

Federal Court



Cour fédérale

Date: 20250506

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

Citation: 2025 FC 816

Ottawa, Ontario, May 6, 2025

PRESENT: The Honourable Madam Justice Heneghan

ADMIRALTY ACTION *IN REM* AND *IN PERSONAM*

Docket: T-1453-16

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

Docket: T-745-16

AND BETWEEN:

PORT OF BRIDGEWATER

Plaintiff by Counterclaim

and

**CORMORANT MARINE SERVICES
LIMITED, A BODY CORPORATE
AND NEIL S. HJELLE**

Defendants by Counterclaim

REASONS AND ORDER

I. INTRODUCTION

[1] By a Notice of Motion filed on July 17, 2023 in cause number T-1453-16, the Port of Bridgewater (the “Port”) seeks the following relief:

1. An Order to set aside the Judgment of the Court issued November 8, 2019;

2. An Order requiring the Administrator to reimburse [the Port] for any payments made to the Administrator while the Judgment was in effect;
3. An Order granting such further and other relief as this Honourable Court may deem just; and
4. Costs of this motion.

II. LITIGATION BACKGROUND

[2] The Port commenced the within action in cause number T-745-16 against Cormorant Marine Services Corporation, the Owners and all those interested in the MV Cormorant (the “Ship”) and the ship Cormorant on May 9, 2016, seeking, *inter alia*, damages for unpaid moorage fees and the costs to salvage the Ship, charges that were incurred between October 2009 and March 2015. The Ship sank on or about March 20, 2015 while moored in Bridgewater, Nova Scotia.

[3] On September 1, 2016, the Administrator of the Ship-Source Oil Pollution Fund (the “Administrator”) filed a statement of claim in cause number T-1453-16, seeking the following relief:

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

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

[4] This action is taken against the Owners and all others interested in the Ship, the Port, 3092714 Nova Scotia Limited (“309”), Cormorant Marine Services Corporation, and Neil S. Hjelle.

[5] The Administrator is appointed pursuant to the terms of the *Marine Liability Act*, S.C. 2001, c. 6. It commenced the action in cause number T-1453-16 to seek recovery of the costs incurred by the Canadian Coast Guard (the “CCG”) and other costs related to the sinking of the Ship.

[6] In pursuit of cause number T-1453-16, the Administrator obtained a warrant for the arrest of the defendant Ship, in the following terms:

TO Any Sheriff in Canada

YOU ARE DIRECTED to arrest the Ship CORMORANT, an unregistered ship situated at the Port of Bridgewater, Nova Scotia, and to keep the same under arrest until further order of this Court.

[7] The Index of Recorded Entries records the filing of the affidavit of Mr. Richard Sansford, deposing to service of the warrant of arrest upon the Ship, on September 12, 2016.

[8] By Order issued on December 2, 2016, the two actions were consolidated and cause number T-1453-16 was designated the lead action.

[9] On March 5, 2018, the Port filed a motion for summary judgment in the amount of \$258,000.

[10] On April 26, 2018, the Administrator filed a motion for summary judgment to determine the ownership of the Ship.

[11] Both motions were dismissed by an Order issued on April 30, 2019.

[12] In July 2019, the Port filed a motion in the consolidated action for the sale of the Ship *pendente lite*. Opposed by the Administrator, the motion was dismissed by an Order issued on July 23, 2019 by Case Management Judge Tabib. In her Reasons for Order, the Case Management Judge noted the following:

[14] Mr. Welsford further mentions that the Port has obtained a writ of seizure and sale for two other vessels that had been abandoned at the Port, and that he believes that if a suitable offer cannot be obtained for the Cormorant, then there could be an opportunity to market all three vessels for sale to take advantage of “economies of scale and the economic practicality of towing more than one ship at a time”.

[24] ... As for the suggestion that the judicial sale of two other vessels left derelict at the Port might afford an opportunity, through “economies of scale and the economic practicality of towing more than one ship at a time”, Mr. Welsford’s qualifications to offer this opinion are neither stated nor apparent to the Court.

[13] Subsequently, the Port and the Administrator reached an agreement to settle the consolidated action, which was formalized in a settlement agreement (the “Settlement Agreement”).

III. AFFIDAVIT EVIDENCE

[14] In support of the motion, the parties filed affidavits.

[15] The Port filed the affidavit of Mr. Richard Welsford who is the president and sole shareholder of the Port. This affidavit was sworn on June 5, 2023.

[16] The Administrator filed the affidavits of Mr. Cameron Grant, Mr. Michael Grebler and Mr. Michael Fegan. The affidavit of Mr. Grant was affirmed on August 15, 2023; the affidavit of Mr. Grebler was affirmed on August 15, 2023; and the affidavit of Mr. Fegan was affirmed on August 14, 2023.

