

Federal Court of Appeal



Cour d'appel fédérale

Date: 20241118

Docket: A-338-24

Citation: 2024 FCA 191

Present: HECKMAN J.A.

BETWEEN:

**Haida Tourism Limited
Partnership d.b.a. West Coast
Resorts**

Appellant

and

THE ADMINISTRATOR OF THE SHIP-SOURCE OIL POLLUTION FUND

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on November 18, 2024.

REASONS FOR ORDER BY:

HECKMAN J.A.

Federal Court of Appeal



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REASONS FOR ORDER

HECKMAN J.A.

[1] The Appellant has appealed the Order of the Federal Court (*per* Strickland J.) issued with reasons on October 3, 2024 in *Haida Tourism Limited Partnership d.b.a. West Coast Resorts v. The Administrator of the Ship-source Oil Pollution Fund*, 2024 FC 1555 and has brought a motion, on consent, for a stay of the Order pending appeal pursuant to paragraph 398(1)(b) of the *Federal Courts Rules*, S.O.R./98-106 (Rules).

[2] For the reasons that follow, the motion for a stay pending appeal is dismissed.

The Appellant has not established that it would suffer irreparable harm if the stay were refused.

[3] The Appellant brought the underlying action against the Respondent seeking compensation for expenses incurred in mitigating oil pollution damage [the preventative effort expenses] resulting from the grounding of the vessel, “Tasu I” [Vessel]. The Appellant claimed that the grounding of the Vessel was caused by the actions of third parties with the intent to cause damage. In such circumstances, the shipowner or owner of the Vessel has a defence from liability for pollution damage under Article 3 of the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001, 23 March 2001, Can TS 2010/3 [*Bunkers Convention*] and paragraph 77(3)(b) of the *Marine Liability Act*, S.C. 2001, c 6, respectively. The Appellant argued that it was entitled under section 101 of the Act to reimbursement of the preventative effort expenses whether as a shipowner or owner (by operation of paragraph 101(1)(b) of the Act) or as a non-owner.

[4] In a previous proceeding, the Appellant had brought a statutory appeal under the Act of the Respondent’s decision to disallow a claim filed by the Appellant under subsection 103(1) of the Act with respect to the preventative effort expenses. The Federal Court had decided that section 103 did not create a right for a shipowner to recover such expenses where the oil pollution damage resulted from an incident caused solely by its own ship: *Haida Tourism Partnership d.b.a. West Coast Resorts v. The Administrator of the Ship-source Oil Pollution Fund*, 2022 FC 1249, 2022 CarswellNat 7449 at para. 111 [*Haida #1*].

[5] In the Order under appeal, the Federal Court ordered that several paragraphs in the Appellant's amended statement of claim, in which the Appellant claimed that it was not the owner of the Vessel, be struck on the ground that the question of the Appellant's ownership of the Vessel had been decided in *Haida #1*. The Federal Court held that the Appellant was barred under the doctrine of issue estoppel from claiming that it was not the owner or operator of the Vessel. The Federal Court also granted the Respondent's request to set a hearing for a preliminary determination of a question of law. It ordered the Respondent to serve and file a motion under Rule 220(1)(a) seeking determination by the Federal Court of several questions, including "whether an owner of a polluting ship can obtain compensation by way of section 101 of the [Act] for costs incurred with respect to oil pollution mitigation measures taken solely with respect to pollution from its own ship."

[6] This Court will grant a stay of proceedings under Rule 398(1)(b) if the Appellant satisfies the test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385 [*RJR*] by establishing that (1) there is a serious issue to be tried, (2) the Appellant would suffer irreparable harm if the stay were refused, and (3) the balance of convenience favours granting the stay.

[7] Under the first part of the test, the Appellant must satisfy the Court that the appeal is neither vexatious nor frivolous, a low threshold: *RJR* at 337. The Appellant states that it will argue on appeal that the Federal Court committed reversible errors when it impermissibly relied on an *obiter* decision to engage issue estoppel and when it directed for determination a question

of law which would only arise if the Appellant successfully proved the facts supporting a defence under paragraph 77(3)(b) of the Act, failing which the question would be moot.

[8] To establish the second part of the *RJR* test on irreparable harm, the Appellant must establish that a refusal to grant relief could so adversely affect its own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the stay application. Irreparable harm is harm of a nature that cannot be quantified in monetary terms or cannot be cured: *United States Steel Corporation v. Canada (Attorney General)*, 2010 FCA 200, 191 A.C.W.S. (3d) 707 at para. 6 [*US Steel*], citing *RJR* at 341. Relying on this Court’s decision in *Fibrogen, Inc. v. Akebia Therapeutics, Inc.*, 2021 FCA 235, 2021 A.C.W.S. 828 at para. 17 [*Fibrogen*], the Appellant argues that failing to stay the Order would irreparably harm the Appellant by making its appeal nugatory: “at the same time as the Federal Court would be adjudicating questions of law premised on the Appellant owning the vessel, and having a valid defence under s. 77(3)(b) of the [Act], the Appellant would also be appealing to this Court, effectively to permit it to deny that it owns the vessel, and has not yet proven the facts to support the defence...”.

[9] Finally, the third part of the *RJR* test, the balance of convenience, involves the determination of which of the two parties will suffer the greater harm from the granting or refusal of the stay application pending a decision on the merits: *RJR* at 342. The Appellant argues that the balance of convenience favours staying the Order because the Respondent consents to the stay and would not suffer the prejudice described by the Appellant as irreparable harm.

[10] Assuming without deciding that the Appellant has established that its appeal is neither frivolous nor vexatious, I am of the view that its application for a stay must be dismissed because it has not established the second part of the *RJR* test that it would suffer irreparable harm if the stay application were dismissed.

[11] This Court has rejected the proposition that an appeal rendered moot automatically gives rise to a finding of irreparable harm, because it would apply to virtually all circumstances in which a stay is sought and deprive the court of the discretion to decide questions of irreparable harm on the facts of each case: *US Steel* at para. 17. The facts of this case differ greatly from those that prevailed in *Fibrogen*. There, the Appellant had appealed the Federal Court's decision that certain witness statements were not subject to a confidentiality agreement. In the absence of a stay, a large portion of these statements would have been made publicly available: *Fibrogen* at para. 8. The failure to grant a stay in such circumstances rendered the appeal nugatory and constituted irreparable harm because the right that the Appellant sought to protect through its appeal—the right to the confidentiality of its documents—would be irretrievably lost.

[12] In this case, if the Order appealed from were not stayed and the motion under Rule 220(1)(a) were allowed to proceed, and if the motion were decided before disposition of this appeal, the Federal Court would have determined whether the owner of a polluting ship can obtain compensation under section 101 of the Act for costs incurred with respect to oil pollution mitigation measures taken solely with respect to pollution from its own ship, even assuming a defence is made out under paragraph 77(3)(b) of the Act. The Appellant has not established how such an outcome would cause it irreparable harm were it to succeed on this appeal.

[13] Accordingly, the motion for a stay of the Order is dismissed without costs.

“Gerald Heckman”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:

A-338-24

STYLE OF CAUSE:

HAIDA TOURISM LIMITED
PARTNERSHIP d.b.a. WEST
COAST RESORTS v. THE
ADMINISTRATOR OF THE
SHIP-SOURCE OIL POLLUTION
FUND

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:

HECKMAN J.A.

DATED:

NOVEMBER 18, 2024

WRITTEN REPRESENTATIONS BY:

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