Federal Court  Cour fédérale

Date: 20170824

Docket: T-1292-15

Citation: 2017 FC 783

Ottawa, Ontario, August 24, 2017

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

LOUIS DREYFUS COMMODITIES CANADA LTD.

Plaintiff

and

CANADIAN NATIONAL RAILWAY COMPANY

Defendant

JUDGMENT AND REASONS

[1] Louis Dreyfus Commodities Canada Ltd. [LDC], the plaintiff, buys grain from Canadian farmers and sells it domestically and internationally. Canadian National Railway Company [CN], the defendant, transports grain for LDC.

[2] The plaintiff brought an action in this Court under subsection 116(5) of the *Canada Transportation Act*, SC 1996, c 10 [the Act] seeking damages for CN's breach of its service

obligations to LDC under the Act and the contract between the two parties [the 1999 Contract]. Subsection 116(5) creates a statutory cause of action for shippers aggrieved by a railway's neglect or refusal to fulfill its service obligations within the meaning of the Act.

[3] In this highly regulated industry, the Canadian Transportation Agency [CTA] is responsible for determining whether a railway has breached these statutory service obligations if a complaint is lodged. In this case, the CTA determined that CN breached its service obligations to LDC and the Federal Court of Appeal upheld that decision; however, the CTA cannot award damages for service complaints, hence LDC's claim in this Federal Court. Federal Court of Appeal jurisprudence has already determined that shippers can bring a subsection 116(5) claim to the Federal Court only if the CTA's decision is in place (*Kiist v Canadian Pacific Railway Company*, [1982] 1 FC 361, 123 DLR (3d) 434 (FCA) [*Kiist*] at p 20).

[4] CN argues that the Federal Court lacks jurisdiction to hear LDC's claim under subsection 116(5) because any rights to damages arise from the 1999 Contract and not the statutory service obligations contained within the Act. CN even contends that the CTA erred in asserting jurisdiction over the complaint and that the Federal Court of Appeal did not rule on this issue. LDC argues that the 1999 Contract contained service obligations within the meaning of the Act and that the CTA was correct to assert jurisdiction; therefore, it can bring a claim to this Court under subsection 116(5).

[5] LDC brought a motion for a summary trial to resolve this question of jurisdiction, which is solely the subject of this judgment. If LDC succeeds, its damages claim would then proceed in a separate trial.

I. Facts

A. *Background*

[6] LDC is a federal company with headquarters in Calgary, Alberta. It is a member of the Louis Dreyfus Commodities group of companies that trades in commodities around the world. LDC's Western Canada operations include purchasing grain, primarily wheat and canola, from farmers, processing it in elevators, and shipping it by rail to ports or processors.

[7] CN is also a federal company, but with its headquarters in Montreal, Quebec. The railway is the largest in Canada, both in terms of the size of its network and revenues. It transports various commodities, including grain.

[8] The dispute that gave rise to this matter concerned CN's transportation of grain from LDC elevators located in Glenavon and Aberdeen, Saskatchewan, and Joffre and Lyalta, Alberta. All four facilities are limited to using the CN adjacent rail network. Grain stored in the LDC elevators is shipped to the west coast, Thunder Bay, Churchill, and processing facilities.

[9] Under the Act, CN owes statutory level of service obligations to shippers like LDC. For example, CN must furnish "adequate and suitable accommodation" for receiving and loading

traffic from a shipper. Railways and shippers can enter into private contracts that further specify their obligations to each other. The Act provides that there are various topics that can be made the subject of a confidential contract. One of them is the manner in which the railway will fulfill its service obligations (section 126). Subsection 113(4) of the Act is specific that shippers and railway companies can agree that such a private contract will set out the manner in which the railway will fulfill the statutory service obligations. The legal effect of subsection 113(4) is at the heart of the issue presented to the Court for resolution.

[10] On March 25, 1999, LDC and CN concluded a contract setting out the terms on which the the plaintiff would construct and operate elevators relevant to this matter. It also provides with a measure of specificity for the service requirements concerning the new elevators at section 7. The contract's lifetime was set at 15 years from the date LDC started using CN rail service at these elevators.

[11] Section 7.0 of the 1999 Contract is the other instrument which is at the centre of the present jurisdiction question. Section 7.1 discusses LDC's rights to certain service standards under the Act and the contract. Once the scheme of the Act is understood, I will interpret this text in further detail in my analysis.

> 7.0 SERVICE REQUIREMENTS
>
> 7.1 LDC shall be entitled to such service and carriage by CN as are provided by Section 113-116 of the Canada Transportation Act (CTA). It is not the intent of the parties that this section 7.0 constitute an agreement, within the meaning of Section 113(4) of the CTA, to replace LDC's rights under those sections of the CTA with rights arising under this Agreement. In addition to such service and carriage as LDC is entitled to by Sections 113-116 of the CTA, CN shall provide train service for placement of empty

> cars for loading and pick-up of loaded cars at each Elevator Facility as provided in this Section 7.0.

[12] The remainder of section 7.0 sets out specific obligations that CN must fulfill in servicing the elevators that were to be built. It is not necessary to reproduce in these reasons those specific obligations. As did the Court of Appeal in its reasons for judgment at paragraph 10, I do not state the contents of section 7.1 other than what is quoted at paragraph 10.

[13] Two other portions of the 1999 Contract that are relevant to the present issue are section 8.1, which specifies the remedies the parties can seek without excluding the regulatory relief, and section 12.2, which states that the contract is a "confidential contract" within the meaning of CTA subsection 126:

> 8.1 In the event that a party violates any duty owed under this Agreement, the other party may pursue (a) civil remedies to recover damages, (b) injunctive relief in any appropriate court, (c) arbitration as provided in this Agreement, or (d) regulatory relief to the extent consistent with and allowed by the *CTA*. For the purposes of determining whether a remedy is available under the *CTA*, it is the intent of the parties that this Agreement be construed strictly and that no matter shall be deemed governed by the Agreement unless, and only to the extent, it is expressly addressed herein. An election by a party to pursue any remedy available to it shall not be deemed a waiver of its right to pursue any other remedy otherwise available to it at law or pursuant to this Agreement.
>
> 12.2 For purposes of the *Canada Transportation Act*, this Agreement shall be deemed a Confidential Contract within the meaning of Section 126.
>
> [my emphasis]

B. *Events in 2013-2014 leading to LDC's claim for damages*

[14] Canada's grain industry is organized on a 52-week crop year that runs from August 1 to July 31.

[15] During the 2013-2014 crop year, the CTA determined that CN failed to fill car orders to LDC's elevators over several weeks as required under its interpretation of the terms of the 1999 Contract. As a result, LDC alleges that it was unable to purchase and resell grain because of insufficient CN rail cars to ship the grain to port. LDC argues that it lost significant profits based on the available profit margins multiplied by the amount of grain it could have shipped in the rail cars CN was obligated to provide under their agreement. LDC also claims that it incurred significant demurrage costs from vessels waiting for grain at port and damage to its business reputation due to the shipment delays.

