

Federal Court



Cour fédérale

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November 24, 2014

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Dear Counsel:

Re: **T-709-13** *Wesley Roots dba W.R. Marine Services v Artificial Reef Society of British Columbia et al*

Enclosed you will find the following document:

- Order

of Mr. Lafrenière, Case Management Judge, rendered on November 24, 2014.

Yours truly,

A handwritten signature in cursive script, appearing to read "Tamsin Ramsay".

Tamsin Ramsay
Registry Officer
(Case Management)

TR/mk
Encl(s).

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Federal Court



Cour fédérale

Date: 20141124

Docket: T-709-13

Vancouver, British Columbia, November 24, 2014

PRESENT: Case Management Judge Roger R. Lafrenière

**ADMIRALTY ACTION IN REM AGAINST
THE SHIP EX "HMCS ANNAPOLIS"
AND IN PERSONAM**

BETWEEN:

**WESLEY ROOTS
DOING BUSINESS AS
W.R. MARINE SERVICES**

Plaintiff

and

**ARTIFICIAL REEF SOCIETY
OF BRITISH COLUMBIA,
THE SHIP EX "HMCS ANNAPOLIS",
THE OWNERS AND ALL OTHERS
INTERESTED IN THE SHIP
EX "HMCS ANNAPOLIS"**

Defendants

ORDER

UPON MOTION dated October 28, 2014 on behalf of the Defendants for orders of the
Court:

- (a) releasing the "*HMCS Annapolis*" from arrest without bail; and
- (b) awarding the Defendants costs on a solicitor-and-client basis;

AND UPON MOTION dated October 30, 2014, on behalf of the Plaintiff for:

- (a) an order to have the Plaintiff appointed as a vessel manager and/or vessel's husband with all the necessary authority with respect to this vessel and/or take possession of the Defendant Vessel to give effect to the protection of *the res*;
- (b) make such an order as is necessary to provide the Plaintiff [protection of] the Defendant Vessel under arrest over the winter months including orders of inspection and access to notification of third party marine regulatory authorities and other third parties, including marine assistance in order to ensure the vessel is protected;
- (c) an order for sale of the Defendant Vessel before judgment;
- (d) the costs of this motion, and
- (e) such further and other relief as this Honourable Court deems just;

AND UPON reading the motion records filed on behalf of the parties, and hearing the submissions of Bryan Hicks and Eric Bojm, counsel for the Defendants, and James Straith, counsel for the Plaintiff, at the General Sittings in Vancouver on November 4, 2014;

ENDORSEMENT

1. The Defendant, the Artificial Reef Society of British Columbia (Reef Society), has moved for an order releasing the ship EX HMCS Annapolis (Annapolis) from arrest without bail

under Rule 488 of the *Federal Courts Rules* and awarding the Reef Society costs on a solicitor and-client basis.

2. The Plaintiff, Wesley Roots, responded with his own motion seeking an order to have the Plaintiff appointed as a vessel manager or vessel's husband to protect the Annapolis over the winter months, as well as an order for sale of the ship before judgment, and costs of the motion.

3. The parties filed affidavit evidence in support of their respective motions. At the commencement of the hearing, counsel for Mr. Roots requested a one month adjournment in order to conduct cross-examination. The Court offered to adjourn the two motions for a shorter period of time; however, counsel declined the invitation and elected to proceed without cross-examination.

4. The two motions were heard together with common evidence because the issues are intertwined. Although there are clearly conflicting views of the parties' deponents on what transpired leading up to the arrest of the Annapolis, the facts are, for the most part, corroborated by documents and not particularly contentious.

Background Facts

5. The Reef Society is a society incorporated under the *Society Act*, RSBC 1996, c 433. Its mission is to create and promote sustainable artificial reefs in British Columbia and around the world for the enjoyment of scuba divers and the protection of marine habitat.

6. In 2008, the Reef Society purchased the Annapolis, a decommissioned helicopter carrying destroyer escort, from the Government of Canada for \$20,000.00 for the purpose of sinking the ship as an artificial reef in Canadian waters. This purpose is an express term of the Bill of Sale.

