Federal Court of Canada
Trial Division

Section de première instance de
la Cour fédérale du Canada

T-2674-96

BETWEEN: LES ENTREPRISES A.B. RIMOUSKI INC.,
-and-
ALDÈGE BANVILLE,

Plaintiffs,

AND: HER MAJESTY THE QUEEN,[1]

Defendant.

REASONS FOR JUDGMENT

DENAULT J.:

In 1989, Les Entreprises A.B. Rimouski Inc. (A.B. company) obtained a contract to demolish the old Cap-Chat commercial dock and undertook to do so before March 31, 1990. Because of a number of disagreements between the parties during the performance of the contract, the defendant (Public Works Canada or PWC) informed the company on May 15, that it considered the company to be in default and was claiming from the surety to have the defects remedied and the contract finished. On October 29, 1992, the plaintiffs brought this action claiming the balance of the amount withheld by the defendant, and damages. The A.B. company went bankrupt on February 23, 1993. Pursuant to assignments of debts and rights of action, first between the trustee in bankruptcy and the Caisse populaire Desjardins de Saint-Robert-de-Rimouski (the Caisse populaire) and then between the Caisse populaire and the plaintiff Aldège Banville (Banville), Mr. Banville continued the proceedings in his personal capacity and as assignee of the A.B. company.

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1 Counsel changed the name of the defendant in the style of cause throughout the pleadings, referring to the defendant as "Her Majesty the Queen", "Attorney General of Canada and Department of Public Works Canada" and "Attorney General of Canada", without leave from the Court for such an amendment. In this judgment, the defendant will be referred to as "Public Works Canada" or "PWC".

Although the fundamental question is whether the A.B. company did or did not perform its contract in accordance with the plans and specifications, the Court must first examine the legal arguments raised by the defendant, that is, that a *Crown debt* is not assignable and that a significant portion of the plaintiffs' action is prescribed.

In view of the prescription alleged by the defendant, we need to do a brief review of the chronology of events and the proceedings. Under the contract signed on September 8, 1989, the work was to be completed on March 31, 1990. On several occasions during the course of the work, PWC pointed out defects to the A.B. company, which denied them. PWC put the company in default on May 15, 1990 and on June 1, 1990 claimed from the surety to have the defects corrected and the contract finished. In the action brought on October 29, 1992, the plaintiffs claimed both the balance of the amount withheld by the defendant — $218,122.55 out of a contract price of $489,491 — and damages. The A.B. company went bankrupt in February 1993, and on December 13, 1993, the trustee in bankruptcy assigned [TRANSLATION] "all book debts and accounts, present and future, of Les Entreprises A.B. Rimouski Inc., arising from any source whatsoever, including contracts, ... with the exception"[2] of a debt owing to the A.B. company by an insurance company which is not involved in this matter.

In July 1994, the Caisse populaire in turn assigned[3] part of the right of action it had obtained from the trustee, that is, 75 per cent of the claim for the $218,122.55 withheld by PWC, to the plaintiff Banville; that claim was already the subject of this action. The plaintiffs filed a reamended statement of claim on August 15, 1995, setting out the changes described above, with the plaintiff Banville continuing the proceedings both in his personal capacity and as assignee of the rights of Les Entreprises A.B. Rimouski Inc.

The defendant, by motion, tried to have the action by the plaintiff Banville stricken, on the ground that it was prescribed and that the company's shareholder had no right of action in this case. The judge who heard the matter was not satisfied that the action by the plaintiff Banville, in his personal capacity, had no

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2 Clause 12(*f*) of the assignment agreement between Gérald Robitaille & Associés Ltée, in its capacity as trustee in bankruptcy of Les Entreprises A.B. Rimouski Inc., and the Caisse populaire Desjardins de Saint-Robert-de-Rimouski, the assignee, on December 13, 1993, Exhibit P-9.