[16] For context, these events occurred during a crop year that presented significant challenges in moving grain to port. The summer leading into that year produced a very large grain crop and the winter was particularly cold, which results in the railways running shorter trains. That amounted to a shortage of cars to ship an abundant grain crop. It appears that the shortage experienced by LDC was quite significant, especially during weeks 30 to 35.

C. *Procedural history*

[17] Under the Act, the CTA is mandated with arbitrating level of service disputes between shippers like LDC and the railways. The triggering mechanism is the receipt by the regulator of a

complaint. If the CTA asserts jurisdiction over a complaint under subsection 116(1), it is taking the position that the complaint concerns "service obligations" within the meaning of the Act. It is what was done in this case. Subsection 116(1) reads:

Complaint and investigation concerning company's obligations	**Plaintes et enquêtes**
116(1) On receipt of a complaint made by any person that a railway company is not fulfilling any of its service obligations, the Agency shall	**116(1)** Sur réception d'une plainte selon laquelle une compagnie de chemin de fer ne s'acquitte pas de ses obligations prévues par les articles 113 ou 114, l'Office mène, aussi rapidement que possible, l'enquête qu'il estime indiquée et décide, dans les cent vingt jours suivant la réception de la plainte, si la compagnie s'acquitte de ses obligations.
(a) conduct, as expeditiously as possible, an investigation of the complaint that, in its opinion, is warranted; and	
(b) within one hundred and twenty days after receipt of the complaint, determine whether the company is fulfilling that obligation.	

[18] CTA decisions can be appealed to the Federal Court of Appeal. On April 14, 2014, LDC applied to the CTA for an order determining that CN had breached its level of service obligations in the 1999 Contract during the 2013-14 crop year with respect to car orders to the elevators and requiring CN to fulfill those obligations.

[19] On October 3, 2014, the CTA issued its decision, within the required 120 days, that CN had breached its level of service obligations to LDC: *Louis Dreyfus Commodities Canada Ltd v Canadian National Railway Company* (Case No 14-02100, Oct 3, 2014). The CTA found that the terms of the 1999 Contract were binding on the parties. CN had not, in the CTA's view, provided all of the cars for which LDC had finalized orders as required under section 7.0 of the confidential contract. The 1999 Contract had two clauses permitting such a breach, and the CTA found that neither justified CN's failure to provide the requested cars.

[20] The Federal Court of Appeal dismissed CN's appeal of the CTA's decision made pursuant to subsection 41(1) of the Act (*Canadian National Railway Company v Dreyfus*, 2016 FCA 232 [*Dreyfus*]). The decision states at paragraph 19 that "[a]lthough CN referred to the identified errors as errors of law or jurisdiction, none of the alleged errors relate to the jurisdiction of the Agency." CN did argue that the 1999 Contract was not a contract contemplated by subsection 113(4), but the Federal Court of Appeal found that this was a matter of contractual interpretation involving mixed fact and law and, therefore, not appealable under the Act, which provides that appeals may only be brought in relation to a question of law or jurisdiction. The CTA's finding was therefore left undisturbed: there was no judicial review sought.

[21] In July 2015, with the CTA decision in hand, LDC filed a Statement of Claim for damages in this Court under subsection 116(5) of the Act.

[22] In January 2016, CN moved to strike the Statement of Claim on the basis that the Federal Court lacked jurisdiction to hear what it believed was a purely contractual matter. Prothonotary Tabib dismissed the motion on May 27, 2016. However, the Prothonotary did not make a final determination about CN's ability to raise the invalidity of the Agency's decision as a defence to the action. As a result, the parties agreed to proceed by way of summary trial on the jurisdiction question before embarking on preparations for a trial on the damages claim.

II. Legislative Framework

[23] Understanding the operation of the Act is necessary to appreciate the parties' arguments with respect to this Court's jurisdiction over a damages claim under subsection 116(5).

[24] Sections 113-116 of the Act prescribe level of service obligations for federally-regulated railways like CN and set out recourse mechanisms for dealing with disputes between shippers and railways.

[25] These sections are contained within Division IV of the Act, which includes definitions for "service obligations" and "confidential contracts":

111 In this Division,	**111** Les définitions qui suivent s'appliquent à la présente section.
[…]	(…)
confidential contract means a contract entered into under subsection 126(1); (*contrat confidentiel*)	**contrat confidentiel** Contrat conclu en application du paragraphe 126(1). (*confidential contract*)

[…]	(…)
***service obligation*s** means obligations under section 113 or 114. (*Version anglaise seulement*)	
Confidential contracts	**Conclusion de contrats confidentiels**
126(1) A railway company may enter into a contract with a shipper that the parties agree to keep confidential respecting	**126(1)** Les compagnies de chemin de fer peuvent conclure avec les expéditeurs un contrat, que les parties conviennent de garder confidentiel, en ce qui concerne :
(a) the rates to be charged by the company to the shipper;	**a)** les prix exigés de l'expéditeur par la compagnie;
(b) reductions or allowances pertaining to rates in tariffs that have been issued and published in accordance with this Division;	**b)** les baisses de prix, ou allocations afférentes à ceux-ci, indiquées dans les tarifs établis et publiés conformément à la présente section;
(c) rebates or allowances pertaining to rates in tariffs or confidential contracts that have previously been lawfully charged;	**c)** les rabais sur les prix, ou allocations afférentes à ceux-ci, établis dans les tarifs ou dans les contrats confidentiels, qui ont antérieurement été exigés licitement;
(d) any conditions relating to the traffic to be moved by the company; and	**d)** les conditions relatives au transport à effectuer par la compagnie;
(e) the manner in which the company shall fulfill its service obligations under section 113.	**e)** les moyens pris par la compagnie pour s'acquitter de ses obligations en application de l'article 113.

[26] Subsection 113 lists the service obligations applicable to all railways. Essentially, railways are required to provide “adequate and suitable” rail service to customers like LDC.

Accommodation for traffic	**Acheminement du trafic**
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 :
(a) furnish, at the point of origin, at the point of junction of the railway with another railway, and at all points of stopping established for that purpose, adequate and suitable accommodation for the receiving and loading of all traffic offered for carriage on the railway;	**a)** fournit, au point d’origine de son chemin de fer et au point de raccordement avec d’autres, et à tous les points d’arrêt établis à cette fin, des installations convenables pour la réception et le chargement des marchandises à transporter par chemin de fer;
(b) furnish adequate and suitable accommodation for the carriage, unloading and delivering of the traffic;	**b)** fournit les installations convenables pour le transport, le déchargement et la livraison des marchandises;
(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;
(d) furnish and use all proper appliances, accommodation and means necessary for receiving, loading, carrying, unloading and delivering the traffic; and	**d)** fournit et utilise tous les appareils, toutes les installations et tous les moyens nécessaires à la réception, au chargement, au transport, au déchargement et à la livraison de ces marchandises;
(e) furnish any other service incidental to transportation that is customary or usual in connection with the business of a railway company.	**e)** fournit les autres services normalement liés à l’exploitation d’un service de transport par une compagnie de chemin de fer.

