Federal Court  Cour fédérale

Date: 20061123

Docket: T-352-05

Citation: 2006 FC 1418

[ENGLISH TRANSLATION]

BETWEEN:

COUPRIE, FENTON INC.

Plaintiff

and

THE CANADIAN NATIONAL RAILWAY COMPANY

Defendant

REASONS FOR ORDER

RICHARD MORNEAU

Introduction

[1] On August 29, 2006, when the trial on the merits of the simplified action was about to begin in this case, counsel for the defendant The Canadian National Railway Company (hereinafter CN) verbally indicated to the Court and to counsel for the plaintiff Couprie Fenton Inc. (hereinafter Fenton) that CN was considering arguing that this Court does not have *ratione materiae* jurisdiction on the merits of the case, based essentially on the fact that the damages to Fenton's fish cargo occurred at the very end of the delivery of the cargo, in the performance of

an intra-provincial trucking contract in Ontario and not during the performance of an initial contract of carriage by rail that led CN to transport by rail the cargo from the Port of Vancouver to its terminal in Brampton, Ontario.

[2] CN's position regarding the establishment and governance of this trucking contract was certainly a bombshell, taking by surprise both the Court and Fenton's counsel, who properly stated that he was unable to provide a defence against this allegation by CN.

[3] This situation therefore led to the *sine die* postponement of the trial and the issuance of the following order on the same day:

> [TRANSLATION]
>
> **ORDER**
>
> WHEREAS on August 29, 2006, at the opening of this simplified action, counsel for the defendant argued for the first time and verbally that his client intended to argue that this Court does not have *ratione materiae* jurisdiction over the action brought;
>
> WHEREAS the Court finds that the issue of jurisdiction by its very nature must be debated first under the circumstances;
>
> WHEREAS the Court can only deplore that this allegation was raised by the defendant only at the beginning of the trial, which caused the *sine die* postponement of the trial in this case;
>
> WHEREAS the Court considers that the issues of the possible award and the quantum resulting from the costs lost by the plaintiff by virtue of the postponement of the trial will be determined when a decision is made on the motion that the defendant must file under paragraph 298(2)(a) of the *Federal Courts Rules* (the Rules);
>
> THE COURT ORDERS AS FOLLOWS:

- The trial on the merits of the simplified action in this case is postponed *sine die*;

- The defendant must serve and file on or before September 28, 2006, under paragraph 298(2)(a) of the Rules, a motion to challenge the *ratione materiae* jurisdiction of this Court;

- The issues of the possible award and the quantum resulting from all the costs lost by the plaintiff by virtue of the postponement of the trial will be determined when a decision is made on the motion that the defendant must file under paragraph 298(2)(a) of the Rules.

[4] On September 28, 2006, CN served and filed this motion to dismiss for lack of jurisdiction under paragraph 298(2)(a) and Rule 369 of the *Federal Courts Rules* (the Rules).

[5] This Court must now determine the fate of CN's motion as well as Fenton's incidental motion to strike the substance of the affidavit filed by CN in support of its motion challenging jurisdiction.

[6] To do so, the Court intends to first address CN's motion challenging the *ratione materiae* jurisdiction of the Court (CN's motion). It will deal with Fenton's motion to strike, and the other remedy, at the appropriate time.

Background

[7] To properly assess the appropriateness of CN's motion, it is necessary to understand the following background.

[8] In February 2005, Fenton brought an action for damages for almost thirty thousand Canadian dollars ($30,000.00 CAN) against CN, essentially claiming that it breached its obligations as a common carrier by rail (in French, “transporteur commun pour le transport ferroviaire”) (hereinafter rail carrier) because the container holding the fish cargo at issue was allegedly left without notice by CN at an inappropriate distance from the doors of Fenton’s designated cold storage facility, namely Imperial Freezers & Distribution Inc. (hereinafter Imperial), located in Mississauga, Ontario.

