Federal Court | Cour fédérale

Date: 20090722

Docket: T-736-03

Citation: 2009 FC 748

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, July 22, 2009

PRESENT: Madam Prothonotary Tabib

BETWEEN:

INSTALLATION GLOBALE
NORMAND MORIN & FILS INC.

Applicant

- and -

PUBLIC WORKS AND GOVERNMENT
SERVICES CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] This motion involves the interpretation of paragraph 68(1)(*a*) of the *Financial Administration Act*, R.C., 1985, c. F-11 (the Act).

[2] The applicant, Installation Globale Normand Morin & Fils Inc., commenced an action against the federal Crown, claiming not only the cost of storage services provided to the Crown under a standing offer between the applicant and respondent, but also damages for loss of profit, unnecessary expense, loss of reputation, loss of credit, pain and suffering, etc., allegedly resulting from the respondent's deliberate failure to pay the amounts due under the storage contract and its unjustified and malicious refusal to renew the standing offer.

[3] After the institution of the proceedings, the applicant company made an assignment in bankruptcy and a trustee in bankruptcy was appointed. In the bankruptcy proceedings, the applicant's trustee agreed to assign to Normand Morin all of the applicant's rights of action, including all of the applicant's rights, titles and interests in the remedies and rights of action underlying this proceeding. It is common ground that this was an assignment by mutual agreement, and not an involuntary assignment under section 38 of the *Bankruptcy Act*.

[4] Mr. Morin, through his counsel, then disclosed the assignment document to the respondent, pursuant to subsection 69(1) of the *Financial Administration Act* and section 117 of the *Federal Courts Rules*, according to which the person seeking to carry on a proceeding as an assignee of the rights or obligations at issue in the proceeding must serve a notice on the other party of this intention and of the basis for the assignment.

[5] The respondent is challenging Mr. Morin's right to continue the proceeding under this assignment, at least with respect to the damages claimed, on the grounds that this part of the claim is not assignable pursuant to the *Financial Administration Act*.

[6] Section 67 of the Act sets out an absolute prohibition on the assignment of a Crown debt:

67. Except as provided in this Act or any other Act of Parliament,	67. Sous réserve des autres dispositions de la présente loi ou de toute autre loi fédérale :
(*a*) a Crown debt is not assignable; and	*a*) les créances sur Sa Majesté sont incessibles;
(*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.	*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.

[7] Subsection 68(1) of the Act authorizes the exceptional assignment of certain specific Crown debts:

68(1) Subject to this section, an assignment may be made of	68(1) Sous réserve des autres dispositions du présent article, les créances suivantes sont cessibles :
(*a*) a Crown debt that is an amount due or becoming due under a contract; and	*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.	*b*) celles qui appartiennent à une catégorie déterminée par règlement.

[8] It should be noted that the parties agree that the amounts claimed in the proceeding do not belong to a prescribed class within the meaning of paragraph 68(1)(*b*) of the Act. The moving party, Mr. Morin, nevertheless submits that all of the amounts claimed in the proceeding constitute assignable debts pursuant to paragraph 68(1) of the Act and that he should therefore be allowed to continue the proceeding in his own name as a result of the assignment.

[9] While the respondent concedes that the part of the claim involving payment for storage services that the applicant alleges to have provided to the respondent under the standing offer are debts "that is an amount due or becoming due under a contract" and are therefore assignable, it submits that the remaining claims, namely the various heads of damages claimed as a result of the failure to meet the obligations under the standing offer contract, do not constitute such amounts and are therefore not assignable.

[10] For the purposes of this analysis, I will assume, without making any formal finding to this effect, that the damages claimed in the proceeding are indeed, as Mr. Morin submits, damages arising directly from the failure to meet the obligations under the standing offer contract, and therefore, according to the provisions of the *Civil Code of Québec*, damages under contract, and not damages based on the extracontractual liability of the respondent's servants, as the respondent argues. Because I find that damages under contract are not debts corresponding to an amount due or becoming due under a contract, it is not necessary for me to make this distinction.

[11] It appears that the issue of whether the damages claimed from the Crown because of non-performance of the contract are assignable has never been subject to judicial determination.

However, the case law does recognize that a case based on torts committed by servants or agents of the Crown does not generate an amount due or becoming due under a contract (*Tacan v. Canada*, 2003 FC 915), that the exceptions contained in section 68 of the Act must be interpreted narrowly and that the terms "contract" and "marché" in the English and French versions of section 68 of the Act are restricted to commercial transactions, therefore excluding amounts owing under an Indian treaty, even though such treaties are often equated to contracts (*Beattie v. Canada*, 2004 FC 674).