[17] Mr. Welsford sets out a history of events between 2015 and the filing of the Port’s motion. Following the first three introductory paragraphs, the affidavit is broken into sections as follow:

- March 2015 sinking incident
- 2019 Surveying work
- CCG interactions after November 8, 2019
- Lack of access to the MV Cormorant
- Litigation against the CCG

- Inquiry by MP Rick Perkins in or around 2022

[18] Mr. Welsford deposed to the events of March 2015 when the Ship capsized and sank at the wharf in Bridgewater, leading to remedial clean-up work by the CCG. He deposed that he understood from public statements by the CCG between 2016 and 2018 that all pollutants had been removed and that the Ship was no longer a pollution threat. He referred to various newspaper articles to that effect and included some articles in the 17 exhibits that he attached to his affidavit.

[19] Mr. Welsford also deposed about certain surveying work that was conducted in July 2019 on board the Ship on behalf of the Administrator and the CCG. He deposed to his understanding from a CCG employee in July 2019 that the condition of the Ship was unchanged since 2015 and no new pollutants were on board.

[20] As well, Mr. Welsford deposed to events in November and December 2019, about problems with access to the Ship. He deposed that the CCG prevented access from the date of the Judgment of November 8, 2019 until the Ship was removed in November 2020 for deconstruction.

[21] Mr. Welsford also deposed that upon attending the ship on November 20, 2019, he met CCG personnel. He was asked if he had received a letter. Later that day, he sent an email to Mr. Kyle Jarvis, Environmental Response Officer with the CCG advising that he had not received a letter. Mr. Jarvis emailed him a letter dated November 20, 2019, advising that the ship posed “an

imminent threat of pollution” and that the CCG would act pursuant to the *Canada Shipping Act, 2001*, S.C. 2001, c. 26 to take “measures to mitigate the immediate threat”.

[22] Mr. Welsford also deposed that on December 17, 2019 he requested the CCG to give him access to the Ship for the purpose of determining the best way to remove the submersible, together with the spare parts. In a response dated December 23, 2019, Mr. Yard on behalf of the CCG advised that access to the Ship was not possible until the Port provided “detailed information” about the removal of a pollution threat.

[23] Mr. Welsford also deposed that the Port first received a copy of a report prepared by London Offshore Consultants (Canada) Limited (“LOC”) in July 2020. He deposed that upon review of that report, he learned that LOC had concluded that the 2015 sinking was the result of a “malicious act”.

[24] Mr. Welsford further deposed as to the efforts he made to obtain a copy of a Ministerial or Departmental Order authorizing the seizure and dismantling of the Ship.

[25] Mr. Welsford deposed that the Port commenced an action against the CCG, Minister Bernadette Jordan and the Queen in Right of Canada, seeking various forms of relief including damages for the “unlawful interference in the operations of the Port of Bridgewater”. This action was begun on July 31, 2020 in cause number T-856-20.

[26] In the closing paragraphs of his affidavit, Mr. Welsford deposed to his efforts to get information from the Government of Canada about the disposal of the Ship, including a request for information pursuant to the *Access to Information Act*, R.S.C., 1985, c. A.-1 in 2021. He deposed that he sought assistance from his Member of Parliament in seeking information about the disposal of the Ship.

[27] Mr. Welsford deposed that he learned on or about February 8, 2023 that there was no “ministerial or departmental order to remove and dispose” of the Ship.

[28] In one of the concluding paragraphs of his affidavit, Mr. Welsford deposed as follows:

PBI would not have consented to the Order in matters T-1453-16 and T-745-16 if it was aware that (1) the Minister had determined the vessel constituted a grave and imminent threat of pollution prior to November 8, 2019, (2) that PBI would not be able to take possession or control of the submersible, spare parts, or the Cormorant subsequent to the Order being issued, (3) that the 2015 sinking had been determined to be the result of a “malicious act”.

[29] Mr. Grant is the lead counsel working in the office of the Administrator. He affirmed his affidavit on August 15th, 2023. He began his employment in the office of the Administrator on September 9, 2019. He deposed as to his knowledge of the litigation in the Federal Court in causes T-745-16 and T-1453-16, including his knowledge of the discussions and correspondence leading up to execution of the Settlement Agreement.

[30] Mr. Grant attached 11 exhibits to his affidavit. Some of these exhibits consisted of correspondence between the office of the Administrator and its outside counsel, Mr. William

Moreira, K.C. Privilege with respect to this correspondence was waived upon its production. The exhibits referenced in the affidavit of Mr. Grant are part of the evidence upon this motion.

[31] Included in Exhibit B to Mr. Grant's affidavit is a statement from Mr. Brad Conrad that was taken on June 17, 2019.

[32] Mr. Conrad is a diver, employed with RMI Marine Limited. His statement addresses his attendance upon the Ship on February 27, 2015, at the request of the CCG. He said that he found only one unbolted valve flange in the engine room on the day he attended. The statement of Mr. Conrad was produced in reply to the many allegations by the Port about intentional interference with through-hull fittings.

[33] The statement of Mr. Conrad was provided to then counsel for the Port on June 24, 2019.

[34] Mr. Grant was cross-examined upon his affidavit by counsel for the Port. A transcript of that cross-examination is part of a supplementary motion record filed on behalf of the Port.

[35] Mr. Grebler is a marine expert in the office of the Administrator. He provides technical advice to the Administrator and legal staff as required.

