

Greer Shipping Ltd. v. Canada (Minister of Citizenship and Immigration), 2002 FCA 80, [2002] 3 FC 565

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A-173-01

2002 FCA 80

Greer Shipping Ltd. (*Appellant*)

v.

Minister of Citizenship and Immigration (*Respondent*)

Indexed

as: Greer Shipping Ltd. v. Canada (Minister of Citizenship and Immigration)
(C.A.)

Court of Appeal, Strayer, Sexton and Sharlow JJ.A.-- Vancouver, January 31;
Ottawa, March 1, 2002.

*Citizenship and Immigration -- Exclusion and Removal -- Removal of Visitors --
Recovery of removal costs -- Appeal from dismissal of application for judicial
review of Minister's decision appellant liable for deportation costs of crew member
who deserted cargo ship in July 1992 -- Appellant providing services, upon
request, to ship -- Under Immigration Act, s. 86 transportation company bringing
crew member to Canada who ceases to be visitor, liable to pay removal costs --
"Transportation company" defined in 1992 as persons carrying or providing for
transportation of persons -- Definition amended in 1993 to include
transportation of goods -- F.C.T.D. Judge erred in relying on Flota Cubana de
Pesca (Cuban Fishing Fleet) v. Canada(M.C.I.) as authority for proposition
transportation of persons including transportation of crew members -- Court in*

Flota Cubana not expressing opinion on whether owner, operator of cargo vessel within old definition of "transportation company", but comment addition of "goods" to definition significant change expanding definition to include owners, operators of cargo vessels suggesting would not have found cargo vessel within 1992 definition of transportation company -- Owner, operator herein not "transportation company" absent evidence ship brought anything to Canada except cargo and crew -- Even if agent, appellant not liable for removal costs.

This was an appeal from the dismissal of an application for judicial review of the Minister's decision that the appellant was liable for the deportation costs of a crew member who had deserted a cargo vessel in July 1992 to which the appellant had provided services. Immigration authorities took no steps to obtain security for the payment of the cost of deporting the crew member while the ship was anchored in Canadian waters, although they were aware of the desertion. After the deportation, the Minister notified the appellant of the costs, but the appellant offered neither payment nor an explanation for non-payment. In July 1999 the Minister recovered the deportation costs against a tax refund owing to the appellant. The appellant did not have general authority to represent the ship, but provided services as specifically requested, with any required disbursements being paid from funds forwarded in advance. The services provided were typical of "tramp vessel services" provided to vessels in the province on but one occasion or infrequently. The basis for imposing liability upon the appellant was that it was the agent of a "transportation company" that had brought the crew member to Canada. *Immigration Act*, section 85 provides that a "transportation company" that operates the vehicle that brought a crew member to Canada who ceases to be a visitor, is liable to pay all removal costs. In 1992 "transportation company" was defined as a person or group of persons carrying or providing for the transportation of persons. The definition was amended in 1993 to add the agent of such persons and to include the transportation of goods. The Trial Division Judge determined that the 1992 definition applied, and that based on *Flota Cubana de Pesca (Cuban Fishing Fleet) v. Canada (Minister of Citizenship and Immigration)*, [1997 CanLII 6387 \(FCA\)](#), [1998] 2 F.C. 303 (C.A.), even though the ship was a cargo ship that carried no one except its own crew, the owner or operator of the ship met the old definition of "transportation company". The following questions were certified: did the definition of "transportation company", prior to its amendment, apply to include companies engaged solely in the transportation of cargo, not passengers; and what legal principles govern whether an entity is an "agent" of a "transportation company" within subsection 2(1)?

Held, the appeal should be allowed, the first question answered in the negative, and the second question left unanswered as it was unnecessary and too abstract.

Dawson J. erred in relying on *Flota Cubana* as authority for the proposition that the transportation of persons includes the transportation of crew members. The Court in *Flota Cubana* did not express an opinion on the question of whether the owner or operator of a cargo vessel may come within the old definition of "transportation company". If that question had been put squarely to the Court in *Flota Cubana*, it probably would have been determined against the Minister given the Court of Appeal's comment therein that the addition of "goods" (*marchandises*) to the definition of "transportation company" was a significant change that expanded the definition to include owners and operators of cargo vessels. Nothing in the legislative history of the definition of "transportation company" compels a broader interpretation of the old definition. In the absence of any evidence that the ship brought anything to Canada except its cargo and crew, its owner or operator did not fall within the old definition of "transportation company". Therefore, even if the appellant were an agent, it could not be held liable for the removal costs.

statutes and regulations judicially

considered

An Act to amend the Immigration Act and other Acts in consequence thereof, S.C. 1992, c. 49, ss. 1, 119.