[27] As noted earlier, subsection 113(4) enables a shipper and a railway to conclude an agreement on the manner in which the statutory service obligations will be fulfilled.

Confidential contract between company and shipper	**Contrat confidentiel**
113(4) A shipper and a railway company may, by means of a confidential contract or other written agreement, agree on the manner in which the obligations under this section are to be fulfilled by the company.	**113(4)** Un expéditeur et une compagnie peuvent s'entendre, par contrat confidentiel ou autre accord écrit, sur les moyens à prendre par la compagnie pour s'acquitter de ses obligations.

As can be readily seen, the Act defines the service obligations in a qualitative way; it is not surprising that it would allow shippers and railway companies to define more precisely the service obligations, if they so wish, by defining, through a confidential contract, the manner in which the qualitative service obligations are to be fulfilled by the railway company. I note that such a contract may be requested by the shipper and that the railway company must make an offer, as provided at subsections 126(1.1), (1.2) and (1.3) of the Act.

[28] Subsection 116(1) authorizes the CTA to hear "a complaint made by any person that a railway company is not fulfilling any of its service obligations."

Complaint and investigation concerning company's obligations	**Plaintes et enquêtes**
116(1) On receipt of a complaint made by any person that a railway company is not fulfilling any of its service obligations, the Agency shall	**116(1)** Sur réception d'une plainte selon laquelle une compagnie de chemin de fer ne s'acquitte pas de ses obligations prévues par les

articles 113 ou 114, l'Office mène, aussi rapidement que possible, l'enquête qu'il estime indiquée et décide, dans les cent vingt jours suivant la réception de la plainte, si la compagnie s'acquitte de ses obligations.

(a) conduct, as expeditiously as possible, an investigation of the complaint that, in its opinion, is warranted; and

(b) within one hundred and twenty days after receipt of the complaint, determine whether the company is fulfilling that obligation.

Pursuant to subsection 116(2), if a shipper and a railway have a confidential contract setting out the manner in which the railway is supposed to fulfill the statutory service obligations under subsection 113, the terms of that agreement are binding on the CTA's determination of the service obligations.

Confidential contract binding on Agency

116(2) If a company and a shipper agree, by means of a confidential contract, on the manner in which service obligations under section 113 are to be fulfilled by the company, the terms of that agreement are binding on the Agency in making its determination.

Contrat confidentiel

116(2) Dans les cas où une compagnie et un expéditeur conviennent, par contrat confidentiel, de la manière dont la compagnie s'acquittera de ses obligations prévues par l'article 113, les clauses du contrat lient l'Office dans sa décision.

[29] As already noted, once the CTA has determined that a railway breached its service obligations, a shipper can bring a claim for damages under subsection 116(5).

Right of action on default	**Droit d'action**
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.

III. Issues

[30] This motion for summary trial presents three issues :

1. Is the question of the Federal Court's jurisdiction over LDC's damages claim suitable for disposition by summary trial?

2. Does the Federal Court have jurisdiction over LDC's claim under subsection 116(5) of the Act?

3. Is CN precluded from bringing its jurisdictional defence given the previous CTA and Federal Court of Appeal decisions?

IV. Summary of arguments

A. *Summary trial*

[31] LDC argues that determining via summary trial whether or not this Court has jurisdiction to hear its subsection 116(5) claim will allow the action to proceed more efficiently. If the jurisdictional issue is fatal to LDC's claim, it is better to know that now before the parties prepare for a full trial on damages. On the other hand, if I find in favour of LDC, that is one less issue for the trial judge on the damages claim. That constitutes a win-win situation. LDC asserts that the evidence required to adjudicate the jurisdiction issue is readily available: the 1999 Contract, and the CTA and Federal Court of Appeal decisions.

[32] CN does not take issue with LDC's suggestion that this matter be resolved using a summary trial.

B. *Can the Federal Court hear the action purportedly launched pursuant to subsection 116(5)?*

[33] On the merits of the jurisdictional issue, the parties dispute whether the service obligations in the 1999 Contract are purely contractual or whether they count as service obligations within the meaning of the Act. If LDC is correct, it can bring a subsection 116(5) claim before this Court. If CN is correct, this Court is not the proper forum for adjudicating a private contractual matter under the test for Federal Court jurisdiction set out in *ITO-International Terminal Operators Ltd v Miida Electronics Inc et al*, [1986] 1 SCR 752 at p 766, 28 DLR (4th) 641 [*ITO-International*].

[34] LDC asserts that the 1999 Contract was a confidential contract within the meaning of the Act. It interprets section 7.1 of the 1999 Contract as supplementing, rather than replacing, LDC's rights under the Act. LDC believes that section 7.0 sets out the manner in which CN is to fulfill its statutory service obligations pursuant to subsection 113(4). CN's interpretation of section 7.1, LDC argues, is only a partial reading and fails to consider the meaning of the paragraph as a whole.

[35] As a result, LDC considers the CTA to have correctly asserted jurisdiction over the dispute as concerning "service obligations" within the meaning of the Act. With the CTA prerequisite decision in place, LDC believes that the Federal Court now has jurisdiction to hear its subsection 116(5) claim.

[36] CN, in contrast, interprets section 7.1 of the 1999 Contract as keeping the statutory and contractual service obligations separate. It focuses on the part of a sentence in section 7.1 that reads, "It is not the intent of the parties that this section 7.0 constitute an agreement, within the meaning of Section 113(4) of the CTA." Therefore, CN argues, the parties did not intend for subsection 113(4) to apply to the 1999 Contract. Rather, the section 7.0 obligations are purely contractual. I note immediately that the said sentence read in its entirety has a different configuration: "It is the intent of the parties that this section 7.0 constitute an agreement, within the meaning of section 113(4) of the CTA, to replace LDC's rights under those sections of the CTA with rights arising under this Agreement."

[37] It should also be said immediately that there is no doubt that the CTA determination made on October 3, 2014, concerns the service obligations owed by CN. It is equally without a doubt that the CTA relied on the confidential contract in making its determination with respect to certain aspects of CN's level obligations under section 113 of the Act (para 4, 5 and 6 of the CTA's decision).

[38] Two arguments flow from CN's position on the contract's interpretation. First, the CTA erred in finding it had jurisdiction to hear the level of service complaint because the complaint was purely contractual and did not concern service obligations within the meaning of the Act. Therefore, LDC lacks the prerequisite decision from the CTA for bringing a claim under subsection 116(5). Second, since subsection 116(5) only applies to service obligations within the meaning of the Act, any alleged breaches of the private obligations in the 1999 Contract cannot qualify for damages under 116(5).