[36] Mr. Grebler deposed to a telephone call on November 8, 2019 from Mr. David Yard of the CCG about potential mold and stability problems with the Ship Cormorant. Mr. Yard was

communicating with Mr. Grebler before a planned meeting on November 13, 2019 about the Ship.

[37] Mr. Grebler also deposed that on November 22, 2019, he received a copy of the written report prepared by LOC, to the CCG. He deposed that prior to the conference call on November 13, 2019, neither he nor other members of the Administrator's staff were aware of the continuing presence of pollutants on board the Ship or of the report, its opinions or conclusions.

[38] Mr. Fegan is a naval architect and is the principal of Fulcrum Marine Consultancy Limited, a surveying and consultancy firm located in Pleasantville, Nova Scotia. He deposed that in the spring of 2015, he was engaged by Mr. Moreira, K.C., Counsel for the Administrator, to attend upon the Ship Cormorant to make observations. The Ship was then severely listing to starboard and was partially sunk at her berth.

[39] Mr. Fegan deposed that he attended upon the Ship between May 11 and June 3, 2015, and provided a report on February 12, 2016 about his work to date.

[40] Mr. Fegan was asked to go below-decks and look at a valve that he had earlier been advised had an unbolted flange. He was asked to make observations about the "arrangement of the engine room" in preparation of a written opinion about the cause of the sinking, in the event of a future request to give an opinion.

[41] Mr. Fegan attached copies of an exchange of emails with Mr. Moreira, K.C., on May 24 and May 28, 2019, as Exhibit A to his affidavit.

IV. THE SETTLEMENT AGREEMENT AND CONSENT JUDGMENT

[42] The Administrator and the Port are the only parties to the Settlement Agreement. The operative part of that Agreement is clause 1 which provides as follows:

1. Subject to the terms of this Settlement Agreement and the conditions to which it is subject, all as set out below, the Action shall be settled on terms and conditions as follows:

(a) In respect of the claims set out in the Statement of Claim in Court File T-1453 -16, the Administrator shall have judgment, jointly and severally, In personam against of the Port and 309 and In rem against the ship CORMORANT (the “Vessel” in the all-inclusive amount of \$375,000.

(b) The claims of the Port as set out in the Statement of Claim in Court File T-745-16 shall be dismissed without costs for or against any party.

(c) It shall be a term of the Settlement that the Port and 309 were and are, and shall be declared to have been as at February 27 2015 and to continue to be, owners of the Vessel.

(d) It shall be a term of the Settlement that the Port and 309 shall be entitled on conclusion of the Settlement to take possession of the submersible and associated spare parts (the “Released Property”) presently stored in the main deck hangar of the Vessel, and that effective at but not before the conclusion of the Settlement the Released Property shall be unencumbered by any in rem claim by the Administrator

(e) In order that the a Release may be granted pursuant to Federal Courts Rule 488 in respect of the Released Property, the Port and 309 shall be responsible to procure and file, within seven days

following the date of this Settlement Agreement, withdrawal of the Caveat Release filed in the Action by Bluenose Coastal Action Foundation on March 22, 2019. Should that withdrawal not be filed within that time or such extended time as may be agreed to in writing by the Administrator, this Settlement Agreement shall be null, void and of no effect.

(f) Should the Court require it the Administrator shall within seven days following communication of that requirement file a Consent to Release in respect of the Released Property. Should that Consent to Release not be filed within that time or such extended time as may be agreed to in writing by the Port or 309, this Settlement Agreement shall be null, void and of no effect.

(g) The arrest of the Vessel and of all the machinery and equipment on board the Vessel excepting only the Released Property, as effected by Warrant issued at the request of the Administrator on September 21, 2016 and served on September 29, 2016, shall remain in effect subject to such further order or release as may be issued by the Court following conclusion of the Settlement

(h) Effective at but not before conclusion of the Settlement the Port and 309 shall be entitled to, and shall promptly at their own cost and risk, remove the Released Property from the Vessel and shall thereafter be a liberty to sell or dispose of the Released Property as the Port and 309 see fit and solely for the account and the benefit of the Port and 309.

(i) Effective at but not before conclusion of the Settlement the Administrator shall be at liberty to take any and all steps as she may see fit to enforce the Order for Judgment referred to below.

(j) The Administrator shall request the Court, on motion if the Court should so require, to issue an Order for Judgment in the terms attached hereto as Schedule A and the Port and 309 shall submit to the Court their written consent to the Order for Judgment requested by the Administrator.

(k) The Settlement shall be concluded by issuance by the Court of an Order for Judgment on the terms attached hereto as Schedule A or such alternate terms as the Court may require and as shall be consented to by all of the Administrator, the Port and 309 by further Instrument in writing.

(l) It is a condition of the Settlement that an Order for Judgment shall be Issued in the form attached as schedule A, or some alternate form proposed by the Court to which alternate form all of Administrator, the Port and 309 shall have indicated in writing their agreement. If for any reason no such Order for Judgment is granted by the Court then this Settlement Agreement shall be null, void and of no effect,

[43] The Settlement Agreement, in clause 1(i), refers to an “Order for Judgment” in the form annexed as schedule “A” or in “some alternate form proposed by the Court”, and the parties to the settlement would have to agree in writing to such “alternate form”. The failure of the grant of such Order for Judgment, “for any reason”, would nullify and void the Settlement Agreement.

