Federal Court  Cour fédérale

Date: 20190531

Docket: T-1384-15

Citation: 2019 FC 768

Ottawa, Ontario, May 31, 2019

PRESENT: Madam Justice McVeigh

ADMIRALTY ACTION *IN REM* AND *IN PERSONAM*

BETWEEN:

ROBIN BEASSE

Plaintiff

And

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

JUDGMENT AND REASONS

I. Introduction

[1] The Plaintiff, Robin Beasse, has brought a Motion for summary trial against the Defendant, the Canadian Coast Guard ("CCG"), for the loss of his wooden tugboat built in 1902 called the *Elf*. On January 14, 2014, the *Elf* sunk in the Squamish harbour, British Columbia (the

"First Sinking"). The CCG raised the *Elf* and determined that, to protect the environmentally sensitive area, it had to be towed to a salvage yard for further inspection. The CCG hired a tow to take the *Elf* to a shipyard. The *Elf* sank again in deep water (the "Second Sinking") on January 17, 2014 near Point Atkinson, British Columbia.

[2] The *Elf* was not registered as a commercial vessel or licensed as a pleasure craft, nor was it insured.

[3] The issue of the First Sinking was squarely dealt with by Justice Manson in *Canada (Ship-source Oil Pollution Fund) v Beasse,* 2018 FC 39 ("*Beasse 1*").

[4] Justice Manson held that Mr. Beasse, who was the defendant in *Beasse 1,* was at fault and granted the motion for summary judgment, with costs to the plaintiff. Justice Manson further specified at paragraph 43 as follows:

> The Tug was unseaworthy and sunk – the Defendant has failed to show in the evidence on a balance of probabilities any defence based on paragraph 77(3)(b) of the *[*Marine Liability Act] relating to third-party responsibility for the First Sinking. The obligation on the Defendant to put its best foot forward has not been met. The Defendant as owner of the Tug is liable for the pollution clean-up.

[5] The parties confirmed at the hearing that this Motion is in relation to the Second Sinking.

II. Issues

[6] The two issues for determination are:

A. Is summary trial appropriate in this case?

B. Is the Defendant liable for the Second Sinking of the *Elf*?

III. Legislative Authority (Appendix A)

[7] The relevant provisions are exerted below in Appendix A.

IV. Analysis

[8] The style of cause will be amended to have "Her Majesty the Queen in Right of Canada" as the appropriate Defendant.

The Evidence

[9] The Plaintiff's affidavit evidence is as follows:

a. Robin Beasse, dated September 9, 2018, — cross-examined on July 15, 2016; May 15, 2017; January 7. 2019;

b. Dean Holonko, dated November 4, 2017 — cross-examined on November 29, 2017.

[10] The Defendant's affidavit evidence is as follows:

a. Jeffrey Brady, Canadian Coast Guard Environmental Response Agency, dated October 31, 2017 and December 9, 2018;

b. Philip Murdock, Superintendent of the Environmental Response Branch of the Canadian Coast Guard Western Region, dated December 10, 2018;

c. Chris Jenkins, Pilot Water Taxi for Squamish Marine Services Ltd., dated December 6, 2018;

d. Steven Roon, Valley Towing Skipper, dated December 6, 2018;

e. Elizabeth Silva, Legal Assistant of the Department of Justice Vancouver, dated December 10, 2018.

[11] Below is a recitation of the facts as determined by the filed evidence. It is noted that the material facts in the record are not a matter of dispute between the parties.

[12] The *Elf* was a wooden tugboat that was built in 1902 and registered in the United States ("US") but never registered in Canada.

[13] On October 15, 2012, the Plaintiff's wife purchased the *Elf* from its US owners, the Van Diests. Although purchased by Mrs. Beasse, the Plaintiff was the one who located and inspected the vessel, and then negotiated its purchase with his wife. A bill of sale was made between the Van Diests and Mrs. Beasse for an amount of $16,500 USD.

[14] Neither Mrs. Beasse nor the Plaintiff had ever owned a wooden hulled vessel before, although in the past they had owned boats that were made of aluminium or fibreglass.

[15] On December 1, 2013, Mrs. Beasse transferred the *Elf* to her husband for $100. The Plaintiff did not register the *Elf* as a commercial vessel or license it as a pleasure craft, nor was the *Elf* insured.

[16] After the purchase of the *Elf*, the Plaintiff brought it to Squamish harbour and moored it alongside a barge known as the King Arthur located in the Mamquam Blind Channel. The barge was owned by an individual named Steen Larsen.

[17] Mr. Larsen was allowed to freely use the *Elf* as he saw fit and, in exchange, the evidence was that he would look after it. Mr. Larsen had no proprietary ownership or stake in the *Elf* but, as described below, he identified himself to the CCG as its owner on multiple occasions.

[18] The Plaintiff considered the *Elf* to be in proper seaworthy condition before the First Sinking that occurred on January 14, 2014.

[19] As per Justice Manson's holding in *Beasse 1*, the Plaintiff became aware of the sinking that same morning. He had not been on board the *Elf* for between seven to fourteen days prior to the First Sinking. The CCG was notified of the First Sinking early that morning and responded to deal with the oil pollution that was upwelling from the *Elf*.

[20] Jeffrey Brady, the Acting Senior Pollution Response Officer at the relevant time and whose affidavit evidence is critical in this Motion, arrived at the incident site in Squamish harbour at approximately 12:30 pm. Mr. Larsen misrepresented himself to Mr. Brady as the

owner of the *Elf*. Mr. Larsen further stated that he did not have insurance; that he was not going to deal with the upwelling oil; and that he would not hire the available contractor to clean up the pollution.

[21] When a pollution incident occurs and the polluter is unwilling, unable, or unknown to take measures to remedy, minimize, or prevent pollution damage from a vessel, the CCG Environmental Response Agency by statute is to take necessary measures to ensure an appropriate response. In his affidavit evidence, Mr. Brady claimed to have observed that the water had a silver/rainbow sheen. He noted that he was also advised by the National Environmental Emergencies Centre ("NEEC") that Squamish harbour was an important bird and fish area that was highly sensitive to pollutants.

[22] Given these concerns, the CCG placed a boom around where the oil was upwelling from the sunken *Elf* and applied absorbent pads inside the boom.

