Federal Court  Cour fédérale

Date: 20201116

Docket: T-1359-07

Citation: 2020 FC 1058

Toronto, Ontario, November 16, 2020

PRESENT: Mr. Justice Diner

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

I. BACKGROUND

[1] The factual background to this litigation may be found in two previous decisions dated November 29, 2019 (2019 FC 1531) and June 15, 2020 (2020 FC 690). I will not repeat that history in this Order, except to say that at the heart of this litigation lies a contract signed between the Parties in 1880 (the 1880 Contract) and specifically, the tax exemption clause in that contract (Clause 16).

II. ISSUES

[2] There are two phases to this litigation. The first – the evidentiary phase – is now nearing completion; the second phrase, in which I will hear legal arguments, is scheduled for February 2021. As we approach the end of the first phase of the trial, the parties have asked for a ruling on a few outstanding evidentiary objections that they have been unable to settle. These comprise a total of ten documents that are challenged by (i) the Defendant, which opposes two qualifications to its read-ins, and (ii) the Plaintiff, which opposes eight documents that the Defendant wishes to enter on the basis of relevance and hearsay.

[3] First, in response to two read-ins proposed by the Defendant (#134 – FC1346 and #137 – FC1349), the Plaintiff (the Canadian Pacific Railroad Company, or CPRC) raises qualifications to provide full answers and context, which the Crown resists. I will allow the Plaintiff's qualification with respect to read-in #134, but will not allow the qualification to read-in #137, as explained below.

[4] Second, the Plaintiff objects to eight documents that the Defendant wishes to enter into evidence as exhibits (FC258, FC299, FC339, FC388, FC418, FC444, FC957, and FC1450). I find that all eight are admissible, with two caveats. For one, five of these documents (FC299, FC339, FC388, FC418, and FC444) are admitted for the limited purpose of illustrating how the Plaintiff has addressed the disputed Clause 16 in the past, mindful that such treatment arose on different facts and in another context. As both parties suggested, these documents are neither binding on this Court, nor do they bind the Plaintiff as to the interpretation of Clause 16.

[5] Next, to ensure a just determination of the proceeding on its merits, I will provide the Plaintiff the opportunity to tender corresponding evidence relating to the five documents, which are four facta and a letter from the Plaintiff, all prepared in the context of past litigation. Specifically, the Plaintiff may tender corresponding evidence from these past cases (from parties and/or interveners involved therein, as the case may be) if the Plaintiff finds that these items may assist the Court to shed full light on the issues raised by this category of disputed documents. The Plaintiff may submit these documents before the close of the evidentiary phase of this trial.

III. ANALYSIS

A. *CPR's Proposed Qualifying Answers*

[6] The Plaintiff argues that qualifying answers should be provided for two read-ins, and requests that they both be admitted under Rule 289.

(1) Read-in #134

[7] The Plaintiff asks that its full answer, with the underlined portion omitted by the Defendant, be included in read-in #134.

Question	Answer
To advise if a different position is being taken than: Number 1, Canadian Pacific Railway was not profitable between 1980 and 1995, and Number 2, that as a result of being not profitable and being able to use tax loss carry-forwards and carry-backs, Canadian Pacific Railway had no Part 1 tax payable between 1980 and 1995	CPRC confirms that prior to 1996, railroad operation revenues and expenses were reported in Canadian Pacific Limited ("CPL"). As stated previously, the rail operations (Canadian Pacific Railway), including the historical main line operations, have typically been profitable. Per CPL tax returns provided pursuant to Questions 52, 56 and 57.

[8] The Defendant argues that the underlined portion is a supplementary answer that the Plaintiff provided after giving the original answer. The Defendant also points to other questions that the Plaintiff declined to answer. The Defendant emphasizes that the purpose of Rule 289 is to ensure the answers reflect the true response given. Additionally, the Defendant argues that the proposed qualifying answer is opinion evidence that should, particularly in this trial, be given by experts.

[9] While I agree that the part of the read-in that the Defendant wishes to excise reflects a supplementary answer, I do not agree that it should be excised from the rest of the answer given. One would hope that, as sworn testimony, (i) answers given during the discovery phase of litigation provide a true answer, and (ii) any supplemental answers provide precisions to those answers to clarify rather than falsify evidence. A brief discussion of this area of civil procedure provides some context.