[9] For the purposes of this motion — which is not at all intended to decide the action on the merits — it is appropriate to note that Fenton’s statement of claim from February 2005, contains, *inter alia*, the following paragraphs:

> 3. At all material times, Canadian National Railway Company (thereinafter “CNR”) was the common carrier by rail of the Cargo from Vancouver, B.C. to Toronto, Ontario;
>
> 4. The Cargo was stowed in a refrigerated container with a required set temperature of -20^{o}C;
>
> 5. The Cargo in the reefer container arrived at the Port of Vancouver on or about August 31st, 2003 after which it was hauled by rail by CNR arriving at CNR Brampton Terminal on or about September 11th, 2003;
>
> 6. On or about September 12th, 2003, Fenton contacted CNR to arrange for delivery of the Cargo from CNR’s Brampton Terminal yard to Fenton’s designated cold storage facility which was Imperial Freezer & Distribution Inc. (hereinafter “Imperial”);
>
> 7. While three (3) other Fenton containers were delivered by CNR as arranged, the Cargo went missing and was only recovered on or about September 26, 2003;
>
> 8. At some point subsequent to September 12th, 2003 when Fenton had requested CNR deliver the Cargo, CNR dropped

> the Cargo off at a yard adjacent to the premises of Imperial. Accordingly, CNR delivered the Cargo to the wrong location;
>
> 9. Moreover, CNR failed to give notice to either the operators of the facility to which the Cargo had been delivered or to Imperial or to Fenton of the fact that CNR was attempting to effect delivery of the Cargo. Therefore, neither Fenton nor its representatives were aware of CNR's intended delivery of the Cargo;
>
> 10. As a result of CNR's misdelivery of the Cargo, during the period of time that the Cargo sat in the wrong yard unattended the reefer unit was not operational. Therefore, cold air was not being circulated within the container and the required set temperature of -20^{o}C was not met;

[10] Therefore, note that paragraph 5 of the statement of claim refers to the rail carriage of the Vancouver container to CN's terminal in Brampton and then, paragraph 6 points out Fenton's request that CN deliver the container to Imperial.

[11] In a fairly simple defence filed in April 2005, CN admits, *inter alia*, paragraphs 3 and 5 of Fenton's statement of claim, disregards paragraph 6 of that same statement of claim, and indicates in the paragraphs that follow what appears to be its basic position with respect to its actions at the time that the container was delivered to Imperial:

> 7. With respect to paragraph 7 of the Statement of Claim, Defendant denies that the Cargo went missing as the said Cargo has been delivered with Imperial;
>
> 8. Defendant denies paragraph 8 of the Statement of Claim, adding further that Defendant has not delivered the Cargo to the wrong location;
>
> (…)
>
> The Defendant further prays:

> 18. At all material times, Defendant has completed its carrier's obligation and any loss suffered by Plaintiff is in no way attributable to Defendant;
>
> 19. The Cargo has been delivered to the right location;
>
> 20. Consequently, the damages incurred to the Cargo, if any, are not in any way whatsoever a result of a fault caused by Defendant;
>
> 21. This Defence is well founded in fact and in law;
>
> [Emphasis added.]

[12] We therefore note that when it filed its defence in April 2005, CN, which must certainly be perceived as an experienced transporter, aware of its cases and the grounds of defence available to it, does not in any way raise as a ground of defence the argument to the effect that the delivery of the container to Imperial was the result of a provincial trucking contract (Brampton to Mississauga, two cities close to one another in Ontario) and that this Court therefore does not have jurisdiction over the dispute. To the contrary, paragraph 3 of this defence, which admits paragraph 3 of Fenton's statement of claim, states in short that at all material times, CN was the rail carrier.

[13] At this stage of Fenton's examination on discovery, CN did not ask any questions about the existence of a provincial trucking contract as opposed to a rail contract that applied at all times.

[14] The situation remains the same at this stage of the pre-trial conference memorandums. In fact, at the end of the pre-trial conference held on February 22, 2006, the Court issued an order on March 1, 2006, in which it states that the issues at the trial will be the following:

1. The issues to be determined at trial are as follows:

   (a) What is the quantum of the Plaintiff's damages, if any?

   (b) Did the Defendant properly deliver the Cargo, and therefore meet its contractual obligation?

   (c) Alternatively, were the damages sustained by Plaintiff caused by CNR's fault, negligence and/or gross negligence?

[15] The Court's lack of jurisdiction is certainly not raised there.

[16] The same applies at the stage of the parties' affidavits filed in chief in the weeks preceding the beginning of the trial.