Immigration Act, R.S.C., 1985, c. I-2, ss. 2(1) "transportation company" (as am. by S.C. 1992, c. 49, s. 1), 85 (as am. *idem*, s. 74), 86 (as am. *idem*, s. 75), 87 (as am. *idem*, s. 76), 91.1 (as enacted *idem*, s. 80), 92 (as am. by R.S.C., 1985 (4th Supp.), c. 28, s. 23; S.C. 1992, c. 49, s. 81).

cases judicially considered

applied:

Flota Cubana de Pesca (Cuban Fishing Fleet) v. Canada (Minister of Citizenship and Immigration), [1997 CanLII 6387 \(FCA\)](#), [1998] 2 F.C. 303; (1997), 154 D.L.R. (4th) 577; 41 Imm. L.R. (2d) 175; 221 N.R. 356 (C.A.); *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999 CanLII 699 \(SCC\)](#), [1999] 2 S.C.R. 817; (1999), 174 D.L.R. (4th) 193; 14 Admin. L.R. (3d) 173; 1 Imm. L.R. (3d) 1; 243 N.R. 22.

APPEAL from dismissal of an application for judicial review of the Minister's decision that the appellant was liable for the deportation costs of a crew member who, in 1992, had deserted a cargo vessel to which the appellant had provided services

(Greer Shipping Ltd. v. Canada (Minister of Citizenship and Immigration), [2001](#)

[CanLII 22026 \(FC\)](#), [2001] 2 F.C. 357; (2001), 200 F.T.R. 1; 12 Imm. L.R. (3d) 245 (T.D.)). Appeal allowed on the ground that a cargo vessel was not a "transportation company" within *Immigration Act*, s. 2(1) in 1992, and therefore not liable for such costs.

appearances:

H. Peter Swanson for appellant.

Helen C. H. Park for respondent.

solicitors of record:

Campney & Murphy, Vancouver, for appellant.

Deputy Attorney General of Canada for respondent.

The following are the reasons for judgment rendered in English by

[1]Sharlow J.A.: The M/V *Trade Carrier* is a cargo vessel. It entered the Port of Vancouver on July 22, 1992. At that time, the only persons on board were its master and crew members. It left Vancouver on July 27, 1992 and left Canadian waters on August 1, 1992. While the vessel was in Vancouver a crew member, Mr. Mohamed Nizam, deserted the ship. Almost six years later he was deported to Maldives, his country of citizenship, at a cost of approximately \$10,000.

[2]The issue in this appeal is whether the Minister of Citizenship and Immigration may hold Greer Shipping Ltd. liable under subsection 87(3) [as am. by S.C. 1992, c. 49, s. 76] of the *Immigration Act*, R.S.C., 1985, c. I-2, for the cost of Mr. Nizam's deportation. Greer is a British Columbia corporation in the business of providing services to ships. It had provided services to the M/V *Trade Carrier* while it was in Vancouver.

[3]An application for judicial review of the Minister's decision was dismissed by a judge of the Trial

Division: *Greer Shipping Ltd. v. Canada (Minister of Citizenship and Immigration)*, [2001 CanLII 22026 \(FC\)](#), [2001] 2 F.C. 357 (T.D.). The Judge certified the following questions to permit Greer to appeal the decision:

(1) Did the definition of "transportation company", prior to its amendment by *An Act to amend the Immigration Act and other Acts in consequence thereof*, S.C. 1992, c. 49, apply to include companies engaged solely in the transportation of cargo, not passengers?

(2) What legal principles govern the determination of whether an entity is an "agent" of a "transportation company" within the meaning of subsection 2(1) of the *Immigration Act*, R.S.C., 1985, c. I-2, as now amended [by S.C. 1992, c. 49, s. 1]?

[4]To put these questions into context, it is necessary to state the facts more fully. On July 28, 1992, the master of the M/V *Trade Carrier* reported to immigration authorities that Mr. Nizam was no longer on the ship. The report was made by means of a document called a "Crew Index". The Crew Index indicated that Greer was the ship's agent.

[5]For reasons unrelated to these proceedings, the M/V *Trade Carrier* anchored in Canadian waters near Plumper Sound until August 1, 1992, when it left for Asia. The immigration authorities took no steps prior to August 1, 1992 to obtain security for the payment of the cost of deporting Mr. Nizam, as they were entitled to do.

