Federal Court of Appeal  Cour d'appel fédérale

Date: 20190117

Docket: A-289-17

Citation: 2019 FCA 9

CORAM: **WEBB J.A.**
RENNIE J.A.
LASKIN J.A.

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

Appellant

and

LOUIS DREYFUS COMMODITIES CANADA LTD.

Respondent

Heard at Vancouver, British Columbia, on December 11, 2018.

Judgment delivered at Ottawa, Ontario, on January 17, 2019.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: WEBB J.A.
LASKIN J.A.

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REASONS FOR JUDGMENT

RENNIE J.A.

[1] Canadian National Railway Company (CN) appeals from a judgment of the Federal Court (2017 FC 783, *per* Roy J.) holding that the Federal Court has jurisdiction to hear a claim in damages of the respondent, Louis Dreyfus Commodities Canada Inc. (LDC), against CN. The Federal Court damages action arises from the determination of the Canadian Transportation Agency (Agency) that CN failed to meet its service obligations to LDC under section 113 of the *Canada Transportation Act*, S.C. 1996, c. 10 (Act), in the manner agreed in a confidential

contract between the parties executed on March 25, 1999 (1999 Contract). The determination by the Agency that CN breached those obligations triggered subsection 116(5) of the Act which provides a statutory claim for damages by LDC against CN in the Federal Court.

I. Background

[2] LDC owns and operates grain elevators in Glenavon and Aberdeen, Saskatchewan, and Joffre and Lyalta, Alberta. LDC relies on CN and its rail network to transport grain from these facilities. Grain stored in LDC elevators is shipped to the west coast, Thunder Bay, Churchill and Canadian processing facilities.

[3] Under subsection 113(1) of the Act, CN owes service obligations to LDC. Under subsection 113(4), a shipper (e.g., LDC) and a railway (e.g., CN) are entitled to enter into a confidential contract "…on the manner in which the obligations under [section 113]" will be met. Similarly, paragraph 126(1)(*d*) of the Act provides that the confidential contract may address "the manner in which the company is to fulfill its service obligations under section 113". A shipper may request such a contract from a railway and the railway must respond with an offer (Act, ss. 126(1.1), 126(1.3)).

[4] Where a contract is made, its terms are binding on the Agency in any determination it must make on whether a railway has fulfilled its service obligations (Act, ss. 116(2)). If the Agency determines that the railway has not met its service obligations, section 116 provides for a statutory claim in damages against the railway.

[5] In 1999 CN and LDC entered into a confidential contract specifying how CN would meet its obligations arising from the addition of the grain elevators in Saskatchewan and Alberta. Section 12.2 of the 1999 Contract specified that "[f]or the purposes of the Canada Transportation Act, this Agreement shall be deemed a Confidential Contract within the meaning of Section 126."

[6] During the 2013-2014 crop year, CN's capacity to meet its service obligations under the 1999 Contract was challenged by the combination of a bumper crop and an inordinately harsh winter which affected the length and frequency of CN trains arriving at LDC's grain elevators. CN was ultimately unable to meet LDC's demands for train cars for several weeks of the year.

[7] LDC sought an order from the Agency determining that CN had failed to satisfy its service obligations during the 2013-2014 crop year and compelling CN to fulfill those obligations. In responding to LDC's level of service complaint, CN did not challenge whether the 1999 Contract was a confidential contract within the meaning of subsection 113(4) of the Act.

[8] The Agency agreed with LDC (*Louis Dreyfus Commodities Canada Ltd. v. Canadian National Railway Company* (Case No. 14-02100, Oct 3, 2014)). In its decision, the Agency made two key findings. It concluded that the 1999 Contract was a "confidential contract" as contemplated by subsection 113(4) of the Act, and it concluded under paragraph 116(1)(*b*) that CN had breached its service obligations under the 1999 Contract.

[9] CN sought and was granted leave to appeal the Agency's decision to this Court under subsection 41(1) of the Act, which provides for appeals on questions of law or jurisdiction. CN did not challenge whether the 1999 Contract was a subsection 113(4) confidential contract, either in its Notice of Appeal or in its memorandum of fact and law. Only at the hearing of the appeal did CN raise the question whether the 1999 Contract was indeed such a contract.

