

Federal Court



Cour fédérale

Date: 20250508

Docket: T-1142-18

Citation: 2025 FC 833

Ottawa, Ontario, May 8, 2025

PRESENT: The Honourable Mr. Justice Southcott

ADMIRALTY ACTION *IN PERSONAM* AND *IN REM*

BETWEEN:

NAVTECH INC.

Plaintiff

and

**CHANTIER DAVIE CANADA INC. AND
FEDERAL FLEET SERVICES INC. AND
THE SHIP M/V ASTERIX AND THE
OWNERS AND ALL OTHERS
INTERESTED
IN THE SHIP M/V ASTERIX**

Defendants

ORDER AND REASONS

I. Overview

[1] This Order and Reasons address four motions brought in the within action, which asserts claims based in contract and intellectual property arising from the Plaintiff's supply of design documentation related to the conversion of a ship.

[2] The Plaintiff, Navtech Inc. [Navtech], moves for summary judgment on a portion of its action that asserts entitlement to unpaid royalties [the Royalties Motion].

[3] The Defendants, Chantier Davie Canada Inc. [Davie], Federal Fleet Services Inc. [FFS], and the Ship M/V *Asterix* [the Ship or Defendant Ship] also seek summary judgment, dismissing the component of the Plaintiff's claim that asserts rights under the *Copyright Act*, RSC 1985, c C-42 [*Copyright Act*] against all the Defendants [the Copyright Motion]. The Defendant, FFS, which is the bareboat charterer of the Defendant Ship (and was previously its owner), also moves for summary judgment, dismissing the *in rem* action as against the Defendant Ship as well as the *in personam* action against FFS [the Admiralty Motion].

[4] Finally, His Majesty the King in Right of Canada [the Crown], who asserts an interest in the Defendant Ship, moves to intervene in the action and seeks an order dismissing the *in rem* action and the Royalties Motion to the extent that it seeks summary judgment *in rem* against the Defendant Ship [the Intervention Motion].

[5] The Defendants and the Crown oppose the Royalties Motion, and Navtech opposes the Defendants' motions and the Intervention Motion.

[6] As explained in more detail below, the outcome of these motions is as follows:

- A. the Intervention Motion is dismissed, because FFS's success in the Admiralty Motion (as noted below) results in dismissal of the *in rem* action against the Defendant Ship, as a consequence of which the Crown has no interest in the action;
- B. the Admiralty Motion is allowed, because Navtech's allegations do not give rise to a maritime lien against the Defendant Ship, as would be necessary to support the *in rem* component of its action, and because Navtech has not advanced a viable legal theory for its claim against FFS, with which it has no contractual relationship;
- C. the Royalties Motion is allowed, because the Defendants' basis for resisting Navtech's royalties claim is limited to asserting a right of set-off, arising from allegations that Navtech's work failed to meet relevant professional standards and caused the Defendants to incur extra costs as a result. The Defendants' ability to assert set-off is protected, notwithstanding that the Court is granting summary judgment on Navtech's royalties claim, by staying enforcement of that judgment pending adjudication of the Defendants' allegations; and

D. the Copyright Motion is allowed, because the allegations on which Navtech relies to assert its claim pursuant to the *Copyright Act* do not give rise to a cause of action under that statute.

II. **Background**

A. *Parties*

[7] The Plaintiff, Navtech, is a navel architecture and engineering company, incorporated in 1977 and based in Québec City. Davie, a Québec company incorporated on August 20, 2012, operates a shipyard in Lévis, Québec, where it carries out vessel construction, conversion, and repairs. FFS is also a Québec company, incorporated on August 14, 2014, under the name Project Resolve Inc. and renamed as Federal Fleet Services Inc. on April 29, 2016. As explained in greater detail later in these Reasons, there is a corporate relationship between Davie and FFS.

B. *Navtech's Design Work*

[8] The record before the Court in these motions includes affidavits sworn by Mr. Paul-Émile Barbeau, the founder and president of Navtech, as well as evidence provided by Mr. Barbeau in cross-examination. Much of the following background to the parties' motions is taken from Mr. Barbeau's evidence.

[9] In the spring of 2014, Davie retained Navtech to perform vessel design and naval architecture services related to a project [the Project] involving Davie's intention to make an unsolicited offer to the Royal Canadian Navy [RCN] for the supply of an auxiliary oiler

replenishment vessel [AOR]. On April 29, 2014, Navtech and Davie entered into a Non-Disclosure Agreement to facilitate the exchange of information regarding the Project [the NDA].

[10] Davie ultimately decided to propose to the RCN to convert an existing containership into an AOR [the Vessel Conversion]. Davie and Navtech signed a Memorandum of Agreement dated June 17, 2024 [the MOA] pursuant to which Navtech agreed to prepare a general arrangement drawing [GA] and other design documentation related to the Project.

[11] Clause 5 of the MOA, bearing the heading “Design Process and Property”, addressed as follows intellectual property rights related to the deliverables under the MOA:

In order to accelerate the design process, [Navtech] may make use of some of its existing design and information from other project for which [Navtech] owns solely the intellectual property, including the commercial rights and copyrights. By doing so, [Navtech] keeps [Davie] exempt of any claim, royalty, fee from any third party for the technology used by [Navtech] in his work.

All and each of the deliverables to be made by [Navtech] will remain the intellectual property of [Navtech]. However, the work and deliverables made by [Navtech] and entirely paid by [Davie] will be entirely available to [Davie] for the purpose herein defined. [Navtech] and [Davie] will agree on the content and may sign a non-disclosure agreement to protect their common interest in the development of the designs.

All of the design information to be further produced by [Navtech] for any of these options will be available to [Davie] as it will become further developed and paid for by [Davie].

[12] While the MOA contemplated two design options for an AOR, only one of those options (related to the Vessel Conversion) was pursued. Specifically, Mr. John Schmidt, then a vice-

president of Davie, instructed Navtech to perform the work necessary to prepare a GA and other plans and designs related to the Vessel Conversion.

[13] Mr. Barbeau describes a GA as the centrepiece of a vessel's design, because it depicts the overall concept of a vessel. He explains that the Vessel Conversion required design components including tanks to carry fuel, replenishment-at-sea arms, space for civil and RCN personnel, combat logistics service support, humanitarian aid capacity, a helipad, and helicopter storage and maintenance facilities. Navtech provided its first version of the GA to Davie on July 1, 2014, and, over the course of the following 16 months, provided numerous GA revisions and other design documentation.

[14] As previously noted, FFS was incorporated on August 14, 2014, under the name Project Resolve Inc., although it remained inactive until the summer of 2015. Navtech explains that this corporate name mirrored that of the Project, which Davie had named "Resolve". Mr. Barbeau describes a meeting at Davie's offices in the summer of 2014, at which Mr. Spencer Fraser was presented to him as a member of the team for the Project. Mr. Fraser was at that stage a consultant for Davie, but he became the Chief Executive Officer [CEO] of FFS (at that time, still named Project Resolve Inc.) on July 1, 2015. Evidence surrounding Navtech's interaction with Mr. Fraser and other representatives of Davie and FFS, in the course of Navtech's performance of its work, will be canvassed later in these Reasons.

[15] In July 2015, Davie informed Navtech that another engineering company, Navis Consult [Navis], a Croatian firm, would be involved in the engineering work necessary for the Vessel Conversion.

[16] On August 14, 2015, Davie and Navtech signed a licence agreement, said to be effective as of August 7, 2015 [the Licence Agreement], pursuant to which Navtech granted Davie the right to use Navtech's work product (as described in an appendix to the Licence Agreement) for the purpose of the Vessel Conversion. The Licence Agreement set out the parties' respective rights and obligations, including a list of services already performed by Navtech and further deliverables (described as conceptual design documents) to be provided by Navtech to Davie, as well as Davie's obligation to pay royalties to Navtech. Navtech and Davie also signed an associated confidentiality agreement on August 14, 2015 [the Confidentiality Agreement].

[17] The provisions of the Licence Agreement related to royalties, and the timing of their payment, read as follows:

12. Royalties.

(A) On consideration of the license granted, the Licensee will pay the Licensor a royalty to an amount corresponding to 1.42% of the total cost of the AOR vessel. An initial payment of CAD 1 860 000 will be paid as defined in section 13 below. The final amount and total cost including all of the extra equipment and work made for the AOR will be adjusted at end of conversion or at delivery of vessel whichever comes last. The percentage of 1.42% will apply to the AOR total cost but limited to a maximum of CAD 280 000 000 at time of determination of the final cost of the vessel.

(B) Should the Licensee desire to use the Work for a second vessel to be constructed or converted, a royalty of 1.2% would then be applied for a total cost of the vessel. The initial payment would be based on an estimated cost of CAD 150 000 000 with final adjustment at the delivery of the vessel. The Licensor should not withhold such use unless any major technical constraint prevailing or until resolution of such.

13. Payment.

A first (no. 1) payment to the amount of CAD 465 000 representing 25% of the initial payment will be made at signature of the Agreement. The balance will be paid as per delivery of the

deliverables to be provided by Licensor to Licensee, as per appendix C. There are ten (10) deliverables, each is associated with a payment of 7.5%, equivalent to CAD 139 500 per deliverable. Invoiced services from Licensor to Licensee prior to date of signature for said project, to the amount of CAD 151 714, will be deducted from the last invoices. Payment no. 1 will be paid within fifteen (15) days from date of signature with subsequent payments at 30 days from the date of the invoice.

[18] By October 23, 2015, Davie made the initial royalty payment to Navtech contemplated by the Licence Agreement in the amount of \$465,000.

[19] Navtech ultimately produced GA 2585-15-001 entitled “revision F General Arrangement Conceptual Design DND Supply Vessel” [Revision “F”] on September 25, 2015, which document was in turn provided to the RCN. On October 20, 2015, Navtech produced GA 2585-15-001 entitled “revision G General Arrangement Conceptual Design DND Supply Vessel” [Revision “G”] to fix a typographical error found in Revision “F”.

[20] In October 2015, Davie decided that Navtech would no longer be involved in the Project. While the parties’ evidence diverges as to exactly when Davie informed Navtech of that decision, they agree that a meeting took place between Mr. Barbeau and Mr. Alan Bowen, CEO of Davie at the time, on October 23, 2015, at which Mr. Bowen confirmed that Navtech would not receive the information necessary for it to be able to complete the remaining deliverables under the Licence Agreement and therefore would not be required to complete those deliverables [the October Meeting].

[21] Mr. Barbeau and Mr. Bowen exchanged email correspondence on October 27 and 28, 2015, documenting points that had been agreed at the October Meeting, including Davie

agreeing to make a second payment under the Licence Agreement in the amount of \$1,395,000, upon receipt of an invoice from Navtech, notwithstanding that the deliverables contemplated by the Licence Agreement would not have been completed [the October Email Exchange].

[22] On November 10, 2015, Navtech issued an invoice to Davie in the amount of \$1,395,000 plus taxes, as contemplated by the October Email Exchange. Davie subsequently paid that amount to Navtech.

C. *Purchase of the Ship*

[23] On July 15, 2015, Davie entered into a memorandum of agreement with Olymbos Navigation S.A. [Olymbos], the owner of the Ship (then registered in Liberia), for the purchase of the Ship by either Davie or its nominee [the Olymbos MOA]. On September 29, 2015, FFS was nominated as purchaser of the Ship pursuant to Addendum No. 1 to the Olymbos MOA. On September 30, 2015, Olymbos issued a bill of sale for the Ship with FFS as the purchaser.

[24] On October 2, 2015, Liberia granted permission for the transfer of the Ship from the Liberian registry to the Canadian registry, and on October 8, 2015, the Ship was registered in Canada under official number 839345 with FFS as its owner. While not material to the issues in this litigation, FFS subsequently conveyed title to the Ship to Asterix Inc. [Asterix], another company that has a corporate relationship with Davie, and Asterix entered into a bareboat charter with FFS.

D. *Contracts to Convert and Supply the Ship*

[25] On July 31, 2015, Davie and FFS signed a letter of intent with the Crown related to the Project [the LOI].

[26] On November 30, 2015, FFS and the Crown entered a Provision of Services Agreement [PSA], pursuant to which FFS would supply the Ship (following conversion to an AOR), and on December 1, 2015, Davie and FFS entered into a contract for Davie to perform the Vessel Conversion [the Conversion Contract]. Along with certain other commercial contracts that were filed in these motions, the PSA and the Conversion Contract are subject to a Confidentiality Order dated March 25, 2025. While these contracts were the subject of oral submissions at the hearing of these motions, counsel agreed to avoid referring to any confidential content, and these Reasons will refer only to non-confidential content that was the subject of such submissions.

[27] Factually, the parties agree that the GA supplied by Navtech (either Revision “F” or Revision “G”, which are materially identical) was incorporated into the PSA and the Conversion Contract. However, Navtech also asserts that as-built drawings of the Ship following its conversion into an AOR demonstrate that the Vessel Conversion was performed in accordance with Navtech’s design work. The Defendants dispute this assertion and take the position that Navtech’s design work was deficient in several respects, as a result of which Navis was required to make multiple changes to the design developed by Navtech and the Vessel Conversion was performed in accordance with designs prepared by Navis.

E. *Navtech's Claim*

[28] Navtech commenced this action against the Defendants by Statement of Claim dated June 12, 2018, alleging unpaid royalties due to Navtech under the Licence Agreement [the Royalties Claim], claiming damages for the Defendants' alleged breach of an obligation to ensure the visibility of Navtech as designer of the Vessel Conversion [the Visibility Claim], seeking a declaration that Navtech is the exclusive owner of the intellectual property rights to the concept and design of the Ship [the Declaratory Relief], and claiming related ancillary relief. Navtech asserts these claims against both corporate Defendants, alleging that not only Davie but also FFS is liable for the monetary amounts claimed on the basis that one is the *alter ego* of the other or pursuant to other legal theories, and asserts that the Defendant Ship is liable for these amounts *in rem*.

