Federal Court  Cour fédérale

Date: 20181012

Docket: T-1621-16

Citation: 2018 FC 1026

Ottawa, Ontario, October 12, 2018

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

THE ST. LAWRENCE SEAWAY MANAGEMENT CORPORATION

Plaintiffs

and

THE VESSEL "BBC LENA" FORMERLY "LENA J"
-AND-
THE OWNERS AND ALL OTHERS INTERESTED IN THE VESSEL "BBC LENA" FORMERLY "LENA J"
-AND-
SCHIFFFAHRTS UG (HAFTUNGSBESCHRANKT) & CO. KG MS "LENA J"

Defendants

JUDGMENT AND REASONS

[1] The St. Lawrence Seaway Management Corporation ("Plaintiff") manages and operates a bridge that was damaged when the vessel "BBC Lena" (formerly the "Lena J.") collided with it. The Plaintiff brought a negligence action against the "BBC Lena", its owners and all others

interested in it, and Schifffaharts UG (Haftungsbeschrankt & Co. KG MS "Lena J.") (collectively, the "Defendants"). The Defendants bring this motion for summary judgement ("Motion" or "Summary Judgment Motion") seeking to dismiss the Plaintiff's action on the basis that the Plaintiff's losses constitute unrecoverable economic loss. While the Plaintiff agrees that this matter lends itself to disposition by way of summary judgment, it is of the view that the matter should be resolved in its favour.

Factual Background

[2] On September 30th, 2015, the "BBC Lena" ("Vessel") collided with Bridge No. 19 ("Bridge 19" or the "Bridge"), which forms part of the St. Lawrence Seaway ("Seaway"). The collision caused severe structural damage to Bridge 19 necessitating significant repairs and halting passage over and through it for almost 6 months.

[3] The Plaintiff is a corporation without share capital that was established by the Government of Canada. It was incorporated by Letters Patent dated July 9, 1998, pursuant to the *Canada Corporations Act*, RSC 1970, c C-32, and was continued under the *Canada Not-for-profit Corporations Act*, SC 2009, c 23. As such, the Plaintiff has the capacity, rights and powers of a natural person (*Canada Not-for-profit Corporations Act*, s 16(1)).

[4] For the purposes of this Motion, the Defendants accept that the Plaintiff was, at all material times, a not-for-profit corporation charged with the management and operation of the Seaway, including Bridge 19. This responsibility arises from s 80(5) of the *Canada Marine Act*, SC 1998, c 10 (or the "Act"), and a series of management agreements entered into by the Plaintiff

and the Crown. These agreements make the Plaintiff responsible for causing any necessary repairs to the Bridge, to be conducted at its own expense.

[5] The Plaintiff commenced this action *in rem* against the Vessel and *in personam* against its owners and all others interested in it. It claims that the collision and the resulting damages were caused by the unseaworthiness of the Vessel with the actual fault and privity of the defendant owners, and the negligence of its officers and crew. Its Statement of Claim seeks approximately $1 million dollars of damages for the cost of repairing the Bridge. It also claims for loss of use of the Bridge, for indemnification for any actions from third parties arising from the Bridge's closure, as well as for costs and pre- and post-judgment interest.

[6] The Defendants' Statement of Defence puts the Plaintiff to strict proof of its claims. It also asserts that any losses and damages that the Plaintiff incurred constitute relational economic losses, which are not recoverable at law. In the alternative, the Defendants assert that any damages are excessive and exaggerated.

[7] On February 26, 2018, the Defendants filed a Notice of Motion for Summary Judgment under Rule 215 of the *Federal Courts Rules*, SOR/98-106 ("Rules"), seeking to have the Plaintiff's negligence action dismissed. In the alternative, the Defendants ask that the Plaintiff's claim for the repair costs be dismissed with costs and that the balance of the action, if any, continue to trial.

[8] In a nutshell, the Defendants' position is that the Plaintiff's damages are not accompanied by physical injury or damage to property owned by the Plaintiff, making the damages pure

economic losses, which are only recoverable in limited circumstances. The Defendants argue that none of those circumstances are present in this matter.

Preliminary Matter - Confidentiality Order

[9] In its Notice of Motion for Summary Judgment, the Defendants seek, among other things, direction on the confidentiality of motion materials. In her Order dated April 4, 2018, Justice St-Louis addressed this issue. She also ordered that the sound recording available for the hearing (in camera) would be turned off and no recording by Court stenography or otherwise of oral argument would be made. The rational being that it would permit counsel the freedom to refer to confidential material when appearing before the Court without fear of jeopardizing the confidentiality of such materials. Justice St-Louis also stated that the whole of her Order was subject to the ultimate decision of the presiding Judge.

[10] With respect to the portion of Justice St-Louis' Order that precludes sound recording of the proceeding, I am concerned that its effect is that there would be no record of the proceeding before me. In the event of an appeal, there would be no transcript of the hearing. In my view, this is not desirable. I also note that the Federal Court's "Notice to the Profession, Pilot Project for Access to Digital Audio Recordings of Federal Court Proceedings" (2015), specifically envisions that confidentiality orders might apply to recordings of proceedings. In that event, the confidential information will either be redacted from the recording or, if redaction is impracticable, the recording will not be released. Accordingly, and as discussed with the parties at the commencement of the hearing, I permitted the hearing to be recorded, in the normal course,

and will order that the recording be treated as confidential and that it shall only be released at my specific written direction.

The Availability of Summary Judgment - Rule 215

[11] Rule 215(1) states that if on motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment. Rule 215(2)(b) states that if the Court is satisfied that the only genuine issue is a question of law, the Court may determine the question and grant summary judgment.

[12] In *Manitoba v Canada*, 2015 FCA 57, the Federal Court of Appeal considered Rule 215 and, citing *Burns Bog Conservation Society v Canada*, 2014 FCA 170, held that there is no genuine issue if there is no legal basis for the claim based on the law or the evidence brought forward. The Court found that this was consistent with the Supreme Court of Canada's decision in *Hryniak v Mauldin*, 2014 SCC 7, which held that there is no genuine issue if there is no legal basis to the claim or if the judge has the evidence required to fairly and justly adjudicate the dispute.

[13] For the purposes of this Summary Judgment Motion, the Defendants admit most of the relevant facts. Specifically, by way of an affidavit sworn on February 23, 2018 by Defendants' counsel, Mr. David Colford ("Colford Affidavit"):

i) the Defendants admit that the Vessel collided with Bridge 19 in clear weather and in excellent visibility causing severe structural damage to the Bridge, halting passage over

and through it, and that the Plaintiff incurred substantial costs and damages as a result (paras 5–8 of the Statement of Claim);

ii) the Defendants have not contested the allegations of fault contained in paragraph 9 of the Plaintiff's Statement of Claim, but also have not admitted them, nor do they allege any facts that would excuse the Defendants' failure to navigate the Vessel in a safe manner;

iii) the Defendants have been advised by Plaintiff's counsel and believe that the Plaintiff has paid for repairs to Bridge 19, with the relevant documents and proof of payments being attached as an exhibit to Mr. Colford's affidavit. The Defendants accept, for the purposes of the Motion, that the Plaintiff has made the payments described;

iv) the Defendants admit that Bridge 19 is a "Managed Asset" as defined within the management agreements described below.

[14] The Coldford Affidavit also states that the Plaintiff has not produced any documents relating to claims for loss of use of the Bridge or indemnification of third parties. In this regard, when appearing before me, Plaintiff's counsel confirmed that the Plaintiff is not seeking damages in relation to its claims for loss of use of Bridge 19 or for indemnification of any third parties. As a result, the only losses at issue are the costs of the repairs to Bridge 19, which the Plaintiff has paid and seeks to recover from the Defendants.

[15] Given these admissions, there is really only one question to be resolved in deciding this Motion. That is, do the Plaintiff's damages constitute relational economic losses and, if so, are they are recoverable.

[16] I am satisfied that this issue can be determined summarily. No genuine issue for trial exists because the evidence before me is sufficient to permit me to fairly and justly adjudicate this question (see *Leo Ocean S.A. v Westshore Terminals*, 2015 FCA 282 (*"Leo Ocean"*)). And, even if this issue amounts to a genuine issue, it is a question of law, which I am able to determine, and, accordingly, I may dispose of the matter by summary judgment.

[17] To the extent that there remains any residual issue as to whether the repairs are excessive and exaggerated, as the Defendants assert as their only alternative defence, Rule 215(2)(a) permits the Court to grant summary judgment and to refer the issue of quantifying the loss to a referee pursuant to Rule 153.

Statutory and Contractual Framework

[18] To address whether the Plaintiff's damages constitute relational economic losses, it is first necessary to understand the relevant legislative and contractual framework in this matter. This is comprised of the *Canada Marine Act* and the management agreements.

Canada Marine Act

[19] Section 2(1) of the *Canada Marine Act* defines the "Seaway", which includes the locks, canals and facilities between the Port of Montreal and Lake Erie, and which is stated to be

generally known as the St. Lawrence Seaway. Section 77 of the Act defines the "Authority" (referred to hereafter as the "Authority" or "SLSA") as The St. Lawrence Seaway Authority, established by s 3(1) of the *St. Lawrence Seaway Authority Act*. The Authority, an agent of the Crown, was the predecessor entity to the Plaintiff.

[20] Part 3 of the *Canada Marine Act* concerns the Seaway. Section 78 sets out the objectives of Part 3 and s 79 deals with the powers of the Minister. Significantly, for the purposes of this matter, s 80(5) permits the Minster to enter into agreements in respect of the Seaway:

> **80(5)** The Minister may enter into agreements in respect of all or part of the Seaway and the property or undertakings referred to in subsection (1) or (2) and those agreements may be with a not-for-profit corporation that accords a major role to Seaway users, in particular in the way in which directors of the corporation are appointed and in its operations, or, where the Minister considers it appropriate, with any other person or anybody established under an international agreement.
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> **(6)** An agreement may include any terms and conditions that the Minister considers appropriate, including provisions respecting
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> **(a)** the transfer of all or part of the property or undertakings referred to in subsection (1) or (2);
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> **(b)** the management and operation of all or part of the Seaway or the property or undertakings referred to in subsection (1) or (2);
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> **(c)** the construction, maintenance and operation of all or part of the Seaway;
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> **(d)** the charging of fees;
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> **(e)** the performance and enforcement of obligations under the agreement;
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> **(f)** the transfer of officers and employees of the Authority;
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> **(g)** the making of financial contributions or grants or the giving of any other financial assistance;

> **(h)** the imposition of additional obligations of financial management; and
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> **(i)** where the agreement is with a body referred to in subsection (5), the application of any of the provisions of this Part relating to an agreement with a not-for-profit corporation or other person referred to in that subsection.

[21] Also of particular significance are s 91(1)(d) and s 91(2), which concern the taking of legal proceedings:

> **91 (1)** Where an agreement entered into under subsection 80(5) so provides, the person who has entered into the agreement
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> **(a)** need not pay compensation in respect of the use of the property that is owned by Her Majesty and managed by the person;
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> **(b)** may, notwithstanding the *Financial Administration Act*, retain and use the revenue received in respect of the property for the purpose of operating the Seaway;
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> **(c)** may lease the property under the person's management and grant licences in respect of it;
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> **(d)** shall undertake and defend any legal proceedings with respect to the management of the property; and
>
> **(e)** shall discharge all obligations with respect to the management of the property.
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> **(2)** A civil, criminal or administrative action or proceeding with respect to any federal real property or federal immovable that a person who has entered into an agreement under subsection 80(5) manages, or any property that the person holds, or with respect to any act or omission occurring on the property, shall be taken by or against the person and not the Crown.

