Federal Court  Cour fédérale

Date: 20191129

Docket: T-1359-07

Citation: 2019 FC 1531

Toronto, Ontario, November 29, 2019

PRESENT: Mr. Justice Diner

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY

Plaintiff

And

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

[1] This is a motion brought under Rules 52.5, 220(1)(b) and 279(a) of the *Federal Courts Rules*, SOR/98-106 [FC Rules] by the Plaintiff, the Canadian Pacific Railway Company [CPR], requesting that the Court find expert evidence submitted by the Defendant to be inadmissible, and strike it from the record. The evidence challenged in this motion consists of two expert reports, out of a total of four thus far produced in this action. The first, drafted by American law professor and historian Dr. James W. Ely Jr., provides answers to several questions relating to the history of US law and policy regarding the taxation of American railroads in the 19th century

[Ely Report]. The second, written by Frank Urban, a former employee of the Canadian Transportation Agency, addresses the relationship between fuel and income taxes and subsidies granted to CPR for grain transport between 1969 and 1996 [Urban Report].

[2] CPR argues that the Urban and Ely Reports are both inadmissible, because neither meets the legal requirements of relevancy nor necessity in assisting the Court to determine the central issues at trial. CPR contends that their admission would do more harm than good. I disagree, and will allow in the reports. Before explaining why, I will first provide a brief background of the case.

I. Background

[3] This background summarizes materials presented to the Court for this pre-trial motion, as well as previous pleadings, some of which date back nearly a decade, along with facts contained in two previous decisions of this Court (*Canadian Pacific Railway v Canada*, 2012 FC 1030, aff'd 2013 FC 161). The parties are attempting to arrive at an agreed statement of facts in advance of the January 2020 trial.

[4] The underlying litigation dates back to the formation of Canada, and British Colombia's entry into Confederation in 1871, when the Government provided this newest province with an undertaking to build a railway within 10 years to connect it to the rest of Canada.

[5] However, the Government was not able to complete the railway according to the promised timeline. Therefore, in 1880, Her Majesty the Queen in Right of Canada and a

company yet to be incorporated entered into a contract with an annexed draft charter for the construction of the remaining portion and permanent operation of the railway [the Contract]. The unincorporated company ultimately became CPR.

[6] Sir Charles Tupper, the Railways and Canals Minister who signed the Contract and was responsible for the *Canadian Pacific Railway Act*, 37 Victoria c 14 [*CPR Act*] of 1881, referenced the US railway experience during debates of the Contract in the House of Commons:

> I will not stop to discuss the question of the road itself being exempt from taxation because honourable gentlemen have only to turn to the laws of the United States, and in reference to the construction of those great lines of railway anywhere, to find that the policy of the Government of the United States has always been that those lines of railway, the roadway, the road itself, the stations, everything embraced in the term railway, was exempt from taxation. One of the judges of the courts of the United States declared that as these great lines of roads were national works, were public easements, that as they were for the benefit and advancement of the whole country, they should not be subject to any taxation, State or municipal. We have, therefore, only followed the practice that has prevailed in the United States and that which honourable gentlemen opposite will feel was incumbent upon us.
>
> [Emphasis added]

[7] The *CPR Act* described the railway to be constructed as being composed of four sections and two branch lines, along a course to be approved by the Governor-in-Council. The *CPR Act* ratified the Contract, which includes the clause that lies at the heart of this litigation. Clause 16 reads in part:

> The Canadian Pacific Railway, and all stations and station grounds, workshops, buildings, yards and other property, rolling stock and appurtenances as required and used for the construction and working thereof and the capital stock of the Company, shall be

> forever free from taxation by the Dominion, or by any Province hereafter to be established, or by any Municipal, Corporation …
>
> [Emphasis added]

[8] CPR contends that because the tax exemption contained in Clause 16 [Exemption] has never been repealed, amended, abrogated or overwritten, it remains valid and in force as a contractual, constitutional and statutory right, exempting the company from both direct and indirect tax. The Exemption only relates to CPR's main line across Canada, and not its branch lines, which separate off the main line to service local communities and industries.

[9] The two taxes contested by CPR as arising from the Exemption are (i) the fuel tax paid under subsection 23(1) the *Excise Tax Act*, RSC 1985, c E-15 [*ETA*], and (ii) the large corporations tax paid under Part I.3 of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [*ITA*]. The fuel tax dispute concerns the years 2003 through 2007; the large corporations tax concerns only the years 2000 and 2005.