[29] Navtech quantifies the unpaid royalties as \$2,258,437.83. This figure is derived from clause 12 of the Licence Agreement, which identifies applicable royalties as 1.42% of the total cost of the converted Ship (limited to a maximum of \$280,000,000). As the Defendants have admitted that the total construction, conversion, and modification costs of the Ship exceed \$280,000,000, Navtech asserts its claim based on 1.42% applied to the \$280,000,000 maximum cost, for a total royalty of \$3,976,000.

[30] Navtech has already been paid \$1,860,000. Also, prior to signing the Licence Agreement, Navtech provided initial design documents to Davie pursuant to the MOA, for which Davie paid a total sum of \$151,714. Under clause 13 of the Licence Agreement, this amount is to be deducted from the applicable royalties. Deducting the sum of \$1,860,000 and \$151,714 from the

asserted royalty figure of \$3,976,000, Navtech quantifies the Royalties Claim in the amount of \$1,964,286, plus applicable taxes, for a total of \$2,258,437.83. Subject to their assertion of a right of set-off (explained later in these Reasons), I do not understand the Defendants to contest this quantification. Navtech also claims interest on this figure.

[31] Navech quantifies the Visibility Claim in the amount of \$400,000.

[32] Subsequent to the initial close of pleadings, the parties exchanged affidavits of documents and the documents listed therein on January 25, 2020, and oral examinations for discovery of Davie's corporate representative, Mr. Schmidt, took place in March 2020 and of FFS's corporate representative, Mr. Fraser, in March 2020 and May 2021.

[33] By motion dated June 27, 2024, Navtech sought to amend its pleadings to add a claim pursuant to the *Copyright Act*. In an affidavit sworn on June 27, 2024, in support of that motion, Mr. Barbeau stated that this amendment arose from information contained in documents produced by the Defendants including pursuant to the discoveries. Mr. Barbeau stated that he thereby learned that on November 12, 2015, pursuant to a direction contained in an email exchange attached to his affidavit, the Defendants had removed all references to Navtech from the plans that Navtech had produced, designed, and prepared. Based thereon, Navtech's motion sought to add to its Statement of Claim allegations of breach of copyright and, by way of remedy, a claim for an accounting of profits under the *Copyright Act* [the Copyright Claim].

[34] Ultimately, the Defendants did not oppose Navtech's amendment motion, and by Direction dated August 8, 2024, the Court granted leave for Navtech to file an Amended

Statement of Claim dated July 31, 2024, which added the Copyright Claim. The parties then closed pleadings with an Amended Statement of Defence [the Defence] and Amended Reply.

F. *Motions*

[35] On December 17, 2024, FFS filed the Admiralty Motion. The parties refer to this motion as the “Admiralty Motion” and the Court has adopted that nomenclature, as FFS relies on principles of maritime law in seeking summary judgment dismissing the *in rem* component of the action as against the Defendant Ship, on the basis that Navtech does not benefit from a maritime lien or other *in rem* right against the Ship. However, FFS’s summary judgment motion also seeks dismissal of the *in personam* action against it, on the bases that it has no contractual relationship with Navtech, that FFS is not the *alter ego* of Davie, and that there is no other viable legal theory pursuant to which it could be liable to Navtech.

[36] On December 19, 2024, the Defendants also filed the Copyright Motion, seeking summary judgment dismissing Navtech’s claim against the Defendants under the *Copyright Act* on the bases that Navtech’s amendment to add that claim was sought and filed after expiry of the applicable limitation period and that the allegations that Navtech advances in support of that amended claim do not give rise to a cause of action under the *Copyright Act*. In the alternative, the Copyright Motion seeks an order compelling further and better answers to the Defendants’ written discovery questions, in relation to the claim under the *Copyright Act*, and summary judgment dismissing Navtech’s request for the remedy of an accounting of profits.

[37] On December 20, 2024, Navtech filed the Royalties Motion, seeking summary judgment against the Defendants for Navtech's claimed unpaid royalties in the amount of \$2,258,437.83 plus interest.

[38] By oral direction dated January 20, 2025, the Court ordered these motions be heard together over two days commencing on March 27, 2025.

[39] On March 21, 2025, the Crown filed the Intervention Motion, seeking leave to intervene in the action (based on its interest in the Defendant Ship pursuant to the PSA) as well as substantive relief, striking the *in rem* portion of the action and dismissing the Royalties Motion as against the Ship. The Crown bases its claim for substantive relief on paragraph 43(7)(b) of the *Federal Courts Act*, RSC 1985, c F-7 [*Federal Courts Act*], which provides, *inter alia*, that no action *in rem* may be commenced in Canada against any ship owned or operated by Canada, where the ship is engaged on government service.

[40] Following subsequent case management conferences, including one conference attended by Crown counsel, the Intervention Motion was scheduled to be heard on the same dates as the other motions. On March 27 and 28, 2025, the Court heard oral argument (in the following sequence) on the Intervention Motion, the Admiralty Motion, the Royalties Motion, and the Copyright Motion. At the hearing, Navtech provided the response to the Intervention Motion, the Admiralty Motion, and the Copyright Motion, and the Defendants provided the response to the Royalties Motion.

III. **Issues**

A. ***Intervention Motion***

[41] The parties' submissions in the Intervention Motion raise the following issues for the Court's determination:

- A. Should the Crown be granted leave to intervene in the action?
- B. Is the Defendant Ship operated by Canada and engaged on government service, as contemplated by paragraph 43(7)(b) of the *Federal Courts Act*, such that:
 - i. the *in rem* claim against the Defendant Ship in the action should be struck; and
 - ii. the Royalties Motion should be dismissed, in so far as it seeks summary judgment *in rem* against the Defendant Ship?

B. ***Admiralty Motion***

[42] The parties' submissions in the Admiralty Motion raise the following issues for the Court's determination:

- A. Is this an appropriate case for summary judgment in relation to the *in rem* action and the *in personam* action as against FFS?
- B. Does this action give rise to a right *in rem* against the Defendant Ship?
- C. Was there a contract between FFS and Navtech?

D. Can FFS be held liable as the *alter ego* of Davie or pursuant to any other legal theory advanced by Navtech?

E. Does Navtech benefit from a maritime lien on the Defendant Ship?

C. ***Royalties Motion***

[43] The parties' submissions in the Royalties Motion raise the following issues for the Court's determination:

A. Is this an appropriate case for summary judgment in relation to the Royalties Claim?

B. Should summary judgment be entered in favour of Navtech for the amount of \$2,258,437.83 (plus interest) claimed for royalties?

D. ***Copyright Motion***

[44] The parties' submissions in the Copyright Motion (including the Defendants' counsel's oral submissions re-ordering and reformulating some of their arguments as being advanced in the alternative) raise the following issues for the Court's determination:

A. Is this an appropriate case for summary judgment in relation to the Copyright Claim?

B. Are the allegations on which Navtech relies to assert its claim pursuant to the *Copyright Act* capable of giving rise to a cause of action under that statute?

C. In the alternative, is Navtech entitled to claim an accounting of profits for the Defendants' alleged infringement under the *Copyright Act*?

- D. In the further alternative, is Navtech time-barred, pursuant to the *Copyright Act*, from asserting the Copyright Claim?
- E. In the further alternative, has Navtech provided sufficient material facts to support its claim made pursuant to the *Copyright Act*?

IV. **Applicable Law**

A. ***Leave to Intervene***

[45] Rule 109(1) of the *Federal Courts Rules*, SOR/98-106 [Rules] allows the Court, on motion, to grant leave to any person to intervene in a proceeding. A proposed intervener must inform the Court how their intended participation will assist the Court's determination of a factual or legal issue related to the proceeding (Rule 109(2)(b)).

[46] *Rothmans, Benson & Hedges Inc v Canada (Attorney General)* (1989), [1990] 1 FC 74, [1989] FCJ No. 446 (FCTD), rev'd in part on other grounds 1989 CanLII 9432 (FCA), identifies the following factors relevant to an intervention motion: (a) whether the proposed intervener is directly affected by the outcome; (b) whether there exists a justiciable issue and veritable public interest; (c) whether there is an apparent lack of other reasonable or efficient means to submit the question to the Court; (d) whether the position of the proposed intervener is adequately defended by one of the parties to the matter; (e) whether the interests of justice are better served by granting leave to intervene; and (f) whether the Court can decide the case on its merits without the proposed intervention (at 79–80).

[47] Recent jurisprudence focuses on the following three factors: (a) the usefulness of the proposed intervener's submissions to the issues the Court must decide; (b) the proposed intervener's interest in the matter; and (c) the interests of justice (*Chelsea (Municipality) v Canada (Attorney General)*, 2023 FCA 179 at para 9).

[48] In the context of maritime matters, it has been held that a party whose interest in a *res* can be adversely affected by the outcome of *in rem* proceedings has the right to participate in such proceedings and, indeed, that such participation can occur as matter of course without that party bringing a formal motion to intervene (*Keybank National Association v Atchafalaya (Ship)*, 2010 FC 406 at para 13).

B. *Summary Judgment*

[49] A party may bring a motion for summary judgment on all or some of the issues raised in the pleadings any time after the defendant has filed a defence but before the trial has been fixed (Rule 213). Pursuant to Rule 215(1), the Court shall grant summary judgment if the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence.

[50] A conclusion that there is “no genuine issue for trial” is available if there is no legal basis for the claim or defence, or if the Court has the evidence required to fairly and justly adjudicate the dispute (*Milano Pizza Ltd v 6034799 Canada Inc*, 2018 FC 1112 [*Milano Pizza*] at para 31, citing *Hyrniak v Mauldin*, 2014 SCC 7 at para 66).

[51] The test on a motion for summary judgment is whether the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial. Summary judgment is not restricted to “the clearest of cases”, and the moving party does not need to establish that a claim or defence cannot possibly succeed at trial. Rather, the moving party must show that the claim or defence is “clearly without foundation” (*Milano Pizza* at para 33; *Premakumaran v Canada*, 2006 FCA 213 at para 8, leave to appeal to SCC refused, 31605 (16 November 2006)).

[52] Summary judgment should not be granted where the necessary facts cannot be found to resolve the dispute, or where it would be unjust to do so. The existence of conflicting evidence does not necessarily preclude summary judgment if the Court finds the issues can be decided notwithstanding the conflicting evidence; however, issues of credibility should not be decided on motions for summary judgment (*Milano Pizza* at paras 36–39). The need for expert evidence that is not before the Court on a summary judgment motion can preclude a matter being appropriate for summary judgment (*Wenzel Downhole Tools Ltd v National-Oilwell Canada Ltd*, 2010 FC 966 at paras 31).

[53] In response to a motion for summary judgment, a responding party cannot rely on what may be adduced as evidence at a later stage. A responding party must set out specific facts and adduce the evidence showing that there is a genuine issue for trial (Rule 214; *Milano Pizza* at paras 34–35; *Gupta v Canada*, 2021 FCA 31 at para 29). This obligation for a responding party to “put their best foot forward” does not necessarily extend to advancing expert evidence, particularly where this is a function of the trial preparation process (*Libra Voyage Limited v NA 5501 (Barge)*, 2022 FC 1311 at paras 127–28).

C. *Maritime Law*

(1) *In Rem Jurisdiction of the Federal Court*

[54] Subsection 43(2) of the *Federal Courts Act* affords the Federal Court its *in rem* jurisdiction. Subsection 43(2) provides that, subject to subsection 43(3), the effect of which will be explained shortly, the jurisdiction conferred on the Federal Court by section 22 of the *Federal Courts Act* may be exercised *in rem* against the ship that is the subject of the action.

[55] Section 22 sets out the Federal Court's jurisdiction over maritime matters as follows, with subsection 22(2) providing a non-exhaustive list of categories of claims:

Navigation and shipping

22 (1) The Federal Court has concurrent original jurisdiction, between subject and subject as well as otherwise, in all cases in which a claim for relief is made or a remedy is sought under or by virtue of Canadian maritime law or any other law of Canada relating to any matter coming within the class of subject of navigation and shipping, except to the extent that jurisdiction has been otherwise specially assigned.

Maritime jurisdiction

(2) Without limiting the generality of subsection (1), for greater certainty, the Federal Court has jurisdiction with respect to all of the following:

[Enumerated categories.]

Navigation et marine marchande

22 (1) La Cour fédérale a compétence concurrente, en première instance, dans les cas — opposant notamment des administrés — où une demande de réparation ou un recours est présenté en vertu du droit maritime canadien ou d'une loi fédérale concernant la navigation ou la marine marchande, sauf attribution expresse contraire de cette compétence.

Compétence maritime

(2) Il demeure entendu que, sans préjudice de la portée générale du paragraphe (1), elle a compétence dans les cas suivants :

[Catégories énumérées.]

[56] The parties' arguments in this matter focus upon the categories of claims enumerated in paragraphs 22(2)(m) and 22(2)(n), which read as follows:

(m) any claim in respect of goods, materials or services wherever supplied to a ship for the operation or maintenance of the ship, including, without restricting the generality of the foregoing, claims in respect of stevedoring and lighterage;

m) une demande relative à des marchandises, matériels ou services fournis à un navire pour son fonctionnement ou son entretien, notamment en ce qui concerne l'acconage et le gabarage;

(n) any claim arising out of a contract relating to the construction, repair or equipping of a ship;

n) une demande fondée sur un contrat de construction, de réparation ou d'équipement d'un navire;

[57] Subsection 43(3) qualifies subsection 43(2) as follows:

Exception

(3) Despite subsection (2), the jurisdiction conferred on the Federal Court by section 22 shall not be exercised *in rem* with respect to a claim mentioned in paragraph 22(2)(e), (f), (g), (h), (i), (k), (m), (n), (p) or (r) unless, at the time of the commencement of the action, the ship, aircraft or other property that is the subject of the action is beneficially owned by the person who was the beneficial owner at the time when the cause of action arose.

Exception

(3) Malgré le paragraphe (2), elle ne peut exercer la compétence en matière réelle prévue à l'article 22, dans le cas des demandes visées aux alinéas 22(2) e), f), g), h), i), k), m), n), p) ou r), que si, au moment où l'action est intentée, le véritable propriétaire du navire, de l'aéronef ou des autres biens en cause est le même qu'au moment du fait générateur.