7. In June 2008, the Annapolis was moved from the federal facility in Esquimalt, BC to Port Graves Bay, Gambier Island, to be prepared for sinking as an artificial reef. The ship has been moored at the same location ever since.

8. In 2008 and 2009, the Reef Society canvassed potential sinking sites for the Annapolis. Halkett Bay Marine Provincial Park (Marine Park) was selected as the sinking site because of its ideal water depth, sea bed characteristics, and proximity to Vancouver.

9. Various preparations are required before a vessel may be sunk as an artificial reef. Generally speaking, the process involves selecting a sinking site with the necessary sea bed, current, and access requirements, developing a plan to fund the project through the re-sale of the vessel's equipment and salvage materials, cleaning and removing residual hydrocarbons from the vessel, making various modifications to the vessel for diver access and egress, coordinating with volunteers and contractors to perform all the necessary preparatory work, obtaining all the required regulatory authorizations, preparing an anchoring system at the sink location, and making arrangements for the final towing of the vessel to its sinking site and safe scuttling through pre-flooding and controlled explosives. Much of this work can be done by volunteers.

10. The Reef Society initially engaged Canadian Artificial Reef Consultants Inc. (CARC) as a contractor to assist with preparing the ship to be sunk as an artificial reef. CARC then engaged Mr. Roots through his company, W.R. Marine Services (W.R. Marine), as its sub-contractor to help with the project.

11. The relationship between the Reef Society and CARC was initially cooperative; however it deteriorated in 2010 after CARC threatened to commence an action against the Reef Society. The Reef Society, CARC, and W.R. Marine entered into an agreement on January 25, 2012 under which CARC formally ended its involvement with the Annapolis project. It was a term of the agreement that CARC assigned its account receivable of \$32,132.10 to W.R. Marine, representing the amount owed by the Reef Society to CARC for its work on the project. It was further contemplated under this agreement that the Reef Society would engage W.R. Marine directly to assist with the project.

Agreement Between the Reef Society and W.R. Marine

12. Mr. Roots states in his affidavit sworn on October 30, 2014 that it was agreed that everything in regard to any future agreement would be in writing between the parties. He acknowledges that the Reef Society engaged W.R. Marine to assist with the Annapolis project when it became clear that CARC would be ending its involvement, but little else.

13. According to the Reef Society's deponents, W.R. Marine agreed to be responsible for, *inter alia*, harvesting salvageable materials from the Annapolis and attending to the sale of those materials to generate revenue to fund the project. It was further agreed that W.R. Marine's

compensation for its work on the project would be 50% of the proceeds from any sale of salvaged materials and that the balance would be paid to the Reef Society. It was also a term of the agreement that W.R. Marine would provide secure moorage for the Annapolis at Port Graves Bay for a monthly fee of \$2,800.00 plus applicable taxes.

14. Although no written agreement was ever formalized and signed, there is a substantial body of objective evidence, surrounding circumstances and history between the parties which supports the finding that the terms summarized by the Reef Society's deponents were not only discussed but agreed to by Mr. Roots.

15. According to the Reef Society's deponents, the parties renegotiated the agreement in April 2012. Mr. Roots states that there was a great deal of discussion, but no final agreement. However, based on the e-mail exchanges between the parties and their subsequent conduct, I find that W.R. Marine did agree to new and mutually beneficial terms to govern their relationship.

16. In particular, I am satisfied that Mr. Roots agreed to forgive \$30,000.00 of the Reef Society's debt and to waive all future moorage fees in exchange for filming rights in respect of the Annapolis project. This would entitle W.R. Marine to pursue an arrangement with a film production company to film the final stages of the Annapolis project to create a reality television episode or some other production about the Annapolis. W.R. Marine was further entitled to retain any fees that it may obtain from the production company for this filming opportunity.

17. The affidavit evidence before me further establishes that the balance of the debt under the agreement of January 25, 2012, being \$2,132.10, was paid to W.R. Marine in September 2012.

Subsequent Steps Taken by the Parties

18. By the fall of 2012, the Reef Society had received authorizations from Transport Canada and the Department of Fisheries and Oceans (DFO) for the proposed sinking. However, the project could not be completed at the time because the Reef Society still required authorizations from Environment Canada and the BC Ministry of Environment. The Province had expressed its support for the project but it would not formally authorize the project until Environment Canada provided its approval.