[23] Although the Plaintiff knew on January 14, 2014 that the *Elf* had sunk, and was aware that there were two large fuel tanks in the vessel that had caused pollution, he testified that he did not respond to the pollution that day as the CCG was dealing with the oil spill and he had no experience or equipment to deal with it.

[24] Mr. Brady attempted to confirm the registered owner of the *Elf* from Transport Canada and learned that the vessel was not appropriately registered.

[25] On the evening of January 14, 2014, all the responders met to discuss the cleanup operation including establishing objectives and priorities. The next day's plan was discussed and these meetings continued every evening from January 14 to 17, with the final management meeting occurring on January 20, 2014.

[26] The CCG advised Mr. Larsen that all pollution remediation costs would be the responsibility of the owner of the *Elf*. Mr. Larsen promised on January 14 that he would have divers and air bags on site the following day. Mr. Larsen was advised that there would be meetings every evening to discuss efforts to deal with the pollution, and was asked to provide a response plan so that the CCG could assess the owner's capability to respond to the pollution incident. He attended the first meeting on January 14, 2014 but left the meeting after advising that he would not have divers or air bags available on January 15, saying he would instead have them on January 16. Regardless, he stated that he would not provide the CCG with any further details and the Plaintiff himself did not attend any more of the daily meetings either.

[27] On January 15, 2014, more absorbent materials and a skimmer were brought to the site. Professional divers from Hydra Marine Services Inc. ("Hydra") did their initial assessment below the waterline and could find no obvious reason the *Elf* sank. The divers did, however, find a major source of diesel leaking and patched the leak as best they could though oil continued to be released from the *Elf*.

[28] Also on January 15, 2014, the Plaintiff and Mr. Larsen met with Philip Murdock of the CCG, who was the Superintendent and Mr. Brady's superior, at the site of the sinking. But the

Plaintiff still did not identify himself as the owner of the *Elf*. During that conversation, Mr. Larsen again promised that he would have divers, a deployment boat, air bags, and other equipment on scene to raise the vessel on January 16, 2014. Mr. Murdock was skeptical about this given Mr. Larsen's failure to come through on his previous promise to Mr. Brady. Unbeknownst to Mr. Murdock, the Plaintiff surreptitiously recorded the conversation that took place amongst the three of them using his cellphone and presented it as evidence at trial.

[29] At or about 11:00 am on January 16, 2014, the Plaintiff arrived at the scene of the incident. At the time, CCG, Vancouver Pile Driving Ltd. ("Vancouver Pile"), a marine construction company, and Hydra divers were completing arrangements to raise the *Elf*. The dive team had lifting straps in place under the vessel and the Vancouver Pile crane was in position to raise it.

[30] The Plaintiff finally identified himself to the CCG as the owner of the *Elf* and requested that Mr. Brady and the crane operator halt the recovery operation to allow him to attempt to recover the vessel himself.

[31] Mr. Brady earlier had consulted with the Canadian Wildlife Service, Environment Canada, and the NEEC. This consultation was as a result of an earlier report of an observation of distressed birds in the Squamish harbour area. Mr. Brady retained Focus Wildlife to conduct a wildlife assessment of the Squamish harbour given the ecological sensitivity of the area. After the assessment, Focus Wildlife indicated no further wildlife response actions were needed.

[32] After all of these considerations were taken into account and all the necessary arrangements were made, the only step left was to actually lift the *Elf*. The CCG proceeded with the lift and then dewatered the *Elf*.

[33] Later, Mr. Brady found that the Plaintiff had brought air bags and other equipment to the site but no other salvage equipment or professional divers. The Plainitff in his affidavit evidence and in his cross-examination testified that his diving certification was limited to recreational diving and he had never entered a sunken vessel or inflated air bags with hoses. The Plaintiff's land-based crane was on standby at a works yard in Delta, B.C. and was not in transit.

[34] Therefore, at no time did Mr. Larsen, the Plaintiff, or anyone acting on their behalf do anything to contain, minimize, or clean up the pollution from the *Elf*. Mr. Larsen and the Plaintiff also did not provide a response plan to the CCG as to what their next steps would be.

[35] The Hydra divers could not see anything below the waterline that would explain the sinking, and when the *Elf* was lifted there was no obvious source of the ingress of water. Afterward, there were multiple efforts made to determine why the First Sinking happened. No one who inspected or examined the *Elf* could clearly determine why it sank, but three salient pieces of information are important.

[36] First – Jim Small, a marine surveyor hired by the CCG, went on board to inspect the vessel. Mr. Small recommended that the *Elf* be removed from the water in order to fully inspect it to determine its current condition, seaworthiness, and value.

[37] Second – Dean Holonko, a marine surveyor hired by the administrator for the Ship-source Oil Pollution Fund, also went on board to inspect the *Elf*. Mr. Holonko could find no evidence of water ingress and no evidence of what caused the sinking. He later testified that the probable cause of the First Sinking was likely due to a submerged wooden plank that gave way, which allowed the water into the ship. Mr. Holonko testified that the fastenings on these older ships tended to give way and deteriorate when lead to sprung planks.

[38] Third – the Plaintiff and Mr. Larsen also went on board to inspect the *Elf* for at least 45 minutes, accompanied by Mr. Small and Mr. Holonko, and were also not able to locate the cause of the First Sinking.

[39] In any event, Mr. Brady observed residual oil and water while on board the *Elf* after they had raised and dewatered it. There continued to be an upwelling of oil though at a reduced amount. The objectives remained to prevent, contain, and mitigate the pollution damage which posed a significant risk to the environmentally sensitive Squamish harbour, and as there was no plan from the owner of the *Elf*, the CCG moved forward and had the vessel surveyed so an operational plan could be designed. It was understood that the closest and most reasonable facility where the *Elf* could be hauled out of the water to allow Mr. Small to complete his survey was Shelter Island Marina on the lower Fraser River. By this point, the *Elf* was now floating on its own.

[40] The CCG made arrangements to tow the *Elf* to Shelter Island Marina in three phases. The vessel would first be towed behind the Vancouver Pile barge from the Mamquam Blind Channel

to log booms near Shannon Creek ("Phase I"). Then it would be towed in the same manner to the vicinity of Point Atkinson ("Phase II"). Squamish Marine Services Ltd. ("SMS"), a commercial tow operator, would perform Phases I and II of the tow. Finally, at Point Atkinson, the *Elf* would be handed off to a second commercial tow operator, Valley Towing Ltd. ("Valley Towing"), which would complete the tow to Shelter Island Marina ("Phase III").