[10] The relevant rules of the *Federal Courts Rules*, SOR/98-106 [*Rules*], read as follows:

Reading in examination at trial	**Extrait des dépositions**
288 A party may introduce as its own evidence at trial any part of its examination for discovery of an adverse party or of a person examined on behalf of an adverse party, whether or not the adverse party or person has already testified.	**288** Une partie peut, à l'instruction, présenter en preuve tout extrait des dépositions recueillies à l'interrogatoire préalable d'une partie adverse ou d'une personne interrogée pour le compte de celle-ci, que la partie adverse ou cette personne ait déjà témoigné ou non.

Qualifying answers	Extraits pertinents
289 The Court may order a party who uses part of an examination for discovery as its own evidence to introduce into evidence any other part of the examination for discovery that the Court considers is so related that it ought not to be omitted.	**289** Lorsqu'une partie présente en preuve des extraits des dépositions recueillies à l'interrogatoire préalable, la Cour peut lui ordonner de produire tout autre extrait de ces dépositions qui, à son avis, est pertinent et ne devrait pas être omis.

[11] In *Apotex Inc v AstraZeneca Canada Inc*, 2017 FC 545 at para 3, Justice Locke set out three circumstances in which qualifying reasons should be permitted, namely where: (i) the witness misunderstood something in the question; (ii) the partial answer read in under Rule 288 misrepresents what the witness was saying; or (iii) the answer lacks necessary context or subject matter (see also *Mediatube Corp v Bell Canada*, 2016 FC 1066 [*Mediatube*]). The party challenging a refusal to qualify read-ins must establish that at least one of these three factors applies. In *Mediatube*, at paras 5-7, Justice Locke summarized the key jurisprudence of this Court as follows:

> [5] An important discussion on Rule 289 was provided by Justice Michael Phelan in *Weatherford Canada Ltd v Corlac Inc*, 2009 FC 449 [*Weatherford*]. Though Justice Phelan was not dealing with the issue of discovery answers that had been corrected, he stated that the basic principle of Rule 289 is "to ensure that the answers to questions fairly reflect the true response given."
>
> [6] Another statement of the purpose of Rule 289 is found in *Canada (Citizenship and Immigration) v Odynsky*, [1999] FCJ No 1389 (QL) at para 6 (FCTD), quoting from *Oro Del Norte, SA v Canada*, [1991] FCJ No 986 (QL) (FCTD):
>
> > […] to ensure that evidence from a transcript of examination for discovery which is read in as evidence at trial is placed in proper context so that it is seen and read fairly, without prejudice to another

> party that might arise if only a portion of the content relevant at [*sic*] to a fair understanding of the evidence read in is given.
>
> [7] Returning to Justice Phelan's discussion in *Weatherford*, he went on to describe in narrow terms the right of a party to force an adversary to include certain discovery answers as part of its evidence:
>
> > 2 … Justice Pelletier (as he then was) in *Canada (Minister of Citizenship and Immigration v. Fast)* [*sic*], 2002 FCT 542, summarized the approach to the issue succinctly – whether the additional material showed either that the witness did not understand the particular question or that the portion being read in was misleading in the sense of suggesting that the witness, at that point, was saying one thing when in fact he/she was saying another.
> >
> > 3 Justice Gibson, in *Almecon Industries Ltd. v. Anchortek Ltd. (2002)*, 17 CPR (4th) 74, gave a slightly broader meaning to the Rule and referred to contextualization. I do not take from that decision anything more than that the question and answer must be seen in the context. For example, a simple affirmative response to a question "Did you do it?" lacks context or subject matter.
> >
> > 4 However, I do not understand Justice Gibson to mean that other questions and answers on the same subject matter had to be added beyond making clear to what the specific answer related.

Justice Locke concluded that "[i]f the defendant indeed has the right to correct its answers (which is agreed), then surely that must include the right to supersede its original answers" (*Mediatube*, at para 12).

[12] The Defendant provides authorities from the provinces for the assertion that qualifying read-in answers sought by a party wishing to adduce self-serving evidence, or to avoid having to adduce its own evidence, should be rejected because the insertion fails the "connectedness" test.