Management Agreements

[22] The Plaintiff's rights and responsibilities concerning the management, operation and maintenance of the Seaway arise by way of three agreements:

i) The Framework Agreement, dated August 11, 1998 as between the Plaintiff, and the Crown as represented by the Minister of Transport;

ii) The Managed Asset Agreement, dated September 30, 1998, as between The Authority and the Plaintiff; and

iii) The Management, Operation and Maintenance Agreement, dated September 30, 1998, as amended, as between the Plaintiff, and the Crown as represented by the Minister of Transport.

(collectively, the "Agreements").

Relevant portions of the Agreements are set out in Appendix A of these reasons. The Agreements explicitly state that they constitute agreements entered into pursuant to s 80(5) of the *Canada Marine Act*.

Parties' Positions

Defendants' Submissions

[23] Although the Plaintiff exclusively frames its action in tort, the Defendants' written submissions begin by arguing that the Defendants do not have a contractual relationship with the Plaintiff arising from the Defendants' payment of Seaway tolls. I take the Defendants to mean that the Plaintiff is therefore unable to recover its losses from the Defendants based on contract

law principles. However, when appearing before me, Plaintiff's counsel confirmed that the Plaintiff is not asserting a claim in contract. Accordingly, I need not address this point.

[24] The remainder of the Defendants' submissions argue that the Plaintiff's losses amount to unrecoverable relational economic loss.

[25] The Defendants begin by providing a history of the management of the St. Lawrence Seaway. They note that in 1951 the *St. Lawrence Seaway Authority Act* established the Authority. It was a Crown agent that acted on the Crown's behalf of in the management and operation of Crown assets, including the facilities, the properties and the bridges used in the Seaway. Its constituting statute gave the Authority the right to act for and on behalf of the Crown, in its own name, with respect to the protection and defence of Crown interests in the Crown assets.

[26] In 1998, in an effort to commercialize certain marine activities, including Seaway operations, the *Canada Marine Act* was enacted. Under the Act, a not-for-profit corporation would now manage the Seaway. This corporation would assume for its own account all expenses and losses in relation to the Seaway, which, according to the Defendant, was in exchange for the right to charge tolls for the use of the facilities. The Plaintiff is such a corporation.

[27] Under its Agreements with the Crown, the Plaintiff assumed full responsibility for and sole risk of the management of Bridge 19 with respect to its operation, maintenance and repair. The Defendants submit that this liability extends up to a specified amount of $2.5 million.

[28] They argue that the Plaintiff's damages arise as a function of its contractual obligation to repair the Bridge, rather than from property damage to the Bridge itself. Accordingly, the Plaintiff's repair expenses constitute relational economic losses because they are purely financial damages that stem from damage to a third party's property, specifically, the Crown's property.

[29] As a general rule, the common law does not impose a duty of care to avoid causing relational economic losses to another party absent any injury or physical damage to person or property. There are exceptions to this rule. Recovery is permitted in cases of relational economic loss arising in situations in which (i) a contractual relationship gives the claimant a proprietary or possessory interest in the damaged property; (ii) the loss arises from a general average incident; or, (iii) the relationship between the claimant and the property owner constitutes a joint venture (*CN v Norsk Pacific Steamship Co. "The Jervis Crown"* [1992] 1 SCR 1021 (*"Norsk"*); *Bow Valley Husky v Saint John Shipbuilding* [1997] 3 SCR 1210 at paras 45–56, pp 1240–1246 (*"Bow Valley"*)).

[30] The Defendants argue that the Plaintiff's claim does not fall within any of these exceptions.

[31] This is because the Agreements explicitly state that the Plaintiff is not in an agency relationship with the Crown. Nor are the two engaged in a joint venture. Instead, the Plaintiff's relationship to the Crown is that of an independent contractor. This relationship can be contrasted to the Plaintiff's predecessor, which was explicitly given agency status under its constituting statute.

[32] The Agreements also do not transfer to the Plaintiff any possessory or proprietary rights over the Managed Assets, which include Bridge 19, nor does the Plaintiff's Statement of Claim allege that any such rights were prejudiced. Subsections 80(1) and (2) of the *Canada Marine Act* and Article 2 of the Managed Asset Agreement demonstrate that it was the intent of the legislators that any propriety or possessory rights held by the Plaintiff's predecessor, the Authority, were to be transferred to the Crown.

[33] The Defendants also argue that the *Canada Marine Act* and the Agreements do not afford the Plaintiff with a right to recover purely economic losses.

[34] In that regard, as to ss 91(1) and (2) of the *Canada Marine Act*, which the Plaintiff argues affords it the authority to undertake and defend any legal proceeding with respect to the management of the property, the Defendants submit that these provisions do not assist the Plaintiff. This is because, interpreted purposively (*Rizzo & Rizzo Shoes Ltd. (Re)* [1998] 1 SCR 27 at para 21 ("Rizzo")), taking into account the predecessor legislation, the purpose of the current Act, and the placement of s 91 within it, these sections only empower the Plaintiff to conduct itself and engage in legal proceedings to "protect Her Majesty's interests, not the Plaintiff Corporation's interests". The Plaintiff's power to act on behalf of the Crown only arises when the Crown's property or interests in the property are engaged, not when there is an unexpected repair cost to the Plaintiff itself. As to s 91(1)(d), which states that the Plaintiff "shall undertake and defend any legal proceedings with respect to the management of the property", here the Crown owns the damaged property, but has not suffered a loss. Only if the Crown had incurred the repair expenses would the Plaintiff have been able to institute proceedings against the third party

wrongdoer to recover those losses - but the Agreements required the Plaintiff to incur the costs on its own account.

[35] Further, s 9.01 and 12.01 of the Managed Assets Agreement make it clear that it was the intention of the parties that the Plaintiff repair any damages to the Managed Assets, which include Bridge 19, at its own cost and for its own account. In this regard, the Management, Operation and Maintenance Agreement is significant as it contains no indemnity by the Crown to the Plaintiff, in the event that the Plaintiff is unable, as a matter of law, to recover compensation from a third party for repairs carried out pursuant to the Plaintiff's management, operation and maintenance responsibilities if those repairs amount to less than $2.5 million. In this matter, the Plaintiff paid $909,009.54 for the repairs on its own account and has no recourse under the Agreements for reimbursements from the Crown. Nor is there any evidence that the Crown has suffered a financial loss. According to the Defendants, had the loss exceeded $2.5 million, then section 14 of the Management, Operation and Maintenance Agreement, which pertains to catastrophic events, would have applied. Otherwise, there is no provision for the Plaintiff to be indemnified by the Crown for money it spends on repairs. Thus, the intention of the parties was that the Plaintiff's losses below $2.5 million are for its own account and at its own risk with respect to third party recovery.

[36] The Defendants emphasize that the Agreements do not purport to grant to the Plaintiff a right to claim relational economic loss, opposable against third parties, which at law the Plaintiff would not otherwise have.

[37] Finally, the Defendants acknowledge that s 122(1) of the *Canada Marine Act* gives the Plaintiff the benefit of a lien on a ship, but submit that a lien can only be exercised for an amount owing; it does not create a debt. Rather, its purpose is to give priority over other claims in the event of a debt. Here, the Plaintiff is owed nothing at law, because it is claiming relational economic losses.

Plaintiff's Submissions

[38] The Plaintiff submits that a review of the relevant provisions of the Agreements and the *Canada Marine Act* clearly establishes that all, or essentially all, of the Crown's rights and responsibilities in connection with the relevant assets, including Bridge 19, were conferred upon it and, therefore, the Plaintiff has all necessary powers to commence these proceedings and obtain full indemnification. The Agreements refer to and were intended to implement the objectives of the *Canada Marine Act*. Together, the legislation and the Agreements serve to transfer rights and responsibilities in respect of certain specified assets, including Bridge 19, from the Crown to the Plaintiff. This is demonstrated by the preamble and s 3.01.01 of the Framework Agreement; Articles 2.01.03, 2.01.04, 2.02.01(a), 2.02.02, 2.02.03, 9.01.01, 9.02.02, and 12.01.02 of the Managed Asset Agreement; and s 91(1)(d) and s 91(2) of the *Canada Marine Act*. Significantly, this transfer of the Crown's rights and obligations included the maintenance and replacement of the subject assets and obliges the Plaintiff to act as would a "prudent owner" of the assets. These provisions demonstrate that the Plaintiff is to take the place of the true owner, being subject to the same obligations and exercising the same rights as would the true owner.

[39] Additionally, pursuant to ss 91(1)(d) and 91(2) of the *Canada Marine Act*, where an agreement has been entered into pursuant to s 80(5) of that Act, as is the case in this matter, the person who has entered into the agreement, here the Plaintiff, exercises the rights of the Crown, explicitly including the right to commence and defend proceedings.

[40] Accordingly, it is the Plaintiff's position that it is not necessary to determine whether the sums the Plaintiff claims constitute relational economic losses. Under the Agreements and the Act, the Plaintiff has the exclusive obligation to repair and replace certain property, including Bridge 19. The entire risk of damage to such assets is placed on the Plaintiff, which stands in the place of the true owner. As a result, the Plaintiff is the only party that sustained losses or damages as a result of the collision. The Agreements and the Act also leave no doubt that the Plaintiff has the full and exclusive right to commence proceedings seeking to recover sums from parties that cause damage to such property.

[41] Further, the Defendants' interpretation of s 91 of the *Canada Marine Act* imports language into that provision that conflicts with the text, spirit and objectives of that Act, is contrary to the principles of statutory interpretation (*Williams v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 252 at paras 41–42), and renders s 91 futile. Specifically, there is no basis for the Defendants' suggestion that s 91 only authorizes legal proceedings to protect Crown property and Crown interests on behalf of the Crown. Neither the Agreements nor s 91 make any mention of the Plaintiff commencing proceedings "on behalf of the Crown". Rather, s 91 confers on the Plaintiff the exclusive right to commence proceedings and recover amounts that it will necessarily have incurred itself in carrying out its obligations under the Agreements, notably the obligation to repair and replace property damaged by third parties. As the Crown has transferred

to the Plaintiff all risks and responsibilities relating to loss of assets, including Bridge 19, proceedings that the Plaintiff commences under s 91 will necessarily be for its own account, not on the Crown's behalf. Accordingly, the Plaintiff has all necessary rights and powers to commence the present proceedings and to seek full indemnification from the Defendants. Judgment should be granted to the Plaintiff on this basis alone, there is no need to consider whether the Plaintiff's losses are relational economic loss.

[42] In any event, the Plaintiff's losses do not constitute unrecoverable relational economic losses. Relational economic losses arise where one party (the property owner) suffers a loss due to damage to its property, while another party (the plaintiff) suffers a separate and distinct financial prejudice. In contractual relational economic loss, the distinct financial prejudice suffered relates to disruption or interference with the performance of a contract (Philip H. Osborne, *The Law of Torts*, 5th ed (Toronto: Irwin Law, 2015) at page 202 ("Osborne")). Here the Plaintiff's losses can be differentiated from relational economic losses.

[43] First, by way of the *Canada Marine Act* and the Agreements, the true owner of Bridge 19, the Crown, suffered no loss or damage as the risk of loss and the duty to repair were transferred to the Plaintiff. Second, the sums claimed by the Plaintiff do not result from disruption or interference with the performance of its contracts with the Crown, but rather represent the actual damages sustained in order to repair the damaged property. That is, the losses that the Crown would have sustained but for the transfer of risk and responsibility. This is particularly relevant in distinguishing this matter from the *Norsk* decision, upon which the Defendants rely. In that case, the Supreme Court of Canada considered whether economic losses, in addition to the property damage sustained and collected by the owner of the damaged bridge, were recoverable. In this

matter, the Plaintiff is seeking the equivalent of the sums awarded to bridge owner in *Norsk* and no other parties are alleging that they have sustained distinct or consequential damages.

