Date: 20081127

Docket: T-573-04

Citation: 2008 FC 1311

Ottawa, Ontario, this 27th day of November

Present: The Honourable Mr. Justice Pinard

BETWEEN:

ALSTOM CANADA INC.
and
AREVA T&D CANADA INC.

Plaintiffs

and

CANADIAN NATIONAL
RAILWAY COMPANY

Defendant

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is a motion for summary judgment pursuant to Rule 213(2) of the *Federal Courts Rules*, SOR/98-106 (the "Rules"). The moving party asks that the case be dismissed in part, for any amount claimed in excess of C$50,000 with costs, and that the matter be referred to trial.

[2] The non-moving party, Alstom Canada Inc. ("Alstom"), is plaintiff, alongside Areva T&D Canada Inc. ("Areva"), in the principal action against Canadian National Railway Company

("CNR") in which the plaintiffs seek judgment for the sum of C$1,850,000, with interests and costs based on alleged breach of contract, and in the alternative, breach of the duty of care.

[3] The plaintiff Alstom and the defendant CNR have been long-time players in their respective industries. Alstom is part of a major industrial conglomerate headquartered in France, with manufacturing plants in numerous countries. Alstom and its affiliates manufacture high-power electrical machinery and apparatus, such as transformers, and transportation equipment. CNR is a transcontinental freight railway company with lines across Canada and the U.S.

[4] Alstom is the owner of a 450 kV outdoor converter transformer (the "Transformer"), which it had agreed to sell to Manitoba Hydro. The size and weight of the Transformer qualifies it as a "dimensional movement" requiring specialized equipment and advanced routing. Through the agency of Kuehne & Nagel Int. Ltée ("K&N"), Alstom entered into a contract with CNR for carriage of the Transformer by rail from Halifax, Nova Scotia to Rosser, Manitoba.

[5] Ian Rae, who is based in Stafford, United Kingdom, was the logistics manager responsible for the transportation of the Transformer from Stafford, where it was manufactured, to Rosser. Alain Collard handled transportation of the Transformer within Canada for Alstom at the time of transaction. He has since been replaced by Robert Nicole, who provided an affidavit in support of the plaintiffs' position. According to the plaintiffs, Ian Rae met with Alain Collard of Alstom and Pierre Leblanc of CNR in December 1999 to discuss carriage of the Transformer. They allege that a freight rate of C$27,795 was agreed upon on May 9, 2000, based on a quote provided by Pierre Leblanc.

[6] On March 18, 2001 the Transformer arrived at the Port of Halifax after having been carried by sea from Liverpool, England. On March 19, 2001, the Transformer was secured for carriage by CNR onto railcar CN 674100. That same day, K&N communicated to CNR the Straight Bill of Lading Instructions, which included the following special handling instructions:

- Do not turn, B-side of railwaycar first
- Transformer must be at head of train; 5 idler cars to be positioned in front of depressed centre car, nos. to be advised by CNR staff
- No humping
- 2 impact recorders installed on top of unit
- Rider Mr. Merlin Halliday to accompany railcar to Rosser, Manitoba station
- CNR clearance file no: P 10527

[7] On the morning of March 20, 2001, the Transformer was welded to the railcar. The securing arrangement, including the welding, was inspected, verified and approved by representatives of CNR. Two impact data recorders were affixed to the Transformer and verified to be properly functioning. Also on March 20, CNR issued waybill number 746269 for carriage of the Transformer from Halifax to Rosser, which references CN Tariff 1311. Tariff 1311 includes no limitation of liability for CNR, and indicates a freight rate to Rosser of C$45,851.

[8] On March 21, 2001, haulage of the Transformer by rail commenced; the Transformer was delivered to Manitoba Hydro on March 30, 2001. Upon delivery, Manitoba Hydro noted that the impact data recorders placed on the Transformer had been activated, giving evidence of shocks or impact sustained by the Transformer during the haulage. Further inspection by engineers and other representatives of Alstom and Manitoba Hydro revealed that substantial damage had been sustained by the Transformer's core and coil assembly. On April 4, 2001, notice of the damage was communicated to CNR and on April 9 or 10, 2001, a joint inspection of the Transformer was

conducted, with representatives of Alstom, Manitoba Hydro and CNR in attendance. Due to the nature and extent of the damage, the Transformer had to be returned to its place of manufacture and assembly in Stafford, UK, where it was repaired and shipped back to Canada for delivery to Manitoba Hydro.