[17] On this point, Mr. William Fenton, for Fenton, swore an affidavit on May 9, 2006, (hereinafter Mr. Fenton's affidavit dated May 9, 2006) in which he discusses at paragraphs 6 and 7 the circumstances that led him to intervene so that the container would be delivered to Imperial by truck, and in particular, the CN employees' strike at that time. This is the text of paragraphs 6 and 7:

6. CNR received the Cargo in Vancouver on or about August 31, 2003 and carried the Cargo to its Brampton Terminal yard, arriving on or about September 11, 2003;

7. Because the local trucker hired to enter CNR's yard to collect the Cargo was prevented from doing so by CNR's striking employees, I arranged, through Couprie Fenton's duly authorized representative, Sue Stickland, for CNR to carry containers Nos. HJCU6946359 (containing the Cargo), MWCU6086630, MWCU6011986 and MAEU5771841 from CNR's Brampton Terminal yard to Couprie Fenton's designated cold storage facility, Imperial Freezers & Distribution Inc. (hereinafter "Imperial"), the whole as appears from Exhibit P-4;

[18] In his affidavit in chief dated May 31, 2006, Mr. Réjean Pichette, Manager of Freight Claims for CN, cannot deny the circumstances of Mr. Fenton's intervention on September 12, 2003. Paragraph 8 of this affidavit (Réjean Pichette's affidavit dated May 31, 2006), appears to confirm this dynamic and then proceeds to justify why, in his opinion, the container was correctly delivered to Imperial. This is what is stated in paragraphs 8 to 12 of this affidavit:

> 8. The said containers were not supposed to be delivered by CNR as normally private containers are outgated from CNR's terminals by third party truckers working on behalf of private containers' owners. It is following the request made by Mr. Fenton, due to a local truck drivers' strike, that CNR accepted to use their own drivers to deliver the aforementioned containers to Imperial's cold storage facility;
>
> 9. Consequently, contrary to Couprie, Fenton Inc.'s representations, the Cargo/container No. HJCU6946359 was delivered to Imperial's cold storage facility on September 15, 2003, the whole as appears from Exhibit P-3;
>
> 10. To that effect, the Cargo/container No. HJCU6946359 was delivered and parked at Imperial's cold storage facility approximately 40 meters away from Imperial's loading docks;
>
> 11. To the best of my knowledge, it is CNR's common practice, that loads are placed or left in a customer's yard depending on docks availability;
>
> 12. CNR advised Couprie, Fenton Inc.'s representative that it had delivered the Cargo/container No. HJCU6946359 as requested, the whole as appears notably from Exhibit P-1;

[19] In passing, we note that here, Mr. Fenton is referring to a strike by CN employees who prevented local truckers from entering the Brampton terminal, while Mr. Pichette is referring to a local truckers' strike. This dichotomy is not important here, although we will come back to it later in the second part of the analysis. Just in case, bear in mind for the moment that this variation in the facts is not at all noted or raised by either party, even despite this motion by CN.

[20] It was therefore not until the morning of the trial on August 29, 2006, that counsel for CN stated that he had just realized in the hours before the trial that, in his opinion, Mr. Fenton's intervention with CN on September 12, 2003, to have the container delivered by CN to Imperial, amounted to the conclusion of an intra-provincial trucking contract between the parties, over which this Court has no jurisdiction. However, there isn't any affidavit from CN or even from its counsel to support, in the context of the motions under review, the lateness of this submission.

Analysis

[21] In my opinion, it is appropriate to approach CN's motion at two levels, first in terms of its admissibility based on its lateness and, second, in terms of its very merits, in the event that it is found to be admissible.

I Admissibility of the motion

[22] I note that it is on this point of CN's motion that Fenton filed a motion to strike almost all the affidavit sworn by CN, namely the affidavit of Mr. Pichette dated September 28, 2006.

[23] I understand that the substance of Mr. Fenton's statements in his Motion to strike it is that it is inconceivable that CN would be allowed to allege at this stage that Fenton's action on September 12, 2003 (when Fenton required CN to deliver the container to Imperial in Mississauga) amounted accordingly to a contract distinct from the rail carriage contract, namely a purely provincial trucking contract.

[24] Before addressing Fenton's position, I should say that Fenton could simply have challenged the admissibility of CN's motion in its reply record rather than through a motion to strike the evidence supporting CN's motion. It is always a very heavy burden for the Court to address a motion within another motion. Fenton's motion to strike filed against Mr. Pichette's affidavit dated September 28, 2006, and, if necessary, against Mr. Lamothe's affidavit dated October 27, 2006, will therefore be officially dismissed for that reason.

[25] This motion will however be dismissed without costs since I consider nevertheless that Fenton's motion — when approached and reviewed as a reply record — raises a well-founded position with respect to the dismissal, first, of CN's motion. (This same motion by Fenton contained a request to the effect that CN be precluded from raising by subsequent amendment the issue of this Court's lack of jurisdiction in the event that CN's motion is dismissed. This request by Fenton will be addressed in the second part of the analysis (see par. [38] *infra*).

