Federal Court  Cour fédérale

Date: 20240531

Docket: T-1292-15

Citation: 2024 FC 832

Toronto, Ontario, May 31, 2024

PRESENT: Mr. Justice Diner

BETWEEN:

LOUIS DREYFUS COMPANY CANADA ULC

Plaintiff

and

CANADIAN NATIONAL RAILWAY COMPANY

Defendant

ORDER AND REASONS

[1] This is a motion brought by the Plaintiff, Louis Dreyfus Company [LDC], pursuant to Rule 279 of the *Federal Courts Rules*, SOR/98-106 [the Rules]. LDC asks that this Court grant it leave to file and serve the reply expert report of John De Pape dated September 6, 2022 [Reply]. LDC also asks that the Court rule that the Reply is admissible at the trial of this action. The Defendant, Canadian National Railway Company [CN], opposes the relief sought, arguing that it constitutes an improper reply, and should thus be refused. I cannot agree.

[2] The motion will be granted for the following reasons.

I. Background

[3] LDC filed an action in this Court for damages under subsection 116(5) of the *Canada Transportation Act*, SC 1996, c 10 [the Act]. The Act grants a statutory cause of action for shippers against a railway company when it has failed to fulfil its service obligations under sections 113–115 of the Act.

[4] On October 3, 2014, the Canadian Transportation Agency [the Agency] held that CN breached its statutory service obligations owed to LDC relating to the supply of grain hopper railway cars LDC had ordered for certain weeks of the 2013/2014 crop year, and which LDC was entitled to receive under contract.

[5] On July 31, 2015, LDC commenced this action against CN to determine the damages incurred as a result of CN's statutory breach, as had been determined by the Agency in 2014.

[6] Under the Act, the Agency decides whether a breach of those obligations has occurred, and if so, the Federal Court assesses the ensuing damages. The competence of this Court to adjudicate the damages component of the said transportation dispute was comprehensively reviewed by the Federal Court of Appeal in an earlier decision in this litigation, wherein CN challenged the Federal Court's jurisdiction to adjudicate this claim for damages. In *Canadian National Railway Company v Louis Dreyfus Commodities Canada Ltd*, 2019 FCA 9, Justice Rennie, writing for a unanimous Court, held:

> The Agency's determination is thus the proper foundation of LDC's claim for damages under subsection 116(5). The jurisdiction to determine whether a railway company has breached its service obligations has been specially assigned to the Agency, while the jurisdiction to assess damages if a breach is found rests with the Federal Court (*Kiist v. Canadian Pacific Railway Co.*, 1981 CanLII 4719 (FCA), [1982] 1 F.C. 361; 123 D.L.R. (3d) 434). This is the division of authority that Parliament has established between the Agency and the Court, which together carry out a complete scheme for the adjudication of level of service disputes (*Canadian National Railway Company v. Northgate Terminals Ltd.*, 2010 FCA 147, [2011] 4 F.C.R. 228).

[7] The trial before this Court to determine the level of damages is set to begin on November 25, 2024. In view of the damages issue at trial, LDC retained John De Pape, a grain industry expert. In his main expert report dated December 17, 2021 [the Main Report], Mr. De Pape concluded that LDC incurred lost profits due to CN's rail services failures of over $22 million.

[8] In response, CN retained Dean Das as their expert. Mr. Das provided a responding "Critique Report" dated May 30, 2022 [Das Report]. Mr. Das is a Chartered Professional Accountant who has a CFF (Certified in Financial Forensics) designation.

[9] In response to the Das Report, LDC provided Mr. De Pape's Reply dated September 6, 2022. The Reply is 20 pages long (in addition to Annexes), and divided into the following four sections: Summary (paragraphs 1–6); Methodology (paragraphs 7–29); Assumptions (paragraphs 30–54); and Errors of Understanding (paragraphs 55–82).

[10] The sole issue before this Court on this motion is whether Mr. De Pape's Reply constitutes appropriate reply evidence. I will grant this Motion, and accept the Reply for filing and allow its admission under reserve of objection and challenge at trial, for the reasons set out below.

II. Positions of the Parties

[11] The Plaintiff argues that the Reply provides new and responsive evidence to the Das Report, which Mr. De Pape could not have reasonably anticipated including in his Main Report. His Reply addresses alternate methodology and assumptions contained in the Das Report, including numerical assumptions used to calculate the railcar lading weight and variable costs.

[12] The Reply also responds to critiques raised in the Das Report with respect to Mr. De Pape's methodology. For instance, Mr. Das perceives the "main business driver" to be the ability to source grain from local farms, whereas Mr. De Pape perceives it to be railcar supply.