[44] The Plaintiff also stresses that this distinction is all the more crucial in light of the policy considerations underpinning the general exclusionary rule against recovery of relational economic loss as set out by Justice La Forest in *Norsk* (p 1051–1052). None of those policy concerns have application in this matter. Instead, they mitigate in favour of permitting the Plaintiff to recover.

[45] Further, even if this Court were to determine that the concept of relational economic loss is generally applicable to the sums claimed in this matter, those sums fall within one of the categories that have been recognized as recoverable; that is, where the claimant has a possessory or proprietary interest in the damaged property (*Bow Valley* at para 48). Here, at the very least, the *Canada Marine Act* and the Agreements establish that the Plaintiff has a possessory interest in Bridge 19 (Osborne at p 206). It has far more than a non-exclusive right to use the Bridge, as was CN's circumstance in *Norsk*. Rather, the Plaintiff has full control over and responsibility for the Bridge and is the sole party charged with its repair and replacement. The Agreements require that the Plaintiff act as would a prudent owner. In this regard, the Plaintiff notes that claims of a bareboat charter are generally considered the most obvious example of recoverable relational economic loss based on a proprietary or possessory interest (Osborne at p 206). It submits that, in this situation, the Plaintiff's relationship to the Bridge even more closely resembles the role of the owner of the Bridge than does the relationship of a bareboat charterer to the ship it has chartered.

[46] Finally, the Plaintiff submits that the Defendants' motion implicitly challenges the constitutional validity, applicability, and operability of s 91 of the *Canada Marine Act*, and must

be dismissed because the Defendants have not served notice on the Attorneys General as required by s 57 of the *Federal Courts Act*, RSC 1985, c F-7.

Analysis

[47] In my view, this matter essentially comes down to the nature of the contractual relationship between the Plaintiff and the Crown.

[48] Accordingly, it is necessary to first analyse the relevant provisions of the *Canada Marine Act* and the Agreements to ascertain the nature of the resultant relationship between the Crown and the Plaintiff. That relationship must then be assessed in the context of the jurisprudence pertaining to relational economic loss. In taking this approach, I will address the Plaintiff's right to pursue its claim; whether this right is restricted; whether the intent of the Agreements was to exclude recovery by the Plaintiff; whether the Plaintiff's losses are relational economic loss; and, if so, whether they are unrecoverable.

i. Does the Canada Marine Act, as implemented by the Agreements, afford the Plaintiff the right to pursue claims?

[49] Section 80(5) of the *Canada Marine Act* permits the Minister to enter into agreements in respect of the Seaway, which agreements can be with a not-for-profit corporation. Pursuant to s 80(6), such an agreement can include any terms and conditions that the Minister considers appropriate, including, by way of s 80(6)(b), provisions respecting the management and operation of all or part of the Seaway, or property and undertakings referred to in s 80(1) or s 80(2) (property directed to be transferred from the Authority to the Minister or other specified entity,

and then otherwise transferred by the Minister). Section 80(5) agreements can also contain provisions as to the performance and enforcement of obligations contained therein (s 80(6)(e)).

[50] Where an agreement entered into pursuant to s 80(5) so provides, the person who has entered the agreement shall undertake and defend any legal proceedings with respect to the management of the property (s 91(1)(d)) and shall discharge all obligations with respect to the management of the property (s 91(1)(e)). Section 91(2) states that "a civil proceeding…with respect to any federal real property or immovable that a person who has entered into an agreement under s 80(5) manages, or any property that the persons holds, or with respect to any act or omission occurring on the property, shall be taken by or against the person and not the Crown." Thus, to the extent that the provisions of the Agreements implement s 91(1)(d) and (e), the *Canada Marine Act* places a positive obligation on the Plaintiff to undertake legal proceedings concerning the management of the property and to discharge all of its obligations with respect to the managed property. The implementation of provisions incorporating s 91(2) requires that civil proceedings pertaining to property managed pursuant to a s 80(5) agreement shall be taken by or against the Plaintiff, and not by the Crown.

[51] It is clear from the preamble and Article 3.01.01 of the Framework Agreement that it was effected to implement the intent of the *Canada Marine Act*, being that the management, operation and maintenance of the Seaway by the Crown, through the Authority, would cease and would be transferred to the Plaintiff, in accordance with the Management, Operation and Maintenance Agreement and such other agreements as may be entered into by the parties.

[52] Similarly, Article 2.01.03 of the Managed Asset Agreement explicitly acknowledges that it, and the other instruments as defined therein, constitute agreements entered into pursuant to s 80(5) of the *Canada Marine Act* and are to be interpreted having regard to the objectives set out in s 78 of the Act. Significantly, Article 2.01.04 states as follows:

> 2.01.04 Her Majesty and the Corporation hereby acknowledge and agree that all civil, criminal and administrative actions and proceedings with respect to the Assets shall be taken by or against the Corporation and not Her Majesty pursuant to Subsection 91(2) of the Act.

[53] The Managed Asset Agreement does not include a provision obliging the Plaintiff to undertake legal proceedings in respect of the management of the property as permitted and contemplated by s 92(1)(d). However, it does implement and require that any civil proceedings shall be brought by (and against) the Plaintiff and not the Crown, as explicitly contemplated by s 91(2) of the *Canada Marine Act*.

[54] The Managed Asset Agreement also obliges the Plaintiff to manage, operate, maintain, repair, acquire and replace the Managed Assets at its own cost and expense, as would a prudent owner (Article 2.02.01(a)); to pay when due all Costs (as defined), charges, expenses and outlays of every nature whatsoever and whether extraordinary or ordinary, and whether foreseen or unforeseen, relating to the Managed Assets (Article 2.02.02); to assume at its own cost and expense the full and sole responsibility for the repair, replacement and maintenance of the Managed Assets (Article 9.01.01); and, at its own expense, to put and keep or cause to be put and kept the Managed Assets in a Fully Operational State (as defined) during the term of the agreement and to make or cause to be made all necessary maintenance and repair, ordinary and extraordinary, foreseen or unforeseen, structural or non-structural in order to keep the Managed

Assets Fully Operational, as would a prudent owner (Article 9.02.01). Similarly, the Plaintiff is obliged, at its own expense, to repair, replace, restore or reconstruct any Managed Assets that are wholly or partially damaged or destroyed (Article 12.01.02).

[55] Thus, by virtue of its obligations under the Managed Asset Agreement, the Plaintiff was required at its own expense, to repair the physical damage to Bridge 19, a Managed Asset, caused by the Defendants' negligence.

[56] As to the Management, Operation and Maintenance Agreement, this agreement also explicitly states that it is made under s 80(5) of the *Canada Marine Act* (s 1.12). Section 3 sets out the Plaintiff's responsibilities and obligations. They include that it shall manage, operate, maintain, repair and acquire and replace the Managed Assets and the Other Assets and Properties (as defined) in a competent, honest and commercially prudent manner (s 3.2); manage, operate, repair, acquire and replace the Managed Assets and the Other Assets and Properties in accordance with the Managed Asset Agreement and the Management, Operation and Maintenance Agreement (s 3.4(1)); immediately notify the Crown of any Claim, demand, right or cause of action asserted, threatened or instituted by or against the Plaintiff or the Crown which involves the Managed Assets and other described assets (s 3.4(3)); generally do and cause to be done all such acts, matters and things required to manage, operate, maintain, repair, acquire and replace the Managed Assets and the Other Assets and Properties in a competent, honest and commercially prudent manner (s 3.4(4)); and, all costs and expenses incurred by or on behalf of the Plaintiff in connection with its performance of its obligations under the Management, Operation and Maintenance Agreement shall be for the Plaintiff's own account, the Crown having no

responsibility for such costs and expenses as contemplated under the agreement or other Instrument (s 3.5).

[57] In sum, the provisions of the *Canada Marine Act* and the Agreements make it clear that responsibility for the management and operation of the Managed Assets, which include Bridge 19, lies exclusively with the Plaintiff. Further, that repair costs of the Managed Assets are to be incurred exclusively by the Plaintiff, which is obliged to keep and repair them as would a prudent owner, and to operate the Seaway in a commercially prudent manner. Further, any actions related to the Managed Asset must be brought by the Plaintiff. Read together and in whole, the Act, as implemented by the Agreements, grants to the Plaintiff the statutory right to pursue claims such as this action. And, as submitted by the Plaintiff, given that the Agreements transfer from the Crown to the Plaintiff all risks and responsibilities pertaining to Bridge 19, the practical effect of s 91(2) is that only the Plaintiff can, and has the exclusive right to, pursue claims for damages, as it has done in this matter. In my view, it is also commercially prudent for the Plaintiff to attempt to recover the cost of repairs incurred due to the negligence of a party such as the Defendants.

ii. Is the Plaintiff's right to commence claims restricted to actions intended to protect the Crown's interests?

[58] The Defendants submit that s 91 only authorizes the Plaintiff to commence proceedings to "protect Her Majesty's interests—not the Plaintiff Corporation's interests". Significantly, in my view, s 91 contains no such wording or restriction.

[59] The Supreme Court of Canada has stated that the preferred approach to statutory interpretation is that set out by Elmer Driedger in *Construction of Statutes* (2nd ed 1983).

Specifically, that: “Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (at p 87; also see *Rizzo* at para 21; *Bell Express Vu Limited Partnership v Rex*, 2002 SCC 42 at para 26). The Supreme Court of Canada has also cautioned against adopting an interpretation that is not supported by the text of a provision and that requires the Court to read in words that are simply not there, as this can amount to judicial rewriting of legislation under the guise of interpretation (*Wilson v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47 at para 27 citing *R v McIntosh*, [1995] 1 SCR 686 at p 701; *R v Hinchey*, [1996] 3 SCR 1128 at paras 8–9 and 36; *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25 at para 40.).

[60] In my view, s 91(1)(d) and s 91(2) are clear and unambiguous and do not require reference to extrinsic evidence to determine the intent of the legislators (see: *Professional Institute of the Public Service of Canada v Canada (Attorney General)*, 2012 SCC 71 at para 95). Nor does anything in the scheme, object or overall context of the *Canada Marine Act* suggest that s 91 has the restrictive meaning that the Defendants suggest. In line with the overall purposes of the Act (s 4), the objectives of Part 3, Seaway, include promoting a commercial and competitive approach to the operation of the Seaway; protecting its integrity and its long term operation and viability as an integral part of Canada’s national transportation infrastructure; and, encouraging user involvement in its operation. Part 3 also sets out operational requirements for a contemplated not-for-profit corporation.