[41] Mr. Brady requested that for the full duration of the tow a pump that was primed was to be placed on board the *Elf* so it would be ready to go if needed. The *Elf* was to be monitored throughout the tow as had been recommended by Mr. Small. During Phase I of the tow, Chris Jenkins operated a water taxi that followed behind the tow operation which included the *Elf*, the Vancouver Pile barge, and the SMS tugboat from the Mamquam Blind Channel to the log booms near Shannon Creek. The *Elf* was secured to the port and starboard sterns of the barge with two large couplers. SMS tasked Mr. Jenkins to provide security to ensure no one tampered with the *Elf* and to monitor it while it was with the log booms.

[42] After the *Elf* was secured to the log booms near Shannon Creek, Mr. Brady and Mr. Holonko again examined the vessel. Neither of them found any source for the ingress of water and were thus unable to clearly determine the source of the leak.

[43] When Mr. Brady left the *Elf* around 5:00 pm on January 16 at the log booms, it was still floating on her own. Mr. Jenkins remained at the log booms to continue monitoring the vessel.

[44] Phase II of the tow started at about 11:30 pm. The tow configuration and towlines were the same as in Phase I. Mr. Jenkins also monitored the *Elf* during Phase II of the tow to Point Atkinson. During this phase, the water taxi remained tied to the starboard quarter of the *Elf* until about 2:45 am on January 17, which is when some waves from a passing large deep sea vessel caused the stern line securing the water taxi with the *Elf* to pop. Thereafter, the water taxi followed closely behind or alongside the vessel. Throughout Phase II of the tow, Mr. Jenkins monitored the markers, list, and condition of the *Elf* and did not observe any changes. He did not have to start the pump during the tow. The hand-off of the *Elf* from SMS to Valley Towing occurred at approximately 4:15 am on January 17 near Point Atkinson and Passage Island. This is where things went downhill.

[45] Steven Roon was the deckhand on board the Valley Towing vessel, the Seatow, during Phase III of the tow. During the hand-off, the floodlights on the Seatow were on. Mr. Roon climbed on board the *Elf*. He looked into the engine room and observed sludge on the floor and oil and debris everywhere. He observed the pump by the engine room and confirmed that Mr. Jenkins did not need to use the pump. Mr. Roon then released the *Elf* from the Vancouver Pile barge. He secured the *Elf* to the Seatow with a polyline and attached portable lights to the port, starboard, and stern sides, and returned to the Seatow.

[46] After pulling in the polyline, Mr. Roon boarded the *Elf* and swapped the polyline for a bridle and the winch tow. After he heard his colleague on the Seatow say that it looked like the *Elf* was in trouble, Mr. Roon went immediately to the stern of the vessel and started the pump. He saw the stern deck was flooding.

[47] As Mr. Roon made his way back to the bow of the *Elf*, his colleague shouted for him to release the tow and get back on board. Mr. Roon retrieved the port and starboard portable lights but did not retrieve the stern light because it was too dangerous. The deck was slippery and he had to hang onto the sides. He released the tow and scrambled back on board the Seatow. Within minutes of Mr. Roon getting back on board the Seatow, the *Elf* sank stern first. William Kelly, the Seatow captain, took a reading of the location of the sinking and reported the co-ordinates to Vancouver Marine Communications and Traffic Services.

[48] The *Elf* officially sank at about 4:35 am on January 17, 2014 near Point Atkinson, approximately 20 minutes after the hand-off, this being the Second Sinking.

[49] The CCG did not consider trying to raise the sunken vessel as the evidence shows that the cost of salvaging the *Elf* would fall within the range of $650,000 to $2,000,000 USD.

[50] After the Second Sinking, the National Aerial Surveillance Program ("NASP") conducted an overflight of the area where the *Elf* sank to check for oil pollution. NASP observed an oil spill in the waters south of Howe Sound, near where the vessel sank. The CCG determined that the estimated quantity of oil did not require deployment of further resources.

A. *Is summary trial appropriate in this case?*

[51] Justice Manson in *Beasse 1* previously canvassed whether it was appropriate for a summary trial and concluded it was. He held at paragraph 30 that, "This Court has confirmed that the application of relevant British Columbia jurisprudence concerning Rule 18A of the

former British Columbia *Supreme Court Rules*, BC Reg 221/90, upon which Rules 213 and 216 of the *Federal Courts Rules* are based, is instructive".

[52] The parties in this Motion both agree that it is appropriate to deal with the matter as a summary trial.

[53] I conclude that the matter is indeed appropriate to decide on summary trial. There is little to no disagreement regarding the facts and credibility is substantially not at issue. The question of liability is the only discrete legal question to be decided, and the record provided is extensive.

[54] Proceeding by way of summary trial will promote affordable and timely justice (*Hryniak v Mauldin*, 2014 SCC 7 at para 5).

B. *Is the Defendant liable for the Second Sinking of the Elf?*

(1) Plaintiff's arguments

(a) *Seaworthiness*

[55] The Plaintiff submits that, when the CCG took possession of the *Elf* after the First Sinking, it subsequently became liable for the Second Sinking. The Plaintiff argues using *Wire Rope Industries of Canada (1966) Ltd v BC Marine Shipbuilders Ltd et al*, [1981] 1 SCR 363 ("*Wire Rope*"), that the Supreme Court of Canada held when a tugboat owner enters into a contract of towage there is a duty on the owner to ensure that the tugboat is seaworthy.

[56] The Plaintiff argues that the CCG, having taken possession and control of the *Elf*, was obliged to ensure that it was seaworthy before towing it.

[57] Moreover, the Plaintiff argues that, as there was no emergency situation after the *Elf* had been lifted out of the water, there is no excuse available to the CCG for not making sure it was seaworthy. The Plaintiff's position is that no evidence has been brought forward regarding why the Second Sinking occurred, and thus there is no way for the Defendant to avoid liability.

[58] The Plaintiff states that, in towing the *Elf*, the Defendant did not ensure that it was seaworthy before the towing began. By not ensuring that the vessel was seaworthy, the Defendant is to be held liable.

[59] These arguments around seaworthiness intertwine with the Plaintiff's other arguments as discussed further below.

