

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20220531**

**Docket: A-232-20**

**Citation: 2022 FCA 96**

**CORAM: STRATAS J.A.  
RENNIE J.A.  
LASKIN J.A.**

**BETWEEN:**

**CSX TRANSPORTATION, INC.**

**Appellant**

**and**

**ABB INC. AND CANADIAN NATIONAL  
RAILWAY COMPANY**

**Respondents**

Heard at Toronto, Ontario and by online video conference hosted by the Registry,  
on May 31, 2022.

Judgment delivered from the Bench at Toronto, Ontario, on May 31, 2022.

**REASONS FOR JUDGMENT OF THE COURT BY:**

**STRATAS J.A.**

**Federal Court of Appeal**



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**REASONS FOR JUDGMENT OF THE COURT**  
**(Delivered from the Bench at Toronto, Ontario, on May 31, 2022).**

**STRATAS J.A.**

[1] The appellant, CSX Transportation, Inc., appeals from the judgment of the Federal Court  
(*per* Grammond J.): 2020 FC 817.

[2] A Quebec manufacturer, ABB Inc., retained the respondent Canadian National Railway Company to ship a generator to Kentucky. CN handled the rail transportation in Canada. CN retained CSXT to handle the rail transportation in the United States. There was no contractual relationship between ABB Inc. and CSXT. CSXT had no knowledge of the arrangements between CN and ABB Inc. CSXT is a Virginia corporation headquartered in Florida.

[3] While the generator was being transported by CSXT in the United States, it was damaged. ABB Inc. sued both CN and CSXT. The Federal Court, among other things, found CSXT liable under the *Civil Code of Quebec*, C.Q.L.R. c. CCQ-1991.

[4] In this Court, CSXT appeals on a number of grounds. One ground is that the Federal Court did not respect procedural fairness. CSXT says it was taken by surprise by the Federal Court's finding that it was liable under the *Civil Code*.

[5] We agree with CSXT that a breach of procedural fairness took place in this case. Thus, the appeal must be allowed.

[6] The following circumstances, taken together, lead us to the conclusion that there was a breach of procedural fairness:

- ABB Inc. did not plead that CSXT was liable in any way under the *Civil Code*. The pleadings did not suggest that the governing law was that of Quebec. The pleadings were never amended, no party sought to amend the pleadings, and the Federal Court did not raise the issue of the pleadings. While there are

circumstances where courts and parties can proceed with issues outside of the scope of the pleadings, the failure to amend the pleadings can result in uncertainty about precisely which issues are on or off the table. That was the case here, especially in light of the following events.

- During the trial the Federal Court raised by itself the possibility of liability of CN and CSXT under the *Civil Code*. But it did this in only a vague and general way, going no further than asking whether the *Civil Code* had any bearing on the matter. The Federal Court never put to the parties any particular theory of liability under the *Civil Code* or provide any particulars of what it had in mind. It never explicitly asked the parties to make submissions on how CSXT could be liable under the terms of the *Civil Code*.
- The Federal Court did not invite submissions on choice of law and private international law and, in particular, on the issue whether the *Civil Code*—Quebec legislation—could apply to CSXT, an entity resident in the United States and an entity that had no contractual relationship with ABB Inc. For example, having had no notice of the issue, the parties did not address with specificity or at all the limits of extra-territorial application of provincial laws: see *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40, [2003] 2 S.C.R. 63.
- The Federal Court did not invite specific submissions on whether the *Civil Code* could apply on the facts of the case in light of the provisions of the *Canada Transportation Act*, S.C. 1996, c. 10 and the *Railway Traffic Liability Regulations*, SOR/91-488, interpreted in accordance with their text, context and

purpose, and whether they ousted the *Civil Code*. Nor did it invite submissions on whether CSXT was an “implied party” or other issues under the *Civil Code*. It just expressed an interest in the *Civil Code* and how it might interact with this case.

The parties were left virtually to guess about what exactly should be argued under the *Civil Code*.

- At the behest of the parties near at the end of the trial, the Federal Court called for supplementary written submissions. Later, counsel for CN was unclear as to what aspects of the *Civil Code* were in play for the purposes of those submissions and sought clarification and particulars from the Federal Court: Appeal Book, p. 88. Importantly, this was a sign that, at this late stage, the parties were unclear as to what exactly was in issue and what should be argued.

- Most significantly, the Federal Court responded in a way that did not assist the parties or clarify any lack of clarity (Appeal Book, p. 91):

With respect to CN’s request for clarification, the Court’s understanding is as follows. At the hearing, the Court asked the parties whether they had considered that the Civil Code of Quebec could govern certain aspects of the case. As a result, CN asked for the opportunity to make supplementary written submissions. It should be emphasized that in asking that question, the Court did not intend to express a preliminary opinion on the matter not to direct the parties as to how they should argue their case. Nevertheless, if that may be of assistance, the Court’s question was not limited to any specific aspect of the case.