[10] The fuel tax is an indirect tax, meaning that it is included in the prices that manufacturers and suppliers charge to CPR. Given that CPR's Exemption only applied to the main line – but that CPR now uses fuel in other parts of its operations – the Canada Revenue Agency [CRA], in a letter dated July 27, 1990, gave the company permission to file for refunds of exempt fuel tax [Authorization] directly, despite it being an indirect tax.

[11] In these proceedings, CPR pleads that the Authorization remains in effect with respect to its Exemption. CPR filed a series of refund claims to recover fuel tax from 2003 to 2007 based

on the Authorization, which the CRA denied because CPR was not the direct taxpayer under the *ETA*. CPR filed notices of objection with the CRA, arguing that the Exemption applied to both direct and indirect taxation. The CRA subsequently also denied these objections, taking the position that no *ETA* provision permits fuel tax refunds.

[12] CPR thus seeks repayment of these fuel tax refunds in this action, as well as a declaration that the CRA is not entitled to collect fuel taxes on fuel purchased, consumed, or used in connection with CPR's main line. CPR further disputes the collection of the large corporations tax paid in respect of its capital stock. While having received refunds for its 2001 to 2004 taxation years, CPR claims an overpayment for its 2000 and 2005 taxation years. In addition, CPR seeks a declaration that the Crown cannot collect tax imposed under the *ITA* on income earned by CPR in connection with the operation of its railway as originally defined in the *CPR Act*.

[13] CPR alleges that the imposition of both taxes are wrongful breaches of (i) the Contract, (ii) the *CPR Act*, (iii) the CPR Charter, and (iv) the Constitution of Canada, for which CPR has filed a Notice of Constitutional Question in accordance with the *Federal Courts Act*, RSC, 1985, c F-7 [*FC Act*] and FC Rules. As a result, the Court will have to determine two main issues at trial: first, whether the two disputed taxes fall within the Exemption; and second, whether past paid taxes are now recoverable despite CPR's prior conduct, for which the Defendant raises equitable defences, including estoppel, acquiescence and laches.

II. Analysis

[14] Both reports must be assessed under *R v Mohan* [1994] 2 SCR 9 [*Mohan*], in which the Supreme Court of Canada ruled that, to be admissible, expert evidence must be (i) relevant, (ii) necessary, (iii) not subject to any exclusionary rule, and (iv) adduced by a properly qualified expert. Even if the evidence meets all four *Mohan* criteria, I must then consider the second part of the analysis, namely the Court's gatekeeper role, by weighing whether the admission of the two expert reports does more harm than good. This includes an assessment of the likely impact the evidence will have on the duration and complexity of the trial if admitted (*White Burgess Langille Inman v Abbott and Haliburton Co,* 2015 SCC 23 [*White Burgess*] at paras 19, 24). The Defendant, having introduced the two expert reports, has the burden of demonstrating that they should be admitted (Sopinka, Lederman & Bryant: *The Law of Evidence in Canada*, Alan W. Bryant, Sidney N. Lederman, Michelle K. Fuerst, 5th ed, (Toronto: Lexis Nexis, 2018) at 12.44 [*The Law of Evidence*]). I will begin the analysis by looking at the grounds that are challenged vis-à-vis the Ely Report, and then move onto the Urban Report.

Admissibility of the Ely Report

[15] CPR submits that the Ely Report is inadmissible because it fails to meet the first two *Mohan* criteria, namely that it is irrelevant to the facts and issues raised, and unnecessary to assisting the Court in interpreting the Exemption under Canadian law. CPR does not challenge the admissibility of either report under the third or fourth *Mohan* criteria (exclusionary rule and experts' qualifications). CPR argues that American policy, history, and jurisprudence regarding

early US taxes do not affect the interpretation of the Contract and the Canadian legislation that codified it. CPR further asserts that the Court can refer to US or other foreign law directly, without the need for expert evidence, rendering the Ely Report unnecessary, and relying in part on *New Brunswick v Rothmans Inc*, 2009 NBQB 60 [*Rothmans*]:

> [82] … no issue of foreign law has been raised in this case and for that reason expert evidence with respect to U.S. laws is not relevant to these proceedings nor is the "Hazard Report" necessary to determine domestic law, which must be left to the court to apply.
>
> [83] The court is clearly capable, without the evidence of an expert, of considering foreign case law and related matters...
>
> [84] Similarly, nothing prevents the defendants, if they wish, to refer to jurisprudence and other publications emanating from other jurisdictions, including the United States, by making legal submissions highlighting the relevant foreign case law and other publications that the court may wish to consider. It is a matter of argument, not evidence!