[61] Further, the *Canada Marine Act* and agreements made pursuant to s 80(5) create a scheme under which, once a s 80(5) agreement is entered into, the entity that enters into the agreement effectively steps into the Crown's shoes in the management and operation of the subject property, assets and services. This scheme affords that entity certain rights and responsibilities. These rights include the right to charge fees (s 92(1)), to control Seaway traffic as specified (s 99) and to act jointly or in conjunction with parallel US authorities (s 100). Further, they include the right to cause a ship to be detained if there are reasonable grounds to believe that an amount is due and payable for fees imposed under the Act (s 115(1)(b)), or, that property that is managed by a person who has entered into an agreement under subsection 80(5) has been damaged by the ship or through the fault or negligence of a member of the crew of the ship ((115(1)(c)). In that regard, for purposes of obtaining clearance from detention, the s 80(5) entity will estimate the amount and determine the satisfactory kind of security to be deposited in court with respect to a claim against a ship for fees owed or damages incurred (s 116(4)(c) and (d)). And, significantly, clearance may be granted when "an amount satisfactory to the port authority, to the Minister or to the person who has entered into an agreement under subsection 80(5), as the case may be, *has been paid to* the port authority, the Minister or *the person in respect of the ship in respect of the fees payable or the damages referred to in paragraph 115(1)(c)*" (s 116(e)).

[62] The s 80(5) entity may also apply to court to sell a detained ship (s 117). Additionally, it has the right to place a lien over a ship and on the proceeds of its sale:

> **122 (1)** A port authority, the Minister or a person who has entered into an agreement under subsection 80(5), as the case may be, has at all times a lien on a ship and on the proceeds of its disposition for an amount owing to the port authority, the Minister or the person, and the lien has priority over all other rights, interests, claims and

> demands, other than claims for wages of crew members under the *Canada Shipping Act, 2001*, if the amount is owing in respect of
>
> **(a)** fees and interest in respect of the ship or goods carried on the ship; or
>
> **(b)** damage to property caused by the ship or through the fault or negligence of a member of the crew of the ship acting in the course of employment or under the orders of a superior officer.

[63] The Defendant correctly submits that a lien on a ship does not create a debt, but merely gives priority over other claims in the event of a debt. However, s 122(1)(b) serves to explicitly recognize that a person who has entered into an agreement under s 80(5) has a lien on the ship, and on the proceeds of its disposition, for an amount owing to that person in respect of damage to property caused by the ship. If anything, the natural implication of s 91, s 116(4)(c), (d) and (e) and s 122 (1)(b) is that in circumstances such as this, where a ship collides with and causes damage to a bridge that is an asset managed by the Plaintiff, the Plaintiff, as a s 80(5) entity, can commence proceedings to cause the sale of the ship to satisfy an unpaid debt arising from that damage. Further, that the proceeds for the amount owing for those damages will be paid to the Plaintiff, not to the Crown. In other words, the Plaintiff can commence an action to recover the losses it incurred because of its obligations under the Agreements to effect the repair of the Managed Asset.

[64] It is possible, of course, that by way of defence a ship may assert, as the Defendants do here, that no debt is owing because the damages are unrecoverable economic loss. However, my point is that the above provisions do not support the interpretation proposed by the Defendants, that s 91 restricts or precludes the Plaintiff from commencing an action and recovering damages it

incurred in repairing property owned by the Crown, managed by the Plaintiff, and damaged by a third-party ship.

[65] Rather, the Plaintiff, having entered into the Agreements pursuant to s 80(5), in effect, acts in *lieu* of the Crown. Section 91 reflects this as it requires that legal proceedings shall be brought by the Plaintiff and not the Crown. Moreover, under the Defendants' interpretation of s 91, the Plaintiff would have no right of recovery in any circumstances such as this. Yet, that would seem contrary to the purpose of the Act, which is to manage the Seaway in a commercially sound manner, as well as the Plaintiff's responsibility under the Agreements to act as would a prudent owner.

[66] In conclusion on this point, I see nothing in the text of s 91, the context or the purpose of the Act, or the Agreements which implement it, suggesting that the Plaintiff's right to engage in legal proceedings is restricted to protecting Crown property and Crown interests on behalf of the Crown, to the exclusion of the Plaintiff recovering losses it incurs as a result of the responsibilities it assumes under the Agreements. In this regard, whether the Plaintiff is a Crown agent or independent contractor is irrelevant.

iii. Was the intent of the Agreements to exclude the Plaintiff from recovering damages caused by third party negligence?

[67] The Defendants also assert that the terms of the Agreements demonstrate that the parties did not intend for the Plaintiff to recover its losses in circumstances such as those before the Court. In this regard, the Defendants argue that it is significant that the Management, Operation and Maintenance Agreement provides no indemnity by the Crown to the Plaintiff in the event that

the Plaintiff is unable, as a matter of law, to recover from a third party compensation for repairs to a Managed Asset that are carried out by the Plaintiff pursuant to their management and operation responsibilities, for amounts less than $2.5 million. I do not find this argument persuasive.

[68] It is correct that the Agreements do not provide for indemnity by the Crown to the Plaintiff for any losses the Plaintiff incurs that it is unable to recover, for any reason, from a negligent third party whose actions cause damage to managed property. Rather, the Agreements primarily address indemnification by the Crown in two circumstances - losses or claims concerning Seaway Management that arose prior to the commencement of the Agreements (Management, Operation and Maintenance Agreement s 19.3), and Catastrophic Events (Management, Operation and Maintenance Agreement s 14). However, the Agreements do not tie the absence of indemnity for claims arising from third party negligence to the Catastrophic Events provisions, as do the Defendants.

[69] The provisions of Section 14, Catastrophic Events, serve to make the Crown solely responsible for taking action to address a Catastrophic Event, as the Crown deems fit, and to be solely responsible for the payment of all Catastrophic Expenses. Thus, Catastrophic Events and Catastrophic Expenses, which are defined in ss 1.1(20) and (21), respectively, of the Management, Operation and Maintenance Agreement, are a carve out from the Plaintiff's responsibilities otherwise arising with respect to the repair of the Managed Assets.

[70] The Crown may, however, direct the Plaintiff to repair any damage or destruction arising from a Catastrophic Event, or to take other action in respect thereof, and to incur Catastrophic Expenses. In that circumstance, the Crown will reimburse the Plaintiff, subject to Treasury Board

approval (s 14.2). The Plaintiff can also take action in response to a Catastrophic Event and incur Catastrophic Expenses if it determines that such action or expense must be incurred immediately, or otherwise prior to obtaining Crown consent, in order to contain or mitigate damage or destruction (s 14.3).

[71] The Plaintiff otherwise has no responsibility to repair any damage or destruction caused by a Catastrophic Event or to incur Catastrophic Expenses (s 14.5). It shall, however, cooperate with the Crown in connection with repairs (s 14.5(1)), and shall pay to the Crown any Property Insurance Proceeds, as defined, or other payment received by the Plaintiff from third parties relating to a Catastrophic Event to the extent that the Crown incurs or pays the Plaintiff for Catastrophic Expenses relating to such Catastrophic Event (s 14.5(2)).

[72] Of note is the limited scope of the Crown indemnity provision pertaining to Catastrophic Events and Catastrophic Expenses, s 14.4(3). Indemnity only comes into play when the Plaintiff incurs costs and expenses as an urgent mitigation effort prior to Crown consent (s 14.3); when the Plaintiff incurs a claim or loss because of the Crown's failure to act in response to a Catastrophic Event (s 14.4); when the Plaintiff fails to act or to incur Catastrophic Expenses following receipt of notice not to do so from the Minister (s 14.4); and, when the Treasury Board fails to give approval for the expenses that the Plaintiff incurs (s 14.4).

[73] In my view, these provisions do not suggest that the parties intended that the Plaintiff would have no means of recouping any losses caused by a negligent tortfeasor unless the damages exceeded $2.5 million. Rather, they pertain to and address a narrow and discrete circumstance, Catastrophic Events and Expenses.

[74] It is also of note that Catastrophic Events are only those in which the damages exceed $2.5 million *and* pose a risk to the safe operation of the Seaway or any Managed Asset. Thus, on the Defendants' interpretation, the parties must also have intended that the Plaintiff would be responsible for and would be unable to recover damages exceeding $2.5 million that pose no safety concerns. I am not persuaded that the terms of the Agreement support that interpretation.

[75] Finally, I note that the insurance provisions of the Management, Operation and Maintenance Agreement contemplate that the Plaintiff will obtain, at its own expense, property and liability insurance, including with respect to the Managed Assets, and that the Plaintiff and the Crown will be named as insured on policies of insurance, as their respective interests may appear (s 18.2). The Plaintiff is entitled to, and, if received, the Crown *shall pay to the Plaintiff*, all property insurance proceeds or payments from third parties for damage in respect of any Managed Assets to pay for the repair or replacement, except to the extent that the Crown is obliged under the agreement to pay for such damage or destruction. Again, these provisions do not support an interpretation that such losses were intended to be unrecoverable by the Plaintiff. Nor do the above discussed provisions concerning the detention or sale of vessels for amounts owing in respect of damage caused by a ship to managed property.

[76] In conclusion, while the Plaintiff does not own the Managed Assets, including Bridge 19, it is solely responsible for the operation, management and repair of those assets at its own expense, and to operate the Seaway on a commercially sound basis and as a prudent owner would. To carry out this function, the Plaintiff must be able to pursue actions to recover costs it incurs to repair damage to those assets caused by the negligence of third parties. By way of the *Canada Marine Act*, as implemented by the Agreements, it has this authority. The absence of an

indemnity by the Crown in the event that such an action, for any reason, should not succeed, does not suggest that the parties intended that the Plaintiff would incur these losses as a cost of doing business, rather than pursuing them by way of legal actions.

[77] That said, and while I acknowledge that the practical effect of s 91 of the Act and the Agreements is that only the Plaintiff incurred the cost of the repairs and only the Plaintiff can sue to recover them, I agree with the Defendants that nothing in the Act, its implementation by way of the Agreements or the terms of the Agreements themselves, goes so far as to grant them a right of recovery that would otherwise not be available to them at law, such as with respect to relational economic loss.

[78] Accordingly, it is necessary to next consider the nature of the relationship between the Plaintiff and the Crown for the purpose of determining if the losses incurred were relational economic losses and, if so, whether the Plaintiff can recover them or not.

iv. Are the Plaintiff's losses relational economic losses?

[79] To address this issue, it is helpful to first set out jurisprudence delineating what constitutes relational economic loss. I will then analyse the factual circumstances present in this case to determine if the Plaintiff's damages fall within that definition.

[80] Historically, the common law did not permit recovery of economic loss where a plaintiff suffered neither physical harm nor property damage. However, over time, Canadian jurisprudence has reconsidered the traditional rule and it now recognizes that, in limited circumstances, such

damages may be recovered (*Martel Building Ltd. v Canada*, 2000 SCC 60 at paras 36–37 *("Martel")*).

[81] Currently, five categories of negligence claims for which a duty of care has been established with respect to pure economic losses, have been recognized:

i) the independent liability of statutory public authorities;
ii) negligent misrepresentation;
iii) negligent performance of a service;
iv) negligent supply of shoddy goods or structure;
v) relational economic loss.

(*Norsk* at p 1049, Justice La Forest, writing in dissent, referencing Feldthusen, "Economic Loss in the Supreme Court of Canada: Yesterday and Tomorrow" (1990 – 91) 17 Can Bus LJ 356 at pp 357–58; *Martel* at para 38; *Design Services Ltd. v Canada*, 2008 SCC 22 at para 31 (*"Design Services"*)).

[82] These categories are not closed (*Martel* at para 45). However, before assessing whether a new category of pure economic loss should be recognized, it must first be determined whether the situation fits within, or is analogous to, a relationship previously recognized as having a duty of care between the parties (*Design Services* at para 27 referencing *Childs v Desormeaux*, 2006 SCC 18 at para 15). If it does not, then the Court will proceed to determine whether to extend the duty of care in a given case, applying the two-stage test set out in *Anns v Merton London Borough Council*, [1978] AC 728 (HL) (*"Anns"*), and *Kamloops (City of) v Nielsen* [1984] 2 SCR 2 at pp 10–11 (*"Kamloops"*):

1) whether the relationship between the plaintiff and defendant was sufficiently proximate to give rise to a *prima facie* duty of care?