C. *CN is precluded from bringing its jurisdictional defence*

[39] Given the existence of the CTA and Federal Court of Appeal decisions, LDC makes the preliminary argument that CN's jurisdictional defence is barred under the doctrines of collateral attack, *res judicata* (issue estoppel), and abuse of process.

[40] By suggesting that the CTA lacked jurisdiction to adjudicate the level of service complaint, LDC argues that CN is improperly pursuing a collateral attack on the underlying validity of the CTA's decision (*Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62, [2010] 3 SCR 585 at paras 63-66). CN counters that it is not seeking to invalidate the CTA

decision; in fact, it argues that the railway already complied with the CTA's order and there is no risk of disturbing the finality of that decision.

[41] LDC argues also that CN is estopped from raising the jurisdictional defence because the CTA determined it had jurisdiction and the Federal Court of Appeal upheld the CTA decision. LDC claims that this fulfills the three preconditions for issue estoppel as set out in *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52, [2011] 3 SCR 422 at para 27): the issue is the same as the one decided in the prior decision; the prior judicial decision was final; and the parties to both proceedings are the same, or their privies. CN contests that the first precondition is met because the Federal Court of Appeal did not consider the question of the CTA's jurisdiction. As a result, CN asserts that the CTA's jurisdiction and the underlying contractual interpretation dispute remain live issues that could still be raised in this Court on judicial review. CN has not pursued judicial review, at this time, but believes it can still raise the jurisdictional defence in the context of this summary trial. CN further asserts that the Court should avoid applying issue estoppel because it would be unfair to use the results of the prior proceedings to preclude its current defence. The policy interest in finality is not at risk because ruling on this Court's jurisdiction does not change the fact that CN already complied with the Agency's decision.

[42] Finally, LDC argues that CN is engaged in an abuse of process if it never raised the jurisdictional issue in the CTA and Federal Court of Appeal proceedings as it asserts. Allowing CN to proceed with its jurisdictional defence at this stage would undermine the considerable effort already expended to come to a final decision on the service breaches. CN counters that it

did raise this issue and it was not addressed, therefore it is not abusing any process by advancing it again since this Court must determine whether it has jurisdiction to hear a claim.

V. Analysis

A. *Summary trial on the issue of jurisdiction*

[43] LDC argues that this Court can, on a motion for summary trial, address the contentious issue of whether this Court can entertain a claim under subsection 116 (5) of the Act. CN does not dispute that contention. Nevertheless, jurisdiction is not conferred on consent (*Canadian National Railway Company v BNSF Railway Company*, 2016 FCA 284). It is my view that the procedural vehicle chosen to deal with that preliminary issue is available in the circumstances, irrespective of the position taken by the parties.

[44] Rules 213 to 216 of the *Federal Courts Rules*, SOR/98-106, provide for summary judgment and summary trial. A motion can be for even only some of the issues raised in the pleadings. That is the case here:

Motion by a party	**Requête d'une partie**
213(1) A party may bring a motion for summary judgment or summary trial on all or some of the issues raised in the pleadings at any time after the defendant has filed a defence but before the time and place for trial have been fixed.	**213(1)** Une partie peut présenter une requête en jugement sommaire ou en procès sommaire à l'égard de toutes ou d'une partie des questions que soulèvent les actes de procédure. Le cas échéant, elle la présente après le dépôt de la défense du défendeur et avant que les heure, date et lieu de l'instruction soient fixés.

In *Teva Canada Limited v Wyeth and Pfizer Canada Inc.*, 2011 FC 1169 [*Teva*], Justice Hughes set out the conditions under which he was satisfied a summary trial was warranted:

> [34] In the present case, I find that a summary trial and summary judgment is an appropriate way to proceed so as to secure a just, expeditious and least expensive determination of the issues before the Court. I do so for the following reasons:
>
> a. the issues are well defined and , while a disposition of the issues may not resolve every issue in the action, they are significant issues and their resolution will allow the action or whatever remains, to proceed more quickly or be resolved between the parties acting in good faith;
>
> b. the facts necessary to resolve the issues are clearly set out in the evidence;
>
> c. the evidence is not controversial and there are no issues as to credibility; and
>
> d. the questions of law, though novel, can be dealt with as easily now as they would otherwise have been after a full trial.

As in the *Teva* case, I find that the motion for summary trial is a perfectly adequate vehicle in view of the issue that is raised. The conditions are easily met.

[45] As the parties do, I see no point in pursuing this lawsuit if, in the first place, this Court does not have jurisdiction. It is a stand-alone matter: if the jurisdictional issue is fatal, it is better to know that now before the parties prepare for a full trial on damages. The Court finds that it would not be unjust to decide this issue on a motion (Rule 216(6)). On the contrary.

B. *Preliminary issues*

[46] LDC has contended that CN's jurisdictional defence constitutes a collateral attack, offends the doctrine of *res judicata*, and is an abuse of the process of the Court. At any rate it says, this Court has jurisdiction over its damages claim. It is certainly late in the day for CN to raise such a jurisdictional defence if it has not been decided directly or in an implied fashion by the CTA and the Federal Court of Appeal. It would certainly seem that the CTA has ruled that it has jurisdiction; CN's appeal to the Federal Court of Appeal has been dismissed. As already pointed out, there is no doubt that the confidential contract between the two parties was at the heart of the examination conducted by the CTA. Paragraphs 4 and 5 of the CTA's decision are explicit and they deserve to be reproduced in their entirety:

> [4] Sections 113 to 115 of the CTA establish a railway company's statutory level of service obligations and subsection 113(4) of the CTA provides that a railway company and a shipper may agree on the manner in which the railway company will fulfill these obligations to the shipper. When such an agreement, including a confidential contract, exists, subsection 116(2) of the CTA provides that the terms of that agreement are binding on the Agency in making its determination under section 116 as to whether a railway company met its level of service obligations.
>
> [5] The Confidential Contract between CN and LDC governs CN's level of service obligations to LDC in this case. Pursuant to subsection 116(2) of the CTA, the Agency must take into account the terms of the Confidential Contract when evaluating LDC's application. The Agency notes that in this case, the Confidential Contract reflects the parties' agreement that the level of service provisions continue to apply. Specifically, section 7.0 of the Confidential Contract states that LDC's rights under sections 113 to 116 of the CTA remain intact:
>
> 7.0 Service Requirements
>
> 7.1 LDC shall be entitled to such service and carriage by CN as are provided by Section 113-116 of the

> Canada Transportation Act (CTA). It is not the intent of the parties that this section 7.0 constitute an agreement, within the meaning of Section 113(4) of the CTA, to replace LDC's rights under those sections of the CTA with rights arising under this Agreement. In addition to such service and carriage as LDC is entitled to by Sections 113-116 of the CTA, CN shall provide train service for placement of empty cars for loading and pick-up of loaded cars at each Elevator Facility as provided in this Section 7.0

The Federal Court of Appeal also found in *Dreyfus* that "whether this Confidential Contract was a confidential contract as contemplated by subsection 113(4) of the CTA will depend on the interpretation of this contract" (para 29). It went on to find that the interpretation of the contract is not a matter that can be appealed. Indeed, the Court further commented that the "Agency found that to the extent that the requests by LDC for railcars were within the limits as contemplated by the Confidential Contract, CN had agreed to supply such railcars. This finding was based on its interpretation of the Confidential Contract that was applicable in this case" (*Dreyfus,* para 32).