(b) *Bailment*

[60] In advancing the argument above, the Plaintiff states that, because the Defendant was the bailee, it owed a duty to exercise reasonable care to the Plaintiff in moving the *Elf* and, in doing so, had exceeded its statutory power and breached that duty such that it was negligent.

[61] The Plaintiff does not address how he purports that the Defendant was acting as a bailee for the goods of the Plaintiff.

[62] Bailment is described in Black's Law Dictionary as "A delivery of personal property by one person (the *bailor*) to another (the *bailee*) who holds the property for a certain purpose, usu. under an express or implied-in-fact contract" (10th ed. 2014). The bailor must take temporary possession of the bailee goods on the understanding that they will be returned. An element that is typical in bailment is that the bailee is taking responsibility for the safekeeping of goods (*Seaspan International Ltd v Kostis Prois (The)*, [1974] SCR 920 at 927 ("*Seaspan*")).

[63] The CCG was acting under the statutory authority of section 180 of the *Canada Shipping Act, 2001*, SC 2001, c 26 ('*Canada Shipping Act, 2001*") to tow the vessel to Shelter Harbour for further investigation after it was taken out of the water. It is trite law that legislation supersedes the common law. I agree with the Defendant that the concept of bailment is not applicable here. Under this applicable legislation, there is no guarantee as in bailment that the chattels must be returned to the owner.

[64] Contrary to the fundamentals of bailment, section 180 of the *Canada Shipping Act, 2001* states that the Minister of Fisheries and Oceans may remove, destroy or otherwise dispose of a vessel if there are reasonable grounds to believe that the vessel has discharged, is discharging, or is likely to discharge a pollutant. The statutory authority does not create a bailment, and to construct an interpretation of bailment here would nullify the plain word meaning of the legislation.

[65] Similar arguments of bailment were made in *Seaspan*, in which the Supreme Court of Canada ultimately concluded as follows at pages 928 to 929:

> In any event, as there was no bailment, the burden of proving that the loss was caused or contributed to by the negligence of the respondents rested upon the appellants, and there was, in my view, no evidence of such negligence….. Other considerations might have applied if there had been evidence of any active negligence attributable to the respondents which caused or contributed to the loss, but, for the reasons which I have indicated, the respondents were under no duty to have the lines checked, and as the failure to do so was a purely passive factor, the appellants cannot succeed.

[66] This same reasoning should apply here. It is not for this Court to supplant the Plaintiff's arguments where they are lacking. Nevertheless, even if it can successfully be argued that the CCG acted as a bailee, it is the duty of a bailee to take such due and proper care of the goods as a prudent owner might reasonably be expected to take of his own goods in similar circumstances (see *Neff v St Catharines Marina Ltd*, [1998] 155 DLR (4th) 647 at paras 23-25). As will be discussed further below, I believe that the CCG did indeed take reasonable care at all times during the tow operation.

(c) *Loss of Evidence*

[67] To support the arguments that the Defendant was negligent, the Plaintiff argues that when the CCG was in its early stages of investigation it lost evidence that would have assisted the Plaintiff, this evidence being the sunken *Elf* itself. The Plaintiff's position is that without recovery of the *Elf*, there is no evidence that a sprung plank caused the sinking and thus the theory of the expert is unsupported. In addition, the Plaintiff argues that the Defendant, in not producing the Hydra divers that refloated the ship after the First Sinking or the riding crew, did not allow the Plaintiff to have any real evidence that would assist these arguments.

[68] As previously mentioned, the Defendant did obtain a quote to raise the *Elf* a second time which fell within the range of $650,000 to $2,000,000 USD, and which is a cost that would be unreasonable to incur given the circumstances. Furthermore, regarding the divers, there is no property in witnesses. If there was evidence that the sinking was caused by something other than a sprung plank, then the Plaintiff could and should have put that evidence forward.

[69] Evidence filed by the Plaintiff of a post-sinking appraisal by Capt. Rose of Marine Consulting and Surveys Ltd. dated August 1, 2014 indicated that the value of the 112-year-old *Elf* was $279,000.00 CAD. As mentioned, however, the costs to do an underwater survey using a remotely operated vehicle or to raise the *Elf* were significant. This combined with the aerial survey of the minimal pollutant discharge after the Second Sinking in deep water made it a reasonable determination by the CCG not to raise the *Elf* after the Second Sinking.

[70] Contrary to the position put forward by the Plaintiff, the burden of proof is on the Plaintiff, not the Defendant, to establish that the CCG was negligent or failed to take reasonable measures to safeguard the *Elf*.

[71] I do not agree that the Defendant in not raising the *Elf* or in not producing the divers has somehow hampered the Plaintiff in meeting his burden of proof. The onus is on the Plaintiff and he has failed to convince me that the Defendant has come to the Court without clean hands.

(d) *Wire Rope*

[72] Just as in *Beasse 1*, the Plaintiff tried to rely extensively on *Wire Rope.* Justice Manson fundamentally disagreed with Mr. Beasse's framing of *Wire Rope* in that case and stated as follows at paragraphs 36 and 37:

> The Defendant's counsel quoted extensively from the case of *Wire Rope Industries of Canada (1966) Ltd v British Columbia Marine Shipbuilders Ltd*, 1981 CanLII 182 (SCC), [1981] 1 SCR 363, at pages 392 and following, and *McDougall v Black & Decker Canada Inc*, 2008 ABCA 353 (CanLII) [*Black & Decker*], to argue that spoliation has occurred, given the loss of the Tug cause by the CCG's reckless actions, and therefore any remedy available to the Plaintiff must be determined after a full trial, where the trial judge can consider all of the facts and fashion the most appropriate response.
>
> However, as stated by the Alberta Court of Appeal in *Black & Decker* at paragraph 18:
>
> > *St. Louis*, therefore, stands for the following proposition. Spoliation in law does not occur merely because evidence has been destroyed. Rather, it occurs where a party has intentionally destroyed evidence relevant to ongoing or contemplated litigation in circumstances where a reasonable inference can be drawn that the evidence was destroyed to affect the litigation. Once this is demonstrated, a presumption arises that the evidence would have been unfavourable to the party destroying it. This presumption is rebuttable by other evidence through which the alleged spoliator proves that his actions, although intentional, were not aimed at affecting the litigation, or through which the party either proves his case or repels the case against him.
>
> There is no evidence that the Plaintiff intentionally destroyed or was reckless in respect of the Second Sinking of the Tug such that it is no longer available as evidence, or that it was aimed at affecting this litigation.