[9] Alstom claims to have sustained C$1,850,000 in damages, including costs and expenses related to the following:

- Repair of the coil assembly
- Repair of the core assembly
- Re-assembly and testing of the Transformer after repair
- Tap changer repair
- Transportation from Winnipeg to the UK
- Transportation from the UK back to Winnipeg
- Transportation from the port of discharge in UK to Stafford factory, and back

[10] On June 5, 2001, CNR issued freight tariff CN 822333-AA to Alstom, which became effective on the same date. It was received by the plaintiffs on June 8, 2001. Tariff CN 822333-AB, its ostensible successor, has a date of issue of March 1, 2001; however, it was not sent to the plaintiff until June 26, 2001. Tariff CN 822333-AB, unlike its predecessor tariff CN 822333-AA, includes a clause limiting CNR's liability to C$50,000.

[11] In January 2004, Areva purchased from Alstom certain assets including all rights of action that Alstom had in connection with the damages sustained to the Transformer during its carriage by CNR by rail from Halifax to Rosser.

[12] On May 17, 2007, Prothonotary Morneau, in the case management of the action, concluded that the case could not move forward efficiently until a preliminary ruling had been made by the Court on a motion for summary judgment determining whether the defendant has a well-founded basis for relying on the limitation of liability in Tariff CN 822333-AB. He therefore postponed the case conference that should have taken place May 23, 2007 *sine die*, to another date to be fixed following a final judgment regarding this motion for summary judgment.

* * * * * * * *

[13] The dispute underlying the present proceeding is with respect to the scope of damages. Specifically, it addresses the contention in paragraph 6b) of the defendant's amended statement of defence, according to which:

> L'acheminement par rail par la défenderesse était notamment assujetti au tarif CN 822333-AB, applicable au transport de transformateurs de la demanderesse Alstom Canada Inc. entre Halifax, Nouvelle-Écosse et Rosser, Manitoba, pièce D-1A, dont copie est signifiée avec la présente, prévoyant une limite de responsabilité de 50 000$, en considération d'un taux de transport réduit. À cet égard, même en cas de négligence de la défenderesse, sa responsabilité est limitée à cette somme de 50 000$.

[14] The defendant claims that the rate charged to Alstom under Tariff CN 822333-AB was considerably discounted relative to the rate found in open tariffs, because of the limitation of liability clause. The defendant requests, at paragraph 39 of its written representations, that this Court:

> . . . make a finding that there was a complete commercial agreement, binding on the parties, which included the provisions of Tariff

> 8822333-AB [*sic*], including those provisions limiting CNR's liability to $50,000 CDN;

[15] The plaintiffs counter that Tariff CN 822333-AB was intended to be a re-issuance of Tariff CN 822333-AA, which contained no limitation of liability clause.

[16] Each party relies on the evidence put forward by a key affiant. In the case of CNR, it is William Hogbin; for Alstom, it is Ian Rae.

a. Affiant for the defendant: William Hogbin

[17] William Hogbin is involved in the drafting, writing and publishing of tariffs at CNR, where he has been an employee for 27 years. He provided an affidavit in support of the defendant's motion, and was cross-examined by the plaintiffs on April 9, 2008.

[18] According to Mr. Hogbin, "the carriage [of the Transformer] was governed by Tariff CN-822333-AB". He notes at paragraph 22 of his affidavit that in November 2001 Alstom paid C$29,740.65 "being the rate prescribed by Tariff CN-822333-AB, plus taxes". In so doing, Alstom is said to have acknowledged and accepted the terms and conditions under which the carriage was performed, including the limitation of CNR's liability to C$50,000.

[19] During his cross-examination by plaintiffs' counsel, Mr. Hogbin acknowledged that Alstom had received two invoices from CNR for waybill number 746269. When asked about the discrepancy between the rates in the two invoices, Mr. Hogbin could provide no explanation as to why the initial invoice of C$51,022.95 issued on August 30, 2001 was later reduced to the amount

paid by the plaintiffs, C$29,740.65. This is confirmed by an e-mail he sent to Réjean Pichette of CNR on March 15, 2006, wherein he expressed ignorance about the source of the change.

[20] During cross-examination, Mr. Hogbin also disclaimed any knowledge of why Tariff CN 822333-AB contained a clause limiting CNR's liability to C$50,000 whereas its forerunner CN 822333-AA did not. He indicated that the person who would have authorized the addition of the clause was Pierre Leblanc, and that ordinarily Mr. Leblanc would make such a change with the consent of the other party (see transcript of cross-examination of William Hogbin, at paragraphs 75 to 78). No affidavit was submitted by CNR from Pierre Leblanc, who works for CN Worldwide.

b. Affiant for the plaintiffs: Ian Rae

[21] At the time the Transformer was shipped by CNR to Manitoba Hydro, Ian Rae was the person directly responsible to Alstom for planning and managing the execution of the shipment from Stafford to Manitoba Hydro's Rosser converter station. In his affidavit, dated October 22, 2007, he responds to a number of allegations made by Mr. Hogbin. At paragraph 10, he writes:

> Insofar as concerns paragraph 19 of Mr. Hogbin's Affidavit, Tariff CN-822333-AB may have been back-dated to March 1, 2001 but was neither issued nor provided to Plaintiffs until well after the damage occurred to the transformer whilst under the care, custody and control of CNR. . . .