[47] The Court of Appeal found that "the Agency also determined that the requirement to determine whether the service request is reasonable could be replaced by a contract between the shipper and the railway company that provided for a certain level of service obligations" (para 23). The Court of Appeal unequivocally found that the contract between the parties controls:

> [26] The *CTA* contemplates that a shipper and a railway company may enter into an agreement that would set out the manner in which the service obligations of the railway company may be fulfilled. If the parties have entered into such an agreement, the service obligations of the railway company will be determined based on what the railway company agreed to provide, not on whether any particular order is considered to be reasonable.

> […]
>
> [28] Since the Agency found that CN had agreed to supply the number of cars ordered by LDC (within the limits identified by the Agency), CN cannot now complain that such orders were unreasonable. CN is simply bound by the agreement that it reached with LDC. In my view, the Agency did not commit any error of law in reaching this conclusion.

[48] The parties have agreed on the manner in which some service obligations are to be fulfilled, the very words found in subsection 113(4). The Court refused to intervene about the nature of the contract. It found at para 29 that "whether this Confidential Contract was a confidential contract as contemplated by subsection 113(4) of the *CTA* will depend on the interpretation of this contract." The interpretation of a contract being a question of mixed fact and law, in the view of the Court of Appeal, and not a question of law, there was no appeal. The decision made by the CTA that the contract is a contract within subsection 113(4) cannot be the subject of an appeal. The matter had been heard and decided, as is plain to see at para 30: "Therefore, whether this Confidential Contract was a confidential contract for the purposes of subsection 113(4) of the *CTA* is not a matter that can be appealed under the *CTA*." In spite of not challenging what is, in my view, the clear decision of the CTA to consider that the 1999 Contract is the contract contemplated by subsection 113(4), CN continues to argue, to a certain extent, that the contract is not a confidential contract as contemplated by subsection 113(4) of the Act.

[49] I would have shown considerable sympathy for the preliminary arguments made by LDC. In effect, it may very well be that the matter has already been heard. However, I prefer to deal with the jurisdictional objection raised by CN on its merits. In my view, once properly

intercepted, the provisions under review in the statute and the contract lead to the conclusion that this Court has jurisdiction to address the damages claim of LDC.

C. *Can the Federal Court hear the action?*

[50] CN does not dispute that the Federal Court has jurisdiction to award damages for a breach of service obligations found by the CTA (memorandum of fact and law, para 36). It would be a tough argument to sustain in view of subsection 116(5) of the Act. Furthermore, the Federal Court of Appeal found 36 years ago that "the Federal Court has jurisdiction to award damages for breach of the duty created by section 262" (*Kiist* at p 14). The Court also found that the determination of whether the railways have furnished adequate and suitable accommodation for the carriage of grain, in the words of current paragraph 113 (1) (b) of the Act, is assigned to the CTA. In fact, "in the absence of such a determination by the Commission [now replaced by the CTA], the Federal Court was without jurisdiction to entertain the claim for damages." The situation is still the same. The point was nicely encapsulated by Sharlow J.A. in *Canadian National Railway Company v Northgate Terminals Ltd.*, 2010 FCA 147, [2011] 4 FCR 228 [*Northgate Terminals*], at para 25:

> [25] Justice Le Dain, writing for the Court, concluded that the Federal Court was the appropriate forum for a claim for damages under subsection 262(7) of the *Railway Act*, rejecting the argument of CN and CP that the Canadian Transport Commission (the predecessor of the Agency) had the exclusive jurisdiction to entertain such a claim. However, he also concluded that the Commission had the sole jurisdiction to determine whether CN and CP had failed to fulfil their service obligations, and that in the absence of such a determination by the Commission, the Federal Court was without jurisdiction to entertain the claim for damages.

If the CTA found that the service obligations have not been met, LDC is right to seek its remedy in this Court.

[51] CN's argument, once boiled down to its essence, is to make a distinction between what it calls "statutory service obligations" and "contractual service obligations". In fact, that distinction is not to be found in Division IV of the Act. CN contends that this Court has jurisdiction only with respect to the "statutory service obligations". It argues that the contract between LDC and CN is just that, a contractual agreement which is not covered by subsection 116(5) of the Act. It follows, according to the argument, that the remedy is to be found before provincial superior courts for a breach of contract. For CN, the contract and the Act are different and independent sources of rights which must be kept separate and apart.

[52] Thus, in order to be successful, CN must show that the 1999 Contract is a stand-alone instrument which gives LDC some rights; if that is the case, it would follow that the breach of contract, if any, would be sanctioned like any other breach of contract.

[53] However, this argument does not accord with the scheme of the Act, the contract itself and its legal effect, as found by the CTA and left undisturbed by the Court of Appeal. Not only the Act does not differentiate between "statutory service obligations" and "contractual service obligations", but CN does not account for the scheme of the Act when it deals with the manner in which the service obligations are to be fulfilled. What is required is an understanding of how Division IV of the Act operates and whether the 1999 Contract plays a part in that scheme. In my view, once properly understood, the 1999 Contract constitutes a confidential contract or other

written agreement which becomes part of the service obligations owed to LDC because it is binding on the CTA, which must therefore include the confidential contract in its determination of the service obligations. As such, there exists a right of action, pursuant to subsection 116(5) of the Act, for a "person aggrieved by any neglect or refusal of a company to fulfill its service obligations".

[54] It would be absurd for Parliament to have allowed for a confidential contract (to the extent it constitutes the agreement of the parties on the manner in which the service obligations are to be fulfilled) to be made binding on the regulator tasked to determine what is the level of service obligations required, only to conclude that the right of action if the service obligations have not been met excludes the confidential contract. In other words, all of this for naught.

(1) The scheme of the Act

[55] The modern approach to statutory interpretation continues to be that articulated by Elmer Driedger:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> (*Construction of Statutes*, Elmer Driedger, Butterworths, 1983, at p 87; cited numerous times by the Supreme Court of Canada since *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27)

As Professor Ruth Sullivan puts it in her *Statutory Interpretation* (2nd ed), Irwin Law, 2007 [*Sullivan*]:

> Courts often say that the meaning of a word or expression can by fully understood only if it is read in the context of the Act as a whole […] What one looks for when considering an Act in its entirety is (1) provisions elsewhere in the Act that are in some way related to the provision to be interpreted; (2) internal groupings; (3) relevant structural components; and (4) the overall legislative scheme.
>
> (p.131)
>
> It is presumed that every feature of a legislative text has been deliberately chosen and has a particular role to play in the legislative design. The legislature does not include unnecessary or meaningless language in its statutes; it does not use words solely for rhetorical or aesthetic effect; it does not make the same point twice.
>
> (p. 167)

[56] Division IV of the Act starts with section 111 which defines terms. "Service obligations" is defined to mean "obligations under sections 113 and 114". As already pointed out, there are no statutory or contractual service obligations, only those obligations under these two sections.