[10] This Court dismissed CN's appeal (*Canadian National Railway Company v. Dreyfus*, 2016 FCA 232). In addressing CN's new argument that the 1999 Contract was not a confidential contract, this Court concluded that, absent an extricable question of law, whether the contract was a confidential contract within the meaning of subsection 113(4) of the Act was a mixed question of fact and law and could not be appealed under subsection 41(1).

[11] While awaiting the outcome of CN's appeal and armed with the Agency's determination that CN had breached its service obligations, LDC asserted its statutory cause of action for damages in the Federal Court under subsection 116(5) of the Act. In its Statement of Defence, CN pleaded that the Federal Court lacked jurisdiction to consider a claim in damages in connection with the 1999 Contract as this was purely a matter of contract outside of the Federal Court's statutory remit. It then moved to strike the statement of claim on this basis.

[12] The motion to strike was dismissed on the ground that it was not plain and obvious that CN's defence would succeed. The merits of CN's objection were then put before Roy J. for determination by way of summary trial.

[13] The judge observed that whether the 1999 Contract was a subsection 113(4) contract was the cornerstone of the Agency's decision and that this Court had refused to intervene in that finding. In the judge's view, "[t]he matter had been heard and decided". The judge then considered preliminary arguments advanced by LDC, including *res judicata*, abuse of process and collateral attack, but elected to deal with CN's jurisdictional defence on the merits.

[14] The trial judge, after a thorough analysis of the statutory regime, concluded that the Federal Court had jurisdiction to consider LDC's claim in damages on the basis that the 1999 Contract was a contract contemplated by subsection 113(4). In considering CN's argument that LDC's claim was for breach of contract, the judge stated, at paragraphs 86 and 87 of his reasons:

> [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 [sic] following a determination that the level of services obligations under federal legislation has not been met. …
>
> [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.

[15] On appeal, CN insists that as jurisdiction is in issue, it is entitled to raise the question whether the 1999 Contract is a subsection 113(4) confidential contract as a defence to LDC's

action under subsection 116(5). CN contends that its jurisdictional defence is not a collateral attack on the Agency's decision since it only seeks to attack the correctness of the factual basis on which the Agency's decision relied and "… is not seeking to invalidate the order granted in the Agency decision" (CN Memorandum of Fact and Law, para. 49). CN submits that the preconditions of issue estoppel are not established since the Agency's decision is subject to appeal and judicial review and is therefore not "final". CN also submits that it would be impractical and inefficient to require CN to seek judicial review of the Agency's decision or to petition the Governor in Council under section 40 of the Act to vary or rescind the Agency's order, some four years after the Agency decision.

[16] In response, LDC maintains its preliminary objections to CN's jurisdictional question. LDC argues that CN seeks to circumvent the effect of the Agency's order that the 1999 Contract falls within the ambit of subsection 113(4) of the Act and that CN had breached its service obligations as articulated in the 1999 Contract. It contends that this is a collateral attack on the Agency's decision and that CN is seeking to re-litigate the very issue that was before the Agency. It relies on the doctrine of issue estoppel. LDC also argues that CN's appeal amounts to an abuse of process, noting in particular that CN did not object to the characterization of the 1999 Contract in reply to LDC's initial level of service complaint to the Agency or in its written submissions to this Court in its appeal of the Agency's decision under subsection 41(1).

II. Analysis

[17] In *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52 at para. 34, [2011] 3 S.C.R. 422, the Supreme Court noted that the doctrines of collateral attack and *res judicata* share common underlying principles, which Abella J. summarized as follows:

> - It is in the interests of the public and the parties that the finality of a decision can be relied on […]
>
> - Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings […]
>
> - The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanisms that are intended by the legislature […]
>
> - Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision […]
>
> - Avoiding unnecessary relitigation avoids an unnecessary expenditure of resources […]
>
> [Citations omitted.]

[18] CN's Statement of Defence engages these principles. CN's challenge to the jurisdiction of the Federal Court to hear LDC's claim for damages is an attempt to circumvent the mechanisms established by Parliament for the review of Agency decisions, and therefore constitutes a collateral attack on the Agency's decision.