2) if such a *prima facie* duty of care existed, whether it was negated for policy reasons and recovery should be denied?

(*Design Services Ltd*., at paras 45–46; *Martel* at paras 46–47).

[83] However, for policy reasons, courts have been cautious in recognizing new categories of recoverable economic loss. These policy reasons were described as follows in *Martel*:

> [37]…First, economic interests are viewed as less compelling of protection than bodily security or proprietary interests. Second, an unbridled recognition of economic loss raises the spectre of indeterminate liability. Third, economic losses often arise in a commercial context, where they are often an inherent business risk best guarded against by the party on whom they fall through such means as insurance. Finally, allowing the recovery of economic loss through tort has been seen to encourage a multiplicity of inappropriate lawsuits. See D'Amato, supra, at para. 20, and A.M. Linden, Canadian Tort Law (6th ed. 1997), at pp. 405-6.

[84] Relational economic loss has been defined as a "situation in which the defendant negligently causes personal injury or property damage to a third party. The plaintiff suffers pure economic loss by virtue of some relationship, usually contractual, it enjoys with the injured third party or the damaged property" (*Design Services* at para 33 quoting A. M. Linden and B. Feldthusen, *Canadian Tort Law* 8th ed (Markham, Ont: LexisNexis Butterworths, 2006) at para 477).

[85] Of the five currently recognized categories of pure economic loss, only relational economic loss continues to operate under a presumption against recovery. There are three categories of contractual relational economic loss that currently constitute exceptions to the presumption against recovery:

> 1) where the claimant has a possessory or proprietary interest in the damaged property;
>
> 2) general average cases; and
>
> 3) where the relationship between the claimant and the property owner constitutes a joint venture;

Like the broader categories of economic loss, these three categorical exceptions are not closed (*Martel*, at paras 42–45; *Design Services* at para 35).

[86] So then, how does the matter before me fit into the principles set out by the Supreme Court in the above decisions?

[87] On their face, the damages that are claimed by the Plaintiff fall within the definition of relational economic loss. That is because this is a situation in which the Defendants have negligently caused property damage to a third party, the Crown. The Plaintiff has suffered pure economic loss by virtue of its contractual relationship with the Crown and/or the damaged property, Bridge 19 (*Design Services* at para 33).

[88] However, as the Plaintiff notes, its damages do not fit neatly within circumstances that have previously been described as defining contractual relational economic loss:

> Contractual relational economic loss arises where the defendant has interfered with or damaged the property of a third person with whom the plaintiff has a contractual relationship. The property damage disrupts or interferes with the performance of the contract, causing the plaintiff to lose some economic advantage or benefits. (Osborne at page 202)

[89] Here, the losses claimed by the Plaintiff do not result from disruption or interference with the Agreements, the contracts with the Crown. They are not loss of use or loss of profit claims. Rather, they reflect the cost of repairing the actual damage caused to Bridge 19 by the Defendants' negligence.

[90] The Plaintiff takes the view that it has taken the place of the true owner and, as a result, it is the only party that sustained losses or damages arising from the collision. Alternatively, the Plaintiff submits that the losses fall within the possessory or proprietary exception to the presumption against recovery of contractual relational economic loss. Conversely, the Defendants characterise the damages as contractual relational economic losses that arose solely because of the Plaintiff's repair obligations assumed under the Agreements.

[91] In effect, albeit indirectly, the Plaintiff characterises its damages as transferred losses, being losses that the Crown would have suffered but for the fact that all risk and responsibility pertaining to Bridge 19 has been transferred from the Crown to the Plaintiff pursuant to the Agreements.

[92] While not a recognized exception to the rule against recovery, the Supreme Court of Canada has addressed the concept of transferred losses on two occasions, in *Bow Valley* and in *Norsk*.

[93] In *Bow Valley*, Husky Oil Operations Ltd. ("HOOL") and Bow Valley Industries Ltd. ("BVI") made arrangements to have an oil drilling rig constructed by Saint John Shipbuilding Limited ("SJSL"). Before construction began, ownership of the rig and the construction contract

with SJSL were transferred to Bow Valley Husky (Bermuda) Ltd. ("BVHB"). HOOL and BVI entered into contracts with BVHB for the hire of the rig to conduct drilling operations. These contracts provided that HOOL and BVI would continue to pay day rates to BVHB in the event that the rig was out of service. An improperly installed heat trace system caused a fire that damaged the rig and put it out of service for several months while repairs were affected. BVHB, HOOL and BVI commenced an action against SJSL alleging breach of contract and negligence and an action against Raychem, the manufacturer of the heat trace system, for negligence. BVHB claimed both for the cost of the repairs to the rig and for the revenue lost as a result of the rig being out of service for several months. HOOL and BVI sought to recover the day rates that they were contractually required to pay to BVHB during the period the rig was out of service, as well as expenses they incurred for supplies to the rig.

[94] The Supreme Court noted that the plaintiffs, HOOL and BVI, sought damages for economic loss incurred as a result of the shutdown of the drilling rig during the period it was being repaired. That is, they sought to recover the economic loss they suffered as a result of damage to the property of a third party, or contractual relational economic loss. The question before the Court was whether the loss suffered by HOOL and BVI was recoverable. The Court found that the case before it did not fall into any of the above noted categories of recoverable contractual relational economic loss. However, as the categories were not closed, it went on to consider whether the situation was one in which the right to recover should nonetheless be recognized. Applying the *Anns* test, the Court found that while a *prima facia* duty of care existed, it was negated by policy considerations, the most serious being indeterminate liability. The ripple effect was found to be present in that case. The Court also considered two other policy factors, additional deterrence of liability and a plaintiff's ability to contractually allocate risk to the

property owner. It concluded, however, that these policy considerations did not assist BVI and HOOL in the circumstances of that matter.

[95] Of note is that in *Bow Valley*, BVI and HOOL also argued that the loss they claimed against the defendants was really loss transferred from BVHB, the rig owner. However, unlike the present matter, they submitted that they were in a common venture with BVHB, which resulted in BVHB's losses being transferred to them. On that basis, they argued they should be able to claim the losses as though they stood in the shoes of BVHB. Because BVHB could have claimed consequential losses for loss of use of the drilling rig, so then could HOOL and BVI. The Supreme Court dismissed this argument in the following paragraph:

> 58 This argument suffers from a number of difficulties. First, insofar as courts have recognized transferred loss, it has been confined to physical damage: *Norsk, supra*. Applied to relational economic loss, it would need to meet the criteria for recovery of that category of loss, and hence would seem not to advance the plaintiffs' case. Second, the plaintiffs claim not only for loss of use of the drilling rig, but for losses related to unavoidable expenses they incurred for other supplies, including food, drilling mud and additional equipment. It is more difficult to see how these losses, based entirely on contracts between the plaintiffs and others, independent of BVHB, can be said to be transferred from BVHB. Third, there is nothing to show that the day rates paid by HOOL and BVI while the rig was idle are identical to what BVHB's consequential losses would have been, Finally, what does one do about the contributory negligence of BVHB? Given that BVHB is 60 percent at fault, under the transferred loss theory would the plaintiffs be able to recover only 40 percent of their claim? These difficulties suggest that the plaintiffs' loss is not the transferred loss of BVHB, the owner of the damaged rig. It is contractual relational economic loss, and should be treated as such.

[96] Significantly, in *Bow Valley*, the contractual relational economic losses claimed by BVI and HOOL did not pertain to the cost of repairs to the drilling rig, which had been recovered by

the rig owner. Conversely, in the case before this Court, the Plaintiff's claim for repair costs is related to physical damage to Bridge 19. Further, in *Bow Valley*, BVI and HOOL sought to recover damages for loss of use, unlike the circumstances in this matter. And, as to BVI and HOOL's claim for expenses incurred for supplies, these were based on contracts between those plaintiffs and third parties who were independent of BVHB and, therefore, were not transferred from BVHB, the rig owner. In short, while HOOL and BVI's claim of transferred loss did not succeed, the factual circumstances are dissimilar to those in this matter and, in my view, the case does not serve to discredit the concept of transferred loss, as the Defendants suggested when appearing before me.

[97] The Supreme Court's decision in *Norsk* is factually closer to the situation before me. In that case, a tug that Norsk owned was towing a barge down the Fraser River when the tug collided with a railway bridge owned by Public Works Canada ("PWC") and used by four railways, including Canadian National ("CN"). The collision caused extensive damage that closed the bridge for several weeks. Norsk admitted liability for its negligence which had caused the collision.

[98] The railways' use of the bridge was governed by a contract that explicitly reserved full ownership of the bridge to PWC and explicitly rejected any possibility of a leasehold estate or interest. The bridge operated on the principle of full recovery of all operating and maintenance costs, but not for profit. CN, in addition, agreed to provide PWC, on a contractual basis, with any repair, maintenance, consulting and inspection services that PWC might request. PWC was to authorize all such services and to pay for them as needed.

[99] PWC paid for the repair to the bridge and, at trial, recovered all damages resulting from the collision. The licence contracts between PWC and the railways, however, did not provide for indemnification in the case of disruption to bridge service. Unable to claim under the contract, CN brought an action in tort against Norsk and the other defendants, claiming costs CN incurred because of the bridge closure. At issue before the Supreme Court was whether or not economic loss and contractual relational economic loss in particular, was recoverable in tort.

[100] Justice La Forest, writing in dissent, noted that *Norsk* involved a claim for relational economic loss by the plaintiff as a result of damage caused to someone else's property. For him, the issue in that case was whether a person (A) who contracts for the use of property belonging to another (B) can sue a person who damages that property for losses resulting from A's inability to use the property during the period of repair, or contractual relational economic loss. Thus, the contractual relational losses sought by CN pertained to loss of use of its contractual rights.

[101] As part of its submissions, CN argued that it had alternative interests at stake that differentiated it from the ordinary contractual claimant, and put forward two arguments to the effect that its interest was more than that of a mere contractor. The first of these arguments was that CN suffered from a transferred loss of use; the second was that CN was involved in a common adventure with PWC. These arguments were centred on the relationship between the plaintiff and the property owner, i.e., between CN and PWC.

[102] As to the transferred loss of use, CN submitted that while PWC initially suffered the physical loss for damage to the bridge, pursuant to their contracts with the railways, all costs were ultimately born by, or trickled down to, the railways. The Court rejected this argument for a

number of reasons. CN also submitted that granting judgment to it in the circumstances of that case would not be extending the liability of the defendants over and above what they would normally incur to the owner of a commercial property because, had PWC been using the bridge, it could have recovered loss of use as consequential economic loss.

[103] In the course of addressing this argument, Justice La Forest noted that in *Candlewood Navigation Corp v Mitsui O.S.K. Lines Ltd. (The Mineral Transporter)*, [1986] A.C. 1, the House of Lords rejected a variant of CN's transferred loss argument made by the time charterer of a vessel damaged in a collision on the basis that, if accepted, it would have far-reaching consequences that would run counter to the accepted policy of the law.