[57] It follows that the right of action, pursuant to subsection 116(5), that is concerned with the fulfillment of service obligations must be with respect to the service obligations under sections 113 and 114 of the Act. The subsection refers directly and unambiguously to the railway company's fulfillment of "its service obligations". Hence, the next task must be to ascertain what Parliament provided for in those sections to be the service obligations.

[58] Under the title “Accommodation for traffic”, section 113 requires that railway companies do a number of things, including:

> - shall furnish adequate and suitable accommodation for the carriage, unloading and delivery of the traffic;
>
> - shall without delay, and with due care and diligence, receive, carry and deliver the traffic;
>
> - shall furnish and use all proper appliances, accommodation and means necessary for receiving, loading, carrying, unloading and delivering the traffic.

Parliament intended to create an obligation, not discretion, in creating these service obligations. The *Interpretation Act*, RSC (1985, c I-21) [*Interpretation Act*] provides specifically at section 11 that “(t) he expression “shall” is to be construed as imperative. […]” But the service obligations are rather qualitative. If left as is, it will be for the regulator to make the decision in a more precise fashion: what constitutes the furnishing of adequate and suitable accommodation for the carriage, unloading and delivery of traffic?

[59] Shippers and railway companies can however agree among them on the manner in which those service obligations will be operationalized. Indeed, a shipper may vanquish the reluctance of a railway company by forcing it to make an offer concerning the manner in which it will fulfill its service obligations under section 113 (subsection 126(1.2) of the Act). For ease of reference, I reproduce again subsection 113(4) of the Act:

Confidential contract between company and shipper	**Contrat confidentiel**
113(4) A shipper and a railway company may, by means of a	**113(4)** Un expéditeur et une compagnie peuvent s’entendre,

confidential contract or other written agreement, agree on the manner in which the obligations under this section are to be fulfilled by the company.	par contrat confidentiel ou autre accord écrit, sur les moyens à prendre par la compagnie pour s'acquitter de ses obligations.

[60] The effect of a "confidential contract" about the manner to fulfill service obligations goes beyond the effect of a regular contract given the role it plays in the regulatory scheme. Section 116 of the Act is the part of the scheme that addresses how the service obligations of sections 113 and 114 are to be implemented. Once a complaint has been made that a railway company is not fulfilling its service obligations, the CTA conducts an investigation and makes a determination. As far as I can see, there is not an obligation to complain to the CTA. But once made, the complaint must be investigated and a determination must be made by the CTA. In making that determination, i.e. a determination whether the service obligations have been fulfilled, the confidential contract is binding on the CTA.

[61] The part of the confidential contract that addresses the manner in which the service obligations will be fulfilled is not left outside the regulatory scheme. It seems to me that the only way to understand the scheme is to conclude that the manner in which the general service obligations are to be fulfilled is integrated into the scheme, and that it must be enforced by the CTA as it is binding on the Agency. In other words, the confidential contract, to the extent it provides for the manner in which the service obligations are to be fulfilled by the railway company, is included into the scheme of the Act. The determination pursuant to paragraph 116(1)(b) cannot be made without including the confidential contract if it is to be binding on the CTA. Parliament has evidently chosen to include the confidential contract as an essential element

of the scheme to be enforced by the CTA. The confidential contract allows the parties to agree specifically on the manner in which the railway will fulfill the service obligations. The enumerated service obligations at section 113 are broad and general. The confidential contract brings specificity that Parliament says is binding on the CTA in making its determination about fulfilling the service obligations.

[62] Taken alone, it may perhaps be argued that subsection 113(4) simply states that two private parties could reach an agreement. However, even then, it is not clear why Parliament would speak about that which arguably would be possible at common law. What would be the point of subsection 113(4)? Parliament does not include unnecessary language. Rather, there is a higher purpose to subsections 113(4) and 116(2); we must interpret the subsections as contributing to the broader operation of Division IV. The role to be played by the confidential contract becomes clear when read together with subsection 116(2). This shows how the Act is using the confidential contract as part of what will constitute the determination of the service obligations. These are the same service obligations, with the benefit of the agreement between the parties, that give rise to compensation in the Federal Court once the CTA has made its determination (subsection 116(5)). The right of action is with respect to the fulfillment of the service obligations.

[63] Hence, the scheme of the Act is perfectly coherent in Division IV. The Act creates the service obligations; it allows, indeed it encourages, the parties to enter into confidential agreements to agree on the manner in which the service obligations will be fulfilled by the railway company (subsection 113(4) and section 126); it makes the confidential contract binding

on the regulator as it determines whether the service obligations have been fulfilled (subsection 116(2)); all this leads to a right of action against the railway company once the regulator has made its determination that the service obligations (including the confidential contract which provides for the manner in which the service obligations are to be fulfilled by the company) have not been met because of the neglect or refusal of the railway company (subsection 116(5)). The principles of interpretation of statutes lead in my view inexorably to that construction of Division IV.

[64] Parliament was not operating *per incuriam*. The purpose of Division IV is easily discovered once the provisions are read together, in context. The confidential contract that provides for the manner in which the service obligations are to be fulfilled plays a particular role in the legislative design; this is not a meaningless concept thrown in and it must be accounted for in the understanding of the scheme.

(2) The confidential contract

[65] The question then becomes whether the 1999 Contract qualifies as a confidential contract such that Division IV of the Act would be engaged.

[66] As seen earlier, that is the conclusion reached by the CTA; the Court of Appeal did not intervene. That finding has not been challenged directly. One may be tempted to say that the interpretation of the contract and its effect cannot be validly before this Court at this stage. That would evidently end the matter. Be that as it may, I have concluded that the confidential contract governs.

[67] The 1999 Contract specifies in explicit terms that it is confidential, that its terms and conditions are not to be disclosed by any party (section 12.1 of the 1999 Contract). It will not be necessary to disclose the content of the 1999 Contract for the purpose of this decision. It suffices to say that the parties agreed on service requirements for grain elevators operated by LDC, making it explicit at section 7.0 that LDC is entitled to service as provided by sections 113 to 116 of the Act.

[68] If there was ever any doubt that the 1999 Contract is a confidential contract within the meaning of subsection 113(4), the parties must have wanted to eradicate it because they dealt with the issue directly:

> 12.2 For purposes of the *Canada Transportation Act*, this Agreement shall be deemed a Confidential Contract within the meaning of Section 126.