[58] Applicable jurisprudence also provides that a statutory right *in rem*, unaccompanied by a maritime lien, does not exist unless the personal liability of the shipowner is engaged (*F.C.*

Yachts Ltd v Vessel Bearing Hull No. QFY10703E709 (Yacht), 2007 FC 1257 at para 5;

Maritima de Ecologia, S.A. de C.V. v Maersk Defender (Ship), 2007 FCA 194 at paras 32–36;

Offshore Interiors Inc v Worldspan Marine Inc, 2016 FC 27 at para 89).

[59] Subsection 43(7) of the *Federal Courts Act* further restricts, as follows, the availability of an *in rem* action in the context of (broadly speaking) government ships:

Ship owned by sovereign power

(7) No action in rem may be commenced in Canada against

- (a) any warship, coast-guard ship or police vessel;
- (b) any ship owned or operated by Canada or a province, or any cargo laden thereon, where the ship is engaged on government service; or
- (c) any ship owned or operated by a sovereign power other than Canada, or any cargo laden thereon, with respect to any claim where, at the time the claim arises or the action is commenced, the ship is being used exclusively for non-commercial governmental purposes.

(2) *Maritime Lien under the Marine Liability Act*

Navire appartenant à un État souverain

(7) Il ne peut être intenté au Canada d'action réelle portant, selon le cas, sur :

- a) un navire de guerre, un garde-côte ou un bateau de police;
- b) un navire possédé ou exploité par le Canada ou une province, ou sa cargaison, lorsque ce navire est en service commandé pour le compte de l'État;
- c) un navire possédé ou exploité par un État souverain étranger — ou sa cargaison — et accomplissant exclusivement une mission non commerciale au moment où a été formulée la demande ou intentée l'action les concernant.

[60] While Navtech does not specify the nature of the maritime lien claimed in its pleadings, the parties' arguments, surrounding the possibility that a maritime lien applies, focus upon the lien created by section 139 of the *Marine Liability Act*, SC 2001, c 6 [*Marine Liability Act*].

[61] Section 139 of the *Marine Liability Act* provides as follows:

Definition of *foreign vessel*

139 (1) In this section, *foreign vessel* has the same meaning as in section 2 of the *Canada Shipping Act, 2001*.

Définition de *bâtiment étranger*

139 (1) Au présent article, *bâtiment étranger* s'entend au sens de l'article 2 de la *Loi de 2001 sur la marine marchande du Canada*.

Maritime lien

(2) A person, carrying on business in Canada, has a maritime lien against a foreign vessel for claims that arise

(a) in respect of goods, materials or services wherever supplied to the foreign vessel for its operation or maintenance, including, without restricting the generality of the foregoing, stevedoring and lighterage; or

(b) out of a contract relating to the repair or equipping of the foreign vessel.

Services requested by owner

(2.1) Subject to section 251 of the *Canada Shipping Act, 2001*, for the purposes of paragraph (2)(a), with respect to stevedoring or lighterage, the services must have been provided at the request of the owner of the foreign vessel or a person acting on the owner's behalf.

Exception

(3) A maritime lien against a foreign vessel may be enforced by an action *in rem* against a foreign vessel unless

(a) the vessel is a warship, coast guard ship or police vessel; or

(b) at the time the claim arises or the action is commenced, the vessel is being used exclusively for non-commercial governmental purposes.

Federal Courts Act**Privilège maritime**

(2) La personne qui exploite une entreprise au Canada a un privilège maritime à l'égard du bâtiment étranger sur lequel elle a l'une ou l'autre des créances suivantes :

a) celle résultant de la fourniture — au Canada ou à l'étranger — au bâtiment étranger de marchandises, de matériel ou de services pour son fonctionnement ou son entretien, notamment en ce qui concerne l'aconage et le gabarage;

b) celle fondée sur un contrat de réparation ou d'équipement du bâtiment étranger.

Service demandé par le propriétaire

(2.1) Sous réserve de l'article 251 de la *Loi de 2001 sur la marine marchande du Canada* et pour l'application de l'alinéa (2)a), dans le cas de l'aconage et du gabarage, le service doit avoir été fourni à la demande du propriétaire du bâtiment étranger ou de la personne agissant en son nom.

Exceptions

(3) Le privilège maritime peut être exercé en matière réelle à l'égard du bâtiment étranger qui n'est pas :

a) un navire de guerre, un garde-côte ou un bateau de police;

b) un navire accomplissant exclusivement une mission non commerciale au moment où a été formulée la demande ou a été intentée l'action le concernant.

Loi sur les Cours fédérales

(4) Subsection 43(3) of the *Federal Courts Act* does not apply to a claim secured by a maritime lien under this section.

(4) Le paragraphe 43(3) de la *Loi sur les Cours fédérales* ne s'applique pas aux créances garanties par un privilège maritime au titre du présent article.

[62] Under subsection 139(1) of the *Marine Liability Act*, a “foreign vessel” is defined in section 2 of the *Canada Shipping Act, 2001*, SC 2001, c 26 [*Canada Shipping Act*]. The relevant definitions in section 2 of the *Canada Shipping Act* are as follows:

Canadian vessel means a vessel that is registered or listed under Part 2 (Registration, Listing and Recording) or that is exempted under the regulations from the registration requirement in subsection 46(1).

bâtiment canadien Bâtiment soit immatriculé ou enregistré sous le régime de la partie 2 (immatriculation, enregistrement et inscription), soit dispensé, en vertu des règlements, de l'exigence relative à l'immatriculation prévue au paragraphe 46(1).

foreign vessel means a vessel that is not a Canadian vessel or a pleasure craft.

bâtiment étranger Bâtiment qui n'est ni un bâtiment canadien ni une embarcation de plaisance.

[63] The requirement created by subsection 43(3) of the *Federal Courts Act*, that beneficial ownership of a vessel have remained unchanged for an *in rem* right to be asserted, does not apply to a claim secured by a maritime lien under section 139 (*Marine Liability Act*, s 139(4)). However, in the context of (broadly speaking) government ships, the availability of a maritime lien is qualified (*Marine Liability Act*, s 139(3)).

D. **Copyright**

[64] The *Copyright Act* provides both economic rights and moral rights relating to a work (*Théberge v Galerie d'Art du Petit Champlain inc*, 2002 SCC 34 [*Théberge*] at paras 11–12, 15).

[65] Section 3 of the *Copyright Act* provides that, in relation to a work, “copyright” means the rights described as follows:

Copyright in works

3 (1) For the purposes of this Act, *copyright*, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right

(a) to produce, reproduce, perform or publish any translation of the work,

[Other specific examples enumerated.]

Droit d’auteur sur l’œuvre

3 (1) Le droit d’auteur sur l’œuvre comporte le droit exclusif de produire ou reproduire la totalité ou une partie importante de l’œuvre, sous une forme matérielle quelconque, d’en exécuter ou d’en représenter la totalité ou une partie importante en public et, si l’œuvre n’est pas publiée, d’en publier la totalité ou une partie importante; ce droit comporte, en outre, le droit exclusif :

a) de produire, reproduire, représenter ou publier une traduction de l’œuvre;

[Autres exemples spécifiques énumérés.]

[66] Moral rights afforded to the author of a work are addressed under section 14.1 of the *Copyright Act* as follows:

Moral rights

14.1 (1) The author of a work has, subject to section 28.2, the right to the integrity of the work and, in connection with an act mentioned in section 3, the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous.

No assignment of moral rights

(2) Moral rights may not be assigned but may be waived in whole or in part.

...

Droits moraux

14.1 (1) L’auteur d’une œuvre a le droit, sous réserve de l’article 28.2, à l’intégrité de l’œuvre et, à l’égard de tout acte mentionné à l’article 3, le droit, compte tenu des usages raisonnables, d’en revendiquer, même sous pseudonyme, la création, ainsi que le droit à l’anonymat.

Incessibilité

(2) Les droits moraux sont incessibles; ils sont toutefois susceptibles de renonciation, en tout ou en partie.

...

[67] Infringement of copyright and moral rights is addressed (in part) as follows in subsection 27(1) and sections 28.1–28.2, respectively, of the *Copyright Act*:

Infringement generally

27 (1) It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.

....

Infringement generally

28.1 Any act or omission that is contrary to any of the moral rights of the author of a work or of the performer of a performer's performance is, in the absence of the author's or performer's consent, an infringement of those rights.

Nature of right of integrity

28.2 (1) The author's or performer's right to the integrity of a work or performer's performance is infringed only if the work or the performance is, to the prejudice of its author's or performer's honour or reputation,

....

Règle générale

27 (1) Constitue une violation du droit d'auteur l'accomplissement, sans le consentement du titulaire de ce droit, d'un acte qu'en vertu de la présente loi seul ce titulaire a la faculté d'accomplir.

....

Atteinte aux droits moraux

28.1 Constitue une violation des droits moraux de l'auteur sur son œuvre ou de l'artiste-interprète sur sa prestation tout fait — acte ou omission — non autorisé et contraire à ceux-ci.

Nature du droit à l'intégrité

28.2 (1) Il n'y a violation du droit à l'intégrité que si l'œuvre ou la prestation, selon le cas, est, d'une manière préjudiciable à l'honneur ou à la réputation de l'auteur ou de l'artiste-interprète, déformée, mutilée ou autrement modifiée, ou utilisée en liaison avec un produit, une cause, un service ou une institution.

....

[68] Where infringement occurs, the *Copyright Act* provides (in part) as follows in relation to civil remedies:

Copyright

34 (1) Where copyright has been infringed, the owner of the copyright is, subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up

Droit d'auteur

34 (1) En cas de violation d'un droit d'auteur, le titulaire du droit est admis, sous réserve des autres dispositions de la présente loi, à exercer tous les recours — en vue notamment

and otherwise that are or may be conferred by law for the infringement of a right.

Moral rights

(2) In any proceedings for an infringement of moral rights, the court may grant to the holder of those rights all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right.

d'une injonction, de dommages-intérêts, d'une reddition de compte ou d'une remise — que la loi accorde ou peut accorder pour la violation d'un droit.

Droits moraux

(2) Le tribunal saisi d'un recours en violation des droits moraux peut accorder au titulaire de ces droits les réparations qu'il pourrait accorder, par voie d'injonction, de dommages-intérêts, de reddition de compte, de remise ou autrement, et que la loi prévoit ou peut prévoir pour la violation d'un droit.

[69] Subsection 35(1) also provides that, in certain circumstances, a party whose copyright has been infringed may claim both for damages and for an accounting of profits made from the infringement:

Liability for infringement

35 (1) Where a person infringes copyright, the person is liable to pay such damages to the owner of the copyright as the owner has suffered due to the infringement and, in addition to those damages, such part of the profits that the infringer has made from the infringement and that were not taken into account in calculating the damages as the court considers just.

Violation du droit d'auteur : responsabilité

35 (1) Quiconque viole le droit d'auteur est passible de payer, au titulaire du droit qui a été violé, des dommages-intérêts et, en sus, la proportion, que le tribunal peut juger équitable, des profits qu'il a réalisés en commettant cette violation et qui n'ont pas été pris en compte pour la fixation des dommages-intérêts.

[70] Finally, the parties' arguments engage the application of section 43.1 of the *Copyright Act*, which prescribes a limitation period applicable to civil remedies for any act or omission done contrary to the *Copyright Act*:

Limitation or prescription period for civil remedies

43.1 (1) Subject to subsection (2), a court may award a remedy for any act or omission that has been done contrary to this Act only if

Prescription

43.1 (1) Sous réserve du paragraphe (2), le tribunal ne peut accorder de réparations à l'égard d'un fait — acte ou omission —

contraire à la présente loi que dans les cas suivants :

(a) the proceedings for the act or omission giving rise to a remedy are commenced within three years after it occurred, in the case where the plaintiff knew, or could reasonably have been expected to know, of the act or omission at the time it occurred; or

(b) the proceedings for the act or omission giving rise to a remedy are commenced within three years after the time when the plaintiff first knew of it, or could reasonably have been expected to know of it, in the case where the plaintiff did not know, and could not reasonably have been expected to know, of the act or omission at the time it occurred.

a) le demandeur engage une procédure dans les trois ans qui suivent le moment où le fait visé par le recours a eu lieu, s'il avait connaissance du fait au moment où il a eu lieu ou s'il est raisonnable de s'attendre à ce qu'il en ait eu connaissance à ce moment;

b) le demandeur engage une procédure dans les trois ans qui suivent le moment où il a pris connaissance du fait visé par le recours ou le moment où il est raisonnable de s'attendre à ce qu'il en ait pris connaissance, s'il n'en avait pas connaissance au moment où il a eu lieu ou s'il n'est pas raisonnable de s'attendre à ce qu'il en ait eu connaissance à ce moment.

Restriction

(2) The court shall apply the limitation or prescription period set out in paragraph (1)(a) or (b) only in respect of a party who pleads a limitation period.

Restriction

(2) Le tribunal ne fait jouer la prescription visée aux alinéas (1)a) ou b) qu'à l'égard de la partie qui l'invoque.

V. Analysis

A. *Intervention Motion*

[71] The adjudication of the Intervention Motion requires little analysis. These Reasons address the various motions before the Court in the order in which they were argued. However, all are being adjudicated simultaneously, and the outcome of the Admiralty Motion (addressed immediately below) is determinative of the Intervention Motion.

[72] As explained below, the Court is granting the Admiralty Motion, which includes a determination that, because Navtech's claim does not give rise to a maritime lien against the Defendant Ship, the *in rem* action against the Ship must be dismissed. My Order below will so provide.

[73] Therefore, the Crown does not have an interest in this action. While I accept that the Crown has an interest in the Ship (as a result of the PSA), the Ship will no longer be a Defendant in this proceeding. As such, applying the principles governing intervention motions set out earlier in these Reasons, there is no basis for the Crown's participation in this action going forward. It is therefore unnecessary for the Court to adjudicate the Crown's requests for substantive relief in relation to the action, and the Royalties Motion, as they relate to the Ship.

[74] Accordingly, my Order will dismiss the Intervention Motion.