3 Assignment of debts and rights of action between the Caisse populaire Desjardins de Saint-Robert-de-Rimouski, the assignor, and Aldège Banville, the assignee, in July 1994, Exhibit P-30.

chance of success, and dismissed the motion, preferring to leave it for the trial judge to decide these questions after a hearing.

Having come to the end of an eleven-day hearing, a majority of which was devoted to examining the plans and specifications and the manner in which the contract was performed, we now need to go back to the starting box and decide whether all or any part of the plaintiffs' action is prescribed and whether, in any event, the *Crown debt* was assignable.

The Court will first examine the question of the prescription which the defendant asserted, primarily in respect of the personal claim by the plaintiff Banville.

The personal claim

In his action, the plaintiff Banville is claiming $300,000 in damages [TRANSLATION] "for loss of contract, interference with reputation and loss of solvency".[4]

The statement of claim provides no details as to these heads of the claim, and we must separate them in order to examine them. First, what of the claim for "loss of contract": is the plaintiff A.B., the sole shareholder and director of A.B. company, alleging that the defendant caused the loss incurred by his company, from which a sum of money was withheld for failure to perform the contract? In so far as the company is a different entity from himself, such an action is not available to the plaintiff Banville.[5] Has Banville brought action for the loss of other contracts? He adduced no evidence to that effect.

The ambiguity of the other two heads of the claim, interference with reputation and loss of solvency, is also a problem. Is it being alleged that the defendant committed some sort of offence or quasi-offence? Absent any other provisions that apply to the time for prescription, actions based thereon are subject to a two-year prescription (Article 2261 of the *Civil Code*). Or is this rather "slander or libel" uttered by an agent of PWC? In that case, the prescription is

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4 Paragraph 13 of the initial statement of claim, and paragraphs 12 and 14(B) of the reamended statement of claim.

5 *Houle v. C.N.B.*, [1990] S.C.R. 122; *Kosmopoulos v. Constitution Insurance Co.*, [1987] 1 S.C.R. 2.

one year (Article 2262 of the *C.C.*). In any event, no evidence of any offence or interference with reputation was adduced.

To prove his allegation of loss of solvency, the plaintiff Banville described the financial difficulties he encountered when the A.B. company had over $218,000 withheld by PWC. He stated that he spent considerable time over three years trying to recover that amount, and that when the A.B. company went bankrupt he lost his main source of income. Nothing was introduced to establish that the defendant was the direct cause of the insolvency, which was, moreover, not proved. Even if we disregard the fact that there was no evidence on that point, it appears that after the notice of default (May 15, 1990) and the claim against the surety (June 1, 1990), the parties held discussions, between July and an indeterminate date in September, to try to resolve their dispute. Under Article 2267 *C.C.*, no action can be maintained after the delay for prescription has expired. In the instant case, when the plaintiff Banville brought his action on October 29, 1992, it was prescribed. Counsel for the plaintiff argued that the prescription had been interrupted but did not prove any express or implied recognition by PWC of the existence of the creditor's right. The plaintiff's personal claim is dismissed.

The claim as assignee

In his reamended statement of claim, the plaintiff Banville, in his capacity as assignee of the rights of Les Entreprises A.B. Rimouski Inc., first claimed $163,591.91 (75 per cent of $218,122.55), that is, the amount withheld by the defendant; we shall return to this question later, it being one of contract. The plaintiff Banville also claimed, as assignee, $75,000 (75 per cent of $100,000) for [TRANSLATION] "... legal fees ... [and] damages arising from the conduct of the defendant",[6] and $225,000 (75 per cent of $300,000) for "... loss of contract, interference with reputation and loss of solvency".[7]

The Court would point out that the $100,000 claimed in paragraph 12 of the initial statement of claim for legal fees and damages arising from the conduct of the defendant is no longer found in the reamended statement of claim. In any

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6 Paragraph 12 of the initial statement of claim.