Subsection 126(1) connects back to the service obligations at para (e). I reproduce again paragraph 126 (1)(e):

Confidential contracts	**Conclusion de contrats confidentiels**
126(1) A railway company may enter into a contract with a shipper that the parties agree to keep confidential respecting	**126(1)** Les compagnies de chemin de fer peuvent conclure avec les expéditeurs un contrat, que les parties conviennent de garder confidentiel, en ce qui concerne :
[…]	(…)
(e) the manner in which the company shall fulfill its service obligations under section 113.	**e)** les moyens pris par la compagnie pour s’acquitter de ses obligations en application de l’article 113.

[69] In *Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53, [2014] 2 SCR 633 [*Sattva*], the Supreme Court offers guidance on the interpretation of contracts. As will be seen, a common sense, practical, approach is favoured to assist in understanding the scope of the agreement, where context, background and the market in which the parties operate, are evidently of some special importance:

> [47] Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, *per* LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, *per* Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
> >
> > (*Reardon Smith Line*, at p. 574, per Lord Wilberforce)
>
> […]
>
> [57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and

> objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62).

[70] Here, CN seems to disregard the fact that the parties specifically express their agreement that their contract is a confidential contract for the purposes of the Act. It does not disavow that sections 113 to 116 of the Act are applicable, which must of course include subsection 113(4). It simply declares boldly that section 7 of the 1999 Contract is not an agreement within the meaning of subsection 113(4) of the Act.

[71] When read in its entirety, it is not possible, in my view, not to conclude that section 7 provides for the manner in which service obligations listed at subsection 113(1) of the Act are to be fulfilled. The subsection makes it mandatory for the railway company to "furnish adequate and suitable accommodation for the carriage, unloading and delivery of the traffic" and to "furnish and use all proper appliances, accommodation and means necessary for receiving, loading, carrying, unloading and delivering the traffic." The purpose of the agreement is to specify what service obligations of CN will be once new grain handling facilities adjacent to CN's rail lines have been built. The 1999 Contract deals with the construction of the facilities, but it also addresses service requirements.

[72] CN has attempted to make hay out of the introduction in section 7.1. It reads:

> 7.1 LDC shall be entitled to such service and carriage by CN as are provided by Section 113-116 of the Canada Transportation Act (CTA). It is not the intent of the parties that this section 7.0 constitute an agreement, within the meaning of Section 113(4) of the CTA, to replace LDC's rights under those sections of the CTA with rights arising under this Agreement. In addition to such service and carriage as LDC is entitled to by Sections 113-116 of the CTA, CN shall provide train service for placement of empty cars for loading and pick-up of loaded cars at each Elevator Facility as provided in this Section 7.0.
>
> [my emphasis]

The railway company argues that the introduction to section 7.1 is to the effect that section 7 does not constitute an agreement within the meaning of section 113(4). I do not find that reading to be persuasive. In fact, it could only have some plausibility if the portion of the sentence underlined twice were excluded from consideration. Such cannot obviously be done. The words must be given their meaning.

[73] In my view, the sentence's meaning and purpose, when read it its entirety, is to state clearly that the service obligations created in broad terms in section 113 of the Act are not replaced with rights arising out of this agreement. Contrary to the position adopted by CN, the sentence does not say that section 7 does not constitute an agreement within the meaning of subsection 113(4) of the Act. The words "within the meaning of section 113(4) of the CTA" qualify the word "agreement". It is the agreement within the meaning of subsection 113(4) which is declared not to replace the rights under the Act. In order to reach a different interpretation, I agree with LDC that one must ignore the punctuation as well as the second half of the sentence.

Furthermore, one must also ignore the meaning of the sentence, which is to state that the parties do not intend, through section 7, to abandon the rights under section 113, which is derived from the segment of the sentence underlined twice. This sentence is about replacing rights.

[74] Punctuation counts and makes a difference. It is said that an English professor once wrote the words: “Woman without her man is nothing” on the blackboard. Then the professor instructed the students to punctuate the words correctly. The men wrote: “Woman, without her man, is nothing.” The women wrote: “Woman! Without her, man is nothing.” Punctuation counts.

[75] In this case, the more plausible reading of the sentence is that the parties did not want to be understood as abandoning the rights under section 113 through an agreement pursuant to subsection 113(4). The sentence simply asserts that section 7 of the agreement is not an agreement under subsection 113(4) which replaces sections 113 to 116; because of the commas around the words “within the meaning of Section 113(4) of the CTA”, the words between the commas qualify the word “agreement”. The agreement within the meaning of subsection 113(4) does not replace the rights under sections 113 to 116; the sentence does not state that section 7 is not an agreement within the meaning of subsection 113(4).

[76] A more purposeful interpretative approach takes account of the surrounding circumstances which include that the service obligations enumerated under subsection 113(1) are much broader than those specified under Section 7.0 of the 1999 Contract. As already noted, subsection 113(1) requires, for example, that railways “furnish […] adequate and suitable

accommodation for the receiving and loading of all traffic offered for carriage on the railway", whereas Section 7.1(C) of the 1999 Contract requires CN to provide "a minimum of one Service Unit per Service Week, provided that LDC has finalized weekly car orders" at any elevator that "can accommodate" a certain number of cars. The latter appears to be setting out what the parties consider to be "adequate and suitable" service in particular circumstances, which is to say that Section 7.0 sets out "the manner in which" CN is required to fulfill its service obligations to LDC within the meaning of subsection 113(4). But the parties agreed that this would not exclude other service obligations under subsection 113(1).

[77] Another approach is asking what interpretation makes sense in the market the parties are operating in, as noted in *Sattva*. If 7.1 clearly states that LDC wanted to retain its rights under sections 113-116, that implies it wanted to retain the right to have a level of service dispute determined by the CTA and the right to seek damages under subsection 116(5). LDC's desire to retain those rights makes sense given the railway-shipper market dynamics. After all, the Act provides that it is the shipper that can make a request for a confidential contract (subsection 126(1.2)). The railway company must make its offer (subsection 126(1.3)). If LDC wanted to retain those rights, why would it agree to oust the operation of 113(4), which enables it to make a 116(5) claim using the 1999 Contract terms?

[78] Finally, circling back to LDC's collateral attack argument, the regulator itself, the CTA, seems to agree with the plaintiff's interpretation of the contract. As already discussed, pursuant to subsection 116(1) of the Act, the regulator only has jurisdiction to hear complaints about "service obligations." Because the CTA decided it had jurisdiction to hear LDC's complaint and

it used the 1999 Contract terms in its decision, it must have interpreted Section 7.1 as allowing the contractual obligations to be considered "service obligations" within the meaning of the Act. The Court of Appeal found that this did not constitute an error of law at paras 29 and 30 of its decision. Read as a whole, section 7 appears conclusively to be the confidential contract contemplated by subsection 113 (4) of the Act.