[6]Mr. Nizam finally reported to immigration authorities in April of 1993. At that time he made a refugee claim. His claim was denied in a decision signed March 20, 1996. He was then the subject of a number of other proceedings which lasted until April 1997. He failed to report to a removals officer when requested to do so, and a warrant was issued for his arrest. He was arrested in January 1998 and deported in February 1998.

[7]In March of 1998, the Minister notified Greer of the deportation costs. Accounts were sent to Greer periodically after that, indicating accumulating interest charges, but Greer offered neither payment nor an explanation for non-payment. In July 1999 the Minister recovered the deportation costs against a tax refund owing to Greer.

[8]The connection between the M/V *Trade Carrier* and Greer began in early July 1992, when Dyson Shipping Company Inc., a New York freight forwarder and broker, contacted Greer on behalf of Food Corporation of India in relation to five vessels fixed to load wheat from the west coast of Canada. One of the vessels was the M/V *Trade Carrier*. Greer did not know who owned the M/V *Trade Carrier* but assumed that Food Corporation of India was its charterer, and that Dyson Shipping Company Inc. was the North American agent for Food Corporation of India.

[9]Thereafter, the Vancouver arrangements for the M/V *Trade Carrier* were made on the basis of communications between Greer and a company called Brokerage and Management Corp. of New York. The record does not explain why these communications involved Brokerage and Management Corp. rather than Dyson Shipping Company Inc., but it appears that nothing turns on that.

[10]According to the affidavit of David Greer, President and Chief Executive Officer of Greer Shipping Ltd., Greer did not have general authority to represent the M/V *Trade Carrier*, but provided services as specifically requested, with any required disbursements being paid from funds forwarded in advance by Brokerage and Management Corp. The services provided by Greer to the

M/V *Trade Carrier* are described as follows in paragraph 15 of the Judge's reasons:

- (a) clearing the vessel into Canada, by preparing and submitting customs documents, and by submitting a crew list and a health certificate prepared by the crew of the vessel;
- (b) arranging for inbound and outbound pilots through discussions with the Pacific Pilotage Authority;
- (c) arranging for tugs and line handlers by contacting the tug company and terminal;
- (d) arranging for launch services to and from the vessel while at anchor;
- (e) liaising with the Canadian Wheat Board and the Grain Clearance Shippers Association which, it was understood, were in charge of providing cargo for the vessel, designating and arranging for a berth to load the vessel, loading cargo into the vessel and which would pay any demurrage for delays in loading caused by unavailability of cargo;
- (f) arranging for garbage collection from the vessel;
- (g) arranging for a telephone set-up on the vessel;
- (h) arranging for survey; and
- (i) arranging for the payment of harbour dues, berthage charges, the Chamber of Shipping Assessment, clearance charges, crew expenses, including medical, transportation and communication.

[11] According to Mr. Greer's affidavit, this is typical of what he called "tramp vessel services" provided to the owners, operators or charterers of vessels that are in British Columbia on a single occasion, or infrequently.

[12] By contrast, Greer is also party to arrangements that Mr. Greer called "liner services" provided to owners, operators or charterers of vessels that are in British Columbia on a regular basis. A typical liner service arrangement runs for a relatively long term and is governed by a detailed service agreement under which Greer would have general authority to provide local services to the vessel and issue cargo documents, and may also undertake promotional and booking tasks.

[13] As stated above, the basis of the liability imposed on Greer was that the owner or operator of the M/V *Trade Carrier* was a "transportation company" (as defined in subsection 2(1) of the *Immigration Act*) that had brought Mr. Nizam

to Canada, and that Greer was the agent of the transportation company. Greer argues that the statutory definition of "transportation company" does not include the owner or operator of a cargo ship, and that in any event Greer was not an agent of the owner or operator of the ship in question.

[14] The provisions of the *Immigration Act* applicable to these proceedings are sections 85 (as am. by S.C. 1992, c. 49, s. 74), 86 (as am. *idem*, s. 75) and 87 (as am. *idem*, s. 76) all of which are found in Part V "Obligations of Transportation Companies". The relevant portions of these provisions read as follows:

85. (1) Subject to subsection (2), a transportation company that has brought a person to Canada may be required by the Minister to convey that person, or cause that person to be conveyed,

...

