propriétaire du navire est responsable des frais occasionnés par les mesures raisonnables de remise en état qui sont prises ou qui le seront.

[85] Subsection 71(a) and paragraph 71(b)(i) of the Act are also relevant and provide as follows :

Liability for pollution and related costs	Responsabilité en matière de pollution et frais connexes
71 The liability of the owner of a ship in relation to preventive measures, for the purposes of the Bunkers Convention, also includes	71 La responsabilité du propriétaire d'un navire à l'égard des mesures de sauvegarde prévue par la Convention sur les hydrocarbures de soute vise également :
(a) the costs and expenses incurred by the Minister of Fisheries and Oceans, a response organization within the meaning of section 165 of the <i>Canada Shipping Act, 2001</i> , any other person in Canada or any person in a state, other than Canada, that is a party to that Convention in respect of measures taken	a) les frais supportés par le ministre des Pêches et des Océans, un organisme d'intervention au sens de l'article 165 de la <i>Loi de 2001 sur la marine marchande du Canada</i> , toute autre personne au Canada ou toute personne d'un État étranger partie à cette convention pour la prise de mesures visant à prévenir,

to prevent, repair, remedy or minimize pollution damage from the ship, including measures taken in anticipation of a discharge of bunker oil from it, to the extent that the measures taken and the costs and expenses are reasonable, and for any loss or damage caused by those measures; and

contrer, réparer ou réduire au minimum les dommages dus à la pollution causée par le navire, y compris les mesures en prévision de rejets d'hydrocarbures de soute causés par le navire, pour autant que ces frais et ces mesures soient raisonnables, de même que les pertes ou dommages causés par ces mesures;

(b) in relation to bunker oil, the costs and expenses incurred by

b) s'agissant des hydrocarbures de soute, les frais supportés par le ministre des Pêches et des Océans à l'égard des mesures visées à l'alinéa 180(1)a) de la *Loi de 2001 sur la marine marchande du Canada*, de la surveillance prévue à l'alinéa 180(1)b) de cette loi ou des ordres visés à l'alinéa 180(1)c) de la même loi et les frais supportés par toute autre personne à l'égard des mesures qu'il lui a été ordonné ou interdit de prendre aux termes de ce même alinéa, pour autant que ces frais et ces mesures soient raisonnables, de même que les pertes ou dommages causés par ces mesures.

(i) the Minister of Fisheries and Oceans in respect of measures taken under paragraph 180(1)(a) of the *Canada Shipping Act, 2001*, in respect of any monitoring under paragraph 180(1)(b) of that Act

[...]

or in relation to any direction given under paragraph 180(1)(c) of that Act to the extent that the measures taken and the costs and expenses are reasonable, and for any loss or damage caused by those measures, or

[86] Each moving party carries the burden of showing, on the civil burden of proof, that there is no genuine issue for trial.

[87] The first question for determination is whether the Administrator has shown, upon the evidence submitted, that either the Port or NSL is the owner of the Defendant Ship.

[88] I am not persuaded by the submissions of the Port that the failure of the Canadian Government to register the disposition of a former government vessel, pursuant to the provisions of the *Canada Shipping Act, supra*, is relevant to the present issue of ownership.

[89] CMS took ownership of the Defendant Ship pursuant to a Bill of Sale that was executed on October 26, 2009.

[90] CMS is incorporated under the laws of Nevada. An expert opinion was obtained by the Administrator from Mr. Kurt Bonds, an attorney licensed to practice in the State of Nevada. He

provided an opinion about the effect, if any, upon the legal capacity of a Nevada Corporation that was “dissolved”.

[91] According to the opinion of Mr. Bonds, which I accept as expert evidence, the legal capacity of CMS to convey legal title to the Defendant Ship by execution of the appropriate Bill of Sale, in October 2013, was unimpaired. Mr. Bonds deposed in his affidavit sworn on April 23, 2018, that the sale to NSL was effective.

[92] Nevada Law is foreign law. Foreign Law must be established by evidence. The only evidence about the corporation law of Nevada and the statutes of CMS in that jurisdiction was provided by the Administrator.

[93] No contrary evidence was submitted by the Port or any other party.

[94] I am not persuaded by the Port’s submissions that the failure of CMS to register as a corporation in Nova Scotia impacts its legal capacity to execute a Bill of Sale outside the province of Nova Scotia.

[95] Submissions were made by the Port and NSL about the latter’s lack of legal capacity to acquire title to the Defendant Ship because NSL had been “dissolved” under the applicable Nova Scotia statutes.

