

Federal Court



Cour fédérale

Date: 20111208

Docket: T-1577-11

Citation: 2011 FC 1440

Vancouver, British Columbia, December 8, 2011

PRESENT: The Honourable Mr. Justice Harrington

ADMIRALTY ACTION
IN REM and *IN PERSONAM*

BETWEEN:

**ALAN TONEY, YVONNE TONEY, and
COURTNEY TONEY & REBECCA TONEY
AS REPRESENTED BY THEIR LITIGATION
GUARDIAN ALAN TONEY**

Plaintiffs

and

**HER MAJESTY THE QUEEN IN RIGHT
OF CANADA IN THE NAME OF THE ROYAL
CANADIAN MOUNTED POLICE, and
HER MAJESTY THE QUEEN IN RIGHT
OF THE PROVINCE OF ALBERTA
AS REPRESENTED BY THE MINISTER
OF SUSTAINABLE RESOURCE
DEVELOPMENT, and THE CANADIAN SHIP
BEARING LICENCE NO. AB1275024**

Defendants

REASONS FOR ORDER AND ORDER

[1] The Plaintiffs have taken action in this Court for damages arising from the death of young Janessa Lynn Toney, their daughter and sister. Young Janessa Lynn died following a boating accident in Lake Newell, near Brooks, Alberta. The date was September 27, 2008.

[2] It is alleged that the Defendants owed search and rescue duties and failed in that regard. The Plaintiffs seek damages under various headings. Without restricting the generality of the foregoing, they seek bereavement damages pursuant to the *Alberta Fatal Accidents Act*.

[3] The “Alberta” Defendants have moved to have the action struck against them *in personam* and against the ship *in rem*. Although it is admitted that the ship was owned by Her Majesty the Queen in Right of Alberta at the time of the incident, it had been sold prior to the commencement of the action. Since the claim did not carry with it a maritime lien, there is no action *in rem*. There is no action *in personam* over the provincial crown.

[4] The two “federal” Defendants have moved for a stay of the action, allowing the Plaintiffs to recommence in a provincial court, otherwise striking the action in whole or in part under Rule 221(1)(f) of the *Federal Courts Rules* as being an abuse of the process of this Court.

[5] Both motions shall be dismissed, save that the action *in rem* is struck, as ownership had not remained the same between the time the cause of action arose and the commencement of the action as required by section 43 of the *Federal Courts Act*. Otherwise, this is as maritime an action as one could have. The cause of action is grounded in sections 6 and following of the *Marine Liability Act*, SC, 2001, c 6. The fact that the ship has been sold by the provincial crown does not shield it from

personal liability. This 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-Internatinal Terminal Operators Ltd v Miida Electronics Inc*, [1986] 1 SCR 752). The fact that one of the Defendants is a provincial crown is irrelevant as this is not an action against the crown as such under section 17 of the *Federal Courts Act*.

[6] There is nothing vexatious about the action as pleaded. Pursuant to Rule 221, an action is not dismissed unless it is plain and obvious that the case is bereft of a chance of success. Furthermore, the facts alleged are taken to be true (*Hunt v Carey Canada Inc*), [1990] 2 SCR 959 and *Operation Dismantle Inc v Canada*, [1985] 1 SCR 441). The Defendants have not alleged that the claim is time-barred in accordance with section 14 of the *Marine Liability Act*.

ORDER

For the reasons given,

THIS COURT ORDERS that:

1. The motions are dismissed, save that the action is dismissed *in rem*;
2. The *in personam* Defendants shall have until January 11, 2012, to file their statements of defence; and
3. Costs in the cause.

“Sean Harrington”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1577-11

STYLE OF CAUSE: ALAN TONEY et al v HER MAJESTY THE QUEEN
IN RIGHT OF CANADA IN THE NAME OF THE
ROYAL CANADIAN MOUNTED POLICE et al

**MOTION IN WRITING CONSIDERED AT VANCOUVER, BRITISH COLUMBIA,
PURSUANT TO RULE 369**

**REASONS FOR ORDER
AND ORDER:** HARRINGTON J.

DATED: December 8, 2011

WRITTEN REPRESENTATIONS:

Darren Williams FOR THE PLAINTIFFS

Bruce Hughson FOR THE DEFENDANTS
HMTQ Canada and the RCMP

Marta Burns FOR THE DEFENDANTS
HMTQ Alberta and the Minister of
Sustainable Resource Development

SOLICITORS OF RECORD:

Merchant Law Group LLP FOR THE PLAINTIFFS
Victoria, BC

Myles J. Kirvan FOR THE DEFENDANTS
Deputy Attorney General of Canada
Edmonton, AB HMTQ Canada and the RCMP

Alberta Justice Legal Services FOR THE DEFENDANTS
Edmonton, AB HMTQ Alberta and the Minister of
Sustainable Resource Development