19. An environmental inspection was planned for November 2012. It was hoped that Environment Canada would authorize the project following this inspection. Concerns were raised about the potential existence of polychlorinated biphenyl ("PCBs") on the ship a short time before the inspection was scheduled to proceed. Environment Canada then decided to postpone its inspection as a result of those concerns.

20. Evidently frustrated by the delay, Mr. Roots commenced the underlying action against the Reef Society and the Annapolis on April 23, 2013, seeking damages in contract for breach of the Settlement Agreement dated January 25, 2012 broken down as follows:

- (a) \$2,240.00 for barge service expenses;
- (b) \$32,131.00 under the agreement dated January 25, 2012;

- (c) \$30,000.00 in unpaid moorage fees; and
- (d) \$40,000.00 in *quantum meruit* for transportation services.

21. On June 10, 2013, the Defendants filed their Statement of Defence. By way of Counterclaim, the Defendants seek damages against Mr. Roots, a declaration that W.R. Marine is in breach of its agreement with the Reef Society, and an accounting of all scrap and other materials removed from the Annapolis and the proceeds derived from the sale or use of such materials.

22. In June 2013, Environment Canada notified the Reef Society that some of the paint and insulation samples collected for testing indicated the existence of PCBs within some of the ship's insulation. Environment Canada informed the Reef Society that it could not approve the sinking of the Annapolis until the materials containing PCBs were removed from the ship.

23. In early 2014, Environment Canada expressed a willingness to undertake the remediation work required to remove the hazardous materials from the Annapolis in order to avoid the risk of an accidental release into the environment. Environment Canada's offer was conditional upon obtaining a Court Order either releasing the Annapolis from arrest or expressly authorizing the remediation work notwithstanding the arrest.

24. On February 24, 2014, the Reef Society obtained a Court Order authorizing the remediation work, with the consent of W.R. Marine. Environment Canada subsequently engaged a third party and the remediation work was completed in June 2014.

25. The environmental inspections originally scheduled for November 2012 were carried out in the summer of 2014 after the remediation work was complete. Environment Canada subsequently provided its authorization for the Annapolis project. The Environment Canada permit became effective on October 14, 2014. The Reef Society has also obtained updated authorizations from Transport Canada, Department of Fisheries and Oceans, and the BC Ministry of Environment.

26. The Reef Society is now in a position to move forward and complete the project. The Annapolis is substantially ready to be sunk as an artificial reef. The Reef Society has made arrangements with marine operators, a marine architect, and volunteers to assist with making the final preparations so the project may be completed. The Reef Society cannot proceed, however, because the Annapolis is under arrest in this action.

Analysis

27. The Reef Society submits that the Court should order that the Annapolis be released from arrest because of the extraordinary circumstances of this case. It maintains that there is urgency to complete the project as the condition of the Annapolis has substantially deteriorated and there is now a material risk that the ship's underwater through-hull fittings may begin to fail before the summer of 2015. The Reef Society further submits that the ship should be released from arrest because the arrest amounts to an abuse of process because W.R. Marine has used the arrest as leverage to pursue issues that are collateral to its claim and has failed or refused to diligently prosecute its claim.

28. The parties agree that this Court has discretion to release property from arrest with or without bail in appropriate circumstances. Based on the material before me, I conclude that appropriate circumstances have been established to justify reducing the bail for the release of the Annapolis to a nominal amount.

29. First, I conclude, on the limited evidence before me, that W.R. Marine's claim is tenuous at best. The claim of \$2,240.00 for barge services was apparently paid by the Reef Society, not W.R. Marine and therefore without merit. There is also compelling and objective evidence that the claims of \$32,132.10 under the agreement of January 25, 2012 and of \$30,000.00 in unpaid moorage fees were settled in exchange for filming rights. This is evidenced by the parties' conduct. The Reef Society ceased making moorage payments as of May 2012 pursuant to the terms of the agreement and W.R. Marine did not object to, or deny this agreement prior to commencing the action. Finally, the claim of \$40,000.00 in *quantum meruit* appears doomed to fail since transportation of volunteers to the Annapolis was one of W.R. Marine's obligations under its agreement with the Reef Society. Moreover, W.R. Marine received a direct benefit from the work done by the volunteers.