[13] Mr. De Pape's Reply also criticizes Mr. Das' methodology on the calculation of various key components for the valuation of losses, including the truncated loss period, calculation of mitigations costs/expenses, provincial market share analysis, alleged expected sale prices, and trading patterns. The Reply also provides clarification on errors and misunderstandings of the grain industry that Mr. De Pape alleges are contained in the Das Report.

[14] CN, on the other hand, contends that the Reply is not admissible as it consists of argument and advocacy, and the Plaintiff is using it to split its case. Moreover, CN submits that the admission of the Reply would cause it prejudice at trial by giving LDC the right to get the last word.

III. Analysis

[15] I will briefly review the relevant law regarding expert evidence, and then apply it to the Mr. De Pape's Reply.

A. *The Law Regarding the Admissibility of Expert Evidence*

[16] Rule 279 of the Rules addresses expert evidence, including the fact that the expert must prepare and serve a report, and be available for cross-examination at trial. Expert evidence must meet the four criteria developed by the Supreme Court of Canada in *R v Mohan*, 1994 CanLII 80 (SCC), [1994] 2 SCR 9 at para 20: it must be: (a) relevant, (b) necessary; (c) not subject to any exclusionary rule; and (d) adduced by a properly qualified expert.

[17] In terms of the order of adducing evidence at trial, Rule 274(1) sets out that unless the Court directs otherwise, there are three stages to the evidence, in that (a) the plaintiff, after an opening address, adduces evidence, followed by (b) the defendant's opening address and adducing of evidence, and (c) the plaintiff's reply evidence. However, in this last stage of reply evidence under Rule 274(1)(c), plaintiffs cannot split their case by bringing evidence that could

have been reasonably anticipated to be presented in chief (*R v Krause*, [1986] 2 SCR 466 at 473, 1986 CanLII 39 (SCC)).

[18] At paragraph 15 of *Halford v Seed Hawk Inc*, 2003 FCT 141 [*Halford*], recently affirmed in *T-Rex Property AB v Pattison Outdoor Advertising Limited Partnership*, 2022 FC 1008 at para 34, Justice Pelletier enumerated the following four principles to govern the admissibility of reply evidence:

> 1. Evidence which is simply confirmatory of evidence already before the court is not to be allowed.
>
> 2. Evidence which is directed to a matter raised for the first time in cross examination and which ought to have been part of the plaintiff's case in chief is not to be allowed. Any other new matter relevant to a matter in issue, and not simply for the purpose of contradicting a defence witness, may be allowed.
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> 3. Evidence which is simply a rebuttal of evidence led as part of the defence case and which could have been led in chief is not to be admitted.
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> 4. Evidence which is excluded because it should have been led as part of the plaintiff’s case in chief will be examined to determine if it should be admitted in the exercise of trial judge’s discretion.

[19] Justice Zinn, in paragraph 10 of *Merck-Frosst v Canada (Health)*, 2009 FC 914 [*Merck-Frosst*], supplemented these with four factors that the Court must also consider in a motion to file reply evidence:

> (a) whether the further evidence serves the interests of justice;
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> (b) whether the further evidence assists the Court in making its determination on the merits;
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> (c) whether granting the motion will cause substantial or serious prejudice to the other side; and

> (d) whether the reply evidence was available and/or could not be anticipated as being relevant at an earlier date.

[20] Justice Zinn went on to raise the additional gloss at paragraphs 23–24 of *Merck-Frosst*, which is helpful to understanding whether evidence is (i) properly responsive, and if so (ii) could have been anticipated earlier, such that it would improperly split the case:

> (23) The first step is to ask whether the proposed evidence is properly responsive to the other party's evidence. It is responsive if it is not a mere statement of counter-opinion but provides evidence that critiques, rebuts, challenges, refutes or disproves the opposite party's evidence. It is not responsive if it merely repeats or reinforces evidence that the party initially filed.
>
> […]
>
> (25) If the proposed evidence is found to be responsive, one must then ask whether it could have been anticipated as being relevant at an earlier date. If it could have been anticipated earlier to be relevant, then it is being offered in an attempt to strengthen one's position by introducing "new" evidence that could and should have been included in the initial affidavit. Such evidence is not proper reply evidence as the party proposing to file it is splitting his case.