[104] Justice La Forest adopted similar reasoning in rejecting CN's argument (at p 1095–6, 1101):

> To accept wide recovery for transferred loss as proposed by the plaintiff here would have the effect of entitling the plaintiff to compensation in all cases dealing with contracts for the use of another's property. If loss of use is extended to include the costs of finding alternate sources for the same benefits, it goes considerably beyond what is normally payable to the owner in commercial cases, although admittedly it could be payable to the owner.
>
> True transferred loss cases involve a claim which is in essence a claim for property damage which the owner himself would have recovered, had the loss not fallen on the plaintiff because of their contract. A true transferred loss case requires that the risk of property damage have passed, as in the case of goods damaged in transit after the risk (but not the property) has passed to the buyer. In such a case, unless the buyer is given a right of action, the carrier will be liable to neither party: not to the seller because he has suffered no loss, nor to the buyer who has no protected interest; see Fleming, *The Law of Torts* (7th ed. 1987), at pp. 164-65.

> Even in that type of case, recovery was denied in the recent House of Lords decision in *Leigh and Sillavan Ltd. v. Aliakmon Shipping Co., supra*, essentially on the ground that contract law provided a sufficient protection in the circumstances of that case. It was only the particular variation of the contract to which the buyers agreed that deprived them of their usual right of action.
>
> The present is not a true transferred loss case. PWC has collected for the property damage it has sustained. The transferred loss claimed in this case is thus not with respect to the property damage claim. Rather, it is a claim for the transferred loss of use, or transferred economic loss.
>
> In these circumstances, I fail to see how the respondent suffered a transferred loss such as to create an alternative protected interest to its contractual interest.
>
> […]
>
> In conclusion, I do not find the respondent's arguments to the effect that it had more than a mere contractual interest convincing. CN's entitlement to use the bridge finds its sole source in the contract. The contract sets out the full extent of CN's rights: without the contract, CN would be trespassing. It has wisely not argued the existence of any possessory interest. Its transferred loss is merely the transfer of a loss of use and is a less compelling case for recovery than the loss incurred by a time charterer. This case does not involve a common adventure such as exists in the cases dealing with general average contributions. As a result, I cannot accept the rationale for recovery set forth by McLachlin J. to the effect that the purpose of allowing recovery in this case is to permit "a plaintiff whose position for practical purposes, vis-à-vis the tortfeasor, is indistinguishable from that of the owner of the damaged property, to recover what the actual owner could have recovered".
>
> (emphasis in original)

[105] It is significant to note that in this matter, unlike *Norsk*, the Plaintiff is not seeking damages for transferred loss of use of contracted for rights. And, unlike *Norsk*, here the true owner, the Crown, has not collected from the Defendant for the property damage sustained. Rather, under s 91 of the *Canada Marine Act* and the Agreements, the Crown transferred the risk and cost of repairs to the Plaintiff and all claims are to be brought by (and against) the Plaintiff. The transferred

loss claimed in this case *is* with respect to the property damage claim, which the Crown would have recovered had the loss not fallen to the Plaintiff because of the contracts, the Agreements. Here the circumstances appear to fit within those described by Justice La Forest as a "true transferred loss case".

[106] However, the Plaintiff has not directly made this claim. In the result, while it is arguable that the Plaintiff's damages for repair costs constitute transferred losses (see Bruce Feldthusen, *Economic Negligence*, 6th ed (Toronto: Thomson Reuters Canada Ltd, 2012) at p 261–7 ("Feldthusen 6th ed")) and, therefore, are not unrecoverable contractual relational losses, I have not made a determination on that basis. That said, in my view, the conceptual basis underlying both transferred loss, and the possessory interest exception, which is discussed below, are similar. In this matter, the issue can be resolved by determining if the Plaintiff's repair cost damages fall within the possessory interest exception to the general presumption against recovery of relational economic loss.

[107] As indicated above, the Supreme Court of Canada confirmed in *Bow Valley* that relational economic loss claims are generally unrecoverable, subject to certain recognized exceptions. These are, cases where the plaintiff has a possessory or proprietary interest in the damaged property; general average cases; and, cases where the plaintiff is in a joint venture with the property owner. The claim of HOOL and BVI in *Bow Valley* did not fall within any of those exceptions. However, because the categories of recoverable contractual relational economic loss in tort are not closed, Justice McLachlin went on to consider whether the situation was one in which the right to recover contractual relational economic loss should, nevertheless be recognized (at para 50 citing *Norsk* at p 1134).

[108] In that regard, she also indicated that exceptional new categories might be created, based on the same approach used for determining whether a tort action lies for relational economic loss, the *Anns* test (at para 56). While Justice McLachlin accepted that new categories of recoverable contractual relational economic loss may be recognized where justified by policy considerations and required by justice, she also stated that the courts should not assiduously seek new categories (at para 50).

[109] While the circumstances before the Court in this case are novel and may warrant consideration as a new exception, the Plaintiff does not argue that the Court should create a new category. Rather, it argues that its claim falls within the possessory or proprietary interest exception.

[110] The jurisprudence of the Supreme Court of Canada does not describe what constitutes the parameters of a possessory or propriety interest sufficient to ground recovery for relational economic loss, or set out a test to be applied in that regard. However, whether the Plaintiff has a possessory or proprietary interest in Bridge 19 is a question of its contractual relationship with the Crown, or of contractual interpretation (see *Leo Ocean* at para 34). In this case, that relationship is also informed by the relevant provisions of the *Canada Marine Act.*

[111] The jurisprudence to date suggests that the minimum possessory or proprietary interest necessary to ground recovery for contractual relational economic loss falls somewhere beyond the interests of a licensee or a time charter and will likely include those of a leaseholder or a demise charterer.

[112] For example, a lease, unlike a license, confers a possessory interest in property (Anne Warren La Forest, Anger and Honsberger Law of Real Property, 3 ed (Toronto: Thompson Reuters, 2018) at s 7:10). And, this Court has determined that a mere license was not a sufficient propriety or possessory interest to ground recovery for pure economic loss (*Gypsum Carrier Inc. v Canada*, [1978] 1 FC 147 *("Gypsum")*). In *Gypsum*, the Crown was the owner of a bridge damaged when a ship collided with it. Railway companies that had a contractual right of use of the bridge, and that claimed expenses incurred while re-routing their trains during the time the damaged bridge was closed, were held not to have a possessory interest in the damaged property. Based on the terms of the agreements between the Crown and the railway companies, this Court held that, at best, they might have some kind of licence in respect of land (the bridge and approaches).

[113] Further, as discussed above, in *Norsk*, Justice La Forest indicated that a demise charterer can have a sufficient possessory interest to ground recovery for relational economic loss. There, CN argued that it had alternative interests at stake that differentiated it from the ordinary contractual claimant. In that regard, Justice La Forest stated that CN did not seek to place itself under a long-standing exception to the exclusionary rule enunciated in *Simpson & Co. v Thomson* (1877), 3 App Cas 279 (HL) at p 290, which involves cases allowing recovery to a plaintiff with a possessory or proprietary interest. If CN could have argued that its interest in the bridge was analogous to the interest of a demise charterer in the chartered ship, then it would have been able to recover since it would be, vis-à-vis third parties, the temporary owner of the bridge (referencing *Scrutton on Charterparties and Bills of Lading* (19th ed. 1984), at pp 47–52; *Baumwoll Manufactur von Carl Scheibler v Furness*, [1893] AC 8 (HL); *The "Father Thames"*, [1979] 2 Lloyd's Rep 364). This was because a demise charterer's interest typically entirely supplants the interest of the owner

of the ship, even in the repair of physical damage (referencing *Candlewood Navigation Corp. v Mitsui O.S.K. Lines Ltd. (The Mineral Transporter)*, [1986] AC 1 at p 18).

[114] And while the Defendants assert that, in light of *Bow Valley*, *Norsk* is no longer good law, I note that although in *Norsk* Justice La Forest and Justice McLaughlin differed in result (what constituted a joint venture) and methodology (starting from a general exclusionary rule as opposed to a two-step test), this difference in approach was subsequently reconciled in *Bow Valley*. In *Bow Valley*, Justice McLaughlin noted that she and Justice La Forest had in fact agreed on several important propositions, including the identification of the three current categories of contractual relational economic loss that constitute exceptions to the presumption against recovery, including the possessory or proprietary exception, which is of concern in this matter (*Bow Valley* at para 48). I also note that the Supreme Court's subsequent decision in *Design Services* referenced *Caltex* and *Norsk* in the context of discussing the requirement for injury or damage to property to a third party as a requirement of the existing categories of relational economic loss. And, in any event, as noted above, *Norsk* is distinguishable. There the owner of the damaged bridge, PWC, recovered the bridge repair costs directly from the tortfeasor. No claim was made by CN, the bridge user, in that regard. And, in its loss of use claim, CN held only the interest of a licencee. Thus, as to the Defendants' argument that *Norsk* would be decided differently today given Justice McLaughlin's subsequent acceptance of Justice La Forest's approach in *Norsk*, this argument is speculative. However, even if the suggestion is entertained, the change of approach would primarily be relevant to whether or not CN was in a joint venture. Here the Plaintiff is not asserting a joint venture, nor a loss of use claim. It is asserting a possessory interest on the basis of its management and operational obligations arising from the *Canada Marine Act* and the Agreements and its claim must be analysed as such.

[115] In this regard, as noted in Feldthusen 6th ed, the possessory interest exception is primarily illustrated by ship chartering cases involving demise charters, in which the Plaintiff has a possessory interest in the ship, as opposed to time charters, in which the plaintiff does not. To describe the distinction between these types of charters, Feldthusen 6th ed (at p 255) quotes from Gilmore and Charles Black, *The Law of Admiralty*, 2nd ed (Mineola, New York: Foundation Press, 1975) at p 194:

> The Time Charter. In this form…the owner's people continue to navigate and manage the vessel, but her carrying capacity is taken by the charterer for a fixed time for the carriage of goods anywhere in the world (or anywhere within stipulated geographic limits) on as many voyages as approximately fit into the charter period. She is therefore under the charterer's orders as to ports touched, cargo loaded, and other business matters…The Demise or Bareboat Charter. In this form, the charterer takes over the ship, lock, stock and barrel, and mans her with his own people. He becomes, in effect, the owner pro hac vice, just as does the lessee of a house and lot, to whom the demise charterer is analogous.
>
> (Russell Brown, Pure Economic Loss (Markham, Ont: LexisNexis Canada Inc., 2011) at p 93, partly quoting from A. Knauth, ed, Benedict on Admiralty, 7th ed (New York: Matthew Bender & Co, 1973) at s 52).

[116] Feldthusen notes that in determining whether a charterer may sue a tortfeasor who damages the ship, for loss of profits, Canadian and English Courts will look to the nature of the chartering agreement itself to see whether the charterer has a sufficient possessory interest upon which to base its claim. It is clear that while a charterer by demise can recover, a time charterer cannot. Again, this speaks to the nature of the relationship between the owner and the charterer.

[117] Here the Plaintiff's role under the Agreements is to manage and operate the Seaway and to maintain, replace and repair the Managed Assets and Other Assets and Properties as agreed (the

Seaway Undertaking as defined in s 1.1 of the Management, Operation and Maintenance Agreement and s 3.1); to manage, operate, maintain, repair, acquire and replace the Managed Assets and the Other Assets and Properties in a commercially prudent manner (Management, Operation and Maintenance Agreement s 3.2); and, to perform all of the responsibilities set out in the Agreements. To meet these obligations, the Plaintiff has possession of the assets covered by the Agreements, including Bridge 19. It has the power to fix fees for users of the Seaway, taking into account its obligations under the Agreements and the aim of providing revenue sufficient to cover the costs of the management, maintenance and operation of the property (*Canada Marine Act* s 92(1); Management, Operation and Maintenance Agreement s 6.1). It is required to retain and hire personnel necessary to perform its obligations under the Agreements (Management, Operation and Maintenance Agreement s 3.6). It can also contract out to third parties as necessary for that purpose (Management, Operation and Maintenance Agreement s 3.7). The Plaintiff is also under an obligation to act as a prudent owner would with respect to the assets. In short, its obligation is to be fully and solely responsible for the operation and management of the assets, which necessitates that it have a possessory interest therein.