[44] The draft Order set out in schedule A of the Settlement Agreement provides for the release from arrest of the submersible and its associated spare parts. The draft Order for Judgment referred to the execution of a “partial release” in that regard.

[45] Included in Exhibit A attached to the affidavit of Mr. Grant are drafts of the Order and of the “partial release”. Exhibit A also includes emails from the file of Mr. Moreira, K.C. about the drafts, ultimately leading to the submission to the Court of an executed “Consent to Judgment” dated October 31, 2019. That Consent provides as follows:

1. It is ordered and declared that The Port of Bridgewater Incorporated and 3092714 Nova Scotia Limited were as at February 27, 2015 and have between that date and the date of this Order continued to be, owners of the Defendant ship CORMORANT (the "Vessel");

2. It is ordered pursuant to Rule 488(1) of the Federal Courts Rules that a submersible and its associated spare parts (the "Released Property") presently on board the Vessel shall be and is hereby released from the Warrant Issued in Court File T-1453-16 on

September 1, 2016, provided however that the arrest effected pursuant to that Warrant shall, subject to any further Order or Release as may be issued by the Court hereafter, remain in full force and effect in respect of the Vessel and of all property and equipment on board the Vessel except only for the Released Property;

3. At any time following granting of this Order, any registry officer of this Court shall upon request of any of the Remaining Parties issue a Partial Release in the form attached as an Appendix to this Order (the "Partial Release");

4. Judgment is hereby granted in favour of the Administrator, jointly and severally, *in personam* against The Port of Bridgewater Incorporated and 3092714 Nova Scotia Limited and *in rem* against the Vessel (but not against the Released Property) in respect of the claims asserted in Court File T-1453-16 in the amount of THREE HUNDRED AND SEVENTY-FIVE THOUSAND DOLLARS (\$375,000.00), which amount is inclusive of principal, prejudgment interest and costs;

5. At any time following the granting of this Order and of the Partial Release The Port of Bridgewater Incorporated and 3092714 Nova Scotia Limited shall be entitled, entirely at their own risk and expense, to remove the Released Property from the Vessel and shall be entitled thereafter to possession of and rights of ownership in the Released Property, including without limitation the right to sell the Released Property to such person and on such terms as they may see fit, unencumbered by any *in rem* claim of the Administrator; and

6. The claims asserted by The Port of Bridgewater Incorporated in Court File T-745-16 are hereby dismissed without costs for or against any party.

[46] That electronic correspondence was addressed to the Case Management Judge, Madam Prothonotary Tabib.

[47] However, in the meantime, the Case Management Judge had issued a Direction on November 1, 2019, in the following terms:

The Court has noted the correspondence of the Plaintiff's counsel. The Court is concerned as to whether it could give effect to some of the relief contemplated in the proposed order without the consent of those who have filed caveats against the release of the vessel. As to the declaration of ownership, in the absence of a detailed statement of agreed facts, the Court would be inclined to modify the proposed order so that the declaration be stated to be "as between the remaining parties". The Court would be disposed to discuss these issues further with the parties in the context of a case management telephone conference, should the parties request one.

[48] The parties resolved the concerns raised, to the satisfaction of the Case Management Judge and on November 8, 2019, the Judgment was issued. The preamble to the Judgment provides as follows:

UPON the joint informal motion of the Administrator of the Ship-source Oil Pollution Fund (the "Administrator"), The Port of Bridgewater Incorporated and 3092714 Nova Scotia Limited (collectively, the "Remaining Parties"), for a consent judgment to be issued in this matter;

CONSIDERING the remaining parties' representations to the effect that this Consolidated Action has been settled by agreement among them;

AND CONSIDERING the parties' representations to the effect that a condition of the settlement agreement is that the Court shall grant, on consent of all of the Remaining Parties, this Order;

AND CONSIDERING the written consents of the Remaining Parties, as represented by their respective solicitors to the granting of this Order and the representations of counsel on behalf of the Remaining Parties;

AND CONSIDERING that the Court is satisfied that all parties who may be affected by this order have consented to it;

[49] The terms of the Judgment that was entered on consent on November 8, 2019 provides as follows:

1. It is ordered and declared that, as between the Remaining Parties, The Port of Bridgewater Incorporated and 3092714 Nova Scotia Limited were as at February 27, 2015 and have between that date and the date of this Order continued to be, owners of the Defendant ship CORMORANT (the "Vessel");
2. It is ordered pursuant to Rule 488(1) of the Federal Courts Rules that a submersible and its associated spare parts (the "Released Property"), presently on board the Vessel, shall be and is hereby released from the Warrant issued in Court File T-1453-16 on September 1, 2016, provided however that the arrest effected pursuant to that Warrant shall, subject to any further Order or Release as may be issued by the Court hereafter, remain in full force and effect in respect of the Vessel and of all property and equipment on board the Vessel except only for the Released Property;
3. At any time following the granting of this Order, any registry officer of this Court shall upon request of any of the Remaining Parties issue a Partial Release in the form attached as an Appendix to this Order (the "Partial Release");
4. Judgment is hereby granted in favour of the Administrator, jointly and severally, *in personam* against The Port of Bridgewater Incorporated and 3092714 Nova Scotia Limited and *in rem* against the Vessel (but not against the Released Property) in respect of the claims asserted in Court File T-1453-16 in the amount of three hundred and seventy-five thousand dollars (\$375,000.00), which amount is inclusive of principal, prejudgment interest and costs;
5. At any time following the granting of this Order and of the Partial Release, The Port of Bridgewater Incorporated and 3092714 Nova Scotia Limited shall be entitled, entirely at their own risk and expense, to remove the Released Property from the Vessel and shall be entitled thereafter to possession of and rights of ownership in the Released Property, including without limitation the right to sell the Released Property to such person and on such terms as they may see fit, unencumbered by any *in rem* claim of the Administrator; and
6. The claims asserted by The Port of Bridgewater Incorporated in Court File T-745-16 are hereby dismissed without costs for or against any party.

[50] The Judgment includes, as an Appendix, a "Partial Release", in the following terms:

To Any Sheriff in Canada:

WHEREAS by warrant issued on the 1st day of September 2016 in Court File T-1453-16 you were directed to arrest the Ship CORMORANT and to keep the same under arrest until further order of this Court.

YOU ARE NOW DIRECTED to release from the arrest effected by virtue of that warrant certain property on board the Ship CORMORANT, being a submersible and associated spare parts, all stored in the main deck hangar of the ship CORMORANT (the "Released Property").

YOU ARE FURTHER DIRECTED to keep the Ship CORMORANT and all property and equipment on board that Ship, excluding only the Released Property, under arrest until further order of this Court.

[51] On November 12, 2019, the Partial Release was filed with the Registry of the Court at Halifax, Nova Scotia, upon the filing of the written consent of the Administrator. The Index of Recorded Entries shows an entry for a solicitor's certificate of service, confirming service of the consent to the Partial Release upon the Port and 309.

[52] According to the Index of Recorded Entries, a Certificate of the Judgment dated November 8, 2019 against the Port was filed in the Land Registry of Nova Scotia on November 18, 2019.

[53] According to the Index of Recorded Entries, a Certificate of the Judgment dated November 8, 2019 against 309 was filed in the Land Registry of Nova Scotia.

[54] The Administrator, as the Plaintiff in cause number T-1453-16, filed a Notice of Discontinuance on November 28, 2019 in cause number T-1453-16.

[55] According to the Index of Recorded Entries, the Administrator filed a Satisfaction Piece on January 14, 2022 with respect to the Certificate of Judgment dated November 18, 2019 upon payment of the Judgment by the Port in the amount of \$375,000.

V. FURTHER LITIGATION

[56] On July 31, 2020, the Port commenced an action against the CCG, the Honourable Bernadette Jordan and the Queen in Right of Canada, seeking various forms of relief, including damages for “unlawful interference” in its operations and an interim injunction prohibiting the Defendants from disposing of the Ship or its contents.

[57] On October 30, 2020, the Port moved for an injunction to prevent “the Defendants or their agents from removing, selling, dismantling, destroying or otherwise disposing of the Cormorant or its contents pending further order of the Court”.

[58] The Port’s motion was dismissed by an order issued on November 9, 2020.

VI. SUBMISSIONS

[59] The parties filed written memoranda of fact and law in their original motion records. Following the cross-examinations of Mr. Welsford and Mr. Grant, on behalf of the Port and the Administrator, respectively, supplementary motion records were filed, including further memoranda of fact and law.

[60] Finally, in response to an Oral Direction issued on August 9, 2024, about Rule 30, brief further submissions were filed by the parties.

A. *The Port's Submissions*

[61] The Port submits that Rule 30 does not apply in the circumstances here since the challenge to the Judgment is based on a change in circumstances, as contemplated by Rule 399(2)(a). It argues that if its consent to the Judgment becomes an issue, then its consent was vitiated by the actions of government actors who denied it access to the submersible and spare parts that were on board the Ship Cormorant.

[62] In broad terms, the Port submits that its lack of access to the submersible and related spare parts caused it to lose the benefit of the Settlement Agreement and of the Judgment. It argues that it did not learn about continuing pollution on board the Ship, nor of the role played by third parties in the sinking of the Ship and subsequent pollution in 2015 nor of the plans of the CCG to bar access to the Ship for the purpose of removing the submersible and spare parts.

[63] The Port pleads that there was a mistake, common to both parties, about the continuing presence of oil on the Ship and whether the Judgment could convey ownership of the Ship or the submersible. In the face of such mistake, the Port pleads that there was no *consensus ad idem* between the parties.

[64] The Port argues that the actions of the CCG were unforeseeable, insofar as the Coast Guard waited until after the Judgment was entered, to both take steps to dismantle the Ship and to prevent its access to the submersible and spare parts.

[65] The Port submits that these circumstances allow for the setting aside of the Order, citing *Ayangma v. Canada*, [2003] 313 N.R. 312, and *Shen v. Canada (Citizenship and Immigration)*, [2017] F.C.J. No 146 (QL).