[21] When deciding whether to allow the admissibility of reply evidence, there has been a willingness to adopt a flexible approach based on the circumstances of a particular case (*Akebia Therapeutics, Inc v Fibrogen, Inc*, 2021 FC 171 at para 6 [*Akebia*]; *Merck Sharpe & Dohme Corp v Pharmascience Inc*, 2021 FC 1456 at para 5 [*Merck Sharpe*]; *Bauer Hockey Limited v Sport Maska Inc*, 2020 FC 212 at para 29 [*Bauer*]).

B. *Application of the Law to the Facts*

[22] The overriding concern of the Court in admitting reply evidence, as explained above, is the risk of case splitting (*Janssen Inc v Teva Canada Limited*, 2019 FC 1309 at para 57; *Bauer* at para 13). Consistent with the principles listed in *Halford* and additional considerations of *Merck-Frosst*, I am satisfied that the Mr. De Pape's Reply is permissible reply evidence for several reasons.

[23] First, I note that Messrs De Pape and Das take very different approaches and hold very different views of the evidence. The parties advise that the two men are the only two experts being tendered. I note that due to the fact that these are the only two experts that the parties will be bringing forward in the context of a very significant damages trial, both in terms of length of time set aside for the trial, as well of quantum of damages sought.

[24] I note that each individual has a very distinct background, Mr. De Pape being a grain industry expert, and Mr. Das being a forensic accountant. The evidence contained in Mr. De Pape's Reply is not confirmatory of evidence that is already before the Court: his Reply does not repeat or reaffirm the contents of the Main Report, but rather considers evidence and analysis directly in response to the critiques raised in the Das Report. Neither expert has been cross-examined at this stage of the proceeding.

[25] Second, Mr. De Pape's response is neither a mere rebuttal nor disagreement with the contents of the Das Report. Rather, the Reply evidence includes recalculations on the basis of the

new expert evidence proposed by Mr. Das, discussions on the different assumptions that Mr. Das employed, and additional analysis from Mr. De Pape using his industry expertise to respond to the critiques in the Das Report. It is not simply rebuttal of evidence led as part of the defence case which could have been led in chief. The critiques raised in the Das Report were, in my view, narrow and specific, and therefore could not have been reasonably anticipated by Mr. De Pape at the time he provided his Main Report (*Akebia* at para 6;*Merck-Frosst* at para 30).

[26] I thus find that at this early point approximately six months in advance of trial, the Reply contains relevant, new, and not simply confirmatory evidence regarding the issues in dispute, and will be of assistance to the Court in its determination of the case at trial (*Merck Sharpe* at para 24). Having said this, I certainly recognize that it can be a challenge to fully appreciate the nuances of expert evidence at this early stage of my review of the evidence, which has consisted of only the motion materials, without the benefit of reviewing or hearing the full body of evidence or submissions that will be entered at trial.

[27] In the event that it later turns out that I have misconstrued or mischaracterized the Reply evidence, it can always be reconsidered as the trial unfolds later this year, and ultimately weighed accordingly (*Swist v Meg Energy Corp* 2020 FC 759 at para 16; *Canadian Pacific Railway Company v. Canada*, 2019 FC 1531 at para 40).

[28] For now, however, I am satisfied that the Reply should be filed in the exercise of the Court's discretion (*Angelcare Development Inc v Munchkin, Inc*, 2020 FC 1185 at para 16). Like in these two cases, I do not find that admitting the Reply will prejudice CN. Should CN seek to

introduce sur-reply evidence, which counsel has reflected may well be the case, there is still ample time to do so.

[29] In addition to the lack of prejudice, I find that the nature of the Reply within the context of the length, complexity and timing of this action, serves the interests of justice (*Akebia* at para 6; *Merck Sharpe* at para 5; *Bauer* at para 29). In short, I find the Reply to be proportionate to the complexity and stakes of this action.

IV. Conclusion

[30] I am satisfied that the Reply is consistent with the factors that must be considered for the filing and admission of reply expert evidence as outlined above in this Court's jurisprudence. It will serve the interests of justice by assisting the Court in the upcoming trial of this matter. It neither splits the case, nor prejudices CN given the time remaining until trial, which maintains its ability to pursue a sur-reply. The Reply is proportionate to the complexity and importance of the issues raised. The content of the Reply will be considered at trial, at which time the Court will be in a better position to assess its contents.

[31] Costs will be awarded to Plaintiff in any event of the cause.

ORDER in T-1292-15

THIS COURT ORDERS that:

1. The Plaintiff's Motion is granted.

2. Mr. De Pape's Reply can be served and filed, and is admissible reply evidence under reserve of objection and challenge at trial.

3. The Defendant may seek to introduce a sur-reply at its earliest possible convenience.

4. Costs are awarded to the Plaintiff in any event of the cause.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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