[16] CPR further takes issue with the legal analysis in the Ely Report; it notes that this focus on foreign law has no relevance to the Canadian legal issues that must be determined in this action. CPR submits that, like in *Rothmans*, no foreign law is being pleaded. While Canadian jurisprudence clearly establishes that foreign law must be proven as fact (see, for example, *JPMorgan Chase Bank v Lanner (The),* 2008 FCA 399 [*JPMorgan*] at para 33), CPR submits that no element of its action requires the interpretation of foreign law. On this point of law, CPR also points to *Canada (Board of Internal Economy) v Canada (Attorney General),* 2017 FCA 43 [*Board of Internal Economy*] where the Federal Court of Appeal struck an Affidavit submitted by a law professor who formed legal opinions based on the law in other jurisdictions:

> This is clearly not a case where the foreign law and authorities referred to by Professor St-Hilaire constitute factual issues which require proof; they are relied upon solely for the purpose of

> assisting the Court in its analysis of an issue of domestic law. Courts routinely rely on foreign case law and doctrine without the need for such authorities to have been introduced by way of an affidavit…
>
> [Emphasis added]

[17] CPR lists five specific reasons that the Report is irrelevant and unnecessary as it relates to foreign law: (i) Sir Charles Tupper's perceptions of US law were misguided; (ii) the US experience was so diverse from state to state that it simply is not relevant to the Canadian context; (iii) the presence or absence of taxation in the US does not form any basis as an interpretive exercise for the Canadian context; (iv) the jurisprudence Mr. Ely relies on does not encompass – but rather post-dates – the relevant period; and (v) the Court must use current Canadian principles to interpret the key documents, and not US law.

[18] Finally, CPR asserts that Dr. Ely arrives at numerous legal conclusions based upon foreign law, which is grounds for excluding evidence. Justice Gagné (as she then was) noted at paragraph 39 in *Boily v Canada*, 2017 FC 1021 [*Boily*]: "legal expert evidence on an ultimate issue is an area where the criteria of necessity would be strictly applied and excluded". CPR argues that Dr. Ely has committed the error described in *Boily* by framing his opinion as "policy". In reality, however, CPR argues that he provides legal conclusions on the core issues to be tried, by interpreting the terms "appurtenances", "property" and "capital stock" with reference to US jurisprudence. CPR notes that under the second component of the *Mohan / White Burgess* test, any benefit of the Ely Report will be outweighed by the additional cost and time required as a result. Specifically, they argue that the examination and cross-examination of a responding

expert would lengthen the proceedings and distract the Court from its core task of interpreting Clause 16 in the Canadian context.

[19] After considering the parties' submissions, I find that the Ely Report is admissible. It assists in providing the factual context of the "surrounding circumstances" of the Contract. The Report could thus play an important role at trial by helping the Court to understanding the context of the US railway experience in the 1800s leading up to the signing of the Contract. These surrounding circumstances are relevant, in part, because a significant number of the original CPR syndicate were either Americans or Canadians who had previously invested and operated railways within the burgeoning US industry – specifically, Messrs. John Kennedy from New York, James Hill and Richard Angus from Minnesota, and George Stephen and Duncan McIntyre from Quebec.

[20] Furthermore, Sir Charles Tupper, the key government figure involved at the time, clearly considered the US experience in contemplating Canada's national railway. Whether Sir Tupper understood these railway practices rightly or wrongly should not, in my view, be the barometer of admissibility.

[21] Rather, the Report helps to understand the larger context in which Sir Tupper's statements were made, particularly given that the larger context shows that not only would the US have had an influence on the gentlemen involved in the formation of the railway, but also the responsible Minister, and presumably, the Canadian government writ large. Neither do I accept the Plaintiff's argument that the Ely Report only includes jurisprudence which post-dates the

Contract, as Dr. Ely cites and discusses several cases which pre-date the Contract and are clearly part of the broader context.

[22] Lastly, the admission of this expert evidence will not impact the Court's application of Canadian rather than US law to its interpretative exercise; the report's inclusion will in no way predetermine its ultimate persuasiveness or weight.

[23] On the second part of the admissibility test, which requires the Court to exercise its gatekeeping function once the report has been declared admissible, I find that its assistance to the Court outweighs any inefficiencies of having this expert (and potentially a responding expert) examined and considered at trial. Quite the opposite: its added benefits justify the potential risks. I find that Dr. Ely helps set the scene surrounding the Contract. As CPR notes, the US experience was immensely diverse. Dr. Ely's ability to contextualize that diversity as it relates to the Canadian railway experience will create efficiencies in digesting disparate case law and practices south of the border.