[22] According to Mr. Rae, the rate to be charged by CNR for carriage of the Transformer was agreed upon in May 2000, long before the issuance of Tariff CN 822333-AB. The sum of C$27,795 came from CNR's agreement to carry the Transformer for the same freight rate that had been charged to Alstom for a smaller, 117-ton unit previously carried, plus a 4% increase. Mr. Rae also

explains that in October 2000, he had received an e-mail from Pierre Leblanc setting out the terms of carriage; they did not include a limitation of liability.

[23] To explain the discrepancy in the initial invoice amount, and the amount finally paid by Alstom, Ian Rae points out that CNR was retained for rail carriage of the Transformer back to Halifax, after the damage was discovered. CNR then invoiced Alstom for the rail carriage both to, and from, Rosser. Alain Collard disputed these invoices in a fax to CNR dated June 8, 2001, which is found in the plaintiffs' motion record at page 131. CNR thereafter sent a new invoice conforming with the rate agreed upon in May 2000, and agreed to cancel the invoice for the journey back to Halifax, pending the result of this litigation. According to Mr. Rae, "It is apparent that CNR issued an invoice to Alstom for an incorrect amount and then later corrected that freight rate amount to reflect the May 2000 freight rate agreement."

[24] With respect to the limitation of liability clause, Rae adds at paragraph 18:

> To the best of my knowledge, in dealing either directly with CN or in discussing with Alain Collard of the Alstom Montreal office and with Gerry Pasloski of Manitoba Hydro, the terms of carriage of transformers by CN the limitation of liability was always intended to be CAN $4,500,000.00 and there was never any discussion, let alone agreement, that the liability of CN would be limited to $50,000.00.

[25] Mr. Rae also describes the history of dealings between the parties. According to him, all tariffs issued by CNR to Alstom were sent prior to or at the time they would come into effect, with one exception: Tariff CN 822333-AB.

* * * * * * * *

[26] This matter raises the following basic issue:

> Has CNR met its burden of proof that there is no genuine issue for trial with respect to its contention as contained in paragraph 6b) of its amended defence that it is entitled to limit its liability to CDN $50,000 in consideration of an agreed reduced freight rate?

[27] Another way of presenting the issue which CN is asking this Court to deliberate upon is to ask, as suggested by the plaintiffs, if the inapplicability of any of the tariffs produced in this file (including those in the 1311 series) other than Freight Tariff CN 822333-AB is so certain that it does not deserve consideration by the trier of fact at a future trial.

[28] The principles for granting summary judgment were set out by my colleague Justice Danièle Tremblay-Lamer in *Granville Shipping Co. v. Pegasus Lines Ltd. S.A.*, [1996] 2 F.C. 853, and can be summarized as follows:

1. The purpose of summary judgment is to allow the Court to summarily dispense with cases which ought not proceed to trial because there is no genuine issue to be tried;
2. The test for whether or not to grant summary judgment is not whether a party cannot possibly succeed at trial; it is whether the case is so doubtful that is does not deserve consideration by the trier of fact at a future trial;
3. Each case should be interpreted in reference to its own contextual framework;
4. The Court may determine questions of fact and law on the motion for summary judgment if this can be done on the material before the Court; and
5. On the whole of the evidence, summary judgment cannot be granted if the necessary facts cannot be found or if it would be unjust to do so.

See also *Liu v. Matrikon Inc.*, [2008] F.C. J. No. 406, 2008 FC 279, at paragraph 4; *Premakumaran v. Canada*, [2007] 2 F.C.R. 191 (C.A.), at paragraph 8; *AMR Technology, Inc. v. Novopharm Ltd.*,

[2008] F.C.J. No. 1210, 2008 FC 970, at paragraph 7; and *Suntec Environmental Inc. v. Trojan Technologies Inc.*, 2004 FCA 140, 320 N.R. 322 (F.C.A.).

[29] In their response to the defendant's claim, the plaintiffs rely on the uncontradicted statements of Ian Rae in his affidavit that:

- the rate paid was in fact agreed in May 2000, well before the shipment and before the issuance of tariff CN 822333-AB;
- the discrepancy between the two invoices sent to Alstom by CNR was based on an error, not on any agreement between the parties related to the limitation of liability in CN 822333-AB; and
- there was never any discussion about the limitation of liability, other than at usual tariff limitation of C$4.5 million.