B. *The Administrator's Submissions*

[66] The Administrator argues that Rule 30, about consent, is the “governing” Rule in the disposition of the Port’s motion. It relies upon the principles of statutory interpretation which suggest that the “specific” overrides the “general”, that is Rule 399. It notes that there is no doubt that the Port consented to the Judgment, as admitted in paragraph 28 of its original Memorandum of Fact and Law. The Administrator submits that in light of that admitted fact the inquiry should end here.

[67] Nonetheless, the Administrator does address Rule 399(2)(a). It begins with the argument that it applies, generally, to an order or judgment issued after an “adjudicative” hearing. It

follows with submissions directed to the existence of a “new matter”, as discussed in the jurisprudence.

[68] The Administrator argues that the delay by the Port in bringing its motion is a factor to be weighed in disposing of the motion.

[69] Relying on the decision in *Alberta v Canada*, [2018] F.C.J. No 454 (QL), it argues that the four factors set out in *Canada (Attorney General) v Hennelly*, 244 N.R. 399 (F.C.A.) for an extension of time apply here. These factors are continuing intention to pursue an application; some merit to the application; a lack of prejudice to the responding party arises from the delay; and a reasonable explanation for the delay.

[70] The Administrator points to the evidence of Mr. Welsford upon his cross-examination where he consistently said that he did not intend to challenge the Judgment at the time that he learned about the matter now presented as a “new matter” vitiating the Port’s consent.

[71] It submits that the insofar as the Port bases its motion upon the discovery of a “new matter” that vitiates its consent to the Settlement Agreement and the subsequent Judgment, it has failed to meet its burden to establish a “new matter”.

[72] In particular, the Administrator argues that the two bases of the so-called “new matter”, that is the continuing presence of pollutants on board the Ship and the alleged role of a third

party in causing the sinking, were known to the Port by December 23, 2019 and June 2020, respectively.

[73] The Administrator also submits that by December 23, 2019, the Port was aware that in preventing access to the Ship, the CCG was purportedly acting under section 180 of the *Canada Shipping Act, 2001, supra*. It was open to the Port to seek judicial review of any decision or order of the CCG, and it did not do so.

[74] The Administrator argues that the Port failed to show due diligence in trying to set aside the Judgment, relying on the decision in *Re Income Tax Act*, 298 A.C.W.S. (3d) 168 (F.C.).

[75] The Administrator submits that the Port's claim about interference from a third party is unsupported by evidence other than a single sentence in the LOC report which cannot be considered a reasonable basis that would have reasonably persuaded the Port to decline settlement in October 2019, on the terms set out in the Settlement Agreement.

[76] Instead, that sentence should have motivated the Port to engage an expert to explore the cause of the sinking. The Administrator argues that the Port should have engaged an expert to investigate the cause of the sinking long before October 2019.

[77] The Administrator responds to the argument of frustration, relative to inability to access the submersible, by submitting that the Port had the opportunity to do that as soon as the partial release was issued on November 12, 2019.

[78] The Administrator refers to the decision in *Kearns v. Canadian Tire Corporation, Limited*, 2019 ONSC 4946; aff'd 2020 ONCA 709 in support of its argument that unless both parties knew about a mistake, the Settlement Agreement is binding.

[79] The Administrator submits that there is no frustration of the Settlement Agreement on the basis of the possibility of the continued presence of pollutants on board the Ship. The then counsel for the Port was aware of the statements made on June 24, 2019 about assessment by the CCG of “potential marine pollution” posed by the Ship.

[80] The Administrator argues that it is not open to the Port to raise its post-Judgment difficulties with the CCG as a ground of “frustration” of the Settlement Agreement or Judgment.

[81] The Administrator submits that it would be gravely prejudiced by the setting aside of the Judgment. It has been paid the monetary judgment of \$375,000.00. It had secured payment by registering a certificate in the appropriate land registry in Nova Scotia against lands owned by the Port.

[82] Those lands have been sold and no security is available.

VII. DISCUSSION

[83] The Port moves, pursuant to Rule 399 of the Rules, to set aside the Consent Judgment that was entered on November 8, 2019, following the execution of a Settlement Agreement that

was executed on October 29, 2019. Rule 399(2)(a) is the basis of the motion and provides as follows:

(2) On motion, the Court may set aside or vary an order

(a) by reason of a matter that arose or was discovered subsequent to the making of the order; or

(2) La Cour peut, sur requête, annuler ou modifier une ordonnance dans l'un ou l'autre des cas suivants :

a) des faits nouveaux sont survenus ou ont été découverts après que l'ordonnance a été rendue;

[84] Since the Judgment was made on consent of the parties, Rule 30(2) is also relevant and provides as follows:

(2) On motion, the Court may set aside or vary an order made under paragraph (1)(a) on the ground that a party did not consent to it.

(2) La Cour peut, sur requête, annuler ou modifier l'ordonnance rendue en vertu de l'alinéa (1)a) au motif qu'une partie n'y a pas consenti.