[73] I agree entirely with Justice Manson.

[74] Unfortunately for the Plaintiff, *Wire Rope* has very little to do with the case at bar where the question is around whether the tugboat operator should be required to ensure the seaworthiness of the *Elf*. The case of *Wire Rope* does not stand for the proposition that the Plaintiff is trying to use it for.

[75] Rather, it has been held that "a tug has a duty to ensure that the tow is more or less ready to be towed, but this does not extend to the seaworthiness of the tow" (*Hamilton Marine and* Engineering *Ltd v CSL Group Inc*, [1995] 95 FTR 161 at para 47). As long as the tug has exercised "competent skill and diligence" to ensure that there is no neglect, misconduct, or the creation of unnecessary risk, there is no warranty that the tug shall be able to accomplish the task in all circumstances and hazards (Chircop et al, *Canadian Maritime Law* (Toronto: Irwin Law, 2016) at 752).

[76] If indeed there is any duty owed, it would be that of the vessel owner to provide a seaworthy tow (Chircop at 753). Thus, where the vessel owner assumes the responsibility to render the tow ready to proceed safely, the owner may in effect be assuming liability for any faulty repairs and consequent loss (*Engine and Leasing Co v Atlantic Towing Ltd* (1992), 51 FTR 1 (TD); var'd (1993), 157 NR 292 (FCA); aff'd (1993), 164 398 (FCA)).

[77] At the hearing, the Plaintiff argued that the law cannot be read as to create a circumstance where the CCG can act negligently and then be protected for its negligent actions. I would disagree with this formulation.

[78] In *CSL Group Inc v Canada*, [1997] 2 FC 575 ("*CSL Group*"), for example, the plaintiffs were a group of Canadian ship-owners who regularly had a number of ships in transit on the St. Lawrence River system. From November 10 to December 15, 1989, a number of public servants including members of the CCG were on strike. Because of the strike, the icebreakers normally used by the CCG on the St. Lawrence River were not in service and the summer buoys, not having been removed, were caught in ice. It was the plaintiffs' contention that, because of the strike of the Ships' Crews groups specifically, their ships were delayed to such an extent that outstanding contracts with shippers and receivers of cargo could not be performed before the end of the navigation season.

[79] Justice Nadon held in *CSL Group* that:

> … To determine what common law duty, if any, the Crown had in this case, it is necessary to examine the role and responsibilities of the Coast Guard. The prime objective of the CCG is to enable maritime traffic to proceed without undue delay to the extent that such an objective is compatible with its duty to ensure the safety and security of those using the waterways. However, one must not confuse an objective with a duty. The duty of care owed by the CCG herein was to assure the safety of the public using the St. Lawrence River by whatever reasonable steps are necessary given the circumstances, including the fact that the Ships' Crews had exercised their legal right to strike and were not available to perform their usual tasks. Its duty is limited to ensuring the safety of those using the waterways. The defendant did not owe a duty to the plaintiffs to maintain the St. Lawrence River at all times in a "fully safe and operational condition" or to take all reasonable

> means to enable them to transit the St. Lawrence River without delays.

[80] Therefore, on the basis above, *Wire Rope* is not determinative in making a finding that the CCG acted in a manner that breached its obligations to the Plaintiff. The Plaintiff spends the majority of the written submissions focusing on the question of the obligation of CCG to ensure that the *Elf* was seaworthy based on *Wire Rope*. As per the relevant statutory authority set out below that the CCG is also relying upon, I simply do not find this to be a compelling legal argument.

(e) *Negligence*

[81] Section 180 of the *Canada Shipping Act, 2001* delineates the powers of the Minister of Fisheries and Oceans that may be exercised if there is a discharge of a pollutant by a vessel. Specifically, if there are reasonable grounds to believe the vessel has discharged or is likely to discharge a pollutant, then the Minister may:

> (a) take the measures that he or she considers necessary to repair, remedy, minimize or prevent pollution damage from the vessel or oil handling facility, including, in the case of a vessel, by removing — or by selling, dismantling, destroying or otherwise disposing of — the vessel or its contents;
>
> (b) monitor the measures taken by any person or vessel to repair, remedy, minimize or prevent pollution damage from the vessel or oil handling facility; or
>
> (c) if he or she considers it necessary to do so, direct any person or vessel to take measures referred to in paragraph (a) or to refrain from doing so.

[82] Under subsection 180(2) of the *Canada Shipping Act, 2001*, if a vessel is sold then the proceeds are first applied against the expenses that the Minister expended to respond to the pollutant discharged or likely to be discharged. Only after this is the surplus paid to the owner.

[83] Paragraph 41(1)(d) of the *Oceans Act*, SC 1996, c 31 also makes the Minister of Fisheries and Oceans in charge of the coast guard services including marine pollution responses. The CCG is the appropriate agency of the Department of Fisheries and Oceans that is responsible for the marine pollutant incidents in Canadian waters and in the Canadian Exclusive Economic Zone. The *Elf* was within this requisite region.

[84] It is under these statutory authorities that the CCG was entirely within its mandate and its rights to take the vessel and do whatever it considered necessary to prevent further pollution damage. *Beasse 1* established Mr. Beasse's liability for the costs and expenses as a polluter and the necessity of the CCG agency to take over to ensure an appropriate response.

[85] It is clear that, in terms of the duty of care, once the CCG had taken reasonable steps to determine that the *Elf* was ready to be towed it had no further duty to ensure that the *Elf* was seaworthy. I find that at all times, after taking control of the *Elf* after the First Sinking, the CCG acted reasonably and with due diligence.

[86] The evidence shows that CCG did everything it could to preserve the *Elf* for the necessary out-of-water inspection that was to take place at Shelter Island. The appropriate response was tailored to the circumstances of each incident. The following is a non-exhaustive

list of the responses that were considered: mitigation of the environmental impact, possible continuation of pollutant threats, economics of the situation, timeliness of the response, efficacy of response measures, safety of the personal and public, and other options. After all of these were taken into account, the incident commander determined the strategy to achieve the environmental response objectives and proceeded to implement them.