B. Admiralty Motion

- (1) *Is this an appropriate case for summary judgment in relation to the in rem action and the in personam action as against FFS?*

[75] FFS asserts that the issues it raises on the Admiralty Motion are suitable for summary judgment. In relation to the *in rem* action, FFS argues that, applying the relevant principles of maritime law, the facts underlying Navtech's claim against the Defendant Ship do not support a claim *in rem*. Similarly, FFS argues that the facts upon which Navtech relies in support of its claim against FFS do not give rise to a viable legal theory pursuant to which FFS can have liability to Navtech, with which it has no contractual relationship.

[76] I agree with FFS's position that there are no material factual disputes or conflicts in the evidence relevant to the issues raised in this motion. Rather, the parties' respective positions in this motion involve the application of matters of law to a factual matrix that can be derived from the record before the Court. Applying the principles governing summary judgment, as canvassed earlier in these Reasons, I find that the issues raised in this motion are suitable for the Court to adjudicate by way of summary judgment.

(2) Does this action give rise to a right in rem against the Defendant Ship?

[77] FFS submits that the action asserts causes of action arising from the law of intellectual property, which are not in pith and substance claims that fall under the definition of navigation and shipping within the meaning of section 22 of the *Federal Courts Act*. As only a claim that falls under this Court's admiralty jurisdiction under section 22 can be exercised *in rem* against a ship that is the subject of the action (*Federal Courts Act*, s 43(2)), FFS argues that Navtech's action *in rem* must fail.

[78] FFS relies heavily on *Trawlercat Marine Inc v Amity (The)*, 2002 FCT 1181 [*Trawlercat*], a case in which Prothonotary John Hargrave concluded that a claim for breach of copyright (and other claims under the *Copyright Act*), arising from alleged use of the plaintiffs' drawings to construct the defendant vessel, did not fall under paragraphs 22(2)(m) or (n) (or, more broadly, under section 22) of the *Federal Courts Act*.

[79] As explained later in these Reasons, the analysis in *Trawlercat* is relevant to the Court's determination whether Navtech benefits from a maritime lien against the Defendant Ship under

section 139 of the *Marine Liability Act*. However, it is unnecessary for the Court to consider the question whether, absent a maritime lien, Navtech's action falls within the Court's *in rem* jurisdiction, as Navtech's effort to invoke the Court's *in rem* jurisdiction is based entirely on an assertion that it has a maritime lien under section 139.

[80] As Navtech concedes in its submissions, the effect of subsection 43(3) of the *Federal Courts Act* and applicable jurisprudence is that, in order to invoke the Court's *in rem* jurisdiction under paragraph 22(2)(m) or (n), the claimant must have a claim against the owner of the vessel at the time the claim arose and the ownership must not have changed between the time the claim arose and the time the claimant commenced its action.

[81] Navtech recognizes that materially all of its design services were performed while Olymbos still owned the Ship. Navtech does not assert a claim against Olymbos, and it acknowledges that it did not commence its action until after title to the Ship had been conveyed by Olymbos to FFS on September 30, 2015. Therefore, absent the availability of a maritime lien under section 139 of the *Marine Liability Act*, Navtech acknowledges that it would not have an *in rem* claim against the Ship. It is therefore unnecessary for the Court to adjudicate FFS's arguments surrounding the Court's *in rem* jurisdiction, other than in relation to section 139, to which I will turn later in these Reasons.

(3) *Was there a contract between FFS and Navtech?*

[82] Similarly, with the benefit of Navtech's submissions, it is unnecessary for the Court to address in any detail FFS's arguments that it was only Davie, and not FFS, which contracted with Navtech.

[83] FFS emphasizes that each of the agreements to which Navtech was a party (the NDA, the MOA, the Licence Agreement, and the Confidentiality Agreement) was signed with Davie and only Davie. Navtech invoiced Davie, and all amounts paid to Navtech were paid by Davie. FFS argues that there is no evidence of any facts that could have led Mr. Barbeau to believe that Navtech had contracted with FFS.

[84] In response to these submissions, Navtech explains that it does not contest that the agreements referenced by FFS were signed by Davie and not by FFS. Rather, Navtech argues, based on various connections between Davie and FFS and based on details of FFS's involvement in the Project, that FFS is liable for Davie's obligations under the Licence Agreement. Navtech argues either that FFS represents an *alter ego* of Davie or that it is liable for Davie's obligations pursuant to other legal theories, which can afford an exception to the strict application of the rule of privity of contract pursuant to which only a party to a contract assumes obligations thereunder.

[85] In the next section of these Reasons, the Court will address Navtech's *alter ego* arguments and related submissions. However, as acknowledged by both parties, it is clear from the record before the Court that it was only Davie, and not FFS, which contracted with Navtech.

- (4) *Can FFS be held liable as the alter ego of Davie or pursuant to any other legal theory advanced by Navtech?*

(a) *Navtech's Position*

[86] Navtech's arguments in support of FFS's liability emphasize that Davie and FFS are "sister companies", by which Navtech means that they are part of the same corporate group and have the same ultimate individual shareholders. Navtech also relies on the degree to which FFS and its representatives were involved in the Project and, in particular, those representatives' interactions with Navtech as it performed its work under the Licence Agreement, including the fact that the employment of some of these representatives at times changed from one corporate Defendant to the other.

[87] FFS was incorporated in August 2014, although Navtech submits that its incorporation was not brought to Navtech's attention or to the attention of the public generally. In support of its position that Davie and FFS are commonly controlled, Navtech refers the Court to documents from the Québec company registry, demonstrating that, through intermediary corporations, the same two individuals each own between 25% and 50% of the voting shares of each of Davie and FFS.

[88] In relation to individuals involved at an operational level, Navtech relies in particular on the roles of Mr. Schmidt and Mr. Fraser. For purposes of the discovery examinations in this matter, Mr. Schmidt served as the corporate representative of Davie and Mr. Fraser as the corporate representative of FFS. Based on a combination of Mr. Barbeau's affidavit, Mr. Schmidt's discovery evidence, and the answers to resulting undertakings, Navtech explains changes to the roles played by Mr. Schmidt and Mr. Fraser over the course of the Project.

[89] Mr. Barbeau describes first meeting Mr. Fraser at Davie's offices in the summer of 2014, when Mr. Fraser was employed as a consultant for Davie. Mr. Schmidt and Mr. Fraser were both employed by Davie until July 1, 2015, FFS having had no employees prior to that date. However, on July 1, 2015, Mr. Fraser was transferred to (and became CEO of) FFS. On August 18, 2015, Mr. Schmidt was transferred to FFS with the title Vice-President, Commercial. He subsequently became president and CEO of FFS. Then, on March 4, 2019, Mr. Schmidt returned to Davie with the title Vice-President, Commercial. Navtech asserts that it was not informed of these changes in Mr. Schmidt's and Mr. Fraser's employment.

[90] Navtech also notes that, after FFS became operational, the Ottawa offices of Davie were converted into the offices of FFS.

[91] Navtech submits that, following July 1, 2015, and during the summer of 2015, Davie and FFS interchangeably gave instructions to Navtech with respect to changes to be made to the design Navtech was preparing. For instance, Mr. Barbeau refers to a request for corrections received by Navtech on July 15, 2015, identifying Mr. Schmidt as "auditor" and Mr. Fraser as "authorizing officer". The evidence also identifies two new employees involved with the Project, Mr. Steve Durrell and Mr. Eric McCole who joined Davie in, respectively, June and August 2015. Navtech asserts that, from then until the end of its involvement in the Project in October 2015, it continued to receive instructions from employees of both Defendants.

[92] Navtech argues that the particular role of each of the Defendants on the Project was not only unclear to Navtech but was unclear even to the Defendants themselves. In support of this position, Navtech notes that the LOI signed with the Crown on July 31, 2015, was entered into

by both Defendants. Mr. Schmidt acknowledged on discovery that, when the LOI was signed, it was not yet clear which of the Defendants would own the Ship. Consistent therewith, the July 15, 2015 Olymbos MOA contemplated purchase of the Ship by either Davie or its nominee. It was only on September 29, 2015, that FFS was nominated as purchaser of the Ship pursuant to Addendum No. 1 to the Olymbos MOA. Navtech therefore argues that, when the Licence Agreement was signed by Davie on August 14, 2015, it was not yet known (and certainly not yet known by Navtech) which of the Defendants would own the Ship and which would contract with the Crown.

[93] While it is not clear from the record before the Court whether FFS necessarily accepts all the above facts, FFS has not contested these facts in this motion. FFS does note that the record before the Court includes a document referenced in Mr. Barbeau's discovery examination, which presents as a Specification for the Ship, signed by Mr. Barbeau on September 29, 2015, and referring to FFS (under its former name, Project Resolve Inc.) as the Ship's owners. Navtech does not dispute this but notes that its work under the Licence Agreement was effectively at an end by the end of September 2015.

[94] It is against that factual backdrop that Navtech argues that not only Davie (which signed the various agreements with Navtech), but also FFS, should bear liability for the obligations that arise under those agreements (and, in particular, the Licence Agreement). Much of Navtech's argument on this issue presents as an effort to "pierce the corporate veil" within the meaning described in, for instance, *Meredith v Canada (Attorney General)*, 2002 FCA 258 [*Meredith*] at para 12:

Lifting the corporate veil is contrary to long-established principles of corporate law. Absent an allegation that the corporation constitutes a "sham" or a vehicle for wrongdoing on the part of putative shareholders, or statutory authorisation to do so, a court must respect the legal relationships created by a taxpayer (see *Salomon v. Salomon & Co.*, [1897] A.C. 22; *Kosmopoulos v. Constitution Insurance Co. of Canada*, 1987 CanLII 75 (SCC), [1987] 1 S.C.R. 2). A court cannot re-characterize the *bona fide* relationships on the basis of what it deems to be the economic realities underlying those relationships (see *Continental Bank Leasing Corp. v. The Queen*, [1998] 2 S.C.R. 298; *Shell Canada Ltd. v. The Queen*, [1999] 3 S.C.R. 622 ; *Ludco Enterprises Limited v. the Queen*, 2001 SCC 62 at para. 51). It follows, therefore, that the Judge erred in law by inquiring into the economic realities of the relationship as between Stem and Meredith, when he was not authorised by statute or common law to do so.

[95] However, Navtech's counsel explained at the hearing of this motion that it is not attempting to pierce the corporate veil within the meaning of the above principles. Navtech's counsel confirmed that it does not assert that FFS represents a "sham" or that the facts of this matter otherwise demonstrate some sort of fraud or other wrongdoing on the part of the Defendants. Rather, Navtech relies on case law that it submits can support a finding that one corporate entity is liable for the obligations of another, based on one corporation being the *alter ego* of another related corporation or other jurisprudential principles that can represent an exception to the rule of privity of contract, pursuant to which only a party to a contract has obligations thereunder.

[96] Turning first to the *alter ego* jurisprudence upon which Navtech relies, it references *Smith, Stone & Knight, Ltd v Birmingham Corp*, [1939] 4 All ER 116 [*Smith*] at 121 (KBD UK), as supporting a principle that, where two companies share a directing mind, one company signs an agreement, and both companies actively participate in the fulfilment of the contractual

obligations and give instructions to the other party to the contract, both companies are liable on the contract. The analysis in *Smith* is summarized as follows in *Buanderie centrale de Montréal Inc v Montreal (City)*; *Conseil de la santé et des services sociaux de la région de Montréal métropolitain v Montreal (City)*, [1994] 3 SCR 29, 1994 CanLII 59 (SCC) [*Buanderie*] at 46–47, another authority on which Navtech relies:

Additionally, in *Smith, Stone & Knight, Ltd. v. Birmingham Corp.*, [1939] 4 All E.R. 116 (K.B.), Atkinson J. came to the conclusion that a parent company could sue the persons responsible for damage caused to one of its subsidiaries. For the case at bar, and regardless of this latter conclusion, most relevant is the way in which the judge arrived at the finding that the subsidiary was not operating on its own account but solely as an integral part of the parent company's activities. To this end he consulted a number of decisions, all of which involved tax law, which needless to say is not without relevance to the case now before the Court. Using these decisions, he identified, at p. 121, six factors that could justify treating two corporations as one for tax purposes. I set them out below:

- (1) Were the profits treated as the profits of the [parent] company?
- (2) [W]ere the persons conducting the business appointed by the parent company?
- (3) [W]as the [parent] company the head and the brain of the trading venture?
- (4) [D]id the [parent] company govern the adventure, decide what should be done and what capital should be embarked on the venture?
- (5) [D]id the [parent] company make the profits by its skill and direction?
- (6) [W]as the [parent] company in effectual and constant control?

[97] Relying on *Smith* and other authorities, *Buanderie* described the *alter ego* concept as follows at 48:

In light of the foregoing cases, a corporation may be regarded as the *alter ego* of another corporation when there is such a close relationship between them that what apparently concerns one actually pertains to the activities of the other. Undoubtedly a large number of factors can be identified to determine the existence of such a relationship: in my opinion, however, the one that is most explicit and most likely to cover all aspects of the concept is control.

[Emphasis in original]

[98] Similarly, in *White v E.B.F. Manufacturing Ltd*, 2005 NSCA 167 [*White*] at paragraphs 45 to 58, the Nova Scotia Court of Appeal [NSCA] referred to courts lifting the corporate veil of a company where it is an agent or the mere *alter ego* of its controlling shareholder or parent company. In that case, the Court upheld the trial judge's lifting of the corporate veil where the evidence established that the same individual was the sole shareholder, director, and officer of two companies (EBF and FENCE), that one of those companies (FENCE) had no employees, very few assets other than its inventory, limited capitalization, and no independent functioning, such that it operated as a mere agent of the other company (EBF). The trial judge therefore had not erred in directing that both companies make their financial records available for inspection, such that royalties payable to the claimant under a license agreement could be calculated based on the revenues of both companies.

[99] Navtech argues that similar reasoning should be applied in the case at hand, treating FFS as the *alter ego* of Davie, or regarding Davie as having entered into the Licence Agreement as the agent of FFS, such that FFS is liable to Navtech for its claims under the Licence Agreement.