(c) to such country as is determined pursuant to subsection 52(2) or (3), in the case of a person who is required to leave Canada by reason of the making of a removal order.

...

(5) This section does not apply in relation to persons who enter Canada as or to become members of a crew.

86. Where a person enters Canada as or to become a member of a crew of a vehicle and ceases to be a visitor pursuant to subsection 26(1), the transportation company that operates that vehicle may be required by the Minister to convey that person, or cause that person to be conveyed, to the country from which that person came to Canada, or to such other country as the Minister may approve at the request of the company, and the company is liable to pay all removal costs in respect of that person.

87. (1) Where, pursuant to section 85 or 86, a transportation company is required to convey a person, or cause a person to be conveyed, from Canada, it shall be notified of that requirement and be given an opportunity to convey that person, or to cause that person to be conveyed, on one of its own vehicles or otherwise.

(2) Where a transportation company referred to in subsection (1), after having been notified, is not prompt in furnishing transportation, the Minister may direct that arrangements be made for the removal from Canada, by another transportation company and at the expense of Her Majesty, of the person to be conveyed from Canada.

(3) The transportation company referred to in subsection (1) is liable, on demand, to reimburse Her Majesty for all removal costs incurred under subsection (2) in respect of the person conveyed from Canada.

[15]The term "transportation company" is defined in subsection 2(1) of the *Immigration Act*. The current definition, reflecting amendments made by *An Act to amend the Immigration Act and other Acts in consequence thereof*, S.C. 1992, c. 49, section 1, came into force on February 1, 1993. I refer to this as the "post-1993 definition". It reads, as far as relevant for the purposes of this case, as follows:

2. (1) . . .

"transportation company"

(a) means a person or group of persons, including any agent thereof . . . transporting or providing for the transportation of persons or goods by vehicle or otherwise,

[16]Prior to February 1, 1993, the relevant part of the definition of "transportation company" read as follows (*Immigration Act*, R.S.C., 1985, c. I-2):

2. (1) . . .

"transportation company" means a person or group of persons carrying or providing for the transportation of persons,

I refer to this as the "old definition".

[17]I have assumed, without deciding, that the "transportation company" under any of the above definitions is the owner, the operator or charterer of a vehicle that provides the requisite transportation.

[18]The Judge determined that because Mr. Nizam deserted his ship in July of 1992, before the post-1993 definition was in force, liability for the cost of the deportation of Mr. Nizam should be based on the old definition of "transportation company", and in particular, without regard to the amendment that changed the phrase "transportation of persons" to "transportation of persons or goods". That is because of section 119 of *An Act to amend the Immigration Act and other Acts in consequence thereof*, S.C. 1992, c. 49, which reads as follows:

119. The financial liability of a person under any provision of the *Immigration Act* amended by this Act that arises from any act or omission done before the coming into force of the amendment to that provision shall be determined as though the amendment were not in force.

[19]The Judge went on to conclude, based primarily on *Flota Cubana de Pesca (Cuban Fishing Fleet) v. Canada (Minister of Citizenship and Immigration)*, [1997 CanLII 6387 \(FCA\)](#), [1998] 2 F.C. 303 (C.A.), that even though the M/V *Trade Carrier* is a cargo ship that carries no one except its own crew, the owner or operator of the M/V *Trade Carrier* met the old definition of "transportation company". Greer argues that this conclusion is not correct.

[20]Considering the importance of *Flota Cubana* in this debate, it is necessary to examine it in some detail. The applicants in *Flota Cubana* were the owners and operators of a number of Cuban fishing vessels that were permitted by international agreement to fish in Canadian waters off the east coast provided they had appropriate arrangements with a Canadian partner. The Canadian partner in this case was a corporation based in Shelburne, Nova Scotia that was entitled to 15% of the catch taken by the Cuban vessels.

[21]In 1993 a number of crew members of the Cuban vessels deserted their ships while they were in Canadian ports to discharge the Canadian partner's share of the catch. The Minister sought to collect certain fees and security from the applicants on the basis of sections 91.1 [as enacted by S.C. 1992, c. 49, s. 80] and 92 [as am. by R.S.C., 1985 (4th Supp.), c. 28, s. 23; S.C. 1992, c. 49, s. 81] of the *Immigration Act*. The liability of the applicants turned on whether the owners and operators of the Cuban fishing vessels were "transportation companies" within the post-1993 definition. The Court held that they were within the definition, and thus liable.