[26] In fact, although the order of this Court dated August 29, 2006, allows CN to bring its motion, the Court's generosity cannot discount that the position taken by CN on the morning of August 29, 2006, is equivalent to some extent, to amending its defence to draw a judicial admission, namely the withdrawal of "at all material times, Canadian National Railway Company … was the common carrier by rail" (See paragraph 3 of the statement of claim and paragraph 3 of CN's defence) to substitute it with, in a way, an allegation that at the relevant time of the alleged loss, the parties were tied by a contract that was not under the *ratione materiae* jurisdiction of this Court.

[27] At the defence stage, CN should have been able to bring this allegation if it wanted to. It did not do so then and did not seek to do so afterward by amending its defence. None of the steps described earlier that are specific to CN's readiness in this case led CN to argue that the relevant contract between the parties was a trucking transport contract. At all relevant times, CN's defence was entirely different and consisted in arguing, essentially, that by delivering the container to Imperial as it did, CN had fulfilled in every respect its obligations as a carrier.

[28] The about-face on August 29, 2006, and CN's motion are, in my opinion, analogous to a motion to amend to withdraw a major admission.

[29] In a situation like this, the Federal Court of Appeal in *Merck & Co. Inc. et al v. Apotex Inc*. 2003 FCA 488, said the following at paragraphs [27] and [52]:

> [27] The proposed amendments, in my view, represent a dramatic departure from the position until now advanced by Apotex in its pleadings. Its defence of non-infringement was essentially based on the fact that it had acquired lisinopril made prior to the issuance, on October 16, 1990, of the '350 Patent and on the fact that it had acquired lisinopril made under a Compulsory Licence issued to its supplier, Delmar. Apotex' pleadings in these and other proceedings has always assumed that were it not for those facts, there would be infringement of the '350 Patent. The construction of the Patent and the chemical composition of lisinopril has never been an issue.
>
> …
>
> [52] I have reached the conclusion paraphrasing the words of Bowman T.C.C.J. in *Continental Leasing (supra*, para.31), that it is more consonent with the interests of justice that the withdrawal of admissions and the raising of a radically new defence be denied in the circumstances. This is not, it seems to me, a case of negligent conduct of litigation by counsel – even at that, one should be reminded of the words of Lord Griffiths in *Kettemen (supra*, para.31) to the effect that courts can no longer afford to show the

> same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. This is a case, rather, of a party attempting to derail litigation which has been pursued for several years by adding a defence which, it knows very well, does not reflect the true questions in controversy.

[30] I also consider in the circumstances that it is not in the interests of justice to receive CN's motion.

[31] In my opinion, therefore, CN's motion is inadmissible and should be dismissed for the foregoing reasons.

[32] However, if CN's motion had not been found inadmissible, then a second analysis would be appropriate to decide on the merits of that motion.

II Merits of the motion

[33] CN argues that paragraph 6 of Fenton's statement of claim (see above, para [9]) as well as paragraph 7 of Mr. Fenton's affidavit dated May 9, 2006, given in chief in support of the merits of the claim (see above, para [17]) are an admission by Fenton that on September 12, 2003, Fenton included a trucking contract separate and additional to the contract of carriage by rail.

[34] I do not think that these paragraphs implicitly or explicitly amount to such a finding. It appears to me that paragraph 7 of Mr. Fenton's affidavit dated May 9, 2006, read together with paragraph 8 of Réjean Pichette's affidavit dated May 31, 2006 (see above, para [18]), establish that CN's formal delivery of the container to Fenton according to the contract of carriage by rail

could not truly be effected at the CN terminal in Brampton since Fenton or its traditional local agents could not enter the terminal yard because of a strike — whether it be the strike of CN employees or that of local truckers, it doesn't matter. Faced with this problem, it appears that CN used one of its own truckers to make the delivery or attempt to make the delivery outside the terminal by bringing the container to Imperial in Mississauga, only a few kilometers further outside of Brampton.

[35] This strike at the CN terminal in Brampton therefore forced CN to complete or to try to complete the delivery due under the rail contract by making the delivery to Imperial in Mississauga. Were it not for the strike, it would have been determined that CN had completed its obligation to deliver the cargo when the container arrived at the Brampton terminal, where Fenton was apparently supposed to come pick it up. As stated at page 592 in *D. Smellie & Sons v. Dom. Cartage,* [1957] 7 D.L.R. (2d) 591:

> Until such time as a reasonable opportunity was given to the plaintiff to accept delivery the goods remained in the possession of the defendant as a common carrier and the duty to carry safely and to deliver safely remained on the defendant.