That test, along with a case from British Columbia was referenced by Justice Gibson in *Almecon Industries Ltd v Anchortek Ltd*, 2001 FCT 1404 [*Almecon*]:

> 112 I understand that it is not uncommon in trials such as that giving rise to these reasons, that counsel have difficulty reaching agreement as to the scope of read-ins from discoveries. In this particular case, counsel for the defendants urged that I should accept certain additions to read-ins proposed to be entered as evidence on behalf of the plaintiff. He referred me to *Foote et al* v. *Royal Columbian Hospital et al* [footnote omitted] where Chief Justice McEachern wrote at page 98:
>
> > In my view it is appropriate for the Court, on its own motion, or on the request of any party, to put into evidence any other parts reasonably connected to portions of an examination already put into evidence. In determining whether parts of the examination are connected, the Court may consider continuity of thought or subject-matter, the purpose of introducing the evidence in the first instance, and fairness in the sense that the evidence should, so far as possible, represent the complete answer of the witness on the subject-matter of the inquiry so far as the witness has expressed it in the answers he has given on his examination for discovery. In this way the Court strives to ensure that the evidence of the witness on each subject-matter is complete, but the Court must, of course, be careful also to ensure that answers are not admitted into evidence which, upon a consideration of the course of the trial, ought to be adduced, if at all, by viva voce evidence.
>
> [Emphasis added.]

[13] Justice Gibson concluded that contextualization is the key, meaning that any explanation, amplification, or contradiction which sets the context, should be allowed in to qualify answers, "particularly in circumstances where that contextualisation better enables the presiding judge to assign appropriate weight" (*Almecon*, at para 113).

[14] To summarize, to allow in a read-in qualification, a witness must have either (i) misunderstood the question, or (ii) the response being tendered by the other side must be misrepresentative of the true response, or (iii) it must lack necessary context or subject matter. The Court must ensure that the answers to questions fairly reflect the true response given and, if only a portion of the full answer is to be provided, that the partial answer does not introduce prejudice through lack of appropriate context. Carve-outs to responses should not occur such that the answers become disconnected from the discovery evidence provided. The jurisprudence errs on the side of caution for read-ins, favouring completeness over selectivity, which should be the default position to ensure fairness to the party being examined for discovery.

[15] Having reviewed the background, arguments and jurisprudence presented, I find that the qualification for read-in #134 ought to be included, because omitting it would provide an incomplete response. I will err on the side of inclusion by including the full answer rather than excluding a portion of it, particularly when the initial answer has been superseded.

[16] As to the point that the proposed qualifying answer constitutes opinion evidence, an argument that the Defendant stated but did not elaborate on, it suffices to say that if the proposed qualifying answer is ultimately helpful to the determinative legal issues in this case, it will either be supported by financial evidence, or it will not be. Obviously, after the remaining portion of this trial concludes, namely after counsel make legal submissions in February 2021, I may agree with the Defendant that the insertion is vague and non-responsive in light of the full trial record and, in that eventuality, decide to place little to no weight on it. At this stage, however, the qualification shall be added to provide the full answer to the Defendant’s discovery question.

(2) Read-in #137

[17] The Plaintiff also proposes to qualify a response to one part of a multi-part question. Specifically, Undertaking 78 includes a series of questions divided into sub-questions (a) through (h). The Plaintiff seeks to include the response to question 78(b), which the Defendant opposes. That question reads, in full:

> 78(b) This question did not refer to branch lines and was not intended to be read as referring to branch lines. Did the CPRC receive passenger train service subsidies under the Railway Act and the National Transportation Act? If the plaintiff maintains its position that the question relates to subsidies on branch lines, please advise as to why it takes this position and what inquiries it has made to arrive at that position.

[18] I agree with the Defendant that there is no need to include the Plaintiff's response to this sub-question, because the Defendant does not plead passenger train service subsidies. I therefore do not find that the proposed qualification – that is, the Plaintiff's response to sub-question 78(b) – is necessary, relevant, or material to the proceedings. Certainly, if the Defendant were pursuing the issue of passenger train subsidies in this litigation, I would have allowed in the question on the same basis and subject to the same jurisprudence canvassed above. However, being only one part of a multi-part question, sub-question 78(b) uniquely relates to the receipt of passenger train service subsidies. Since sub-question 78(b) is discreet, is not inextricably linked to other parts of the multi-part question, and has itself been removed by the Defendant, then the answer to the question should be removed as well. Consequently, I find that the qualification does not meet the requirements of the three-part Rule 289 test, or the legal principles that underlie it.