[87] In light of these considerations, the Defendant took reasonable measures especially given the overriding concern for the marine environment. Mr. Brady went on board the *Elf* after it was dewatered and noted the presence of fuel tanks, a hydraulics oil tank, engine, and fuel lines. As he could not determine how much oil was left on the *Elf,* it was reasonable to believe the CCG had to remove the *Elf* from the Squamish harbour.

[88] The Hydra divers were able to slow the upwelling of oil when the *Elf* was sunken, but they were not able to stop the discharge of the pollutants.

[89] None of the individuals, including the Hydra divers, the surveyors, Mr. Small, Mr. Holonko, the Plaintiff, Mr. Larson, and Mr. Brady could identify the source of the ingress of water when the vessel was examined after it was refloated. In the surveyor's expert opinion, it was most likely a sprung plank board and this opinion was confirmed by the speed of the ingress during the Second Sinking once the vessel was no longer being lifted by the straps, which may have temporarily held the plank back in place.

[90] Evidence that supports the sprung plank theory is a photobook of approximately 500 photographs that were taken from 1989 to 2004. The photobook was recovered after the First Sinking. This photobook recorded restorations and inspections that the Van Diests had done to the *Elf*. The photographic evidence indicated that the previous owners had hauled out the *Elf* on six specific occasions. The first photographic evidence indicates the *Elf* was hauled out in 1990, the second being in May 1993, and subsequent haul-outs in 1995, 1999, 2002, and the final photograph of a haul-out is dated 2004 (cross-examination of Robin Beasse beginning at page 18, line 109).

[91] On cross-examination it was confirmed by Mr. Beasse that:

- The last photo record of a haul-out was 9 or 10 years after the *Elf* sank;
- After the *Elf* had been acquired from the Van Diests, neither the Plaintiff nor his wife had the *Elf* hauled out of the water for maintenance of the hull;
- Neither he nor his wife had done any maintenance on the hull after it was purchased in October of 2012;
- That there was no maintenance done on the engines other than bilge pumps, generators and sonar panels to keep batteries up;
- No repairs were done to the *Elf* since it was purchased;
- That he was aware of wood rot in the superstructure of the *Elf* yet did not have it repaired; and

- Below the waterline the hull had not been examined or inspected by a marine surveyor or anyone else either before or after it was purchased in October 2012.

[92] Much of the hull's planks were covered on the surface with ironwood, which is also sometimes referred to as ironbark. The strips of ironwood must be removed to expose the hull planks and the hull planks are fastened to the ribs of the hull. Without removing the ribs the hull cannot be examined. Neither the Plaintiff nor his wife examined the non-watertight connection point between the ironwood or removed the ironwood to inspect the hull planks or fastenings underneath (cross-examination of Robin Beasse at pages 43 and 44).

[93] In 1999, when the ironwood was previously removed by the Van Diests, there was a photo (ID 106.1) that had the following written on: "we knew we had a leak port bow, but when we took the ironbark off, the beams fell out in dust!" There is also a photo (ID 106.3) that shows a huge hole in the hull and is labelled: "horrible dry rot in 5 planks or beams and 4 1/2 ribs."

[94] Mr. Small had in fact recommended that the *Elf* be removed from the water to do a full inspection, especially given that the hull was covered with ironwood. He recognized that the ironwood strips needed to be removed to discover the condition of the vessel's hull. Mr. Small determined that there was significant wood deterioration on the topside decks and cabins due to the *Elf* being 112 years old. The inspection that was recommended was to determine the *Elf*'s current condition, seaworthiness, and value that the agency could then use to determine the next steps.

[95] Logically, given the rot in the visible upper part of the *Elf* as evidenced by the surveyors and other parties after the *Elf* was refloated, as well as the evidence of prior rot in the hull after the ironwood was removed as shown in the photos, it is not inconceivable that the hull could have again suffered rot or a sprung plank in the wooden hull as the boat had not been taken out or inspected since the Plaintiff purchased it.

[96] Further evidence of the probable cause of the sinking was determined by Mr. Holonko after he surveyed the vessel once it had been refloated and dewatered following the First Sinking. He too indicated that his inspection was not a complete inspection as the vessel needed to be taken out of the water. As a marine surveyor who had examined 30 to 40 wooden vessels, Mr. Holonko's evidence was that the most common cause of old wooden vessels sinking was a submerged or partially submerged plank that would spring, thereby allowing a rapid ingress of water. In his opinion, this would occur when the wood around the fastening would deteriorate and no longer be able to hold on, resulting in the plank springing loose and water flowing in.

[97] Though there was no visible sprung plank on the *Elf* when it was lifted, which Mr. Holonko indicated could be because it may have been pushed back into place by the lifting slings that were used in raising the vessel. He indicated that this could also explain why the *Elf* did not leak after being raised and why when inspected by all the parties there was no visible reason for the sinking. Mr. Holonko's evidence was that the Second Sinking, which was rapid and occurred under tow, was consistent with a plank springing, especially when combined with the evidence of the First Sinking.

[98] Given all of the evidence as set out above, Mr. Brady's decision that it was not safe to leave the *Elf* in the Squamish harbour is reasonable and supported by the evidence.

(f) *The Tow*

[99] The CCG's concerns around the fuel tanks and residual oil were reasonable grounds to believe that the removal of the *Elf* from the Squamish harbour were necessary.

[100] The CCG took all reasonable measures in responding to the pollution incident. While the Plaintiff did little or nothing at the outset to prevent the discharge of pollutants, the CCG appropriately responded to take immediate and effective measures. The CCG had reasonable grounds to refuse the Plaintiff's request to retake possession of the *Elf*, as the CCG had reason to believe that it continued to pose a risk to the environmentally sensitive Squamish harbour, and that removal of the *Elf* was necessary to prevent further pollution damage.

[101] The CCG made a full plan for transporting the Elf to the shipyard. Mr. Brady advised the Plaintiff that the *Elf* would be towed but did not identify the shipyard, as he wanted to avoid confrontations between the shipyard and the Plaintiff or Mr. Larsen, which in the circumstances was a possibility. Reasonable measures such as pumps being primed and ready to go with a water taxi escort were implemented in case there was an issue. There were no repairs that were suggested by the surveyors and none were done, which again is reasonable and for which no fault can be attached. The arrangements in place for the tow of the tug were consistent with the standard practice described by Mr. Holonko who was the hired expert. The CCG is not subject to the legal obligations of an owner or towing company as the CCG itself was not the tow operator.