[100] Navtech also refers the Court to cases in which a so-called "special contract" has been identified and has resulted in an exception to the doctrine of privity of contract. In *The Albazero*

(1976), [1977] AC 774, [1976] 3 All ER 129 [*The Albazero*] at 842 (HL (Eng)), Lord Diplock described the concept of the special contract as follows:

Assumpsit against a carrier for loss or damage to goods could be based either upon an implied promise to perform the duties imposed by law upon a common carrier by the custom of the realm or upon an express promise varying those duties which in the contemporary cases is referred to as a “special” contract with the carrier. A special contract between the consignor and the carrier was one which he had entered into on his own behalf and not as agent for the consignee; but since the question generally arose where the goods carried were the subject of a contract of sale between the consignor and the consignee the question whether the seller was contracting with the carrier on his own behalf or on behalf of the buyer/consignee was often a matter of inference from the terms of the contract of sale. It was well established by the end of the eighteenth century that the ordinary implication in a contract for the sale of goods was that the place of delivery of the goods to the buyer was the seller’s place of business and that if the seller made a contract with a carrier for onward delivery he did so on the buyer’s behalf. This implication could, however, be rebutted by the express terms of the contract of sale. Since this too was referred to as a “special contract,” though in this case between the consignor and the consignee, it has led to some confusion in the cases dealing with the right of the consignor to sue the carrier which sometimes is said to depend upon a special contract between consignor and carrier and sometimes upon a special contract between consignor and consignee.

[101] In *Alfred McAlpine Construction Limited v Panatown Limited*, [2000] UKHL 43 [*Panatown*] at 529, Lord Clyde referenced what he referred to as “The *Albazero* exception”, explained by Lord Diplock as follows (*The Albazero* at 844):

...that the consignor may recover substantial damages against the shipowner if there is privity of contract between him and the carrier for the carriage of goods; although, if the goods are not his property or at his risk, he will be accountable to the true owner for the proceeds of his judgment.

[102] As will be apparent from these passages, the concept of the special contract arose in the context of the carriage of goods, in circumstances where there was concern as to the right of a shipper and consignor to sue a carrier for loss or damage to goods because title to the goods had passed to a consignee. However, *Panatown* explains that this concept has also been developed in the context of building contracts (at 523). Navtech refers the Court to the following broader statement of the concept found at page 535 of *Panatown*:

It seems to me that a more realistic and practical solution is to permit the contracting party to recover damages for the loss which he and a third party has suffered, being duly accountable to them in respect of their actual loss, than to construct a theoretical loss in law on the part of the contracting party, for which he may be under no duty to account to anyone since it is seen to be his own loss. The solution is required where the law will not tolerate a loss caused by a breach of contract to go uncompensated through an absence of privity between the party suffering the loss and the party causing it. In such a case, to avoid the legal blackhole, the law will deem the innocent party to be claiming on behalf of himself and others who have suffered loss. It does not matter that he is not the owner of the property affected, nor that he has not himself suffered any economic loss. He sues for all the loss which has been sustained and is accountable to the others to the extent of their particular losses. ...

[103] Finally, Navtech argues that, if the above legal theories do not support its claim against FFS, then FFS must be regarded as having acted as an agent of Davie when its employees instructed Navtech to carry out duties pursuant to the Licence Agreement. Navtech submits that the law of agency permits a third party to sue either the agent of a disclosed principal or the principal, or both. On this basis, Navtech asserts that both Davie and FFS are liable under the Licence Agreement.

(b) *FFS's Position*

[104] In response to Navtech's submissions, FFS refers the Court to jurisprudence emphasizing the need to demonstrate conduct akin to fraud in order to pierce the corporate veil for purposes of extending a corporation's liability to another party. For instance, in *Nevsun Resources Ltd v Delizia Limited*, 2016 FC 393 [*Nevsun*], aff'd 2017 FCA 187, Justice Henry Brown (relying on *Meredith* at para 12) explained the following at paragraph 44:

There is no doubt that lifting the corporate veil is contrary to well-established principles of corporate law, both in Canada and elsewhere. In order to pierce a corporate veil in the absence of agency or statutory requirement, there must be a sham or the existence of a vehicle for wrongdoing, or some conduct akin to fraud. ...

[105] Turning to the factual matrix, as previously noted, I do not understand FFS to contest any of the facts on which Navtech relies. However, FFS has also introduced evidence, through affidavits sworn on December 4, 2024, by Mr. Schmidt (then Davie's Vice-President, Commercial), and on December 5, 2024, by FFS's secretary and general counsel, Marc Babinski, identifying the distinct lines of business in which the two companies are engaged (Davie operating a shipyard and FFS being a ship management company). Mr. Schmidt also refers to each company having its own employees.

[106] FFS also relies on evidence given by Mr. Schmidt on discovery. The Rules do not contemplate a party relying upon of the transcript of its own witness's discovery evidence. However, in the case at hand, the parties have agreed that each may do so for purposes of these motions, in the interest of the efficiency in avoiding the need to prepare affidavits capturing

evidence that has already been given on discovery. Mr. Schmidt testified on discovery that, in relation to the Conversion Contract between them, Davie and FFS were acting as separate entities, maintaining separate offices, budgets, and allocations for costs. Mr. Schmidt also explained on discovery that it was considered beneficial to be able to demonstrate to the Crown that risks associated with the provision of the Ship to the Crown were isolated in FFS, distinct from any risks born by Davie.

[107] FFS also relies on the evidence given by its corporate representative, Mr. Fraser, in his discovery examination. Mr. Fraser testified that, during his tenure as CEO of FFS, he reported to the board of directors of FFS. He also provided evidence as to separate teams that FFS and Davie had working on the Project, including reference to occasional disagreement between those teams regarding the work to be carried out on the Ship. In relation to progressing the design of the Ship, Mr. Fraser testified that the role of FFS was to ensure that the Ship met the Crown's requirements under the Crown's statement of work and that it was Davie's role to design and execute the conversion to accomplish that goal.

[108] FFS submits that, consistent with this delineation of responsibilities, FFS and Davie entered into the Conversion Contract, pursuant to which FFS paid Davie to perform the conversion of the Ship. FFS also emphasizes Mr. Schmidt's evidence on discovery that FFS has no obligation to have Davie perform dry docking or other in-service repairs that the Ship requires.

[109] FFS further notes Mr. Barbeau’s testimony on discovery to the effect that it was not unusual for Navech, in performing vessel design work generally, to interact both with the relevant shipyard and the ultimate shipowner for which the shipyard was working.

[110] In responding to this motion, Navtech has not identified any particular disagreement with the above facts or supporting evidence upon which FFS relies.

(c) *Analysis*

[111] For the reasons explained below, I agree with FFS that, based on the facts and legal theories on which Navtech relies, Navtech’s arguments in support of liability on the part of FFS do not raise a genuine issue for trial in this matter.

[112] FFS submits that the authorities upon which Navtech relies, related to the *alter ego* and “special contract” concepts, do not involve the imposition of contractual liabilities on parties that are not privy to the relevant contracts.

[113] I agree with this submission. The special contract cases set out analyses pursuant to which a claimant, which is a party to contract, is entitled to assert a claim under that contract, notwithstanding that the loss resulting from a contractual breach was sustained by a third party. The *alter ego* analyses in *Smith* and *Buanderie* are not performed in a contractual context but rather (in contexts of, respectively, municipal expropriation and taxation) to afford entitlements to one corporation arising from the property or operations of another.

[114] At first glance, the fact pattern in *White* is closer to that of the case at hand, in that it involved a claim for royalties under a licence agreement, and the NSCA found the financial circumstances of both the corporation that had contracted with the claimant and a related corporation to be relevant to the calculation of those royalties. As Navtech submits, that determination turned in part on the common ownership, directors, and officers of the two companies (EBF and FENCE), FENCE having no independent functioning, and the directing mind of both corporations penetrating the corporate façade such that one company became the agent of the other (at para 54).

[115] *White* involved a matter of contractual interpretation (at para 1). Indeed, the NSCA interpreted the licence agreement such that both corporations were party thereto (at para 46). The NSCA also conducted an alternative *alter ego* analysis, concluding that, even if both corporations were not party to the agreement, it was appropriate in the unique circumstances of that case for the trial judge to have lifted the corporate veil (at para 47). However, that analysis involved taking the revenues of both corporations into account for purposes of calculating the royalties due under the licence agreement. I do not read *White* as having pierced the corporate veil for purposes of imposing liability on a corporation that was not party to the relevant contract. As such, *White* does not conflict with the explanation provided expressed by Justice Brown in *Nevsun*, that piercing the corporate veil for purposes of imposing liability upon a company for the debt of another requires a sham, the existence of a vehicle for wrongdoing, or some conduct akin to fraud (at paras 44–49).

[116] Regardless, the corporate circumstances identified in *White* are not comparable to those in the case at hand. Clearly Davie and FFS are related companies, including apparently having

similar beneficial ownership that may amount to common control. I also accept that some of the individuals involved in the Project at times changed their employment from one of these companies to the other, and I accept that facilities originally used by one company were later used by the other. However, there would be no basis to conclude, as in *White*, that the two companies did not have independent functioning. Consistent with the Defendants' witnesses' evidence, Davie operates a shipyard, FFS operates as a ship owner/manager, and the commercial contracts in the record before the Court demonstrate their distinct roles in the Project.

[117] Navtech's submissions emphasize the extent to which representatives of FFS were involved in providing instructions related to Navtech's work under the Licence Agreement. However, Mr. Barbeau's evidence confirmed that it is not unusual in his experience for Navtech, in performing vessel design work generally, to interact both with the relevant shipyard and the ultimate shipowner for which the shipyard was working. Mr. Fraser's evidence explained FFS's role in confirming that the Ship, following the Vessel Conversion, would meet the requirements of the Crown with which FFS was contracting. I find nothing in these circumstances that, at least on the facts of this case, gives rise to liability on the part of FFS as an *alter ego* of Davie.

[118] To the extent that the analysis in *White* or other authorities upon which Navtech relies turns on treating one corporate entity as the agent of another, I again find no basis to conclude that FFS has incurred contractual obligations to Navtech. Through the Licence Agreement, Navtech contracted with Davie to perform design work required by the shipyard to undertake the Vessel Conversion. One can imagine a naval architecture firm being retained either by a shipyard or by an owner. However, Navtech entered into the Licence Agreement with a shipyard, and the Court has not been presented with any evidentiary basis, related to the facts of this case or

industry practice generally, supporting a conclusion that the shipyard was not contracting on its own behalf but rather on behalf of whichever corporate entity would ultimately become the owner of the Ship.

[119] As previously noted, Navtech argues, as an alternative legal theory in support of FFS's liability, that FFS must be regarded as Davie's agent when FFS provided instructions to Navtech under the Licence Agreement between Navtech and Davie. Navtech submits that this analysis supports its claim against FFS, because the law of agency permits a contracting party to sue either the agent of a disclosed principal or the principal, or both. FFS disagrees with this statement of the law. Following discussion of this argument at the hearing of this motion, the Court afforded Navtech an opportunity to provide in writing, post-hearing, its authority for its submission.

[120] By letter dated April 7, 2025, Navtech's counsel provided the Court with reference to authorities that had considered the possibility that both an agent and its principal could be liable on a contract entered into by the agent. As Navtech submits, the identity of the contracting party or parties is to be determined by looking at the matter objectively. As expressed in *Middle East Tankers & Freighters Bunker Services S.A. v Abu Dhabi Container Lines P.J.S.C.*, [2002] 2 Lloyd's Rep 643 (QBD UK) [*Middle East Tankers*] at 647–648, the analysis depends on the intention of the parties involved, as determined by construction of the relevant contract, taking into account the nature of the contract and the surrounding circumstances.

[121] To similar effect, *Air Tahiti v McKenzie*, [2009] NSWCA 429 at paragraph 28 held that the identity of the contracting party is to be determined by looking at the matter objectively,

examining and construing any relevant documents in the factual matrix in which they were created, and ascertaining between whom the parties objectively intended to contract (see also *The Starsin*, [2003] UKHL 12 at paragraph 45 for an application of this principle).

[122] I take no issue with the analyses explained in these authorities but find that they turned on the particular facts involved in those cases and have little application to the case at hand. For instance, in *Middle East Tankers*, the standard form contractual terms referenced in the claimant's invoices expressly referenced the agent being jointly and severally liable with its principal (at 648). Navtech has identified nothing in the terms of the Licence Agreement that supports a conclusion that any party other than Davie is liable to Navtech thereunder. By way of surrounding circumstances, I recognize that Navtech emphasizes that, when it and Davie entered into the Licence Agreement, it was not yet known which of it and FFS would eventually become the owner of the Ship. However, nothing in the terms of the Licence Agreement or other evidence adduced in this motion suggests that the parties intended that the eventual shipowner would necessarily be a party to the Licence Agreement. I find nothing in the surrounding circumstances supporting a conclusion that the contracting party was other than Davie.

[123] Finally, in concluding that Navtech has not advanced a viable legal theory that, on the facts of this case, could result in liability on the part of FFS, I have considered whether this conclusion gives rise to any injustice to Navtech. In addition to noting the comment in *Nevsun* that mere injustice to one party is not sufficient, without more, to pierce the corporate veil (at para 49), I also observe that Navtech has not identified any particular injustice suffered by it as a result of FFS's role in the Project, including in providing instructions to Navtech in a context in which Navtech has contractual recourse only to Davie. This is not a situation in which Navtech

alleges that FFS provided instructions, Navtech performed work pursuant thereto, and Davie is attempting to resile from its obligations under the Licence Agreement on that basis.

[124] More broadly, this is also not a case in which there has been any suggestion that Davie is impecunious or otherwise unable to satisfy Navtech's claim. As expressed by the Defendants' counsel at the hearing of these motions, Navtech's arguments present simply as an effort to expand the pool of assets available to satisfy its claim, and Navtech has not provided any basis for the Court to find that Davie was obliged to secure or maintain ownership of the Ship as an asset against which any claim by Navtech might be enforced.

[125] In conclusion, I find that FFS is entitled to summary judgment dismissing Navtech's action against it, and my Order below will so provide.

(5) Does Navtech benefit from a maritime lien on the Defendant Ship?