B. *The Historical Document Evidence*

[19] The Plaintiff objects to eight documents that the Defendant wishes to introduce into evidence. These eight documents can be split into two categories: three relate to the Plaintiff's treatment of fuel, and five relate to past court cases involving the Plaintiff's treatment of Clause 16. A brief overview of the law precedes my analysis of the admissibility of these eight documents.

[20] Rule 174 of the Rules states:

Material facts	**Exposé des faits**
174 Every pleading shall contain a concise statement of the material facts on which the party relies, but shall not include evidence by which those facts are to be proved.	**174** Tout acte de procédure contient un exposé concis des faits substantiels sur lesquels la partie se fonde; il ne comprend pas les moyens de preuve à l'appui de ces faits.

[21] Pleadings are the cornerstones of actions. They establish the parameters of relevance for trial, and limit the evidence that litigants may tender to the issues raised within the four corners of their pleadings: *V Hazelton Limited v Perfect Smile Dental Inc*, 2019 ONCA 423 at para 82.

[22] The truth-seeking function of a trial creates a starting premise that relevant evidence is *prima facie* admissible (*Globe and Mail v Canada (Attorney General)*, 2010 SCC 41 at para 56). Relevant evidence must be received by the trier of fact unless the evidence is rendered inadmissible by a particular rule of exclusion: AW Bryant, SN Lederman & MK Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 5th ed (Toronto: LexisNexis Canada,

2018) at §2.44 [Sopinka]. However, the admissibility of evidence must not be confused with weight. It is up to the Court to determine the probative value and weight of evidence: *Morris v The Queen*, [1983] 2 SCR 190 at 193.

(1) Historical Documents relating to Fuel

[23] The Plaintiff objects to the Defendant's request to tender into evidence documents FC248, FC957, and FC1450, which relate to import duties that were imposed on oil and other fuel used by the Defendant. Specifically, FC248 is a question and answer from an examination for discovery, in which the Plaintiff is asked about not invoking Clause 16 to dispute the payment of federal sales tax, excise tax, or customs duties. FC957 is a summary published in the *Canada Gazette* of the value of goods that entered into Canada and the duties that were collected on these goods in February 1881. Finally, FC1450 is a submission by the CPRC to the Royal Commission on Coal, dated October 1945.

[24] The Plaintiff argues that these documents are irrelevant to this case, and that the first step in determining relevance is to identify the facts in issue, as established in the pleadings (Sopinka, at §2.51). While there is significant latitude particularly in judge-alone trials such as this, evidence unrelated to the issues as disclosed in the pleadings will be rejected (Sopinka, at §2.52).

[25] The Plaintiff argues that while the 1880 Contract provided exemptions from both duties and taxation, it did so through two different clauses – Clause 10 (an exemption from certain duties) and Clause 16 (the tax exemption). The Plaintiff emphasizes that this action involves

Clause 16 only, which concerns tax and not duties, and that the Defendant has not pleaded duties. On this basis, the Plaintiff argues that the documents do not meet the test of relevance.

[26] The Defendant disagrees, arguing that the issues raised by the disputed documents relate to the facts and issues that have been raised in its pleadings. The Defendant contends that the pleadings do not need to specify the evidence that will be used in support of the legal argument and, in fact, that the *Rules* expressly indicate that pleadings shall not include evidence (Rule 174, reproduced in paragraph 20 above).

[27] The Defendant asserts that the Plaintiff is confusing the admissibility of evidence with the assessment of weight, which is something that this Court will have to decide once it has heard legal arguments. The Defendant contends that it was sufficient that the substantive defences were pleaded. Furthermore, the Defendant points out that the authenticity of these historical documents is not at issue, as they were produced by the Plaintiff, and that the documents show the conduct and representations made by the Plaintiff dating back to the 1880s. The Defendant also notes that the Court can take judicial notice of document FC957 because it emanated from the *Canada Gazette* and that, under subsection 32(2) of the *Canada Evidence Act*, RSC 1985, c C-5, the document is admissible.