[118] By virtue of section 80(5) of the *Canada Marine Act* and the Agreements, the Crown, in effect, has relinquished possession of the Seaway assets, including the Managed Assets, and conferred it upon the Plaintiff. In other words, the Plaintiff has stepped into the shoes of the Crown in all relevant respects, short of outright ownership. And, significantly, the Plaintiff is not seeking recovery of a loss of use claim. Rather, it seeks the costs of repairing the Bridge. Accordingly, in my view given the nature, or effect, of the contractual relationship between the Crown and the Plaintiff, the Plaintiff's claim for recovery of the costs it incurred in repairing

damage to Bridge 19, caused by the Defendants' negligence, is analogous to claims made by demise charterers and falls within the possessory interest exception.

[119] The Defendant points to ss 80(1) and (2) of the *Canada Marine Act* and Article 2 of the Managed Asset Agreement as demonstrating that the Crown did not intend to grant the Plaintiff a proprietary or possessory right. In my view, these provisions do not support this position. Subsections 80(1) and (2) of the Act concern the transfer of property and undertakings of the Authority. Subsection 80(1) states that the Minister may direct the Authority to transfer all or any part of its property or undertakings to the Minister or to other persons as described. Subsection 80(2) states that if such property or undertakings have been transferred from the Authority to the Minister, the Minister may transfer them as set out therein. Neither provision suggests that the parties to the agreement did not intend for the Plaintiff to have a possessory right over such property or undertakings or the Managed Assets.

[120] That said, it is true that some provisions of the Agreements also contemplate "Government Retained Assets", as defined, being managed and repaired at the Crown's expense in accordance with authorizations and directions provided by the Crown to the Plaintiff (Managed Assets Agreements 9.02.04). The Agreements also contemplate that the Crown retains certain residual rights, such as responding to Catastrophic Events. Viewed in whole, however, I am satisfied that the *Canada Marine Act* and the Agreements give the Plaintiff exclusive possession of and a possessory interest in Bridge 19, a Managed Asset, for the purpose of managing and operating the Seaway. Accordingly, as I have found above, the Plaintiff's claim for its damages incurred in paying for the repair of Bridge 19 falls within the possession or propriety interest exception and are recoverable relational economic losses.

[121] Given this conclusion, it is not necessary for me to also consider policy concerns. That said, and as noted in Osborne (p 206), since few plaintiffs will have a possessory or proprietary interest, the indeterminacy concerns created by contractual relational economic loss are allayed. In my view, the traditional policy rationales for denying these types of claims are less compelling in these circumstances. Unlike typical cases of economic loss, in this matter, allowing the Plaintiff to sue based upon its possessory interest in the Bridge does not pose a risk of indeterminate liability, or over deterrence. Here only the Plaintiff has the statutory authority and related contractual right to manage the Seaway and, in that capacity and for that purpose, has possession of the Managed Assets. Within that framework, only the Plaintiff is responsible for assuming the cost of their repair. In fact, if the action were not permitted, the opposite concern would arise with respect to deterrence. That is because the Plaintiff, by statute as implemented by the Agreements, has the exclusive authority to bring these proceedings with respect to these losses. If the Plaintiff were not permitted to bring this action seeking to recover its actual repair costs, then there would be no deterrence factor. In effect, all users of the Seaway who negligently damage Seaway assets would be free of any liability for their actions. Further, and unlike *Bow Valley*, here the Plaintiff is claiming for losses arising from physical damage to the Bridge, not loss of use, and it is the only party that may do so. No ripple effect exists. And, finally, the Crown and the Plaintiff chose to contractually allocate the risk to the Plaintiff. To the extent that this factor does not fully favor the Plaintiff, in my view, in these circumstances, it is outweighed by the other two factors.

Should the Defendants' Motion be dismissed by virtue of the Plaintiff's failure to serve notices of constitutional question?

[122] The Plaintiff argues that the Defendants implicitly attack the validity, applicability, or operability of s 91 of the *Canada Marine Act*, without having served Notices on the Federal and Provincial Attorneys General. According to the Plaintiff, if this Court accepts that the Plaintiff's losses are unrecoverable relational economic losses, this would necessarily imply that s 91 is invalid, inapplicable, and/or inoperative, because no proceedings could ever validly be commenced on the basis thereof. Arguments that even implicitly call into question the validity of statutory provisions must be preceded by a s 57 notice. Given that the Defendants have not served s 57 notices in this case, their motion for summary judgment must be dismissed (*Husband v Canadian Wheat Board*, 2006 FC 1390).

[123] As I have found that the Plaintiff's claim for the cost of repairing Bridge 19 is recoverable relational economic loss, I need not address this issue. However, in my view, the argument is without merit. The Defendant is not arguing, even implicitly, that s 91 of the *Canada Marine Act* is constitutionally invalid, inapplicable, or inoperable. On the Defendants' theory, the Plaintiff could commence proceedings under s 91, but only when the Crown's interests are engaged. As such, their argument does not imply that s 91 is invalid. Rather, the Defendants are simply offering an interpretation of s 91, which this Court has not accepted.

Conclusion

[124] In conclusion, I agree with the parties that this matter lends itself to disposition by summary judgment. The issue in this case is whether the Plaintiff is precluded at law from recovering the cost of the repairs to Bridge 19, which, pursuant to the *Canada Marine Act* and the Agreements, it was obliged to undertake at its own expense, on the basis that these losses are

relational economic loss. For the reasons above, I have concluded that the Plaintiff, which has exclusive responsibility for the operation and management of the Seaway, is entitled to recover its losses as its situation falls within the possessory and proprietary exception to the general exclusionary rule barring recovery for contractual relational economic loss.

[125] It is true that the Plaintiff did not bring its own motion in this matter seeking summary judgment. However, the genuine issue identified by the Defendants was accepted as such by both parties. Accordingly, this is not a circumstance in which the Plaintiff asserts a genuine issue different that than that captured by the Defendants' Motion, which would have required the Plaintiff to bring its own motion (*Canada (Citizenship and Immigration) v Omelebele*, 2015 FC 305 at paras 5, 11).

JUDGMENT

THIS COURT ORDERS THAT:

1. The Defendants' motion seeking summary judgment is allowed but is granted in favour of the Plaintiff;

2. As to the Defendants' alternate defence that the Bridge 19 repair costs are excessive and exaggerated, pursuant to Rules 215(2)(a) and Rule 153 the issue of the quantification of the repair cost shall be referred to determine the amount if the parties are unable to resolve the quantification as between themselves;

3. The Plaintiff shall have its costs in this motion; and

4. The recording of the hearing of this proceeding shall, in accordance with the Confidentiality Order dated April 30, 2018, be treated as confidential. No copy of the recording shall be released by the Registry unless previously authorized by my specific written direction.

"Cecily Y. Strickland"
Judge

APPENDIX A

i) Framework Agreement

The preamble to the Framework Agreement states as follows:

WHEREAS Her Majesty desires to implement Part 3 of the Canada Marine Act (Canada), S.C. 1998, c. 10, which in part, entails the transfer of the management, operation and maintenance of the Seaway to a not-for-profit corporation that accords a major role to Seaway users, in order to commercialize the management, operation and maintenance of the Seaway with users' participation;

AND WHEREAS the parties have identified the major principles upon which such transfer would be made and recognized that further negotiations and discussions would be required before any agreement to transfer management, operation and maintenance of the seaways to the Corporation could be entered into;

AND WHEREAS the parties have concluded such negotiations and discussions;

AND WHEREAS Her Majesty desires to transfer the management, operation and maintenance of the Seaway to the Corporation;

AND WHEREAS the Corporation wishes to assume, as an independent contractor, the management, operation and maintenance of the Seaway;

***

Section 3.01 Management, Operation and Maintenance of Seaway

Section 3.01.01 The parties hereto agree that Her Majesty shall cease to manage, operate and maintain the Seaway through the SLSA at 11:59 p.m. on the Closing Date and that the Corporation shall, as of 12:00 a.m. on the Transfer Date, alone (through its employees and agents) and not in partnership with any other Person, continuously manage, operate and maintain the Seaway thereafter, as an independent contractor, subject to and in accordance with the Management, Operation and Maintenance Agreement and the other Instruments and any other agreement which the parties hereto may enter into after the execution and delivery of this Agreement.

ii) The Managed Asset Agreement

ARTICLE 1 – DEFINITIONS AND INTERPRETATION

Section 1.01 Definitions

(ak) **"Government Retained Assets"** means, collectively, the Government Retained Lands, the Existing Government Retained Assets, the New Government Retained Assets and any other building, structure or facility now or hereafter located on Government Retained Lands, all fixed equipment, fixed machinery, fixed apparatus, fixtures and Government Retained Asset Improvements forming part hereof;

(ay) **"Managed Assets"** means, collectively, the Managed Lands, the Existing Managed Assets, the New Managed Assets and any other building, structure or facility now or hereafter located on the Managed Lands, all fixed equipment, fixed machinery, fixed apparatus, fixtures and Managed Asset Improvements forming part thereof;

(bw) **"Seaway Undertaking"** means that undertaking formerly carried on by SLSA consisting of managing and operating the Seaway and maintaining, replacing and repairing the Managed Assets and Other Assets and Properties which the Corporation has agreed in writing with Her Majesty to perform or carry on;

(bx) **"Seaway Undertaking Responsibilities"** means those responsibilities formerly performed by SLA consisting of carrying on the Seaway Undertaking in accordance with Applicable Law;

ARTICLE 2 - TRANSFER, MANAGEMENT, OPERATIONS AND MAINTENANCE

Section 2.01 Transfer

2.01.01 SLSA hereby acknowledges and agrees that the Minister has directed SLSA to transfer all of SLSA's interest in the Existing Assets to Her Majesty and SLSA hereby transfers all of its interest in the Existing Assets to Her Majesty pursuant to Subsection 80(1) of the Act.

2.01.03 Her Majesty and the Corporation hereby acknowledge and agree that this Agreement and the other Instruments constitute agreements entered into pursuant to Subsection 80(5) of the Act and shall be interpreted having regard to the objectives set out in Section 78 of the Act as it exists on the date hereof.

2.01.04 Her Majesty and the Corporation hereby acknowledge and agree that all civil, criminal and administrative actions and proceedings with respect to the Assets shall be taken by or against the Corporation and not Her Majesty pursuant to Subsection 91(2) of the Act.

Section 2.02 Managed Assets

2.02.01 The Corporation acknowledges and agrees that:

(a) the Corporation shall, at its own cost and expense, manage, operate, maintain, repair, acquire and replace the Managed Assets as would a prudent owner thereof subject to and in accordance with this Agreement and the other Instruments;

(b) the Corporation shall manage, operate, maintain, repair, acquire and replace the Managed Assets in a competent, honest and commercially prudent manner and in accordance with Applicable law.

2.02.02 The Corporation acknowledges and agrees that, except for any obligation which Her Majesty has pursuant to this Agreement or any of the other Instruments, the Corporation shall pay when due all Costs, charges, expenses and outlays of every nature whatsoever and whether extraordinary or ordinary, and whether foreseen or unforeseen, relating to the Managed Assets.