[24] In short, after many years in the pre-trial phase of this litigation, the trial is now less than two months away, with the holiday season arriving shortly and further cutting into that pre-trial time. Given that we have limited evidence regarding the parties' intentions regarding the Exemption in Clause 16, and no living witnesses to those events that took place in 1880, I find the US approach to railway taxation is an important component of the "surrounding circumstances" of the railway development occurring in Canada.

[25] The Court may thus find it useful to rely on the factual backdrop provided in Dr. Ely's analysis in understanding those surrounding circumstances in interpreting the Contract, the *CPR Act*, the CPR Charter, and the Canadian Constitution [the Four Cs]. As that interpretation will be at the crux of the trial, the factual circumstances in the US are both relevant and necessary. Certainly, the other two unopposed expert reports of Dr. Hanna and Dr. Regehr already introduced by CPR and the Defendant respectively, provide a general overview of the people, politics and events leading up to the Four Cs from different perspectives. Both Dr. Hanna and Dr. Regehr have had long careers as history professors at prominent Canadian Universities. Both specialize in railway history, having published widely in the area.

[26] Dr. Ely, by contrast, comes at the subject from an entirely distinct, legal perspective and training, including a deep understanding of then the US legislative context. Given the national and transnational establishment of the railway system in North America, Dr. Ely's different perspective complements those provided by the two Canadian historians, which will enrich the Court's understanding of the surrounding circumstances and how they may have impacted the Four Cs.

[27] As for the first and most critical of these four instruments – the Contract and its Clause 16 – its interpretation necessitates a practical, common-sense approach to contractual interpretation mandated by the Supreme Court "to determine the intent of the parties and the scope of their understanding" such that the Contract can be read "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" (*Creston Moly Corp v Sattva*

Capital Corp, 2014 SCC 53 at para 47) [*Sattva*] (Emphasis added). Unlike in *Board of Internal Economy*, Dr. Ely's references to US law, legal authorities and other policies would appear to help establish those surrounding circumstances as part of the factual context of the Contract.

[28] This distinguishing feature also separates Dr. Ely's report from those seen in the cases mentioned above where such reports were excluded, such as *Rothmans'* exclusion of Professor Hazard's report commenting on US law. There, the pleadings raised no issue of foreign law, and US jurisprudence and ethical standards were found to be matters of argument, not evidence (*Rothmans* at para 84). While the *Constitution Act, 1867* also formed part of *Rothmans'* issues for trial, its Glenn and Hazard expert reports focused on the issue of ethical and professional standards and public policy issues regarding an Attorney General retaining outside counsel pursuant to a contingency fee agreement. That was a very modern, novel issue, raised in a Canadian context in which US law played no part. Moreover, *Rothmans* did not require the interpretation of a Contract and circumstances arising a century and a half ago, as does the present case.

[29] *Boily* also raised a distinguishable issue – namely, the legal expert evidence was given on an ultimate issue of the case, which is outside the acceptable bounds for an expert report (at para 39). Here, however, I do not read Dr. Ely's comments as straying into the opinionated territory that the impugned expert did in *Boily*.

[30] I realize that Canadian courts, including most notably the Supreme Court, "have commented on the necessity of expert evidence being exceptional, rather than admitted by

default… there must be a factual and technical need for it" (*Association of Chartered Certified Accountants v The Canadian Institute of Chartered Accountants*, 2016 FC 1076 at para 17 [*Chartered Accountants*], citing *R v DD*, 2000 SCC 43). Indeed, in *Chartered Accountants*, two law professors–both recognized experts – provided an overview on the regulation of accountants in Canada. The law professors' reports included the interpretation of provincial statutes regulating the accounting profession. While conceding that the reports were helpful and efficient summaries, this Court held that "[m]ere helpfulness does not constitute necessity for the admission of expert evidence", and "efficiency no more constitutes necessity than does helpfulness" (*Chartered Accountants* at paras 22 and 26).

[31] Here, once again, the context differs from *Chartered Accountants*. The US political, business and judicial treatment of railways 150 years ago forms part of the context, for which Dr. Ely provides valuable insights. His report is not simply another legal interpretation that could make the Court's task more efficient: it adds knowledge that may assist this Court with its central fact-finding exercise. Without knowing the nature or scope of all factual evidence to be tendered at trial, I am unable to conclude that it is irrelevant and unnecessary; on the contrary, I believe it adds value to the Court's deliberative process. I find that it would therefore be premature to strike the report at this point in the proceedings.