[126] Navtech's *in rem* claim against the Defendant Ship relies on its position that it is afforded a maritime lien by paragraph 139(2)(a) of the *Marine Liability Act*, which provides as follows:

Maritime lien

(2) A person, carrying on business in Canada, has a maritime lien against a foreign vessel for claims that arise

(a) in respect of goods, materials or services wherever supplied to the foreign vessel for its operation or maintenance, including, without restricting the generality of the foregoing, stevedoring and lighterage; or

Privilège maritime

(2) La personne qui exploite une entreprise au Canada a un privilège maritime à l'égard du bâtiment étranger sur lequel elle a l'une ou l'autre des créances suivantes :

a) celle résultant de la fourniture — au Canada ou à l'étranger — au bâtiment étranger de marchandises, de matériel ou de services pour son fonctionnement ou son entretien, notamment en ce qui concerne l'acconage et le gabarage;

[127] Navtech asserts that it supplied design services, between June 2014 and October 2015, necessary to allow the Ship to be operated as an AOR. It emphasizes that the Ship was registered in Canada on October 8, 2015, by which time Navtech had completed or materially completed its services, and therefore submits that the Ship was a foreign vessel (as defined pursuant to subsection 139(1) of the *Marine Liability Act*) for purposes of subsection 139(2) of the *Marine Liability Act* when its services were performed.

[128] Navtech also emphasizes that, by virtue of subsection 139(4) of the *Marine Liability Act*, subsection 43(3) of the *Federal Courts Act* does not apply to a claim secured by a section 139 maritime lien. That is, unlike in relation to an *in rem* claim that does not have the benefit of a maritime lien, a section 139 maritime lien may be enforced against a vessel notwithstanding that its ownership has changed from the time that the lien arose. Indeed, this is the nature of a maritime lien that, for the most part, arises through common law principles of maritime law and, once attached to a ship, remains attached through any subsequent changes in ownership.

[129] I agree with Navtech that if its provision of design services caused a maritime lien to attach to the Ship under paragraph 139(2)(a) of the *Marine Liability Act*, during the period that the Ship was owned by Olymbos, registered in Liberia, and therefore a foreign vessel for purposes of subsection 139(2), that lien would have survived the subsequent conveyance of the Ship by Olymbos to FFS and its registration in Canada, such that Navtech would be in a position to enforce its *in rem* claim against the Ship in this action.

[130] Indeed, I do not understand FFS to take issue with this aspect of the analysis. Rather, FFS argues that Navtech's claim does not fall within paragraph 139(2)(a) because, contrary to

Navtech's assertion, the claim does not represent a claim in respect of services supplied to the Ship for its operation within the meaning of that paragraph. FFS argues that, at the time the Ship was a foreign vessel owned by Olymbos (when Navtech asserts its maritime lien attached), Navtech's services (related to the conversion of the Ship into an AOR for purposes of providing service to the Canadian government) would not have been useful for the Ship's operation or maintenance.

[131] Prothonotary Hargrave's analysis in *Trawlercat*, while not definitive, assists the Court in undertaking the interpretation of the language of paragraph 139(2)(a) that is necessary to address this dispute between the parties. *Trawlercat* considered the availability of an *in rem* claim under paragraph 22(2)(m) of the *Federal Courts Act* and not paragraph 139(2)(a) of the *Marine Liability Act* (section 139 not having been enacted until many years after *Trawlercat* was decided). However, the language of these two provisions (both of which are reproduced in these Reasons) is sufficiently similar that the analysis in *Trawlercat* is instructive. In relation to paragraph 22(2)(m) of the *Federal Courts Act*, Prothonotary Hargrave held as follows (at para 21):

That there are limitations in this seemingly broad provision is immediately clear. First, the goods, materials or services must be for "operation or maintenance", of the ship which is not the case where plans for a non-existing ship are involved. Second, the section refers to "operation or maintenance of the ship, ..." (emphasis added). Here the reference is not to "a ship", but rather to "the ship". When the drawings were supplied to one or the other or perhaps to both of the *in personam* Defendants, "the ship" existed only as a possibility which might bear fruit in the future in the event the *in personam* Defendants decided to instruct builders. The existence of the ship is an essential, without which there can only be *in personam* liability. Section 22(2)(m) is not a basis for jurisdiction, for not only are drawings not needed for the operation or maintenance of the ship, but also such drawings are neither incidental to nor complimentary to a non-existent ship. ...

[132] This passage identifies both: (a) that the language of the relevant paragraph requires that the services to which the claim relates be for the “operation and maintenance” of a ship; and (b) that the services must relate to the operation and maintenance of a particular existing ship.

Navtech argues that the analysis in *Trawlercat* is distinguishable, because the defendant vessel involved in that case had not been built at the time the design services were provided. In contrast, the Ship was an existing ship at the time Navtech provided services under the Licence Agreement.

[133] I agree with Navtech that the facts of *Trawlercat* are not on all fours with those in the case at hand. However, in my view, Prothonotary Hargrave’s reasoning remains relevant and supports FFS’s position on this issue. In particular, as was the case in *Trawlercat*, it is difficult to characterize Navtech’s services as having been supplied for the operation of the Ship (as Navtech argues), as those services had no utility in relation to the Ship’s operation at the time they were supplied (as FFS argues). Just as the utility of the services provided in *Trawlercat* was theoretical when they were supplied, because a ship existed only as a possibility that might come to pass if the *in personam* defendants decided to instruct builders, the utility of the services provided by Navtech was theoretical until FFS acquired the Ship from Olymbos such that FFS could arrange the Vessel Conversion with a view to supplying the Ship to the Crown.

[134] Moreover, in addition to (and indeed independent of) the particular analysis in *Trawlercat*, the language of paragraph 139(2)(a) of the *Marine Liability Act* (and paragraph 22(2)(m) of the *Federal Courts Act*) requires that the services to which the claim relates be supplied to the ship (my emphasis). Paragraph 139(2)(a) uses the language, “supplied to the

foreign vessel”. In my view, it is not possible to characterize Navtech’s services as having been supplied to the Ship itself, as distinct from having been supplied to Davie.

[135] This point illustrates the difference between the services at issue in the present case and a hypothetical example that Navtech presents in its submissions on this motion. In support of its position (that there is no requirement in the *Marine Liability Act* that, in order for a service to a foreign vessel to give rise to a maritime lien under paragraph 139(2)(a), the service must have enabled the ship to operate while it remained a foreign vessel), Navtech refers to a situation in which a supplier delivers a radar to a foreign vessel. Navtech submits that it is no defence against the resulting maritime lien to argue that the vessel was registered in Canada after the delivery of the radar but before completion of its installation.

[136] As explained above, I agree with Navtech that, if a maritime lien attaches to a ship under paragraph 139(2)(a) during the period that the ship is a foreign vessel, the lien will survive if the vessel is subsequently sold and registered in Canada. As also previously noted, it is the nature of a maritime lien that it attaches to a vessel and survives subsequent conveyances.

[137] However, in relation to the radar hypothetical, while I will not comment definitively on whether that hypothetical situation would give rise to a maritime lien upon delivery of the radar to the ship, I understand how the claimant might frame an assertion that it rendered a supply to the ship itself, as required by the language of paragraph 139(2)(a). That is, the radar was delivered on board the ship. That situation differs significantly from the case at hand, in which Navtech’s services were not supplied to the Ship itself.

[138] In my view, the logic of the conclusion, based on the language of paragraph 139(2)(a) of the *Marine Liability Act*, that Navtech's supply of design services do not give rise to a maritime lien against the Ship, is further supported by considering what FFS argues would be the untenable result if the Court were to reach the contrary conclusion. FFS asks the Court to consider the hypothetical situation in which, after Navtech supplied its design services, the sale of the Ship by Olymbos to one of the Defendants was not completed, such that the Ship remained a foreign vessel involved in commercial operations wholly unrelated to the Project in which it would serve as an AOR for the Crown. I agree with FFS that it is difficult to imagine a compelling argument (either commercially or legally) as to why the Ship should then be subject to a maritime lien for Navtech's claim against Davie under the Licence Agreement.

[139] However, that untenable result would accrue on those hypothetical facts, if Navtech's position on this issue were to be accepted. Navtech is correct in arguing in this motion that a maritime lien attaches to a vessel, in support of a supplier's claim, at the time the goods, materials, or services are supplied. Therefore, for the Court to accept Navtech's position, that its supply of design services to Davie gave rise to a maritime lien against the Ship then owned by Olymbos, the Court would also be required to accept that, had the transaction conveying the vessel under the Olymbos MOA not closed, Olymbos's property (the Ship) would nevertheless have been subject to Navtech's lien for its services. This result would follow notwithstanding that (potentially in contrast with, for instance, a delivered but as yet uninstalled radar) Navtech's services represented no value whatsoever to Olymbos or the Ship.

[140] I emphasize that the above analysis does not turn on the absence of *in personam* liability on the part of Olymbos. Navtech argues in this motion that there is no need for it to establish *in personam* liability on the part of Olymbos, the owner of the Ship at the time Navtech's services were provided, in order for its maritime lien to attach. Navtech relies on the effect of subsection 139(2.1) of the *Marine Liability Act*, reproduced earlier in these Reasons, which limits the ability of a supplier of stevedoring or lighterage services to a ship to claim a maritime lien against the ship under paragraph 139(2)(a). A supplier of those categories of services can claim a lien only in circumstances in which the services were provided at the request of the owner of the ship or a person acting on the owner's behalf. Navtech argues that, by implication of subsection 139(2.1), suppliers of other categories of services under paragraph 139(2)(a) need not establish circumstances that give rise to *in personam* liability on the part of the shipowner.

[141] I do not understand FFS to take issue with this particular point. However, as in *Comfact Corporation v Hull 717 (Ship)*, 2012 FC 1161, aff'd 2013 FCA 93, in which Justice Sean Harrington declined to decide various points related to the operation of section 139 of the *Marine Liability Act*, because adjudication of those points was not necessary to address the dispute before the Court (at para 27), I similarly decline to address the *in personam* liability point. My conclusion that Navtech does not benefit from a maritime lien turns on the language of paragraph 139(2)(a), including the language requiring that the claimed supply be to the Ship, and not upon the absence of *in personam* liability on the part of the owner of the Ship at the time that it was a foreign vessel.

[142] In conclusion, having found based on undisputed facts and consideration of the applicable law that Navtech is not entitled to a maritime lien in support of its claim in this action,

I find that FFS is entitled to summary judgment dismissing Navtech's action *in rem* against the Defendant Ship, and my Order below will so provide.

C. ***Royalties Motion***

- (1) *Is this an appropriate case for summary judgment in relation to the Royalties Claim?*
- (2) *Should summary judgment be entered in favour of Navtech for the amount of \$2,258,437.83 claimed for royalties?*

[143] In the Royalties Motion, the determination of both issues articulated above turns on the same analysis, as set out below.

[144] Navtech moves for summary judgment, in relation to the Royalties Claim only (as distinct from the Visibility Claim, the claim for Declaratory Relief, and the Copyright Claim). It asserts that the existence and content of the Licence Agreement is admitted by the Defendants, that there is no dispute that the Licence Agreement was signed by Mr. Bowen, the president and CEO of Davie, and that pursuant to the Licence Agreement Navtech provided designs to Davie for the Vessel Conversion in the form of the GA and other drawings. Navtech submits that it performed the work as required under the Licence Agreement, that the Defendants have presented no basis to resist paying amounts owing under the Licence Agreement, and that there is therefore no need for a trial to adjudicate its entitlement to the Royalties Claim.

[145] In relation to quantification of the Royalties Claim, Navtech notes that the Defendants have admitted that the total cost of the Vessel Conversion exceeded \$280,000,000. As such,

Navtech submits that there is no issue for trial surrounding the calculation of the Royalties Claim (as set out earlier in these Reasons) in the amount of \$2,258,437.83, plus interest and costs.

[146] In their written submissions in response to the Royalties Motion, supported by an affidavit sworn by Mr. Bowen on February 27, 2025, and in their oral submissions, the Defendants note that their Defence denies that Navtech is owed the amounts claimed as royalties under the Licence Agreement. To some extent, the Defence sets out the basis for this denial, although the Defendants' submissions in this motion have provided a clearer articulation of their position, particularly through the Defendants' counsel's oral submissions at the hearing of this motion.

[147] The Defendants resist paying the Royalties Claim on the basis of allegations that Navtech's work was not performed in accordance with industry standards and contained errors and deficiencies, resulting in such work having to be re-performed or corrected by Navis, with consequent costs to the Defendants (as yet unquantified) arising both from such re-performance and correction and from consequential changes and other effects that developed as the design and conversion of the Ship progressed [the Davie Claim]. Davie asserts entitlement to set off the Davie Claim against the Royalties Claim.

[148] The Defendants recognize that Navtech disputes the Defendants' allegations as to deficiencies in its work and argue that a trial will be required in order for the Court to hear and adjudicate both the parties' respective factual evidence, and eventual expert evidence, related to Navtech's work and the alleged deficiencies. The Defendants also submit that expert evidence

will be required to quantify costs that they say they incurred as a result of the alleged deficiencies.

[149] The Defendants argue that expert evidence will also be required at trial to assist the Court in adjudicating Navtech's claim for Declaratory Relief (that Navtech is the exclusive owner of the intellectual property rights to the concept and design of the Ship as converted). The Defendants submit that the Declaratory Relief claim cannot be adjudicated without expert analysis of the as-built plans for the Ship that assesses their similarity to the plans prepared by Navtech. The Defendants note that analysis of this sort is not necessary to adjudicate Navtech's entitlement under the Royalties Claim. However, they argue that the fact that expert evidence will be required at trial in any event, on distinct issues but likely involving similar areas of expertise, militates in favour of dismissing Navtech's summary judgement motion.

[150] Mr. Bowen's affidavit provides evidence as to frustrations said to have been experienced by Davie in connection with Navtech's work under the Licence Agreement, including elements of Navtech's work product that required corrections, changes, or further work. Mr. Bowen refers to events leading to Davie's decision to have Navis take over the design of the Vessel Conversion, culminating with the October Meeting at which Mr. Bowen confirmed to Mr. Barbeau that Navtech's involvement in the Project had been terminated and the October Email Exchange reflecting terms agreed at the October Meeting.