[79] Accordingly, I conclude that the confidential contract, as framed by the parties, falls within the ambit of subsection 113 (4) of the Act. It follows that the manner in which the service obligations are to be fulfilled by CN includes the appropriate provisions of the confidential contract which, once a determination has been reached by the CTA, gives rise to a right of action, the CTA not having jurisdiction to impose damages. It seems to me that the position taken by CN would, with respect, lead to an absurdity. The regulatory scheme is coherent if the confidential contract dealing with the manner in which service obligations are to be fulfilled is included in the scheme. What is the point of making the provisions of the contract, that deal with the manner in which the service obligations are to be fulfilled, binding on the CTA if the exercise does not lead to the cause of action specifically created by legislation? CN's interpretation leads to starting all over again before a court of law. The strained construction it puts on the scheme of the Act and the confidential contract leads to a result that cannot be what Parliament was intending. Instead of bringing a remedial effect (section 12, *Interpretation Act*), that construction leads to an impasse because it fails to recognize that "every feature of a legislative text has been deliberately chosen and has a particular role to play in the legislative design" (*Sullivan*, p 167).

D. *Jurisdiction of the Court on damages*

[80] CN, in its submissions, argued that this Court does not have jurisdiction over the damages claim. The issue can be dealt with quickly now that it has been determined that the "confidential contract" is part and parcel of the regulatory scheme enacted by Parliament as Division IV of the Act.

[81] This Court does not have inherent jurisdiction. The Supreme Court of Canada in *ITO-International* has developed a three-part test to determine whether this Court has jurisdiction to hear a particular issue. CN refers to those conditions that are found at p 766 of *ITO-International* decision:

> 1. There must be a statutory grant of jurisdiction by the federal Parliament.
>
> 2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.
>
> 3. The law on which the case is based must be "a law of Canada" as the phrase is used in s. 101 of the *Constitution Act*, 1867.

[82] CN does not dispute the statutory grant of jurisdiction to the Federal Court. Section 23 of the *Federal Courts Act* (RSC, 1985, c F-7) states:

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 claim for relief is made or a remedy is sought under an Act of Parliament or otherwise in relation to any matter coming	**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 réparation ou d'autre recours exercé sous le régime d'une loi fédérale ou d'une autre règle de droit en matière :

within any of the following classes of subjects:	
(a) bills of exchange and promissory notes, where the Crown is a party to the proceedings;	**a)** de lettres de change et billets à ordre lorsque la Couronne est partie aux procédures;
(b) aeronautics; and	**b)** d'aéronautique;
(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.

Railway companies being undertakings connecting a province with another province, LDC's claim relating to the service obligations of the CN satisfies the first condition. The present case meets the criterion in that LDC is bringing its claim for damages under the *Canada Transportation Act*, an Act of Parliament, and the dispute concerns rail shipping that crosses multiple provinces.

[83] But it is obviously not enough to simply sue a railway. The claim must also be under a federal law. In effect, CN's argument relies on its argument that the confidential contract is not covered by subsection 113(4) of the Act, which brings into play the right of action for damages pursuant to subsection 116(5), once the CTA has made its determination after a complaint has been filed against a railway company. If the claim is not in accordance with the confidential contract of subsection 113(4), the argument goes, and then the dispute is over an alleged breach of contract, which is not under federal law, a law of Canada, the Federal Court does not have jurisdiction in the matter.

[84] Contrary to what is argued by CN, the CTA's decision relies specifically on section 7 of the 1999 Contract as being a confidential contract pursuant to subsection 113(4). One would have to wonder where the CTA would find its jurisdiction if it did not consider the confidential contract as being the contract under subsection 113(4), an agreement on the manner in which the service obligations under section 113 are to be fulfilled. Those obligations include the furnishing of adequate and suitable accommodation for the carriage, unloading and delivery of the traffic. As the CTA recognized, the case is about the manner in which the service obligations will be fulfilled:

> [84] In this case, the alleged breach relates to the number of cars delivered by CN to LDC's Facilities. The parties do not agree on how the Confidential Contract has addressed the number of cars to be provided to LDC. Therefore, the Agency must determine what the parties have agreed to with respect to CN's service requirements in the Confidential Contract.

I have not been persuaded that the confidential contract was not the kind of contract contemplated by section 113 of the Act. Neither was the regulator, the CTA:

> [77] In or about 1999, LDC informed CN that it wished to construct five new grain handling facilities in areas served by CN. A Confidential Contract between LDC and CN was executed prior to the construction of the facilities in which the parties agreed, among other things, on the terms governing the construction of the five grain elevator facilities and on the manner in which CN's level of service obligations under section 113 of the CTA are to be fulfilled.

[85] I cannot therefore accept CN's proposition that the contract operates outside the Act. The confidential contract which provides for the manner in which the obligations are to be fulfilled is part of the federal scheme enacted by Parliament. It is through the right of action of subsection

116(5) that LDC wishes to seize the Federal Court following the determination by the federal regulator. That is appropriate as there is a body of law that recognizes this Court's jurisdiction to decide on damages once the regulator has made its own determination (*Kiist* and *Northgate Terminals*, *supra*). The Federal Court will establish the damages suffered by LDC in view of the determination of the service obligations made by a federal regulator, who was instructed by Parliament to include in its determination a confidential contract providing for the manner in which the service obligations are to be fulfilled.

[86] As is plain from a reading of the statement of claim, LDC is seeking damages pursuant to subsection 116(5) of the Act because the level of service obligations has been found to be lacking by the agency specialized in the matter. That determination by the CTA has been completed by the regulator as a matter of federal law. That is the essential nature of the claim damages following a determination that the level of services obligations under federal legislation has not been met. That is the administration of federal law. Surely that is the role imparted to the Federal Court in the interpretation and development of federal law in matters over which jurisdiction was granted to it. Its role follows in the footsteps of the federal regulator of the industry.

[87] CN's argument is that LDC's claim is a claim for breach of contract. That is not so. The effect of the contract has already been decided by the CTA. The regulator is tasked by Parliament to make a determination whether a railway company has fulfilled its service obligations once a complaint has been made. That determination must include the agreement of the parties on the manner in which the service obligations are to be fulfilled. Thus, the claim

under subsection 116(5) is not for breach of contract. It is for damages following the determination by the regulator that the level of service obligations, including the manner in which those obligations are to be fulfilled provided for by a confidential contract, have not been met. The source of LDC's right is not so much the contract as it is the determination that the service obligations have not been fulfilled, which has already been made by the regulator and left undisturbed on appeal. All that needs to be done is figure out the damages.

[88] Accordingly, this Court has the required jurisdiction to entertain the right of action in damages pursuant to federal law.

JUDGMENT in T-1292-15

THIS COURT'S JUDGMENT is that the Federal Court has the required jurisdiction to hear the claim in damages, pursuant to subsection 116(5) of the *Canada Transportation Act*, as launched by the plaintiff.

The plaintiff is entitled to its costs in any event of the cause.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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