Admissibility of the Urban Report

[32] CPR once again does not challenge this report under the third or fourth *Mohan* criteria (exclusionary rule and experts' qualifications), focusing rather on relevancy and necessity. It

submits that the Urban Report is irrelevant due to (i) considering a taxation period that predates the period under review, (ii) relating to subsidies received in relation to the branch lines, not the relevant main line, and (iii) providing calculations that, if correct, only show that the parties were net-neutral in respect to any taxes paid and reimbursed between 1979 and 1996.

[33] Additionally, CPR notes that the damages aspect of the action has been bifurcated from the pending January 2020 trial, and that an assessment of total taxes to be repaid – which Mr. Urban calculates in his report – is not appropriate for that first stage of the action. Given its contents, CPR maintains that the Urban Report does not make the existence or non-existence of any fact in issue more or less likely than would be the case without the Urban evidence.

[34] CPR further argues that even if the Urban Report is deemed relevant and necessary, it should not be admitted because it will result in an inefficient use of the Court's time relative to its overall relevance, in that it will unduly protract and complicate the trial. CPR contends that I should therefore exercise my gatekeeping function by excluding it, given that the prejudice caused by its admission would outweigh any potential probative value it brings to bear.

[35] I disagree and, similar to the Ely Report, find the Urban Report to be both relevant and necessary, thus satisfying the two *Mohan* criteria at issue. The Defendant has persuaded me that the report could be relevant to the equitable defenses it will plead, namely estoppel, laches and acquiescence, due to CPR's failure to invoke Clause 16 at various other points in history, including during the years cited in the Urban Report (1979-1996). Despite that period being prior to the years in controversy in this trial (most of the years between 2000 and 2007) as noted

by CPR, Mr. Urban nonetheless provides a detailed breakdown and explanation of grain transportation subsidies and railway costing. That analysis transcends the sample years he examines, because these are highly technical areas for which evidence and/or knowledge is otherwise unavailable at this point in the proceedings. This was made apparent through the discovery process, based on questions and responses highlighted during the hearing of this motion.

[36] The Urban Report is thus necessary to help the Court understand central issues at trial. It too would be premature to strike this Report at this stage. In any event, the Urban Report deals, at least in part, with the main line at issue, and many of the taxes that were repaid by CPR to provincial governments and not to the Defendant.

[37] In sum, the issues CPR notes (that the Report does not reference the time period at dispute; that it references subsidies that were repaid to the government; and that it deals primarily with the branch lines, rather than the main line) can all be dealt with in cross-examination of Mr. Urban and oral argument, both of which will ultimately impact the weight given to the report. These issues are not a sufficient basis to exclude a report relevant to the key issues of this case, because to do so at this early stage would undermine the Defendant from adducing the evidentiary basis to support its arguments and defenses at trial.

III. Conclusion

[38] The Defendant has met its burden of demonstrating that the two reports are admissible. The Ely Report provides evidence regarding the surrounding circumstances of the Contract,

making it both relevant and necessary as a historical, political, and social perspective on Clause 16. To exclude the report at this point, just prior to trial, will leave the proceedings bereft of a leading US expert in the history of railway law who provides the historical context south of the border, to create one factual view of the circumstances surrounding the Canadian context.

[39] Similarly, the Urban Report shall be included despite the fact that it considers years which pre-date those directly at issue for the excise and income tax disputes. Those years provide an important context that would otherwise be missing in regard to the parties' behaviour leading up to the years in controversy. Exclusion would also prejudice the Defendant's ability for a fair and full defense based on the equitable grounds it raises.

[40] Whether Dr. Urban's and Ely's written reports will hold up under the rigour of cross-examination, and/or in light of other expert testimony that will be tendered, will have to be determined in light of the full body of evidence presented at trial. Excluding the two reports before the Court has the opportunity to understand them in their broader context is premature; the benefits of their inclusion outweigh the detriment of exclusion. Accordingly, this decision in no way signals or predetermines the reports' ultimate persuasiveness.

IV. COSTS

[41] Costs will issue to the Defendant.

ORDER in T-1359-07

THIS COURT ORDERS that:

1. This motion is denied; the impugned reports will not be struck.

2. Costs are awarded to the Defendant.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1359-07
STYLE OF CAUSE:	CANADIAN PACIFIC RAILWAY COMPANY V HER MAJESTY THE QUEEN
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