[151] Mr. Bowen's affidavit refers to work performed by Navis from 2015 to 2017, including both adding to and correcting work originally done by Navtech, and attaches copies of invoices from Navis to Davie for work performed by Navis. Mr. Bowen describes the rework performed

by Navis as including the midship section plan, the preliminary stability calculation, the lifesaving equipment arrangement, the helideck arrangement, the helicopter hangar arrangement, the structural calculations, the fire integrity plan, the escape plan, the equipment technical specifications, the electrical load calculations, the firefighting system for the ammunition holds, the capacity plan, and the electrical plan, as well as changing the alternate propulsion system.

[152] Mr. Bowen also states that, overall, Navis was required to make changes from the GA plans prepared by Navtech to the final plans prepared by Navis that formed the basis for the Vessel Conversion. He refers to Navis having been required to make multiple changes to the Navtech plans that were annexed to the Conversion Contract, such that there are several differences between Navtech's last version of the GA and the final version prepared by Navis, and provides examples of those differences.

[153] At the hearing of this motion, Navtech's counsel noted that Davie's Defence does not either assert a counterclaim or plead set-off in relation to the Davie Claim. The Defendants' counsel emphasized that the Defence does allege errors and deficiencies in Navtech's work, but conceded that neither a counterclaim nor right of set-off is expressly pleaded. Both counsel referred to the possibility that leave could be sought to amend any deficiencies in the Defendants' pleading.

[154] Navtech's counsel also argued that it is possible to determine, from the invoices attached to Mr. Bowen's affidavit, the amounts paid to Navis for work performed on the design deliverables produced by Navtech under the Licence Agreement. Notwithstanding that Mr. Bowen's affidavit attached invoices that in the aggregate exceed \$1,000,000, Navtech argues that

the Davie Claim will be in the range of \$30,000. While Navtech does not concede that its work was deficient or that Davie would be entitled to a set-off even in this amount, Navtech argues that it should not be denied summary judgment on the Royalties Claim based on a claimed set-off in such a modest amount. Navtech submits that, with the benefit of judgment on the Royalties Claim, the parties would be better positioned to settle or seek adjudication of the remaining issues in this action, including the Davie Claim. Navtech also argues that Davie's set-off position under the Davie Claim would still be protected, even if the Court granted summary judgment on the Royalties Claim, because Davie could set off the Davie Claim against the Visibility Claim (which Navtech's asserts at the level of \$400,000) and/or the Copyright Claim.

[155] Davie disputes Navtech's effort to quantify the Davie Claim, arguing that Navtech's analysis, performed solely in the course of oral argument, is superficial and fails to account for "knock-on effects" of the requirement to have Navis rework or correct Navtech's deliverables.

[156] Notwithstanding the possibility that the Defendants' pleading may require amendment (a point that is not before the Court on this motion and, if necessary, can be addressed through the case management process), I find that Mr. Bowen raises a sufficient evidentiary foundation for the Court to conclude that a trial will be required to adjudicate the merits of the Davie Claim. I agree with the Defendants' position that the determination of these issues will require that the Court consider conflicting evidence, and likely expert evidence from one or both parties, related to relevant industry standards, whether those standards were met by Navtech, and the quantification of costs that Davie claims it incurred as a result. However, it remains necessary for the Court to consider whether the need for a trial on the Davie Claim is an impediment to granting summary judgment on the Royalties Claim

[157] As summarized above, Davie's defence to the Royalties Claim is based on its allegation that Navtech breached obligations to exercise care, skill, diligence, and competence in the performance of its work, for which Davie seeks compensatory damages, as yet unquantified, as a remedy for breach of this duty. In other words, Davie does not argue that Navtech is not entitled to be paid the amounts asserted under the Royalties Claim, other than to the extent that Davie is entitled to set off the Davie Claim against those amounts. Nevertheless, the right of set-off represents a substantive protection against impecuniosity of a party against which the right is asserted and, although there is no suggestion of impecuniosity on Navtech's part, it would not be just to enter summary judgment on the Royalties Claim in a manner that deprived Davie of that right.

[158] Nor has Navtech convinced me that Davie's right of set-off would be protected by the fact that, if the Court were to grant summary judgment on the Royalties Claim, Davie could still exercise the right of set-off against the Visibility Claim and the Copyright Claim, which would remain to be adjudicated. As explained later in these Reasons, the Defendants' Copyright Motion will be granted and the Copyright Claim dismissed. With respect to the Visibility Claim, the Court has not been asked in these motions to make any determination of its validity, and Navtech has not at this stage provided any evidence, authority, or argument in support of its proposed quantification of \$400,000.00. Also, the Court is not in a position to conclude, based on Navtech's counsel's submissions, that the quantification of the Davie Claim is necessarily as modest as Navtech suggests. I agree with the Defendants' position that such quantification will require a more robust analysis of the factual evidence, likely supplemented by expert evidence, and therefore a trial.

[159] However, the Rules afford a form of remedy, available on a motion for summary judgment, that will serve the interests of justice in the circumstances presented by this motion. Rule 219 provides that, on granting summary judgment under Rule 215 (or judgment following summary trial under Rule 216), the Court may order that enforcement of the judgment be stayed pending the determination of any other issue in the action or in a counterclaim or third-party claim.

[160] In *Marine Atlantic Inc v Blyth*, [1994] FCJ No 560, 1994 CarswellNat 611 (FCTD) [*Blyth*] Justice Barbara Reed considered then Rule 432.6 (the comparable predecessor to Rule 219) in a matter in which the plaintiff sought summary judgment of a debt, which the defendants resisted in part based on an equitable set-off claim related to financial losses that the defendants said they incurred in connection with the same transaction that gave rise to the plaintiff's claim. The Court referred to the possibility of entering summary judgment on the plaintiff's claim, with a stay of execution of that judgment pending resolution of the other issues in dispute (at para 17). However, ultimately the Court declined to grant summary judgment, finding that the issue of how the plaintiff's claim was to be calculated could not be separated from those other issues (at para 19).

[161] In *Kerr v Miller*, 2004 CanLII 4351 (ONSC) [*Kerr*] at paragraph 27, the Ontario Superior Court of Justice addressed a motion for summary judgement on a debt claim, again resisted by the defendant based on assertion of a right to an equitable set-off related to a counterclaim for an alleged breach of contract by the plaintiff. Based on the rules of court in Ontario and applicable jurisprudence, the Court identified the options available in such circumstances as follows:

Where there is an established liquidated claim in debt, and an arguable claim for equitable set-off, on a motion for summary judgment the court may do one of the following:

- (a) grant judgment on the debt and stay enforcement of that judgment until the conclusion of the trial on the issue of equitable set-off without other terms;
- (b) grant judgment on the debt and order the amount of the judgment be paid into court pending final determination of the claim for equitable set-off (or such other practical payment terms as may be thought appropriate by the court);
or
- (c) grant judgment on the debt and not stay enforcement of the judgment, permitting the debtor to proceed with its claim if it wishes to do so.

Where there is an established liquidated claim in debt and the claimed equitable set-off does not present an arguable case for trial, then the court should grant summary motion for the debt and dismiss the counterclaim. See Rules 20.08 and 76.07(3) and *Cuddy Food Products v. Puddy Bros. Ltd.*, [2002] O.J. 3181.

[162] Ultimately, the Court in *Kerr* found that the evidence adduced by the defendant in support of its counterclaim did not merit trial, and it accordingly granted summary judgment on the plaintiff's claim.

[163] In contrast, in the case at hand, I am satisfied that the evidence adduced by the Defendants in support of the Davie Claim is sufficient to warrant a trial on that issue. Also, unlike the result in *Blyth*, I do not find the issues in the Royalties Claim and the Davie Claim to be intertwined in a manner that precludes entering summary judgment on the former. Rather, provided their ability to assert the right of set-off in connection with the Davie Claim is protected (which can be accomplished through the power afforded to the Court under Rule 219), the

Defendants have presented no compelling reason why the Court should not grant summary judgment on the Royalties Claim.

[164] As such, my Order below will grant summary judgment in favour of Navtech for the amount of \$2,258,437.83 claimed for royalties, plus interest to be quantified as this action proceeds, but will stay enforcement of the judgment pending determination of the Davie Claim.

D. *Copyright Motion*

- (1) *Is this an appropriate case for summary judgment in relation to the Copyright Claim?*

[165] As with the Admiralty Motion, I agree with FFS's position that there are no material factual disputes or conflicts in the evidence relevant to the issues raised in the Copyright Motion. The parties' positions involve the application of matters of law to facts that can be derived from the record before the Court. Applying the principles governing summary judgment, as canvassed earlier in these Reasons, I find that the issues raised in this motion are suitable for the Court to adjudicate by way of summary judgment.

- (2) *Are the allegations on which Navtech relies to assert its claim pursuant to the Copyright Act capable of giving rise to a cause of action under that statute?*

[166] As explained earlier in these Reasons, Navtech amended its Statement of Claim to add the Copyright Claim, a claim pursuant to the *Copyright Act*, including by way of remedy a claim for an accounting of profits under that statute, arising from its allegation that the Defendants had

removed all references to Navtech from the plans that Navtech had produced, designed, and prepared.

[167] The principal allegation in support of the Copyright Claim is set out as follows in paragraph 69.1 of the Amended Statement of Claim:

69.1 En novembre 2015, à l’insu de Navtech, les défendeurs retirent de tous les plans réalisés par Navtech toute référence à cette dernière, le tout en violation de leurs obligations contractuelles et à la *Loi sur le droit d’auteur* L.R.C. 1985, ch. C-42 ;

[168] The Defendants also refer the Court to a more detailed explanation of the Copyright Claim that Navtech provided in written representations to the Court. These representations are set out in a document entitled “Table of Objections on Written Examination of the Amendments of the Statement of Claim”, attached as Appendix A to the Order of Case Management Judge Alexandra Steele dated December 9, 2024, which addressed a motion by the Defendants seeking adjudication of objections by Navtech to written examination questions arising from Navtech’s amendment to plead the Copyright Claim [the Objections Motion]. The Defendants note that Navtech’s representations on the Objections Motion included the following:

... A license agreement was entered into by the parties in order to allow the defendants to use the plaintiff’s design in the conversion of the ship. ... In the original action, only those sums unpaid pursuant to the license agreement and general damages for breach of contract were claimed. But, during the discovery process, the defendants revealed that they had taken the plaintiff’s design and drawings and removed any reference to the plaintiff, substituting their own logo and reference as if they had designed the converted vessel.

....

The plaintiff has not disputed the defendants' right to use its design, but it does ask to be paid the amount agreed therefor in the license agreement, and it has added a claim in accounting of profits for having made the logo and all references to the plaintiff disappear from the plaintiff's drawings and documents and for unlawfully substituting the name of the defendant Davie in its place, thereby infringing the plaintiff's copyright.

[169] In their written submissions in support of the Copyright Motion, the Defendants argued that, notwithstanding the way in which it is framed in the Amended Statement of Claim, the allegations upon which Navtech relies to assert the Copyright Claim demonstrate that it is not actually a claim for copyright infringement within the meaning of the *Copyright Act*. Rather, the Defendants submit that the Copyright Claim represents a claim for infringement of moral rights and that Navtech is prevented from asserting a moral rights claim because it has not been properly pled and because it does not have standing to do so.

[170] In support of their position, the Defendants' written submissions emphasized that (including as reflected in Navtech's representations in the Objections Motion) Navtech does not dispute the Defendant's right to use its designs, as the Licence Agreement was entered into specifically to allow the Defendants to use those designs in the Vessel Conversion and Navtech seeks payment of the balance of the royalties payable pursuant to the Licence Agreement in relation to such use. As such, the Defendants argue that the Copyright Claim does not assert that the Defendants reproduced works (within the meaning of the *Copyright Act*) without the consent of Navtech as the copyright owner.

[171] Rather, say the Defendants, the sort of non-attribution or misattribution allegation that forms the basis for Navtech's claim represents an allegation of infringement of moral rights, which are protected as follows by subsection 14.1(1) of the *Copyright Act*:

Moral rights

14.1 (1) The author of a work has, subject to section 28.2, the right to the integrity of the work and, in connection with an act mentioned in section 3, the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous.

Droits moraux

14.1 (1) L'auteur d'une œuvre a le droit, sous réserve de l'article 28.2, à l'intégrité de l'œuvre et, à l'égard de tout acte mentionné à l'article 3, le droit, compte tenu des usages raisonnables, d'en revendiquer, même sous pseudonyme, la création, ainsi que le droit à l'anonymat.

[172] Much of the Defendants' written submissions focused on demonstrating that Navtech has not properly pleaded, and does not have standing or entitlement to assert, a cause of action for infringement of moral rights. The Defendants emphasized that, as reflected in subsection 14.1(1), moral rights belong to the author of the work, which the Defendants submit must be a natural person rather than a corporation. Further, as reflected in subsection 14.1(2), moral rights cannot be assigned.

[173] However, in its written submissions in response to the Copyright Motion, Navtech explains that it is not intending to assert a claim for infringement of moral rights. As such, the Court need not address the Defendants' arguments that Navtech is not entitled to assert moral rights. Rather, the outcome of this motion turns on whether the Copyright Claim, as framed in Navtech's pleadings and as supported by the evidence upon which Navtech relies, is capable of giving rise to a claim for copyright infringement (as distinct from infringement of moral rights) under the *Copyright Act*.

[174] With the benefit of an understanding of Navtech’s position on this issue, informed by Navtech’s written submissions, the Defendants’ oral submissions focused on the distinction between claims for copyright infringement and claims for infringement of moral rights under the *Copyright Act*. In relation to the former, the Defendants note that subsection 27(1) of the *Copyright Act* provides that it is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by that statute only the owner of the copyright has the right to do. Subsection 3(1) identifies such rights by explaining that, for purposes of the *Copyright Act*, copyright, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever (and other rights not relevant to the issues in the case at hand). The Defendants assert that the misattribution or non-attribution allegations that form the basis for the Copyright Claim reference the sort of conduct at which the moral rights protections in subsection 14.1(1) of the *Copyright Act* are directed, but do not identify any conduct that is prohibited by the combination of sections 3 and 27.