- The Federal Court did not give notice of any related issues such as private international law, the applicability of the *Civil Code* in light of specific provisions of the *Canada Transportation Act*, or any other related issues.

- Thus, without clarification in the pleadings or from the Federal Court, all the parties could do is take a stab at the matter.
- In the end, in extensive reasons the Federal Court found CSXT liable under the *Civil Code*. The Federal Court appears to have assumed that, as a matter of private international law, the *Civil Code* could apply to CSXT, a foreign entity operating entirely outside Canada without any contractual or other relationship with ABB Inc.

[7] A court has an obligation to decide cases on all relevant law. Thus, the Federal Court did not err in raising with the parties the question whether they had overlooked the *Civil Code*.

[8] However, to fulfil the obligations of procedural fairness, the Federal Court had to be more specific about its concerns or put specific propositions to the parties so that they could debate them in an informed way. To do this, it had to invite submissions on the particular issues in the *Civil Code* it was concerned about, including the applicability of the *Civil Code* under private international law and its applicability in the face of provisions of the *Canada Transportation Act*.

[9] The Federal Court need not have fleshed out the issues for the parties in much detail at all. Rather, it only had to flag the issues with enough particularity to facilitate the making of submissions. On procedural fairness in this context, see *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74, 157 O.A.C. 203 (C.A.); the comments of the Supreme Court in *R. v. Mian*, 2014

SCC 54, [2014] 2 S.C.R. 689 concerning procedural fairness concerning new issues in appeal courts are also helpful to first-instance courts.

[10] Given the procedural fairness shortcomings in this case, we consider the Federal Court's verdict on the issue of CSXT's liability to be unsafe. The parties tried their best to anticipate what was of concern regarding the *Civil Code* and related issues. Even then, the parties' submissions on the applicability of the *Civil Code* were sparse at best and did not address larger issues of private international law. Had the Federal Court received fully informed submissions on all relevant issues, the submissions and the outcome might have been different. Indeed, we cannot rule out the possibility that if the Federal Court had put specific concerns to the parties, the parties might have decided to file additional evidence or file additional authorities.

[11] Further, had the issues between the parties been fully defined and clear, CSXT might have taken different tactical and evidentiary steps in the case. These could well have affected the outcome of the case.

[12] As long as procedural fairness is afforded to the parties, a court can consider issues that have to be decided even though they have not been pleaded: *Pinder Jr. v. Canada*, 2016 FCA 317; *Tervita Corporation v. Commissioner of Competition*, 2013 FCA 28, 360 D.L.R. (4th) 717 at para. 72, rev'd on other grounds, 2015 SCC 3, [2015] 1 S.C.R. 161. However, now that additional issues are in play, we consider it advisable for the parties to amend their pleadings in the Federal Court in order to embrace these issues.

[13] Therefore, we will allow the appeal with costs, set aside the judgment of the Federal Court against CSXT, and, as the whole proceeding is tainted by procedural unfairness as far as CSXT is concerned, order a new trial in the Federal Court concerning CSXT's liability and any related or consequential issues before another judge of the Federal Court. The last-mentioned component of our judgment is necessary because the judge who issued the judgment of the Federal Court has already expressed his views on some of the issues.

[14] In retrying the matter, the Federal Court should not consider itself bound or influenced, one way or the other, by the Federal Court's reasons for judgment in this case on the issues affecting the liability of CSXT, including the *Civil Code* issues and whether the *Civil Code* can even apply in the first place. These issues as against CSXT should be regarded as unresolved. They should be given an independent, fresh look, informed by the submissions of the parties.

“David Stratas”

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J.A.



**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-232-20

**APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE SÉBASTIEN GRAMMOND OF THE FEDERAL COURT DATED AUGUST 6, 2020, DOCKET NO. T-1766-16.**

**STYLE OF CAUSE:** CSX TRANSPORTATION, INC.  
v. ABB INC. AND CANADIAN  
NATIONAL RAILWAY  
COMPANY

**PLACE OF HEARING:** HEARD AT TORONTO,  
ONTARIO AND BY ONLINE  
VIDEO CONFERENCE HOSTED  
BY THE REGISTRY

**DATE OF HEARING:** MAY 31, 2022

**REASONS FOR JUDGMENT OF THE COURT  
BY:** STRATAS J.A.  
RENNIE J.A.  
LASKIN J.A.

**DELIVERED FROM THE BENCH BY:** STRATAS J.A.

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