7 Paragraph 13 of the initial statement of claim, which became paragraphs 12 and 14(B) of the reamended statement of claim.

event, no evidence was introduced in respect of that head of the claim and, since it is also subject to the two-year prescription set out in Article 2261 of the *Civil Code*, it is prescribed.

With respect to the $225,000 claimed by the plaintiff Banville as assignee of the A.B. company for loss of contract, interference with reputation and loss of solvency, that portion of his action also cannot be maintained. The company had known as early as May 15, 1990, that the defendant considered it to be in default, and that on June 1, 1990 it had claimed from the surety to have the defects corrected and the contract finished. As set out earlier, there is nothing in the evidence to establish that the defendant committed any interference with the reputation of the A.B. company or that its insolvency was attributable to an agent of Her Majesty, other than in relation to the contract that will be discussed later. I therefore believe that this head of the claim is prescribed, even if we disregard the impact of the bankruptcy of the A.B. company and the question of the non-assignability of a *Crown debt*.[8]

The remaining issue is the claim of $163,591.91 representing 75 per cent of $218,122.55, the amount withheld from the contract, which the plaintiff Banville is claiming as assignee of the rights of the A.B. company. It would appear that this amount corresponds to the balance of the contract price and comprises a *Crown debt*; we therefore need to examine it from the standpoint of the second defence raised by the defendant, that is, that a *Crown debt* within the meaning of sections 66 to 69 of the *Financial Administration Act*, R.S.C. 1985, c. F-11 (the Act) is not assignable.

Reduced to a few lines, the defendant's argument is as follows. Her counsel first recalled that in this case, as described in the [TRANSLATION] "Assignment of debts and rights of action" between the Caisse populaire and the plaintiff Banville, what was assigned was the A.B. company's right of action in this matter, and not the debt arising under the contract; since the right of action is a chose in action within the meaning of the definition of a *Crown debt*, it is subject to the general rule that such a debt is not assignable. Counsel for the defendant also argued that in this case the plaintiff Banville, in his capacity as assignee of the A.B. company, is not entitled to the exception set out in paragraph 68(1)(*a*) of the Act in that this is not a debt that is an amount due or coming due

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[8] The Court is also disregarding the question of the legality of the assignment by the trustee to the Caisse populaire, having regard to the decision of the Supreme Court in *Marzetti v. Marzetti*, [1994] 2 S.C.R. 765.

under a contract. He explained that in so far as what was assigned was a right of action relating to a litigious right, it is not a debt arising under a contract. In the same breath, he argued that the plaintiff could not claim that the debt was a debt that is an amount due or coming due under a contract, in that it is not due. He contended that the courts have recognized that in order for a debt to be due, it must be certain and liquidated, and that precisely because in this case the dispute concerning the amount withheld by the defendant out of the contract price is not frivolous, the dispute [*sic*] is not liquidated and accordingly the debt is not due, certain and payable.

In the alternative, counsel for the defendant contended that even if the Court did not conclude that the debt was subject to the general rule of non-assignability, the plaintiff was not entitled to the exception set out in section 68 of the Act since, in any event, he does not satisfy the requirement set out in paragraph 68(2)(*c*) of the Act, in that he failed to give notice of the assignment by the Caisse populaire as provided in section 69.

ANALYSIS

We need to reproduce the relevant sections of the *Financial Administration Act*:

66. Definitions. In this Part,	**66.** Les définitions qui suivent s'appliquent à la présente partie.
...	...
"Crown debt" means any existing or future debt due or becoming due by the Crown, and any other chose in action in respect of which there is a right of recovery enforceable by action against the Crown;	«créances sur Sa Majesté» Créance existante ou future, échue ou à échoir, sur Sa Majesté, ainsi que tout autre droit incorporel dont le recouvrement peut être poursuivi en justice contre Sa Majesté.
"contract" means a contract involving the payment of money by the Crown;	«marché» Contrat prévoyant un versement de fonds par Sa Majesté.
"Crown" means Her Majesty in right of Canada;	«Sa Majesté» Sa Majesté du chef du Canada.
67. Except as provided in this Act or any other Act of Parliament, (*a*) a Crown debt is not assignable; and (*b*) no transaction purporting to be an assignment of a Crown debt is effective so as to confer on any person any rights or remedies in respect of that debt.	**67.** Sous réserve des autres dispositions de la présente loi ou de toute autre loi fédérale : *a*) les créances sur Sa Majesté sont incessibles; *b*) aucune opération censée constituer une cession de créances sur Sa Majesté n'a pour effet de conférer à quiconque un droit ou un recours à leur égard.
68. (1) Subject to this section, an assignment may be made of (*a*) a Crown debt that is an amount due or becoming due under a contract; and	**68.** (1) Sous réserve des autres dispositions du présent article, les créances suivantes sont cessibles : *a*) celles qui correspondent à un montant échu ou à échoir aux termes d'un marché;

(*b*) any other Crown debt of a prescribed class.

(2) The assignment referred to in subsection (1) is valid only if
(*a*) it is absolute, in writing and made under the hand of the assignor;
(*b*) it does not purport to be by way of charge only; and
(*c*) notice of the assignment has been given to the Crown as provided in section 69.

(3) The assignment referred to in subsections (1) and (2) is effectual in law, subject to all equities that would have been entitled to priority over the right of the assignee if this section had not been enacted, to pass and transfer, from the date service on the Crown of notice of the assignment is effected,
(*a*) the legal right to the Crown debt;
(*b*) all legal and other remedies for the Crown debt; and
(*c*) the power to give a good discharge for the Crown debt without the concurrence of the assignor.

(4) An assignment made in accordance with this Part is subject to all conditions and restrictions in respect of the right of transfer that relate to the original Crown debt or that attach to or are contained in the original contract.

...

69. (1) The notice referred to in paragraph 68(2)(*c*) shall be given to the Crown by serving on or sending by registered mail to the Receiver General or a paying officer, in prescribed form, notice of the assignment, together with a copy of the assignment accompanied by such other documents completed in such manner as may be prescribed.

(2) Service of the notice referred to in subsection (1) shall be deemed not to have been effected until acknowledgment of the notice, in prescribed form, is sent to the assignee, by registered mail, under the hand of the appropriate paying officer.

b) celles qui appartiennent à une catégorie déterminée par règlement.

(2) La cession n'est valide que si les conditions suivantes sont remplies:
a) elle est absolue, établie par écrit et signée par le cédant;
b) elle n'est pas censée faite à titre de sûreté seulement;
c) il en a été donné avis conformément à l'article 69.

(3) Sous réserve des droits qui, en l'absence du présent article, auraient pris rang avant celui du cessionnaire, la cession a pour effet de transférer, à compter de la date de la signification de l'avis :
a) le droit à la créance sur Sa Majesté;
b) les recours juridiques et autres concernant la créance;
c) le pouvoir de donner quittance à cet égard sans l'assentiment du cédant.

(4) Une cession faite en conformité avec la présente partie est assujettie à toutes les conditions et restrictions, relatives au droit de transfert, qui se rattachent à la créance originale ou qui découlent du marché original.

...

69. (1) Toute cession visée au paragraphe 68(2) est communiquée à Sa Majesté par un avis accompagné d'une copie de l'acte de cession, signifié ou envoyé par courrier recommandé au receveur général ou à un agent payeur; la forme de l'avis et la nature des autres documents qui doivent l'accompagner, ainsi que la manière d'établir ceux-ci, sont fixées par règlement.

(2) La signification de l'avis n'est considérée comme effective qu'après envoi au cessionnaire, par courrier recommandé, d'un accusé de réception établi en la forme réglementaire et signé par l'agent payeur compétent.