[175] The Defendants refer the Court to *Théberge*, in which the majority of the Supreme Court of Canada [SCC] referenced the difference between the economic rights and moral rights protected by the *Copyright Act*, including the separate structures within that statute that show a clear distinction and separation between those two categories of rights (at para 59). In keeping with that distinction, the SCC explained that allegations of modification of a work (without reproduction) were to be addressed through moral rights rather than economic rights (at para 60). The Defendants submit, and I concur, that the references to “economic rights” in *Théberge* relate to claims for copyright infringement, as distinct from claims for infringement of moral rights.

[176] Navtech’s position is that the allegations in the Copyright Claim are capable of infringing both moral rights (although it is not asserting such a claim) and its copyright in its designs, because the Licence Agreement, pursuant to which Navtech consented to Davie’s use of its designs, included an obligation on the part of Davie to ensure the visibility of Navtech as designer of the Vessel Conversion.

[177] Navtech argues that this obligation, which forms the basis for the Visibility Claim, is implicit in the Licence Agreement but is also set out explicitly in the October Email Exchange, which Navtech submits represented an amendment to the Licence Agreement. The items in the October Email Exchange, upon which Navtech relies, states: “[Davie] to identify [Navtech] as the AOR Designer, to give proper relevant visibility to Navtech and to ensure adequate protection for such in subsequent engineering work.” Navtech asserts that Davie breached this obligation under the Licence Agreement and that such breach represents an infringement of Navtech’s rights under section 3 of the *Copyright Act*.

[178] The Defendants submit that *Harmony Consulting Ltd v G.A. Foss Transport Ltd*, 2011 FC 340 [*Harmony*], affirmed 2012 FCA 226, is instructive in identifying the flaw in Navtech’s argument. In that case, the plaintiff sought a declaration that copyright subsists in certain software, that the plaintiff was the owner of the copyright, and that the copyright had been infringed by the defendants. Among other arguments, the plaintiff submitted that copyright was breached when the name “Harmony” was replaced by “BiLd Solutions” on the startup screen and that this modification was made to misattribute the author as BiLd Solutions at paras 263-264).

[179] In analysing this argument, Justice Elizabeth Heneghan noted that, in order to prove copyright infringement, it was necessary for the plaintiff to prove both that the defendants had performed or authorized any of the acts identified in section 3 of the *Copyright Act* and that the plaintiff had not consented to such acts (at para 257). The plaintiff's argument in satisfaction of these requirements included an assertion that the defendants had breached the relevant licence agreements, which prohibited certain conduct including misattribution (at para 260). The Court rejected the plaintiff's argument as follows (at para 261):

In simple terms, the Plaintiff argued that any violation of the licensing agreements constituted a violation of copyright. This argument is inherently flawed and cannot succeed as "...copyright infringement does not arise out of a breach of contract"; see *Corel Corp. v. Guardian Insurance Co. of Canada* (2001), 26 C.C.L.I. (3d) 39 (O.S.C.J.) at para. 22. As I have explained, copyright is violated only if the defendant has performed, or authorized, an act that only the owner can do within the confines of the *Copyright Act*.

[180] The Court further analysed the plaintiff's misattribution allegation at paragraphs 264 to 265:

264. The Plaintiff argues that its copyright in Petro Dispatch was breached when the name Harmony was replaced by BiLd Solutions on the start-up screen. Relying on *Gemologists International Inc. v. Gem Scan International Inc. et. al.* (1986), 9 C.P.R. (3d) 255 (Ont. H.C.J.), the Plaintiff argued that the change to the start-up screen required a reproduction, which constitutes a violation of copyright.

265. The facts in *Gemologists International* are distinguishable from the facts in this case. In *Gemologists International*, the defendants copied and modified the plaintiff's software, including the start-up screen menus, to create their own computer program. In this case, the Plaintiff has not alleged that the Defendants modified the start-up screen of Petro Dispatch to create their own software. Instead, the Plaintiff argued that the modification was made to misattribute the author of Petro Dispatch as BiLd Solutions.

[181] To the extent that the contractually prohibited misattribution occurred in copies that the defendants had made of the software, the Court in *Harmony* concluded that no copyright infringement had occurred, because such copies were authorized under the licence agreements (at paras 266–273). The Court recognized that misattribution of software can represent an infringement of the author’s moral rights but explained that, as an infringement of moral rights does not relate to anything which only the author has the right to do under section 3 of the *Copyright Act*, any infringement of moral rights is not tantamount to an infringement of copyright (at paras 289–292).

[182] The Federal Court of Appeal upheld Justice Heneghan’s analysis, concluding as follows (*Harmony Consulting Ltd v G.A. Foss Transport Ltd*, 2012 FCA 226 at para 74):

I have not been persuaded that the trial judge made a palpable and overriding error in concluding that Harmony had not establish [*sic*] that modification of the start-up screen necessarily involved making an unauthorised reproduction. Thus, in such circumstances, the change in the name appearing on that screen (alleged misattribution of the work) could only be challenged by the owner of the moral rights in Petro. Such rights cannot be assigned and are vested in the author.

[183] Navtech argues that *Harmony* does not stand for the proposition that a particular act can never represent both a contractual breach of a licence agreement and a copyright infringement. Rather, Navtech submits that depends on the particular act, breach, and infringement alleged. It takes the position that the misattribution or non-attribution alleged in the Copyright Claim, occurring both in breach of the visibility obligation assumed by Davie and in the course of copying Navtech’s designs, represents infringement of Navtech’s copyright.

[184] I accept that *Harmony* should not be read as broadly concluding that no breach of a licence agreement can ever give rise to copyright infringement as well. However, I find the reasoning in *Harmony* instructive in the case at hand. In both that authority and in the present case: (a) the relevant licence agreement conferred the licensor's consent to use, in a manner that included making copies, the licensor's copyrighted material; (b) the licence agreement allegedly prohibited misattribution of the copyrighted material; and (c) the licensor alleged that misattribution occurred in the course of copying the copyrighted material.

[185] On the facts of the present case, I find no basis to depart from Justice Heneghan's analysis and conclusion that, while an allegation of breach of a misattribution prohibition may give rise to a claim in contract, it does not support a claim for copyright infringement, where any copying was performed with the consent of the licensor. While the allegations that Navtech raised in support of the Copyright Claim may resonate contractually in relation to the Visibility Claim, I agree with the Defendants that, for purposes of application of the *Copyright Act*, such allegations relate to infringement of moral rights, not to copyright infringement.

[186] This conclusion is dispositive of the Copyright Motion. I find that the Defendants are entitled to summary judgment dismissing Navtech's claim under the *Copyright Act*, and my Order below will so provide.

(3) *In the alternative, is Navtech entitled to claim an accounting of profits for the Defendants' alleged infringement under the Copyright Act?*

[187] Navtech's claim for an accounting of profits is based on subsection 35(1) of the *Copyright Act* that, in certain circumstances, makes such an accounting available, in addition to a

claim for damages, as remedies for copyright infringement. As expressed in subsection 35(1), the accounting remedy relates to such profits as are attributable to the infringement. That is, the profits sought to be disgorged must have been realized as a result of the act of infringement (see *Leuthold v Canadian Broadcasting Corporation*, 2012 FC 748 at para 148, aff'd on other grounds 2014 FCA 173, leave to appeal to SCC refused, 36030 (30 April 2015); *Cinar Corporation v Robinson*, 2013 SCC 73 at para 77; *Constellation Brands US Operations Inc c Société de vin internationale ltée*, 2021 QCCA 1664 at para 46).

[188] The Defendants repeat their argument that they were entitled to reproduce and otherwise use Navtech's design drawings pursuant to the Licence Agreement and submit, in the alternative to their position that Navtech has no basis to assert any claim under the *Copyright Act*, that Navtech has not alleged in its pleadings, or adduced any evidence to demonstrate, a link between the alleged act of infringement (removing Navtech's name from the drawings) and any profits realized by the Defendants.

[189] However, it is unnecessary for the Court to adjudicate this alternative argument. Having accepted the Defendants' position that Navtech has no claim under the *Copyright Act*, it follows that Navtech has no claim for an accounting of profits under subsection 35(1) of that statute.

(4) *In the further alternative, is Navtech time-barred, pursuant to the Copyright Act, from asserting the Copyright Claim?*

[190] Similarly, because Navech has no claim under the *Copyright Act*, it is unnecessary for the Court to adjudicate the Defendants' further alternative argument that the Copyright Claim is time-barred pursuant to section 43.1 of the *Copyright Act*.

(5) *In the further alternative, has Navtech provided sufficient material facts to support its claim made pursuant to the Copyright Act?*

[191] Under this final (and again alternative) issue, the Defendants argue that, should the Copyright Claim survive their other arguments in the Copyright Motion, Navtech should be compelled to provide additional information, in response to written discovery questions that have already been posed, related to the documents that Navtech asserts are subject to copyright and the documents by which the Defendants are alleged to have infringed such copyright.

[192] As I have found that Navech has no claim under the *Copyright Act*, it is unnecessary for the Court to adjudicate this further alternative argument.

VI. **Costs**

A. *Introduction*

[193] At the hearing of these motions, the Court encouraged counsel to consult with a view to presenting, if possible, a joint recommendation as to how the Court should approach costs (including their quantification) for each motion.

[194] Following such consultation, counsel for Navtech and the Crown advised that, in relation to the Intervention Motion, they jointly proposed that costs be awarded to the successful party, to be assessed based on the mid-point of Column III of Tariff B of the Rules.

[195] In relation to the other motions, counsel for Navtech and the Defendants jointly proposed that costs be awarded to the successful party in each motion, in any event of the cause, to be

assessed following trial or other conclusion of this proceeding. In the event of materially divided success on a motion, the parties proposed that costs be in the cause.

B. *Intervention Motion*

[196] Although recognizing the joint proposal by the parties to the Intervention Motion that costs (to be assessed) be awarded to the successful party, the Court nevertheless exercises its discretion to award no costs on this motion. Neither party has succeeded in relation to the substantive relief that was the subject of that motion (striking the *in rem* claim on the basis of subsection 43(7) of the *Federal Courts Act*), as the success of the Admiralty Motion eliminated the need to consider the parties' arguments in relation to that relief. As such, while the Intervention Motion is being dismissed (because the Crown no longer has an interest in the action), it is appropriate that the parties bear their own costs of this motion.

C. *Admiralty Motion*

[197] The Defendant, FSS, has prevailed in the Admiralty Motion, obtaining summary judgment in its favour both in relation to the *in personam* claim against it and the *in rem* claim against the Ship. As such, in keeping with the parties' proposal, my Order will award costs of that motion to FSS, in any event of the cause, to be assessed following trial or other conclusion of this proceeding.

D. *Royalties Motion*

[198] Navtech has prevailed in the Royalties Motion, obtaining summary judgment in its favour in relation to the Royalties Claim. Although my Order will stay enforcement of that judgment pending determination of the Davie Claim, I do not regard this as a circumstance of materially divided success. As such, in keeping with the parties' proposal, my Order will award costs of that motion to Navtech, in any event of the cause, to be assessed following trial or other conclusion of this proceeding. Given the success by FFS in the Admiralty Motion, establishing that Navtech has no claim against it or the Defendant Ship, Navtech's costs award will be against Davie only.

E. *Copyright Motion*

[199] The Defendants have prevailed in the Copyright Motion, obtaining summary judgment dismissing the Copyright Claim. As such, again in keeping with the parties' proposal, my Order will award costs of that motion to the Defendants, in any event of the cause, to be assessed following trial or other conclusion of this proceeding.

VII. **Conclusion**

[200] The combined effect of the four motions addressed herein is that the action will proceed towards trial, to adjudicate the Visibility Claim and the claim for Declaratory Relief, all against the remaining Defendant, Davie, as well as (subject to any pleading amendment that may be determined necessary and made in the future) the Davie Claim. Taking into account the fact that it has been almost seven years since the action was commenced, it is reasonable to hope that the

narrowing and delineation of the issues resulting from the adjudication of the present motions will allow the parties to move forward expeditiously towards either settlement or trial.

ORDER IN T-1142-18

THIS COURT'S ORDER is that:

1. The Intervention Motion is dismissed, without any award of costs.
2. The Admiralty Motion is allowed, and summary judgment is granted, dismissing this action as against the Defendant, Federal Fleet Services Inc., and *in rem* against the Defendant Ship M/V *Asterix*. The Defendant, Federal Fleet Services Inc., is awarded costs of the Admiralty Motion against the Plaintiff, in any event of the cause, to be assessed following trial or other conclusion of this action.
3. The Royalties Motion is allowed, and summary judgment is granted in favour of the Plaintiff against the Defendant, Chantier Davie Canada Inc., in the amount of \$2,258,437.83 claimed for royalties, plus interest to be quantified as this action proceeds, with enforcement of that judgment stayed pending determination of the Davie Claim following trial or other conclusion of this action. The Plaintiff is awarded costs of the Royalties Motion against the Defendant, Chantier Davie Canada Inc., in any event of the cause, to be assessed following trial or other conclusion of this action.
4. The Copyright Motion is allowed, and summary judgment is granted, dismissing the claim made pursuant to the *Copyright Act* in this action. The Defendants are awarded costs of the Copyright Motion against the Plaintiff, in any event of the cause, to be assessed following trial or other conclusion of this action.

"Richard F. Southcott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1142-18

STYLE OF CAUSE: NAVTECH INC. v CHANTIER DAVIE CANADA INC.
AND FEDERAL FLEET SERVICES INC. AND THE
SHIP M/V ASTERIX AND THE OWNERS AND ALL
OTHERS INTERESTED IN THE SHIP M/V ASTERIX

PLACE OF HEARING: QUEBEC, QUEBEC

DATE OF HEARING: MARCH 27, 2025

JUDGMENT AND REASONS: SOUTHCOTT J.

DATED: MAY 8, 2025

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