[30] Moreover, the plaintiffs point out that the defendant's affiant Mr. Hogbin was unable to explain why Tariff CN 822333-AA did not have a limitation clause, whereas CN 822333-AB did, and had no personal knowledge of the agreement entered into by the parties. Pierre Leblanc, the CN employee presumably with such knowledge, provided no evidence.

[31] In effect, the plaintiffs argue that there is no privity between the parties with respect to Tariff CN 822333-AB. In other words, they contest the defendant's proposition in its written representations that Tariff CN 822333-AB forms part of the "complete commercial agreement, binding on the parties".

[32] The defendant's submissions rely on what is on the face of the tariff in question. There is no doubt that Tariff CN 822333-AB contains a limitation of liability provision; that it establishes a rate of C$27,795; and that it indicates a date of issue of March 1, 2001. However, the record is also clear

that CN 822333-AB was only sent to the plaintiffs on June 26, 2001, and received by them on June 29, 2001, well after damage to the Transformer was discovered. No sensible explanation has been provided by the defendant for the apparent back-dating of the tariff, or for the presence of the disputed limitation clause, which was absent in all prior tariffs issued by CNR to Alstom.

[33] Moreover, the allegation by the defendant that the rate of C$27,795 reflects a discount due to the limitation clause has been challenged by the plaintiffs, who argue that it was in fact the amount agreed upon in May 2000. This is supported by the e-mail exchange, noted above, between representatives of CNR and of Alstom, which indicates agreement between the parties on a rate that was the same as that charged on a prior carriage, plus 4%.

[34] In my view, the plaintiffs have, through the evidence presented in the affidavit of Ian Rae, succeeded in raising a genuine issue that merits a hearing by the trier of fact, namely which tariff among those in the record properly governs this dispute.

[35] Furthermore, I note that counsel for the defendant was unable to point to any specific signed agreement between the parties regarding a limitation of liability in this case, as required by section 137 of the *Canada Transportation Act*, S.C. 1996, c. 10, which reads:

137. (1) A railway company shall not limit or restrict its liability to a shipper for the movement of traffic except by means of a written agreement signed by the shipper or by an association or other body representing shippers.	**137.** (1) La compagnie de chemin de fer ne peut limiter sa responsabilité envers un expéditeur pour le transport des marchandises de celui-ci, sauf par accord écrit signé soit par l'expéditeur, soit par une association ou un groupe représentant les expéditeurs.
(2) If there is no agreement, the railway company's liability is limited or restricted to the	(2) En l'absence d'un tel accord, la mesure dans laquelle la responsabilité de la compagnie

extent provided in any terms and conditions that the Agency may (*a*) on the application of the company, specify for the traffic; or (*b*) prescribe by regulation, if none are specified for the traffic.	de chemin de fer peut être limitée en ce qui concerne un transport de marchandises est prévue par les conditions de cette limitation soit fixées par l'Office pour le transport, sur demande de la compagnie, soit, si aucune condition n'est fixée, établies par règlement de l'Office.

[36] Counsel for the defendant, in this regard, simply relied on the "paper trail" in the case. Considering that the testimonial evidence referred to above is very relevant to the interpretation of the "paper trail" in question, I find it is desirable that this specific issue related to section 137 of the *Canada Transportation Act* also be dealt with at trial.

[37] I find, therefore, that the defendant's submissions do not prove the necessary facts, at this stage, that would allow me to conclude that Tariff CN 822333-AB, including its provision limiting the defendant's liability to C$50,000, is binding on the parties.

[38] With respect to costs, the plaintiffs argue, at paragraph 38 of their Memorandum of Fact and Law, that the "only logical conclusion that can be reached from the uncontradicted facts is that CN[R] in virtue of the issuance of Tariff 822333-AB has attempted to unilaterally and retroactively impose a liability limitation regime upon its customer to the detriment of Alstom". Consequently, they ask the Court to issue a cost award against the defendant.

[39] The rules regarding costs are set out in Part 11 of the *Federal Courts Rules*. According to Rule 400(1), the Court has full discretion over the amount and allocation of costs. Rule 400(3) sets out a number of considerations that may guide the exercise of this discretion.

[40] The present motion for summary judgment was brought based on a determination by Prothonotary Morneau that it would assist the case in moving forward more efficiently. In my view, there is no basis to award costs against the defendant at this stage.

[41] For all the above reasons, the motion for summary judgment must be denied, with costs in the cause.

JUDGMENT

The defendant's motion for summary judgment pursuant to Rule 213(2) of the *Federal Courts Rules*, SOR/98-106, is denied. Costs in the cause.

"Yvon Pinard"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-573-04
STYLE OF CAUSE:	ALSTOM CANADA INC. and AREVA T&D CANADA INC. v. CANADIAN NATIONAL RAILWAY COMPANY
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Mr. Jacques Perron	FOR THE DEFENDANT

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