Thus, in principle, the Act provides that a *Crown debt*, *créance sur Sa Majesté* in the French version, is not assignable; there are, however, two categories of debts that are exceptions to the rule and may be assigned: a Crown debt that is an amount due or becoming due under a contract (68(1)(*a*)) and any other Crown debt of a prescribed class (68(1)(*b*)). For the purposes of this analysis, we shall immediately eliminate the second category since it is not applicable on the facts.

Prima facie, given that it appears that, under a contract between the A.B. company and the defendant, Her Majesty was required to pay moneys in consideration for the performance of certain work, what we have here is a "contract".

Counsel for the defendant drew a distinction and erected a watertight barrier between a claim under a contract and a chose in action — a right of action — and argued that in this instance, given that what was assigned by the Caisse populaire was a right of action, the plaintiff Banville is not entitled to the exception set out in paragraph 68(1)(*a*), but rather is subject to the general rule of non-assignability.

At the outset, the Court acknowledges that a right of action is a chose in action — *droit incorporel* in the French version — within the meaning of the definition of a *Crown debt* in section 66.[9] However, the Court does not agree that such a distinction should be made in this case. First, the Court does not believe that Parliament intended to confer preferential status on the owner of a debt under a contract by allowing him or her to assign it, while someone who had brought legal proceedings to recover a debt could not assign his or her right. Moreover, the evidence does not support such a distinction. The assignment signed by the Caisse populaire and the plaintiff Banville, in both the preamble and the clauses stating the purpose of the contract, clearly sets out the facts which resulted in the parties agreeing to the assignment, including, specifically, the existence of a contract between the A.B. company and PWC with an unpaid balance of $218,122.55, and the instant action to recover it. In the description section of the assignment (p. 10), the parties stipulated:

[TRANSLATION]

> 15. The debts and rights of action assigned by the assignor to the assignee to a maximum of 75% of the rights and interests of the assignor in the said debts and rights of action are:
>
> (a) the debts claimed by Les Entreprises A.B. Rimouski Inc. against the Department of Public Works Canada resulting from the contract signed on September 8, 1989 concerning the demolition of the old Cap-Chat commercial dock;
>
> (b) the rights of action of Les Entreprises A.B. Rimouski Inc. against the Attorney General of Canada and the Department of Public Works Canada resulting from the action brought in the Federal Court (District of Quebec City, Court No. T-2674-92);

There is therefore no doubt in the instant case that the plaintiff Banville has the capacity of assignee and is acting in that capacity pursuant to the assignment, and that that document authorizes him to exercise the right of action resulting from a contract with the defendant.

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9 In *Black's Law Dictionary* (5th edition, 1979, p. 219), a number of meanings are given for the expression "chose in action", including: "[a] right to receive or recover a debt, demand, or damages on a cause of action *ex contractu* or for a tort or omission of a duty".

However, for the plaintiff Banville as assignee, while the right of action he acquired results from a contract, this does not solve the problem. There is another obstacle he must overcome. Under paragraph 68(1)(*a*) of the Act, only a debt that is an amount due or coming due under a contract is assignable.

It is rare to find the expression *due or coming due* in legislation in relation to a debt. In the Section of the *Civil Code of Lower Canada* dealing with compensation, Article 1188 provides, rather, that compensation takes place by the sole operation of law between debts which are equally liquidated and demandable. Counsel for the defendant, seeking to establish that a liquidated and demandable debt is equivalent to a debt that is due, cited a number of judgments of the Quebec courts[10] in relation to compensation. Although those decisions may be useful, caution must be exercised in referring to them, since not only are the words different but also, it must be recalled, there is nothing in the instant case that calls for compensated.

The English version of subsection 68(1) of the Act is of more assistance in understanding the French expression *montant échu ou à échoir*; this is translated as "an amount due or becoming due under a contract". *Black's Law Dictionary* (*op. cit.* p. 448) states: "The word 'due' always imports a fixed and settled obligation or liability ...".