[102] There is no evidence that either SMS or Valley Towing failed to exercise due diligence in furnishing a seaworthy tug to conduct the tow or that the loss of the *Elf* was caused by the lack of seaworthiness of the tug conducting the tow. Both the SMS tug and Valley Towing tug were seaworthy and I have no evidence that the two methods or the implementation of the tow by the operators or crew were negligent.

[103] To the contrary, I have evidence that the operators and crew acted as reasonable operators and crew members would have and as recommended. Mr. Holonko had opined that the tandem would not be more likely to re-damage the hull if it was indeed damaged, which was unidentifiable without the dry docked inspection. The plan in place was well-thought-out and carried out to the letter, and through no fault of the Defendant the Second Sinking occurred.

[104] The standard and recommended practice of monitored close proximity to the marine casualty was done. Mr. Jenkins monitored the *Elf* during the tow to the log booms near Shannon Creek and then during the 6.5 hours it was moored there. As well, he monitored the tow from Point Atkinson to the hand-off at Valley Tow. His notes and photos that were kept are evidence of his close monitoring.

[105] Mr. Roon and Mr. Kelly, the crew members on the Seatow, were also both experienced mariners who continued monitoring the *Elf* after it was handed off to Valley Towing. Mr. Roon went on board the *Elf* on two separate occasions. The photographic evidence shows the waterline and the monitoring of the *Elf* and, when compared to the evidence of Mr. Jenkins of the water taxi during the first portion of the tow, the waterlines are shown to be similar.

[106] I find that the towing operation plan and the operators exhibited due diligence as evidenced by:

- having a water taxi accompany at all times;
- evidence in photos taken by the water taxi operator show the close monitoring of the waterline and the tow in general;
- pumps primed and ready to start, evidenced by photos which include the gas tank on board;
- tow light was shining on the *Elf* so that it could be monitored if any issue arose; and
- when there was listing observed the poly lines were swapped out to steel cable and winch which is a reasonable option given the slight listing that was noticed.

[107] Furthermore, the tow operators did all that could be asked of them to insure a safe tow and were diligent and not negligent. As soon as it was determined the *Elf* was in trouble, Mr. Roon boarded the *Elf* and started the pump but due to the rapid ingress from an unidentified location this was not enough to save the vessel.

[108] It was reasonable to have the pump manually operated on this marine casualty as the tow was closely monitored and the pump could be started as soon as any trouble was noticed. There is no evidence that an automatic pump would have made a difference in the rapid ingress or even that it could have been started sooner and saved the *Elf*.

[109] All this is to say that it was a diligent close monitoring which was recommended and was in fact carried out as established by the cumulative evidence. The tow operators did all that could be asked of them to ensure a safe tow and they were diligent and not negligent.

[110] The practice taken with the towage of the *Elf* appeared to be standard practice. No evidence has been proffered that stands for the proposition that the recommendations given by Mr. Small, Mr. Brady, or Mr. Holonko fell below a normal standard practice, and no arguments were provided as to why this normal practice did not meet an appropriate standard.

[111] The Plaintiff points towards no clear and specific act of incompetency by the CCG but, rather, asserts broadly that the CCG failed in its duty of care. I do not see how this argument can succeed (see *Champlain (The) v Canada Steamship Lines Ltd*, [1939] Ex CR 89 at para 10).

[112] Based on the affidavit evidence and relevant cross-examinations, there is ample evidence to suggest that the CCG performed the relevant due diligence in ensuring that the *Elf* would be transported safely before towing it.

[113] The Motion for summary trial is dismissed.

V. Costs

[114] The Defendant filed a bill of costs on March 22, 2019 in the amount of $12,448.20 inclusive of fees, disbursements, and taxes. The Plaintiff did not file a bill of costs as I understand he was out of the office for an extended time so the parties were unable to reach an

agreement regarding costs. For these reasons, I order that the parties file an agreement 7 days after this judgment regarding lump sum costs, inclusive of disbursements and taxes or, in the alternative, to file no more than 2 pages of submissions regarding costs with the supporting Bills of Costs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The style of cause will be amended to have "Her Majesty the Queen in Right of Canada" as the appropriate Defendant.
2. The motion for summary trial is dismissed.
3. The parties have 7 days after the judgment to file an agreement regarding lump sum costs or, in the alternative, to file no more than 2 pages of submissions regarding costs.

"Glennys L. McVeigh"
Judge

ANNEX A

***Federal Courts Rules*, SOR/98-106**

Dismissal of motion	**Rejet de la requête**
216 (5) The Court shall dismiss the motion if	216 (5) La Cour rejete la requête si, selon le cas :
(a) the issues raised are not suitable for summary trial; or	a) les questions soulevées ne se prêtent pas à la tenue d'un procès sommaire;
(b) a summary trial would not assist in the efficient resolution of the action.	b) un procès sommaire n'est pas susceptible de contribuer efficacement au règlement de l'action.
Judgment generally or on issue	**Jugement sur l'ensemble des questions ou sur une question en particulier**
(6) If the Court is satisfied that there is sufficient evidence for adjudication, regardless of the amounts involved, the complexities of the issues and the existence of conflicting evidence, the Court may grant judgment either generally or on an issue, unless the Court is of the opinion that it would be unjust to decide the issues on the motion.	(6) Si la Cour est convaincue de la suffisance de la preuve pour trancher l'affaire, indépendamment des sommes en cause, de la complexité des questions en litige et de l'existence d'une preuve contradictoire, elle peut rendre un jugement sur l'ensemble des questions ou sur une question en particulier à moins qu'elle ne soit d'avis qu'il serait injuste de trancher les questions en litige dans le cadre de la requête.