[36] Therefore, it can be properly determined that this Court has the jurisdiction to hear this case on the merits, since in terms of jurisdiction assigned by statute to this Court, there is no doubt that CN, with respect to the rail carriage at issue, falls under paragraph 23(c) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended**.** This paragraph reads:

23. Except to the extent that jurisdiction has been otherwise specially assigned, the Federal Court has concurrent original jurisdiction, between subject and subject as well as otherwise, in all cases in which a	**23.** Sauf attribution spéciale de cette compétence par ailleurs, la Cour fédérale a compétence concurrente, en première instance, dans tous les cas — opposant notamment des administrés — de demande de

claim for relief is made or a remedy is sought under an Act of Parliament or otherwise in relation to any matter coming within any of the following classes of subjects:	réparation ou d'autre recours exercé sous le régime d'une loi fédérale ou d'une autre règle de droit en matière:
(…)	(…)
(c) works and undertakings connecting a province with any other province or extending beyond the limits of a province.	*(c)* d'ouvrages reliant une province à une autre ou s'étendant au-delà des limites d'une province.

(See on this point *HerrenKnecht Tunnelling Systems USA Inc. et al* v. *Canadian Pacific Railway Co. et al*. (2002), 224 F.T.R. 74)

[37] With respect to the federal law that sustains this issue, it is found in paragraph 113 (1)(*c*) and in subsection 116 (5) of the *Canada Transportation Act*, S.C. 1996, c.10, as amended. This provision reads:

113. (1) A railway company shall, according to its powers, in respect of a railway owned or operated by it,	**113.** (1) Chaque compagnie de chemin de fer, dans le cadre de ses attributions, relativement au chemin de fer qui lui appartient ou qu'elle exploite:
(…)	(…)
(c) without delay, and with due care and diligence, receive, carry and deliver the traffic;	*c*) reçoit, transporte et livre ces marchandises sans délai et avec le soin et la diligence voulus;
(…)	(…)
116. (5) Every person aggrieved by any neglect or refusal of a company to fulfil its service obligations has, subject to this Act, an action for the neglect or refusal against the company.	**116.** (5) Quiconque souffre préjudice de la négligence ou du refus d'une compagnie de s'acquitter de ses obligations prévues par les articles 113 ou 114 possède, sous réserve de la présente loi, un droit d'action contre la compagnie.

[38] CN's motion will therefore be dismissed. In the wake of this dismissal and as required by Fenton, it is appropriate to prescribe in the order that accompanies these reasons that, in

accordance with Rules 3 and 53, CN is precluded from submitting that this Court does not have *ratione materiae* jurisdiction in this matter.

[39] With respect to the costs for CN's motion, they will be awarded to Fenton to be assessed at the maximum of Column III of Tariff B. These costs will include a separate and additional amount for costs lost by Fenton because of its preparation and the postponement of the trial on August 29, 2006, caused by the lateness of the CN's submission that this Court did not have jurisdiction. In an affidavit, one of Fenton's counsel (hereinafter Kenrick Sproule's affidavit dated October 6, 2006) established this amount on a client-solicitor basis at close to $16,280.86.

[40] However, given that the dismissal of CN's motion is such that the trial in this matter must ultimately proceed, we must consider that all of Fenton's efforts and proceedings to prepare for trial are not entirely lost. Accordingly, and even though Kenrick Sproule says that he considered this situation based on Exhibit E appended to his affidavit dated October 6, 2006, it is appropriate under subsections or paragraphs 400(1), (3), (3)(o), (4) and (6)(c) of the Rules to reduce the amount claimed under Exhibit E to $8,000.00 and to award under these same rules the amounts claimed under Exhibits F and G of the same affidavit, namely a total of $11,477.09 in costs.

[41] Accordingly, an order will be issued.

“Richard Morneau”

Prothonotary

Montréal, Quebec
November 23, 2006

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-352-05
STYLE OF CAUSE:	COUPRIE, FENTON INC. Plaintiff and THE CANADIAN NATIONAL RAILWAY COMPANY Defendant

MOTION IN WRITING CONSIDERED IN MONTRÉAL WITHOUT APPEARANCE BY PARTIES

REASONS FOR ORDER:	PROTHONOTARY MORNEAU
DATED:	November 23, 2006

WRITTEN SUBMISSIONS:

J. Kenrick Sproule	FOR THE APPLICANT
Jean-François Brière	FOR THE RESPONDENT

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