[28] The Defendant's arguments are persuasive. The issue of fuel duties forms part of the Defendant's pleadings (for instance, see paragraphs 19, 21-23 of the Defendant's Amended Statement of Defence), and was included in the legal position that the Defendant has advanced thus far (in opening submissions of this trial). While the position on fuel duties could have been

articulated more precisely in the pleadings, the Defendant has nonetheless always asserted that Parliament did not intend to exempt the Plaintiff from the payment of excise tax (for fuel). As the Defendant and the experts have pointed out, fuel tax did not exist when the 1880 Contract was negotiated. Therefore, the Defendant should now be able to adduce evidence showing the treatment of fuel levies historically, and to point to these documents for its legal arguments and defences.

[29] Principally, the Defendant has asserted that the Crown's imposition of duties on fuel and coal were the historical and economic equivalent of levying taxes on fuel, despite the Plaintiff's claim that the two are distinct. This is an argument I must evaluate at trial, once I have had the benefit of hearing legal submissions. The question, then, is not one of relevance, but rather a question on the merits of the legal argument that the Defendant advances. If that argument fails, I may decide these historical documents relating to duties on coal and fuel have a low probative value. Nevertheless, it is imperative not to conflate the merit of legal argument with the relevance of evidence. This evidence cannot be said to be unrelated to the issues disclosed in the pleadings.

[30] In sum, I find that these historical documents fit within the four corners of the Defendant's pleadings. To accept the Plaintiff's position that these documents are irrelevant would be to exclude the evidence because the Defendant's arguments on the point have no merit. That position cannot be sustained because I have yet to hear legal submissions (*Bart v McMaster*, 2015 ONSC 4313 at para 25). Rather, given the very fact that the evidence relates to the

pleadings, no matter how tenuous the legal position might or might not be, that does not change its relevance to this action.

(2) Historical Court Documents

[31] As outlined in the Background above, the Plaintiff objects to the Defendant tendering documents FC299, FC339, FC388, FC418, and FC444 into evidence. Four of the documents are facta provided in the context of past litigation; the fifth document is a letter. Each of these documents relates to four past legal proceedings: (i) *Taxation of Canadian Pacific Railway, Re*, [1951] SCR 190, [1951] 1 DLR 721, (ii) *Canadian Pacific Railway Co v Estevan (Town)*, [1957] SCR 365, 7 DLR (2d) 657, (iii) *Manitoba (Attorney General) v Canadian Pacific Railway*, [1958] SCR 744, 15 DLR (2d) 449, and (iv) *Reference re Taxation of Canadian Pacific Railway*, [1953] 2 All ER 970, [1953] 3 DLR 785 (JCPC). The Plaintiff provided all four of these decisions to this Court in its "Brief of Historical Case Law Regarding Canadian Pacific Railway, Clause 16 Exemption & 1881 Act". In all four proceedings, the Plaintiff (and/or its predecessor companies) were involved. The Defendant now seeks to tender the four facta and the letter related to these cases as evidence.

[32] The Plaintiff contends that these documents should be excluded on the basis that they are not relevant, constitute hearsay, and are improperly being tendered by the Defendant as opinion evidence of the position the Plaintiff took in earlier court cases. Furthermore, the Plaintiff argues that these facta lack probative value in this case, because they consider different taxes, and thus fail to meet the principled exception to the hearsay rule. That rule states that, where documents raise the issue of hearsay evidence, it is necessary to consider whether the documents are useful

and reasonably reliable, and whether their probative value outweighs any potential for prejudice (*Sides v Her Majesty The Queen*, 2018 FC 797 at para 10).

[33] The Defendant, on the other hand, asserts that the five documents support the argument that the Plaintiff has failed to invoke Clause 16 against federal taxation in the past, a fact upon which the Defendant founds the equitable defences it pleads. The Defendant states that the historical facta are relevant for its defence, as well as supporting the manner in which the Plaintiff has historically approached the Clause 16 exemption with respect to federal, provincial, and municipal taxation.

[34] I agree that the four facta are relevant to the issues and facts pleaded, and are admissible as evidence. The Plaintiff has itself submitted the judicial decisions for each proceeding to which the facta relate, and each of the facta address Clause 16, the central provision in issue, albeit in different contexts. These facta may provide useful context to these previous proceedings, and show how the Plaintiff approached Clause 16 in the past.