***Canada Shipping Act, 2001*, SC 2001, c 26**

Minister of Fisheries and Oceans — measures	**Mesures du ministre des Pêches et des Océans**
180 (1) If the Minister of Fisheries and Oceans believes on reasonable grounds that a vessel or an oil handling facility has discharged, is discharging or may discharge a pollutant, he or she may	180 (1) Le ministre des Pêches et des Océans peut, s'il a des motifs raisonnables de croire qu'un bâtiment ou une installation de manutention d'hydrocarbures a rejeté, rejette ou pourrait rejeter un polluant :
(a) take the measures that he or she considers necessary to repair, remedy, minimize or prevent pollution damage from the vessel or oil handling facility, including, in the case of a vessel, by removing — or	a) prendre les mesures qu'il estime nécessaires pour prévenir, contrer, réparer ou réduire au minimum les dommages dus à la pollution, voire enlever le bâtiment ou son contenu et disposer, notamment par

by selling, dismantling, destroying or otherwise disposing of — the vessel or its contents;

vente, démantèlement ou destruction, du bâtiment ou de son contenu;

(b) monitor the measures taken by any person or vessel to repair, remedy, minimize or prevent pollution damage from the vessel or oil handling facility; or

b) surveiller l'application des mesures prises par toute personne ou tout bâtiment en vue de prévenir, contrer, réparer ou réduire au minimum les dommages dus à la pollution;

(c) if he or she considers it necessary to do so, direct any person or vessel to take measures referred to in paragraph (a) or to refrain from doing so.

c) dans le cas où il l'estime nécessaire, ordonner à toute personne ou à tout bâtiment de prendre les mesures visées à l'alinéa a) ou de s'abstenir de les prendre.

***Marine Liability Act*, SC 2001, c 6**

Liability for pollution and related costs

77 (1) The owner of a ship is liable

(a) for oil pollution damage from the ship;

(b) for the costs and expenses incurred by the Minister of Fisheries and Oceans, a response organization within the meaning of section 165 of the Canada Shipping Act, 2001 or any other person in Canada in respect of measures taken to prevent, repair, remedy or minimize oil pollution damage from the ship, including measures taken in anticipation of a discharge of oil from it, to the extent that the measures taken and the costs and expenses are reasonable, and for any loss or damage caused by those measures; and

Responsabilité en matière de pollution et frais connexes

77 (1) Le propriétaire d'un navire est responsable :

a) des dommages dus à la pollution par les hydrocarbures causée par le navire;

b) des frais supportés par le ministre des Pêches et des Océans, un organisme d'intervention au sens de l'article 165 de la Loi de 2001 sur la marine marchande du Canada ou toute autre personne au Canada pour la prise de mesures visant à prévenir, contrer, réparer ou réduire au minimum les dommages dus à la pollution par les hydrocarbures causée par le navire, y compris des mesures en prévision de rejets d'hydrocarbures causés par le navire, pour autant que ces frais et ces mesures soient raisonnables, de même que des pertes ou dommages causés par ces mesures;

(c) in relation to pollutants, for the costs and expenses incurred by

(i) the Minister of Fisheries and Oceans in respect of measures taken under paragraph 180(1)(a) of the Canada Shipping Act, 2001, in respect of any monitoring under paragraph 180(1)(b) of that Act or in relation to any direction given under paragraph 180(1)(c) of that Act to the extent that the measures taken and the costs and expenses are reasonable, and for any loss or damage caused by those measures, or

(ii) any other person in respect of the measures that they were directed to take or refrain from taking under paragraph 180(1)(c) of the Canada Shipping Act, 2001 to the extent that the measures taken and the costs and expenses are reasonable, and for any loss or damage caused by those measures.

c) s'agissant des polluants, des frais supportés par le ministre des Pêches et des Océans à l'égard des mesures visées à l'alinéa 180(1)a) de la Loi de 2001 sur la marine marchande du Canada, de la surveillance prévue à l'alinéa 180(1)b) de cette loi ou des ordres visés à l'alinéa 180(1)c) de la même loi et des frais supportés par toute autre personne à l'égard des mesures qu'il lui a été ordonné ou interdit de prendre aux termes de ce même alinéa, pour autant que ces frais et ces mesures soient raisonnables, de même que des pertes ou dommages causés par ces mesures.

Liability — grave and imminent threat of pollution damage

(1.1) For the purposes of subsection (1), with respect to the costs and expenses incurred by the Minister of Fisheries and Oceans or any other person, including in respect of preventive measures referred to in paragraph (1)(c), the owner of a ship is liable only for the costs and expenses related to an occurrence — or series of occurrences having the same origin — that causes pollution damage or creates a grave and imminent threat of causing such damage.

…

Responsabilité — menace grave et imminente de pollution

(1.1) Pour l'application du paragraphe (1), la responsabilité du propriétaire d'un navire à l'égard des frais supportés par le ministre des Pêches et des Océans ou par toute autre personne, notamment à l'égard des mesures de sauvegarde visées à l'alinéa (1)c), ne peut être engagée qu'à l'égard des frais qui ont trait à tout fait ou tout ensemble de faits ayant la même origine qui cause des dommages dus à la pollution ou qui constitue une menace grave et imminente de causer de tels dommages.

…

Strict liability subject to certain defences

(3) The owner's liability under subsections (1) and (2) does not depend on proof of fault or negligence, but the owner is not liable under those subsections if they

Défenses

(3) La responsabilité du propriétaire prévue aux paragraphes (1) et (2) n'est pas subordonnée à la preuve d'une faute ou d'une négligence, mais le propriétaire n'est

establish that the occurrence

(a) resulted from an act of war, hostilities, civil war or insurrection or from a natural phenomenon of an exceptional, inevitable and irresistible character;

(b) was wholly caused by an act or omission of a third party with intent to cause damage; or

(c) was wholly caused by the negligence or other wrongful act of any government or other authority that is responsible for the maintenance of lights or other navigational aids, in the exercise of that function.

pas tenu pour responsable s'il démontre que l'événement :

a) soit résulte d'un acte de guerre, d'hostilités, de guerre civile ou d'insurrection ou d'un phénomène naturel d'un caractère exceptionnel, inévitable et irrésistible;

b) soit est entièrement imputable à l'acte ou à l'omission d'un tiers qui avait l'intention de causer des dommages;

c) soit est entièrement imputable à la négligence ou à l'action préjudiciable d'un gouvernement ou d'une autre autorité dans le cadre des responsabilités qui lui incombent en ce qui concerne l'entretien des feux et autres aides à la navigation.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1384-15
STYLE OF CAUSE:	ROBIN BEASSE V HER MAJESTY THE QUEEN IN RIGHT OF CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	FEBRUARY 20, 2019
JUDGMENT AND REASONS:	MCVEIGH J.
DATED:	MAY 31, 2019

APPEARANCES:

Jay Straith	FOR THE PLAINTIFF
Monika Bittel	FOR THE DEFENDANT

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