

Sea Pics Adventures (1995) Inc. v. Astrolabe Marine Inc., 1997 CanLII 4867 (FC)

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Docket: T-2713-96
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T-2713-96

Between:

SEA PICS ADVENTURES (1995) INC.,

Plaintiff,

- and -

ASTROLABE MARINE INC. and

GEOFFREY REGINALD DAVIS,

Defendants.

REASONS FOR ORDER

JOHN A. HARGRAVE

PROTHONOTARY

This *ex parte* application in writing, for a pre-judgment garnishing order, arises in an action for breach of a ship building agreement. In the absence of any Federal Court provisions for pre-judgment garnishment, the Plaintiff submits I should employ the Gap Rule, Rule 5, to import section 4 of the *British Columbia Court Order Enforcement Act*, R.S.B.C. 1979, c.75, which counsel refers to as a procedural provision allowing garnishment of a debt owed a defendant before judgment.

Attachment of debts by way of garnishment, which is essentially an equitable remedy to enable debts owing to a judgment debtor to be taken in execution, has

no common law or equitable ancestry. Rather, it was created by and has developed from the *English Common Law Procedure Act* of 1854. Garnishment before judgment is an extraordinary right statutorily provided for in various provincial legislation, including the *B.C. Court Order Enforcement Act*.

Leaving aside the view of Mr. Justice Collier in *Frank v. T'szil Board of Education*, unreported reasons in action T-710-86 of August 12, 1986 (summarized (1986), 6 W.D.C.P. 34), that ". . . Rule 2300 of this Court is a complete code in respect of garnishing orders. There is no gap.", Mr. Justice Walsh wrote extensively on whether the Federal Court might issue a pre-judgment garnishment order in *Maple Leaf Mills Ltd. v. The "Baffin Bay"*, [1973] F.C. 1097.

The "*Baffin Bay*" suffered various mishaps during a voyage from Montreal to Haiti, with owners eventually abandoning the voyage at Halifax. The Plaintiff applied *ex parte* and obtained a pre-judgment garnishing order in order to attach insurance proceeds. The garnishing order was obtained on the basis of the Gap Rule and provincial garnishing legislation, being the civil procedure of the Supreme Court of Nova Scotia and the *Quebec Code of Civil Procedure*.

Mr. Justice Walsh acknowledged that the Federal Court might have provided in its Rules a procedure for attachment before judgment, if it had seemed desirable (p. 1103). But he then went on to say that the omission of such a provision in the Rules was not in his view an oversight and that Rule 5, the Gap Rule, should not be used to provide a rule for a special set of circumstances if a general rule had been deliberately omitted in making the Rules of the *Federal Court*(*loc.cit.*).

Mr. Justice Walsh also considered whether [section 56\(1\)](#) of the [Federal Court Act](#), which refers to the issue by the Federal Court of process ". . . of the same tenor and effect as those that may be issued out of any of the superior courts of the province in which the judgment is to be executed . . ." might be considered enabling authority for the use of [Rule 5](#). In the particular instance he found it would be prejudicial to the defendant if Nova Scotia-based procedure were used for an execution in the province of Quebec and thus quashed the garnishment of the insurance proceeds.

The concept of using [section 56\(1\)](#) of the [Federal Court Act](#) as enabling legislation is interesting, however, one must remember that The "*Baffin Bay*" was decided in 1973, before the decision in *The Queen v. CAE Industries Ltd.*, [1977 CanLII 221 \(SCC\)](#), [1977] 2 S.C.R. 566 in which Chief Justice Laskin confirmed that [Rule 5](#) could not be used to effect an amendment to the *Federal Court Rules* where no gap in fact existed. As I have noted earlier, both Mr. Justice Collier, in the *Frank* case, and Mr. Justice Walsh, in The "*Baffin Bay*", were of the view that there is no unintentional gap in the Federal Court garnishing provisions.

Garnishment has no common law or equitable antecedent on which to build garnishing procedure. I view any extension of the Federal Court garnishing provisions, to include garnishment before judgment, to be not merely a matter of practice and procedure, but rather to be a substantive extension. Mr. Justice Pinard pointed out in *Vespoli v. Canada* [reflex](#), (1988), 15 F.T.R. 128 at p. 134 to 137, that [Rule 5](#) might only be applied to matters of practice and procedure and not to matters of substantive law. Thus the notion of an extension of the Federal Court jurisdiction by the application of the Gap Rule is fundamentally improper.

Garnishment before judgment is certainly a useful tool. Unfortunately it is not provided for in the *Federal Court Rules*. Thus the application must be dismissed.

(Sgd.) "John A. Hargrave"

Prothonotary

February 3, 1997

Vancouver, British Columbia

NAMES OF COUNSEL AND SOLICITORS OF RECORD

STYLE OF CAUSE: SEA PICS ADVENTURES (1995) INC. - and -
ASTROLABE MARINE INC. and GEOFFREY REGINALD DAVIS

COURT NO.: T-2713-96

EX PARTS MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE
OF COUNSEL

REASONS FOR ORDER OF JOHN A. HARGRAVE, PROTHONOTARY, dated
February 3, 1997

WRITTEN SUBMISSIONS BY:

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