[85] The moving party bears the burden of proof in this motion. That burden is the ordinary burden of proof on the balance of probabilities; see *F.H. v McDougall*, [2008] 3 S.C.R. 41 at paragraph 49:

In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

[86] The heart of the Port's claim is that it would not have agreed to the Judgment if it had been aware of matters that subsequently came to its attention, as set out in paragraph 37 of Mr. Welsford's affidavit, as follows:

PBI would not have consented to the Order in matters T-1453-16 and T-745-16 if it was aware that (1) the Minister had determined the vessel constituted a grave and imminent threat of pollution prior to November 8, 2019, (2) that PBI would not be able to take possession or control of the submersible, spare parts, or the Cormorant subsequent to the Order being issued, (3) that the 2015 sinking had been determined to be the result of a "malicious act".

[87] The law is well-settled as to the circumstances in which a Court will set aside a Judgment or Order. I refer to the decision in *Ayangma, supra*, where the Federal Court of Appeal identified three conditions that must be satisfied before a Court will intervene pursuant to Rule 399(2)(a), as follow:

[3] The jurisprudence establishes three conditions which must be satisfied before the Court will intervene:

- 1- the newly discovered information must be a "matter" with the meaning of the Rule;
- 2- the "matter" must not be one which was discoverable prior to the making of the order by the exercise of due diligence; and
- 3- the "matter" must be something which would have a determining influence on the decision in question.

[88] In the decision in *Volkswagen Canada Inc. v. Access International Automotive Ltd.*, [2004] F.C.J. No. 240, the Court said that in seeking to set aside a consent order the moving party must show that its consent was vitiated by matters beyond its sole control:

[5] First, since what is being sought to be set aside is a consent order, plaintiff must show that in some way its consent to the order was vitiated. There are any number of possible ways in

which that might have been the case, fraud, mistake, something of that sort, grounds upon which contracts can be set aside. But no showing of that sort has been made or has been attempted to be made. All that has happened is that since the order has been consented to plaintiff has withdrawn a part of its claim with the result, it says, that the ordered documents are no longer relevant. In my view, a "matter" which is within the sole control of the moving party (and the withdrawal of a part of plaintiff's claim falls clearly into that category) is not a "new matter" within the meaning of the rule.

[6] Furthermore, to come within the rule, the new matter must be one which is shown to be something that would have changed the result. In a case of a consent order, that has to mean, not only that the moving party would not have given its consent but also that the other party would not have done so. A consent order, like any negotiated contract involves give and take by both parties. Once it endorses the consent order, the Court cannot look into the giving and taking that has gone on between the parties so as to reach what is, or was at the time, in their view, a fair bargain.

[89] The principle of this decision applies in the present case. It was within the control of the Port to take steps to protect its interests in the Ship and in the submersible, and it did not do so in a timely manner.

[90] In *Volkswagen, supra*, the Court also said that the party moving to set aside a consent order, on the basis of a "new matter", must show that neither party would have agreed to the Order in the first place.

[91] In my opinion, the Port has failed to show here that the Administrator would not have agreed to the Judgment. The evidence submitted on behalf of the Administrator shows that it was interested in settling the within litigation. That is a reasonable goal, considering the expenses and

uncertainty that accompany litigation. The Administrator settled for a monetary judgment that was less than the amount claimed in its Statement of Claim.

[92] While acknowledging the test set out in *Ayangma, supra* for vitiation of consent, I note that the Court has applied Rule 399 to both procedural consent orders, as in *Volkswagen, supra* and *Wagg v. Canada*, [2003] F.C.J. No. 1115 (QL).

[93] In my opinion, it does not matter which Rule “governs” since the legal test is the same. The main issue here is whether the Port has shown that its consent was vitiated when it could not get access to the submersible and spare parts and learned, in late November 2019, about the LOC report that attributed the sinking of the Ship to the malicious acts of a third party.

[94] According to the evidence of Mr. Welsford, both in his affidavit and upon his cross-examination, access to the submersible, for the purpose of its sale, was critical. The submersible was arrested under the warrant of arrest that was served on September 12, 2016. Both the Settlement Agreement and the Judgment provided for the partial release of the submersible and related parts from arrest. The Judgment was filed on November 8, 2019 and the partial release was issued by the Registry of the Court on November 12, 2019.

[95] The then lawyer for the Port was provided with a copy of the partial release. His knowledge of that partial release can be attributed to the Port.

[96] The Port did not take immediate steps to take possession of the submersible. According to Mr. Welsford, there were logistical problems that required resolution before it could move the submersible.

[97] Nonetheless, the Port had the opportunity to do so.

[98] The Administrator's motion materials contain correspondence between the parties and with the Case Management Judge between July and November 2019. This correspondence shows the steps contemplated by the parties following the dismissal of the motions for summary judgment and summary trial, including discovery examinations and requests by the Port for access to documents from the CCG in connection with the Ship and its contents.

[99] The CCG, while not a party to the consolidated action, was a continuing "presence" around the events involving the Ship since 2015. Its claim upon the Ship Source Oil Pollution Fund in respect of the salvage and pollution clean-up costs is the basis for the claim of the Administrator in cause number T-1453-16.

[100] The Port was aware of the press release of June 24, 2019. While a press release is not necessarily solid or reliable information, the fact is that the Port was aware of potential action by the Government of Canada to "deal" with the Ship.