In the instant case, without going into the details of the merits (or lack thereof) of the dispute that arose in the course of the performance of the contract, it can certainly be said that the defendant's obligation was not "fixed and settled". On the contrary, the fact that, first, PWC had to claim from the surety to finish the work and, second, the plaintiff had to bring proceedings to recover the balance owing on the contract, shows that the debt is not an amount due or coming due, particularly in that the amount in question is the subject of a hotly contested action, as the evidence has shown. The defendant's dispute is not frivolous and the Court believes that we are not dealing with a debt that is due, certain and payable or, in other words, a debt that is due or becoming due under a contract. Accordingly, given that the assignee has not established that he is entitled to the exception set out in paragraph 68(1)(*a*) of the Act, he is subject to the rule of non-

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10 *Enros v. E.H. Jones Inc.*, [1976] C.A. 387; *Investissements Habibec Ltée (In re): Bank de Montréal v. Druker & Associés Inc.*, [1983] C.A. 244; *Marquis v. Martin*, Rapports judiciaires 237; *Weber v. Donat Paquin Limited*, (1939) R.P. 23; *Rinfret v. Gravel*, [1943] R.P. 144 (S.C.); *Hutkin v. Roy and Roy*, [1959] Rapports judiciaires 530; *Lauzier Électrique Inc. v. Place Dupuis Inc.*, [1977] C.S. 196.

assignability. In short, the debt claimed by the A.B. company was not assignable to the plaintiff Banville.

Even if the Court is wrong in declining to recognize the plaintiff Banville's right to have the Crown debt owing to the A.B. company assigned to him, his action still cannot succeed. Assuming that the debt owing to the A.B. company was a debt due or becoming due under a contract, in order for the plaintiff to be entitled to the exception to the general rule that a *Crown debt* is not assignable, he had to satisfy the requirements for validity set out in, *inter alia*, paragraphs 68(2)(*a*) and (*c*) of the Act: he had to prove that the assignment was absolute and that notice of the assignment was given to the Crown as provided in section 69. That section provides, in particular, for the form and the procedure for sending the notice, which is effected only after acknowledgement of the notice, in prescribed form, is sent to the assignee under the hand of the appropriate paying officer. Failure to comply with these mandatory requirements of the Act is fatal.[11]

In the instant case, it appears from the assignment by the Caisse populaire to the plaintiff Banville that the debt was not absolute, the assignor having divested itself of only [TRANSLATION] "a portion equivalent to seventy-five per cent (75%) of its rights and interests in the debts or rights of action hereinafter described in the description clause",[12] reserving full ownership of 25 per cent of the debts and rights of action. In addition, pursuant to that assignment, the plaintiff Banville undertook [TRANSLATION] "to pay and reimburse to the assignor, upon recovery and realization of the said debts and rights of action, a sum equivalent to 25 per cent of the amounts recovered or realized by the assignee in respect of the said debts and rights of action".[13] Certainly, an assignment of a debt that covers only three-quarters of the debt, and that further contains an undertaking by the assignee to repay a substantial portion of the amount ultimately recovered, cannot be characterized as absolute. On the question of the notice required under section 69 of the Act, no notice was given, so that no acknowledgement of the notice was given by the appropriate paying officer.

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11 *Carex v. Canada* (1983), 46 N.R. 505.

12 Clause 12 of Exhibit P-10.

13 Clause 21(c) of Exhibit P-10.

Having regard to the conclusions that the Court has reached, it would be pointless to examine the evidence in order to determine whether Les Entreprises A.B. Rimouski Inc. performed the work provided for in the contract in accordance with the plans and specifications.

For these reasons, the action of the plaintiff Aldège Banville, both personally and in his capacity as assignee of the rights of Les Entreprises A.B. Rimouski Inc., is dismissed with costs.

OTTAWA, October 11, 1996

PIERRE DENAULT

J.F.C.C.

Certified true translation

C. Delon, LL.L.

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO:	T-2674-92
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REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE DENAULT

DATED OCTOBER 11, 1996

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Stéphane Lilkoff and Sylvie Gadoury	FOR THE DEFENDANT

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