[35] Furthermore, the Plaintiff, as referenced above, argues that the evidence constitutes hearsay. I will simply observe that much of the documentary evidence for this trial - given the historical nature of the underlying dispute and the genesis of the events dating back more than 150 years to Confederation - is not documentation being tendered for the truth of its contents. Much of the evidence will therefore have to be viewed with a discerning eye, and some of it may not ultimately be persuasive.

[36] As the parties agreed at the beginning of this portion of the trial, there are no objections as to the authenticity of the documents, nor to the circumstances under which they were produced. Given that they are more than three decades old, produced from proper custody, and are free from suspicious circumstances, they are generally admissible under the ancient documents exception to the rule against hearsay. That exception is a means of authenticating old documents where witnesses may no longer be available to prove the documents where they are (a) not less than 30 years old; (b) produced from proper custody; and (c) free from suspicious circumstances (see *Ontario v Rothmans Inc*, 2011 ONSC 5356 at paras 53-55; *Canada (Minister of Citizenship and Immigration) v Fast*, 2003 FC 1139 at paras 27-28; see also Sopinka at §18.107). Furthermore, as noted above in paragraphs 4-5 of these Reasons, these five documents are admitted subject to the caveat that they do not bind the Plaintiff's position on Clause 16 (*i.e.*, the Defendant does not intend to admit them for the truth of their contents).

[37] Finally, FC418, the letter from CPRC's legal department to the federal Assistant Deputy Minister of Justice, should also be admitted for the same reasons provided above with respect to the four facta – namely, relevance to the issues pleaded regarding the Plaintiff's approach to Clause 16. Like the facta, while the letter sets out the company's position in a decidedly different context, it has some connection to the Defendant's legal argument in the present case. Ultimately, whether the letter will have probative value is a question for another day. For admissibility purposes, however, I find that all five documents are useful and reasonably reliable, given the purpose and source of the documents. The documents' probative value outweighs their potential for prejudice.

IV. CONCLUSION

[38] My ruling in this matter, consistent with other preliminary, procedural rulings in this litigation (see two decisions cited at paragraph 1 of these Reasons), favours inclusion over exclusion. First, I will allow the Plaintiff's qualifying answer to the Defendant's read-in #134. Second, subject to the caveats above, I will allow in the eight documents tendered by the Defendant, which will at best support legal positions to be advanced, and at worst, be accorded little to no weight from this Court. Given the large evidentiary record already in this trial, I find that the benefit of including this evidence outweighs the detriment of excluding it. However, the opposite conclusion applies to allowing in a qualifying answer to a question that has been retracted, and I will accordingly exercise my gatekeeping function to exclude that response with respect to read-in #137.

[39] I wish to note, to the great credit of the parties' cooperative approach to these proceedings, that the construction of a large evidentiary edifice in the lead-up to, and over the course of the evidentiary phase of this trial, has been remarkably smooth. Most areas of contention regarding the admissibility of evidence were resolved by the parties through diligent work before the resumption of the hearing. That work and spirit of cooperation does not go unnoticed, and the collaboration of counsel stands out as a model for the Court that other counsel would do well to emulate. It is in that spirit of cooperation, and the goal of seeking the truth of the matter in dispute, that I will allow the Plaintiff an opportunity to submit corresponding submissions from parties and/or interveners in the four cases noted at paragraph 31, should they

be of assistance to shed full light on issues raised before Canada's Supreme Court and the U.K.'s Judicial Committee of the Privy Council.

[40] Finally, as this interlocutory matter was argued during the course of trial, no separate costs will issue with respect to this Order. Costs will be addressed at the end of trial.

ORDER in T-1359-07

THIS COURT ORDERS that:

1. The Plaintiff's qualification to question 1006 of the Defendant's read-in #134 is allowed.

2. The Plaintiff's response to retracted sub-question 78(b) of the Defendant's read-in #137 is excluded.

3. The eight documents tendered by the Defendant, FC258, FC299, FC339, FC388, FC418, FC444, FC957, and FC1450, are accepted into evidence.

4. There is no costs order.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Michael Barrack Max Shapiro Justin Manoryk Naiara Toker	FOR THE PLAINTIFF
William Softley Michael Ezri Joanna Hill Linsey Rains	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Blake, Cassels & Graydon LLP Barristers and Solicitors Toronto, Ontario	FOR THE PLAINTIFF
Attorney General of Canada Ottawa, Ontario	FOR THE DEFENDANT