[19] The mechanisms for review of an Agency decision are set out in sections 40 and 41 of the Act. Subsection 41(1) relates to appeals to this Court:

Appeal from Agency	**Appel**

41(1) An appeal lies from the Agency to the Federal Court of Appeal on a question of law or a question of jurisdiction on leave to appeal being obtained from that Court on application made within one month after the date of the decision, order, rule or regulation being appealed from, or within any further time that a judge of that Court under special circumstances allows, and on notice to the parties and the Agency, and on hearing those of them that appear and desire to be heard.	**41(1)** Tout acte — décision, arrêté, règle ou règlement — de l'Office est susceptible d'appel devant la Cour d'appel fédérale sur une question de droit ou de compétence, avec l'autorisation de la cour sur demande présentée dans le mois suivant la date de l'acte ou dans le délai supérieur accordé par un juge de la cour en des circonstances spéciales, après notification aux parties et à l'Office et audition de ceux d'entre eux qui comparaissent et désirent être entendus.

[20] Section 40 affords recourse to the Governor in Council:

Governor in Council may vary or rescind orders, etc.	**Modification ou annulation**
40 The Governor in Council may, at any time, in the discretion of the Governor in Council, either on petition of a party or an interested person or of the Governor in Council's own motion, vary or rescind any decision, order, rule or regulation of the Agency, whether the decision or order is made *inter partes* or otherwise, and whether the rule or regulation is general or limited in its scope and application, and any order that the Governor in Council may make to do so is binding on the Agency and on all parties.	**40** Le gouverneur en conseil peut modifier ou annuler les décisions, arrêtés, règles ou règlements de l'Office soit à la requête d'une partie ou d'un intéressé, soit de sa propre initiative; il importe peu que ces décisions ou arrêtés aient été pris en présence des parties ou non et que les règles ou règlements soient d'application générale ou particulière. Les décrets du gouverneur en conseil en cette matière lient l'Office et toutes les parties.

[21] As noted above, this Court previously determined that, as no extricable question of law was identified, the Agency's conclusion that the 1999 Contract was a confidential contract could not be challenged on an appeal under section 41. Subsequent to that decision, in *Canadian National Railway Company v. Scott*, 2018 FCA 148 (*Scott*), this Court held that questions that

are the proper subject either of an appeal to the Court under subsection 41(1) of the Act, or an appeal to the Governor in Council under section 40, are not also open to challenge by way of an application for judicial review.

[22] LDC contends that the decision in *Scott* (which had not been decided when the trial judge rendered his decision) is dispositive of this appeal. I agree.

[23] In *Scott*, CN sought to judicially review a decision of the Agency with respect to excessive noise levels. As the noise levels and their compliance with regulatory requirements was a question of fact, the Agency decision was not appealable to the Federal Court of Appeal under section 41. Nor was judicial review of the Agency's decision available, because CN had an adequate, alternative remedy by way of an appeal under section 40 to the Governor in Council, whose decision would itself then be subject to judicial review. After a thorough review of the recourse mechanisms established by the Act, Nadon J.A. wrote:

> [56] It follows from the Supreme Court's decision in Canadian Railway SCC, that there is a meaningful acceptable alternate remedy open to CN to challenge factual findings and determinations made by the Agency. It also follows from Canadian Railway SCC that decisions made by the Governor in Council under section 40 are adjudicative decisions which are subject to judicial review before the Federal Court whose decisions can be appealed to this Court.

[24] CN argued before the Federal Court that it could have brought an application for judicial review of the Agency's decision, and so it had the right to raise the same issues in its defence to LDC's action for damages. However, the premise is incorrect. *Scott* makes it clear that the recourse provided by Parliament was to petition the Governor in Council. CN cannot, in effect, by conducting what amounts to a judicial review or appeal of the Agency decision in defence of

the Federal Court damages proceedings, by-pass the route that Parliament has laid out for determining this type of issue. Whether a petition to the Governor in Council is the most efficient means or best forum for resolving issues of this nature is not for this Court to decide – at this point it is the only recourse available whereby CN can challenge the Agency's decision that the 1999 Contract was a subsection 113(4) confidential contract.