[96] The *Corporations Registration Act*, R.S.N.S. 1989, c. 101 provides consequences for a default in payment of annual fees, that is a financial penalty. I agree with the submissions of the Administrator that this legislation does not contemplate the dissolution of the corporate existence, as a consequence of non-payment of annual fees.

[97] It follows, in my opinion, that there is no genuine issue for trial as to the capacity of NSL to take ownership of the Defendant Ship.

[98] In my opinion, there is no genuine issue for trial also on the legal capacity of CMS to convey title.

[99] However, I am not satisfied that the Administrator has met the burden of showing on a balance of probabilities that the sale of the Defendant Ship to NSL was affected.

[100] There is a conflict between the evidence of Hjelle and that of Mr. Welsford. Mr. Welsford gave affidavit evidence on behalf of the Port.

[101] His name is mentioned in the “Narrative Report” attached as Exhibit C to the affidavit of Ms. Legars sworn on April 13, 2018, as “the owner” of the Defendant Ship. I refer to page 22 of the Motion record filed by the Administrator on April 26, 2018.

[102] The Administrator submits that the Rules governing summary judgment authorizes the Court to determine a question of law; see Rule 215 (2)(b).

[103] I have answered two questions of law, regarding the corporate capacity of CMS in October 2013 to execute a Bill of Sale in favor of NSL.

[104] I have also answered a question of law about the legal capacity of NSL in October 2013 to accept and hold property.

[105] The question of the ownership of the Defendant Ship, at the relevant time, is not a “pure” question of law. It is a question of mixed fact and law. I am not satisfied, on the basis of the evidence submitted, that this question can be answered on a summary basis.

[106] In the exercise of my discretion, pursuant to rules 215 and 216, I decline to grant the relief sought by the Administrator, CMS and Hjelle in their respective motions, and the motions will be dismissed.

[107] I turn now to the Port’s motion for summary judgment in respect of its claim for mooring.

[108] The Administrator, CMS and Hjelle resist the entry of judgement in favour of the Port, prior to determination of the question of ownership. They argue that personal liability has to be established first.

[109] With respect, I disagree.

[110] Paragraph 22(2)(s) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, grants this Court admiralty jurisdiction in respect of docking fees, as follows:

Maritime jurisdiction	Compétence maritime
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 :
(s) any claim for dock charges, harbour dues or canal tolls including, without restricting the generality of the foregoing, charges for the use of facilities supplied in connection therewith.	s) une demande de remboursement des droits de bassin, de port ou de canaux, notamment des droits perçus pour l'utilisation des installations fournies à cet égard.

[111] According to subsection 43(3) of the *Federal Courts Act*, supra, such a claim can be established in the absence of personal liability. Subsection 43(3) provides as follows:

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

[112] In my opinion, the Port was at liberty to seek the entry of judgment prior to a decision about ownership of the Defendant Ship.

[113] However, there is again the question of sufficiency of the evidence.

[114] I agree with the submissions of the Administrator, CMS, and Hjelle that the Port's evidence about the mooring claim is lacking. They note the absence of invoices in support of the Port's mooring claim. The Port's claim is in the nature of "special damages" and as such, requires specific proof.

[115] The evidence set out in the affidavit of Mr. Welsford, sworn on March 3, 2018, is insufficient, at this time. The Port's motion will be dismissed.

[116] If the parties cannot agree among themselves about costs then brief submissions can be made. A direction will issue setting out timelines in that regard.

ORDER in T-1453-16 and T-745-16

THIS COURT'S JUDGMENT is that the Motion by the Administrator of the Ship-Source Oil Pollution Fund is dismissed, without prejudice. If the parties cannot agree on costs then brief submissions may be made in accordance with a Direction to be issued.

AND FURTHER that the Motion by Cormorant Marine Services Corporation and Neil S. Hjelle is dismissed without prejudice. If the parties cannot agree on costs then brief submissions may be made in accordance with a Direction to be issued.

AND FURTHER that the Motion by the Port of Bridgewater for summary trial is dismissed without prejudice. If the parties cannot agree on costs then brief submissions may be made in accordance with a Direction to be issued.

"E. Heneghan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKETS: 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: HALIFAX, NOVA SCOTIA

DATE OF HEARING: JUNE 26-27, 2018
MARCH 5, 2019

ORDER AND REASONS HENEGHAN J.

DATED: APRIL 30, 2019

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