[22]The Court's conclusion was based on the premise that a fishing vessel is not engaged in transporting goods, a premise that seems to have been accepted without debate. It seems to me arguable that fish are goods and that the job of a fishing vessel is to catch fish and transport them to a place where they can be processed for sale. If that is so, then it would appear obvious that the owner or operator of a fishing vessel is a transportation company, at least under the post-1993 definition which was the one that applied in *Flota Cubana*. Perhaps the parties felt constrained to address only the certified question, a constraint subsequently removed by *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999 CanLII 699 \(SCC\)](#), [1999] 2 S.C.R. 817. In any event, the authority of *Flota Cubana* depends upon what it actually determined.

[23]The reasons in *Flota Cubana* include a very thorough discussion of the relevant provisions of the *Immigration Act* as they read in 1927 [R.S.C. 1927, c. 93] and as they were amended from time to time until 1993. The legislative history was closely examined against the statutory objectives. The Court reached the following conclusion, as stated in the reasons of Stone J.A., speaking for the Court, at paragraphs 43 and 44:

While the definition may in the past have been restricted to carriers, or companies engaged primarily in providing a transportation service to passengers, the amendments to the definition manifest an intention to expand the application of the section to encompass a greater number of companies. Moreover, I am satisfied that this broad interpretation best reflects the Act's objective of controlling the illegal entry of persons to Canada, and of recouping expenses associated with their removal. In my view, therefore, the term "transportation company" is meant to apply to all companies which transport or provide for the transportation of persons or goods, by vehicle or otherwise. It is not, as the applicants contend, restricted to companies whose primary business activities involve the transportation of persons or goods for hire.

I would dismiss both appeals with one set of costs, and would answer the certified question in each appeal as follows:

Where the owner or operator of a vehicle not used primarily for the purpose of transporting persons or goods, such as a vessel engaged in fishing operations, transports persons or goods into Canada aboard that vehicle, the owner, operator or agent thereof is a "transportation company" as defined in subsection 2(1) of the Act. [Emphasis added.]

[24]As indicated above, these statements refer to the post-1993 definition. The Judge in the present case relied on *Flota Cubana* as authority for the proposition that the transportation of persons includes the transportation of crew members. If that is correct, then the owner or operator of a cargo ship comes within the old definition even though the old definition refers only to the "transportation of persons" and not the "transportation of persons or goods".

[25]In my respectful view, the Judge erred in relying on *Flota Cubana* as she did. This Court in *Flota Cubana* did not express an opinion on the question that is central to this case, which is whether the owner or operator of a cargo vessel may come within the old definition of "transportation company". It seems to me that if that question had been put squarely to the Court in *Flota Cubana*, it probably would have been determined against the Minister. I reach that conclusion because the Court in *Flota Cubana* was aware of the amendment that added a reference to "goods", and commented on its significance. The following appears at paragraph 40:

The 1992 amendments brought about another significant change, which was the addition of the word "goods" to the English text and "marchandises" to the French. This amendment served to expand the application of the Act to companies engaged in transporting goods into the country.

[26]The Court would not have made this statement if it had believed that owners and operators of cargo ships were included in the old definition merely

because they carry crew members. I think we may take judicial notice of the fact that ships without crews are not yet commonplace.

[27]In my view, the Court in *Flota Cubana* was correct to conclude that the addition of "goods" (*marchandises*) to the definition of "transportation company" was a significant change that expanded the definition to include owners and operators of cargo vessels. I see nothing in the legislative history of the definition of "transportation company" in the *Immigration Act* that compels me to adopt a broader interpretation of the old definition.

[28]In the absence of any evidence that the M/V *Trade Carrier* brought anything to Canada except its cargo and its crew, I conclude that the owner or operator of the M/V *Trade Carrier* does not fall within the old definition of "transportation company". Therefore, even if Greer is an agent, it cannot be held liable for the removal costs of Mr. Nizam.

[29]For these reasons, I would allow this appeal and answer the first certified question as follows:

Did the definition of "transportation company", prior to its amendment by *An Act to amend the Immigration Act and other Acts in consequences thereof*, S.C. 1992, c. 49, apply to include companies engaged solely in the transportation of cargo, not passengers?

Answer: No

[30]The second certified question relates to the principles for determining who is an "agent" within the meaning of that word as used in the definition of "transportation company". In my view, it is not necessary to answer that question, and in any event I would be reluctant to do so because the question is so abstract.

Strayer J.A.: I agree.

Sexton J.A.: I agree.