[12] The closest the courts have come to interpreting the provisions of paragraph 68(1)(*a*) of the Act with respect to contractual damages can be found in *Entreprises A.B. Rimouski Inc. c. Canada*, [1998] F.C.J. No. 934 (FCA), in which the Court wrote the following:

> 13 First, I cannot accept that the expression "debt due or becoming due" within the meaning of paragraph 68(1)(*a*) means a liquid, due and payable debt which is required for the purposes of legal compensation. Even if a debt is challenged in court, if its alleged existence is directly related to a contract, it seems impossible in my view to say that it does not fall within the exception. Otherwise, all the Crown would have to do to prevent any assignments would be to raise an objection, which would unduly interfere with commercial transactions. This is certainly not what Parliament wanted. <u>At the very most, a distinction could be made between the claim for the payment of the balance owing on the contract and the claim for damages. It seems clear that a judgment favourable to the company would indicate that the assigned debt was in fact due and payable at the time of the assignment, certainly for the balance due on the price for the work if not for the damages</u>.
>
> (Emphasis added.)

[13] Note that this part of the decision is clearly *obiter*, the basis for the decision being that even if the validity of an assignment is challenged, the trial judge presiding over the proceedings, which were commenced by the company to which the debt was initially owed, could not summarily dismiss the proceedings, given that the company's right of recovery continued to exist, even in cases

where the assignments were found to be invalid. It is nevertheless relevant to note that the Court of Appeal did admit the possibility of distinguishing between the claim for the payment of the balance owing on the contract and the claim for damages.

[14] It is clear that the standing offer allegedly at the root of the claim is a "contract", defined by section 66 of the Act as a "contract involving the payment of money by the Crown". Counsel for Mr. Morin submits that any claim arising directly from this contract, including claims in damages, is a debt that is "an amount due or becoming due under a contract".

[15] I cannot accept this interpretation.

[16] In my view, both the restrictive approach called for in interpreting an exception and Parliament's clear intention to make an exception for the protection only of commercial transactions militate in favour of the interpretation that this provision applies only to amounts owing on the contract itself. Therefore, an amount due or becoming due under a contract is an amount the payment of which is expressly set out in the actual terms of the contract, such as the payment of the sale price of goods, services or securities, or even, when expressly set out in the contract, a predetermined amount of damages in the event of a breach of the contract obligations. In contrast, even though the right to claim compensation for the losses or damages suffered by a party to the contract as a result of the other party's failure to execute its obligations is a right granted by suppletive law, and even though such claims are rightly considered contractual claims, they cannot be considered claims for amounts under the contract. They are not amounts owing as a result of the execution of obligations set out in the contract, but rather amounts that become due as a result of a failure to execute the obligations set out in the contract.

[17] This distinction is consistent not only with the specific wording employed in section 68 of the Act: "An amount due or becoming due under a contract" (« Les créances (…) qui correspondent à un montant échu ou à échoir aux termes d'un marché »), but also with the judicial interpretation of Parliament's intent to protect through this section only commercial transactions, thereby ensuring the security and transferability of debts arising from commercial transactions. Note that the damages that may be suffered by a contracting party as a result of the non-execution of the obligations set out in a contract are specific to that party. They are not defined by the contract, they depend on the particular circumstances of the party, and, contrary to accounts receivable, are generally not themselves subject to commerce and financial transactions. Given Parliament's intent to authorize the assignment of purely commercial debts only, there is no more reason to maintain the assignability of claims for contractual damages than there is for extracontractual damages.

[18] The order to substitute Mr. Morin for the applicant will therefore be granted, but only in relation to the claim for amounts owing for services rendered in accordance with the standing offer, namely, the amount of $504,000, plus any interest provided for in the contract.

[19] As for the other claims, the respondent concedes that the applicant Installation Globale Normand Morin et Fils Inc. retains, through the trustee in bankruptcy, its right to continue its proceedings against them. This order therefore stipulates that the trustee in bankruptcy of Installation Globale Normand Morin et Fils Inc. will have 30 days from the date of this order to indicate his desire to continue pursuing the claim; if he fails to do so, the respondent will be entitled to seek, by way of motion, to have this part of the proceedings dismissed for delay.

ORDER

THIS COURT ORDERS that:

1. The moving party, Normand Morin, is authorized to be substituted for the applicant, but only for the purposes of the claim for the amount of $504,000 owing for services rendered in accordance with the standing offer, including any taxes and interest provided for in the contract.

2. The applicant, or its trustee in bankruptcy, has 30 days from the date of this order to serve notice that it intends to carry on proceedings for its remaining claims, and if it fails to do so, the respondent will have 30 days from the expiration of this time limit to serve and file a motion to have the proceedings dismissed.

3. An amended statement of claim reflecting the substitution will be served and filed by the applicant itself or its trustee no later than 15 days following the applicant's notice of intention to continue the proceedings on its own behalf, or following a decision on the motion to dismiss that the respondent may bring in accordance with this order.

4. No later than 15 days after the filing date of the amended statement of claim, the parties will file written submissions regarding a timetable for the next steps in the litigation; in the event that the next step is the hearing of the motion to decide the objections as they currently

stand, without any amendments, the parties will indicate in their submissions the dates on which they are both available for this hearing.

"Mireille Tabib"
Prothonotary

Certified true translation
Francie Gow, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-736-03
STYLE OF CAUSE:	Installation Globale Normand Morin & Fils Inc. v. Public Works and Government Services Canada
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	June 29, 2009
REASONS FOR ORDER:	Madam Prothonotary Mireille Tabib
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