2.02.02 Except for any obligation which Her Majesty has pursuant to this Agreement or any of the other Instruments, the Corporation hereby assumes and agrees to discharge or cause to be discharged any obligation of Her Majesty as owner of the Managed Assets or any part thereof including any obligation arising out of, resulting from or pursuant to Applicable Law and the Corporation covenants with Her Majesty to observe and perform any such obligations of Her Majesty during the entire Term.

ARTICLE 3 – USE AND OPERATION

Section 3.01 Use of Assets

3.01.01 The Corporation shall use the Managed Assets in the carrying on of the Seaway Undertaking.

ARTICLE 9 – MAINTENANCE AND REPAIR

Section 9.01 Obligation to Maintain and Repair

9.01.01 Subject to this agreement and the other Instruments, the Corporation hereby assumes, at its own cost and expense, the full and sole responsibility for the repair, replacement and maintenance of the Managed Assets during the Term.

Section 9.02 Maintenance and Repairs

9.02.01 Subject to Subsection 9.02.02 and to the other Instruments, the Corporation shall, at its own expense, continuously put and keep or cause to be put and kept the Managed Assets in a Fully Operational state during the Term, (the "Maintenance and Repair Obligation") and shall make or cause to be made all necessary maintenance and repair, ordinary and extra ordinary, foreseen and unforeseen, structural or non-structural in order to keep the Managed Assets Fully Operational as would a prudent owner.

ARTICLE 12 – DAMAGE OR DESTRUCTION

Section 12.01 Corporation Obliged to Reconstruct

12.01.01 Subject to this Agreement and the other Instruments, in the event any Assets are wholly or partially (in any material respect) damaged or destroyed, the Corporation shall give Her Majesty prompt notice thereof.

12.01.02 In the event that any Managed Assets are wholly or partially (in any material respect) damaged or destroyed, subject to the other Instruments the Corporation shall, unless the Corporation and Her Majesty agree otherwise, promptly, continuously and diligently, at its own expense, repair, replace, restore or reconstruct any such Managed Assets to a standard and quality required by this Agreement. All such repairs, replacements, restorations and reconstruction shall be substantially in accordance with Applicable Laws and with all applicable building and construction standards in accordance with Article 9.

iii) Management, Operation and Maintenance Agreement

SECTION 1 – INTERPRETATION

(20) ***Catastrophic Expenses*** mean costs and expenses, other than non-cash costs and expenses such as amortization and depreciation, actually incurred or projected to be incurred by Her Majesty or the Corporation, as the case may be, during any relevant period in connection with the repair of damage or destruction caused by a Catastrophic Event.

(21) ***Catastrophic Event*** means a sudden, unanticipated event, series of events, occurrence or condition which causes or is likely in the near future to cause damage to or destruction of any Managed Asset that likely will require expenditure of more than $2.5 million to address and which:

(a) has interrupted or is likely in the near future to interrupt the safe operation of the Seaway (or any part thereof), any such Managed Asset; or

(b) has or is likely in the near future to affect adversely the Corporation's ability to safely conduct the Seaway Undertaking or safely perform the Seaway Undertaking Responsibilities.

(22) ***Claims*** mean any claim, action, suit, proceeding, demand or assessment.

(68) ***Other Assets and Property*** means the assets and properties which are owned, operated or managed by the Corporation from time to time including Transferred Assets, but excluding Managed Assets and Government Retained Assets.

SECTION 3 – RESPONSIBILITIES OF CORPORATION

3.1 Corporation to Carry on the Seaway Undertaking

The Corporation shall continue to carry on the Seaway Undertaking and to perform the Seaway Undertaking Responsibilities in succession to the SLSA during the Term on the terms and conditions of the Agreement and other Instruments and in accordance with Applicable Law.

3.2 Corporation to Act in a Commercially Prudent Manner

The Corporation shall carry on the Seaway Undertaking and perform the Seaway Undertaking Responsibilities and manage, operate, repair, acquire and replace the Managed Assets and Other

Assets and Properties in a competent, honest and commercially prudent manner and in accordance with Applicable Law.

3.4 Corporation's Obligations

Without limiting the generality of Section 3.1 and 3.2, the Corporation shall perform, or cause to be performed, the following obligations in accordance with Applicable Law:

(1) manage, operate, maintain, repair, acquire and replace the Managed Assets and the Other Assets and Properties in accordance with the Managed Asset Agreement and this Agreement;

(2) provide information to supervisory or regulatory authorities (through their representatives) having jurisdiction over the Corporation or the Seaway as may be required by Applicable Law;

(3) immediately notify Her Majesty of any Claim, demand, right or cause of action asserted, threatened or instituted by or against the Corporation or Her Majesty which involves the Seaway Undertaking, the Managed Assets, the other Assets and Properties, the Government Retained Assets or the performance by the Corporation or Her Majesty of its obligations under the Agreement or any other Instrument;

(4) generally do and cause to be done all such acts, matters and things required pursuant to the terms of this Agreement and the other Instruments to carry on the Seaway Undertaking and perform the Seaway Undertaking Responsibilities and manage, operate, maintain, repair, acquire and replace the Managed Assets and the Other Assets and Properties in a competent, honest and commercially prudent manner;

3.5 Corporation's Expenses.

All costs and expenses incurred by or on behalf of the Corporation in connection with performance by the Corporation of its obligations under this Agreement shall be for the Corporation's own account, and Her majesty shall have no responsibility for such costs and expenses except as contemplated under this Agreement or any other Instrument.

3.6 Personnel.

The Corporation shall retain or hire, or cause to be retained or hired, either as employees of the Corporation or as independent

contractors to the Corporation, such personnel, including such employees, contractors and consultants as may be required for the Corporation to perform or cause to be performed its obligations under this Agreement and the other Instruments, including any additional services arising pursuant to Section 3.8, and the Corporation shall be responsible for directing and supervising them in their duties.

3.7 Contracting Out.

The Corporation may retain such third party contractors and services providers as may be required for the Corporation to perform or cause to be performed its obligations under this Agreement and the other Instruments. Subject to the terms and conditions of the Managed Asset Agreement, the Corporation may lease any of the Managed Assets or grant licenses in respect thereto to any Person.

SECTION 14 – CATASTROPIC EVENTS

14.1 Notice and Estimating Extent of Catastrophe

(1) The Corporation shall give Her Majesty notice of the occurrence of a Catastrophic Event promptly after the occurrence of such event.

(2) Forthwith after giving the notice referred to in Section 14.1(1), the Corporation and Her Majesty shall determine the extent of the damage or destruction caused by the Catastrophic Event and, acting reasonably, shall estimate the Catastrophic Expenses to be incurred to repair such damage or destruction.

14.2 Government's Responsibility. Her Majesty shall be solely responsible to, and shall, take such action to address a Catastrophic Event as Her majesty in its sole discretion deems appropriate having regard to Section 78 of the Act as it exists on the date hereof, and Her Majesty shall be solely responsible for the payment of all Catastrophic Expense. Her Majesty may in its sole discretion direct the Corporation to repair or cause to be repaired any damage or destruction caused by a Catastrophic Event, or take any other action in respect thereto, and to incur Catastrophic Expenses. Subject to the Treasury Board approving the making of any such payment, Her Majesty shall reimburse the Corporation for any Catastrophic Expense which it incurs at the direction of Her Majesty.

14.3 Actions Without Government Consent. Notwithstanding anything to the contrary in Section 14.2, the Corporation may without the prior consent or direction of Her Majesty take any action in response to a Catastrophic Event, and incur Catastrophic

Expenses, if the Corporation determines, acting reasonably, that such action or the incurring of such expense must be taken or incurred immediately or otherwise prior to the time required to obtain Her Majesty's prior consent in order to contain or mitigate the damage or destruction caused or likely to be caused by the Catastrophic Event, provided however that the Minister of Transport may at any time in writing direct the Corporation to not take any action or incur any Catastrophic Expense pursuant to this Section 14.3, and following receipt of such notice the Corporation shall not take any such action or incur any such Catastrophic Expenses

14.4 Treasury Board Approval

14.4(3) Her Majesty shall be solely responsible for, and shall fully indemnify and hold harmless the Corporation from and against:

a. all costs and expenses incurred by the Corporation pursuant to Section 14.3; and

b. any Claim made against, or any Loss suffered or incurred by, the Corporation by reason of:

(i) Her Majesty failing to take any action in response to or in respect of a Catastrophic Event

(ii) the Corporation not taking any action or incurring any Catastrophic Expenses following receipt of a notice given by the Minister of Transport under Section 14.3; and

(iii) the Treasury Board failing to give its approval under Section 14.4.

14.5 Corporation's Responsibility. The Corporation shall have no responsibility to repair or cause to be repaired any damage or destruction caused by a Catastrophic Event, to take any other action in connection with a Catastrophic Event or to incur any Catastrophic Expense unless Her Majesty has directed the Corporation to take such action or incur such expense and the Treasury Bard has approved reimbursement of the Corporation for any Catastrophic Expenses which it incurs. The Corporation shall:

(1) cooperate with Her Majesty and its agent and contractors in connection with the repair of any damage or destruction caused by a Catastrophic Event; and

(2) pay to Her Majesty any Property Insurance Proceeds or other payment received by the Corporation from third parties relating to a

Catastrophic Event to the extent that Her Majesty incurs or pays the Corporation for Catastrophic Expenses relating to such Catastrophic Event.

SECTION 18 – INSURANCE

18.2 **Corporation's Obligation to Insure**. Effective on the Commencement Date, the Corporation shall have obtained, at its own expense, such property and liability insurance with respect to the Seaway Undertaking, the Managed Assets and the Other Assets and Properties, with such deductibles, in such amounts, against such risks and with such terms and conditions, as Her Majesty has deemed satisfactory pursuant to the Framework Agreement, acting reasonably. The Corporation shall maintain or case to be maintained such insurance coverage during the Term, and not change the amount or extent of such insurance coverage without prior consent of the Minister of Transport. Her Majesty and the Corporation shall be named as insured on each such policy of insurance as their respective interests may appear.

18.3 Use of Property Insurance Proceeds. The Corporation shall be entitled to, and, if received, Her Majesty shall pay to the Corporation, all Property Insurance Proceeds or payments from third parties for damages in respect of any Manage Assets to pay for the repair of such damages or the replacement of the Managed Assets, except to the extent that Her Majesty is obliged under this Agreement or any Instrument to pay for the damage or destruction in respect of which Property Insurance Proceeds are received, in which case Her Majesty shall be entitled to all such Property Insurance Proceeds.

SECTION 19 - INDEMNITY

19.1 Indemnity by the Corporation. Subject to the exclusions set forth in Section 19.2, the Corporation shall indemnify, protect, and defend and hold harmless Her Majesty from and against any and all Losses incurred or suffered by Her majesty arising out of or in connection with any and all Claims of any Person (other than Environmental Claims or Aboriginal Claims) resulting from, relating to or arising out of:

(1) the carrying on of the Seaway Undertaking during the Term;

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1621-16
STYLE OF CAUSE:	THE ST. LAWRENCE SEAWAY MANAGEMENT CORPORATION v THE VESSEL "BBC LENA", FORMERLY "LENA J", -AND-, THE OWNERS AND ALL OTHERS INTERESTED IN THE VESSEL "BBC LENA" FORMERLY "LENA J", -AND-, SCHIFFFAHRTS UG (HAFTUNGSBESCHRANKT) & CO. KG MS "LENA J"
PLACE OF HEARING:	MONTRÉAL, QUÉBEC
DATE OF HEARING:	JULY 16, 2018
JUDGMENT AND REASONS:	STRICKLAND J.
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APPEARANCES:

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