[101] The evidence shows that the parties engaged in discussions that led to the execution of the Settlement Agreement on October 29, 2019. The Port now seems to attack its participation in

that Agreement but, in my opinion, the evidence shows that it had the opportunity to seek clarification of the matters described in the press release.

[102] As noted by Mr. Grant upon his cross-examination, the Administrator is “not” the CCG and bears no responsibility for its actions. The Administrator paid the claim of the CCG and then pursued a subrogated action against the Port and others.

[103] There is no debate about the policy of enforcing settlement agreements, as observed by the Supreme Court of Canada in *Sable Offshore Energy Inc. v Ameron International Corp.*,

[2013] 2 S.C.R. 623 at para 11 as follows:

Settlements allow parties to reach a mutually acceptable resolution to their dispute without prolonging the personal and public expense and time involved in litigation. The benefits of settlement were summarized by Callaghan A.C.J.H.C. in *Sparling v. Southam Inc.* (1988), 1988 CanLII 4694 (ON SC), 66 O.R. (2d) 225 (H.C.J.):

. . . the courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial court system. [p. 230]

This observation was cited with approval in *Kelvin Energy Ltd. v. Lee*, 1992 CanLII 38 (SCC), [1992] 3 S.C.R. 235, at p. 259, where L’Heureux-Dubé J. acknowledged that promoting settlement was “sound judicial policy” that “contributes to the effective administration of justice”.

[104] Both parties were represented by counsel and advised by counsel.

[105] The Port puts much emphasis on the report from LOC and the reference at paragraph 8.9 of that report which provides as follows:

Nothing in the dive survey nor our observations would suggest that the previous sinking was caused by water ingress due to failure of the hull or internal pipework, but rather, it was most likely the result of a malicious act. Therefore, given the complete lack of security – other than a locked gate and locked access doors – there is a significant risk of a repeat incident.

[106] It is to be noted that this report was prepared for the CCG, at its request. It is dated October 14, 2019. It came into the hands of the Administrator on November 22, according to the affidavit of Mr. Grebler.

[107] The Port clings to this observation in arguing that had it known about this, it would not have consented to the entry of Judgment.

[108] However, this appears to be only an opinion on the part of those consultants. There is no evidence cited in the report to support this opinion.

[109] Mr. Welsford, upon cross-examination, was asked why the Port did not take steps between the time of the sinking of the Ship in 2015 and October, 2019, to engage an expert to investigate the cause of the sinking. He was asked about police reports.

[110] Mr. Welsford testified that the police investigated in 2020, but no police reports were produced in the motion record or upon the cross-examination. According to the transcript of that

cross-examination, counsel for the Port said that the police reports were not produced because they were deemed not to be relevant:

... Why they were not produced in connection with this specific Motion, I would suggest is because they were not deemed relevant.

[111] I agree with the Administrator that the lack of evidence about police investigation and police reports undermines the Port's argument that the disclosure of the opinion in the LOC report is a "new" matter within the scope of Rule 399(2)(a).

[112] The evidence of the Administrator, contained in the various, emails, letters, and reports filed as part of its motion records, more than adequately shows that a ship will rarely be free of oil or oily residue. These products can be considered "pollutants", in some circumstances.

[113] Upon consideration of the evidence filed and the arguments made by the parties, I conclude that the Port has failed to establish a "new matter", about the continued presence of pollutants on board the Ship or the alleged role of a third party, within the scope of Rule 399(2)(a) that would justify granting its motion. That evidence includes the affidavits filed by the parties, the exhibits attached to those affidavits, bundles of emails and correspondence that were tendered by the Administrator, and the transcripts of the cross-examinations of Mr. Welsford and Mr. Grant.

[114] It is not necessary for me to address in any detail the arguments about mistake, whether by one party or both. I am not persuaded that the Port has shown the existence of any mistake that would vitiate its consent to the Judgment in issue, or vitiate the consent of the Administrator.

[115] The Port has not adduced evidence to support the single line in the LOC report about interference by “bad actors”.

[116] In any event, the Port can explore the significance of that report and its impact upon it, as it pursues its action in cause number T-856-20 which squarely makes claims against the CCG.

VIII. CONCLUSION

[117] In the result, the motion will be dismissed with costs to the Administrator.

ORDER IN T-1453-16 AND T-745-16

THIS COURT ORDERS that the motion is dismissed with costs to the Administrator of the Ship-Source Oil Pollution Fund.

“E. Heneghan”
Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKETS: T-1453-16 and T-745-16

STYLE OF CAUSE: THE ADMINISTRATOR OF THE SHIP-SOURCE OIL POLLUTION FUND v. THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP CORMORANT ET AL. and PORT OF BRIDGEWATER v. CORMORANT MARINE SERVICES LIMITED, A BODY CORPORATE ET AL.

PLACE OF HEARING: HALIFAX, NOVA SCOTIA

DATE OF HEARING: FEBRUARY 14, 2024

FURTHER SUBMISSIONS: AUGUST 19, 2024, and AUGUST 26, 2024

REASONS AND ORDER: HENEGHAN J.

DATED: MAY 6, 2025

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