30. Second, I find that the Annapolis has little, if any, commercial value and, in any event, constitutes a wasting asset. The Reef Society purchased the Annapolis from the Government of Canada in 2008 for \$20,000.00. Since that time, W.R. Marine has harvested almost all of the salvageable material from the ship, except for certain ladders, doors, and hatches. The remaining salvageable items cannot be removed until immediately prior to sinking since they are required in order to move about the ship or for safety and security reasons. I note that the Reef Society has

offered those materials plus some additional equipment to W.R. Marine to try and resolve this dispute.

31. Third, there is urgency to complete the project. The condition of the Annapolis has deteriorated to the point that there is a substantial risk that the ship may develop a leak in one of its through-hull fittings before the summer of 2015 due to its deteriorating condition and corrosion. A failure of one of these fittings would likely cause a flood within various areas of the ship and ultimately result in a total loss. The ship has been substantially stripped and opened up. It is not feasible to repair the Annapolis at this stage or to tow the ship anywhere other than its approved sinking location at Halkett Bay. Releasing the Annapolis from arrest in order that the ship may be sunk in a controlled manner at the approved location appears to be the only realistic alternative to an eventual accidental sinking at an unwanted location.

32. The fact that the Ministry of Fisheries and Oceans and Environment Canada authorizations contain a blackout period from February 1, 2015 until August 15, 2015 only serves to accentuate the urgency. If the project is not completed by the end of January 2015 then it will not be possible to proceed until August 2015, by which time the risk of ship sinking will have greatly increased.

33. Fourth, W.R. Marine would not suffer any serious prejudice if the bail for the release of the Annapolis was reduced to a nominal amount. As explained above, the ship has little, if any, commercial value. Almost all salvageable material has already been harvested from the ship and the Reef Society has offered W.R. Marine what remains.

34. In the end, I conclude that an order releasing the Annapolis from arrest so the ship may be sunk in a controlled manner as an artificial reef is the only realistic alternative to the eventual catastrophe of a through-hull fitting failure, which would work a prejudice to both parties.

35. In light of the above, I need not deal with the Reef Society's argument that the continued arrest of the ship amounts to an abuse of process, or W.R. Marine's motion for appointment of a vessel manager.

36. As for costs of the two motions, I conclude that they should be awarded to the Reef Society on an elevated scale, but not solicitor-client costs. W.R. Marine has been highly adversarial in both opposing the motion by Reef Society and bringing its own motion, thereby increasing the costs unnecessarily.

THIS COURT ORDERS that:

1. The ex HMCS Annapolis (the "Annapolis") shall be released from arrest upon the payment of bail of \$1.00 by the Artificial Reef Society of British Columbia (the "Reef Society").
2. The Annapolis may remain moored at its current location, being a water lot (the "Water Lot") located in Port Graves Bay, Gambier Island, B.C., for 30 days from the date of this Order, with leave granted to the Reef Society to make a motion to the Court for an extension of the mooring period.

3. The Reef Society, its officers, directors, agents, contractors, designates, and guests, shall have reasonable access to the Annapolis and Water Lot for purpose of carrying out all work, inspections, and preparations that are required or related to the preparation of the Annapolis to be sunk as an artificial reef, towing the Annapolis to its anticipated sinking location, or the general maintenance of the Annapolis. W.R. Marine Services and its principals, agents, employees, contractors or designates shall not interfere with such reasonable access.
4. The Reef Society shall provide notice to Wesley Roots one day prior to entering upon the Water Lot pursuant to paragraph 3 of the Order. Such notice may be provided by electronic mail to Wesley Roots or to legal counsel for W.R. Marine Services.
5. The Artificial Reef Society shall not install explosives on the Annapolis while it is moored at the Water Lot, or otherwise bring explosives to the Water Lot, without first obtaining the consent of Wesley Roots.
6. The Plaintiff's motion is dismissed.
7. The Reef Society is hereby awarded costs against W.R. Marine Services for the two motions in the amount of \$10,000.00, inclusive of disbursements and taxes.

§ 10.01

“Roger R. Lafrenière”
Case Management Judge