[25] I do not accept the argument that given the inherent limitation of a petition to the Governor in Council, a jurisdictional challenge in the Federal Court is CN's only effective means to challenge the Agency's decision that the agreement was a confidential contract. The decisions of this Court in *Canadian National Railway Company v. Viterra Inc.*, 2017 FCA 6 at paragraph 58, 410 D.L.R. (4th) 128, *Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 79 at paragraph 26 and *Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 86 at paragraph 17, demonstrate that Agency determinations concerning confidential contracts can be challenged on appeal to this Court, provided a question of law can be identified.

[26] I turn to the second reason why CN's argument fails – collateral attack.

[27] There is no question, having regard to the legislative scheme and the history of the proceedings, that CN's jurisdictional objection is a collateral attack on the Agency's decision that CN was in breach of its section 113 service obligations as specified in the 1999 Contract. The Agency's determination is the legal and factual 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.*, [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).

[28] CN's defence in the Federal Court action is a direct attack on the decision of the Agency that the 1999 Contract was a confidential contract within the scope of subsection 113(4) and that CN was in breach of its service obligations for failing to fulfill its terms. Indeed, CN argues that its "jurisdictional defence is premised on the fact that the Agency Decision is wrong." (CN Memorandum of Fact and Law, para. 42). This was a decision for the Agency to make, and absent the identification of an extricable question of law or jurisdiction, its decision in this regard was binding on the parties, subject only to review by the Governor in Council. Absent Governor in Council review, the Federal Court was entitled, indeed required, to accept the Agency's determination that CN had breached its section 113 service obligations specified in the contract. This is the scheme that Parliament has designed.

[29] As noted, CN did not challenge the 1999 Contract when it responded to LDC's level of service complaint before the Agency. CN did not challenge this decision in its Notice of Appeal under section 41 or in its memorandum of fact and law. To the contrary, in its pleading before this Court in the first appeal, CN accepted that "…at all relevant times, the level of service owed to LDC by CN was provided for in a confidential written agreement" (CN Memorandum of Fact

and Law in the section 41 appeal, para. 6). Indeed, CN's section 41 appeal was premised on the applicability of the 1999 Contract to the Agency's assessment of CN's service obligations.

[30] While CN contends that it "has no interest in obtaining an order quashing the Agency Decision" (CN Memorandum of Fact and Law, para. 52), it, of necessity, seeks to do so because the Agency's decision is the foundation for the statutory cause of action. It is difficult, if not impossible, to reconcile CN's argument with its repeated insistence that the Agency "erred" or "was wrong" in concluding that CN breached its service obligations set forth in the 1999 Contract: see, for example, paragraph 45 ("a false finding"), paragraph 60 ("[it] is not an agreement within the meaning of subsection 113(4)"), and language to similar effect at paragraphs 79, 82, 85 and 87 of CN's Memorandum of Fact and Law. CN's objection falls squarely within the Supreme Court's description of a collateral attack as it is seeking to "avoid the consequences of the [ministerial] order issued against it" (*Garland v. Consumers' Gas Co*., 2004 SCC 25 at para. 72, [2004] 1 S.C.R. 629).

[31] CN argues that it can challenge the Agency's decision in the Federal Court damages action without having to set it aside. In support, it points to *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R 585 (*TeleZone*). *TeleZone* does not assist the appellant. To the contrary, *Telezone* brings into sharper relief the conclusion that CN's jurisdictional challenge is a transparent collateral attack on the Agency's decision.

[32] In *TeleZone*, the Supreme Court of Canada held that an action in tort or breach of contract could proceed against the federal Crown without the aggrieved party first having to set

aside the decision or order in question. In *TeleZone*, and critical to the decision of the Court, the party was content to let the administrative decision in question remain in place. As noted by the Court, *TeleZone*'s action in contract and tort for damages did not challenge the Governor in Council's decision denying it telecommunication licences. *TeleZone* did not "seek to deprive the Minister's decision of any legal effect" (*TeleZone* at para. 79).

[33] As I have described, the only purpose of CN's defence to LDC's subsection 116(5) damages action, in its own language, is to "correct" the Agency's decision that it was in breach of its service obligations, a ruling which it contends is "wrong": see paragraphs 28-30, above. CN's argument attempts, in the language of *Telezone*, to deprive the Agency's decision of legal effect.

[34] In conclusion, and consistent with the reasons of this Court in *Scott*, I refrain from commenting on the Federal Court judge's interpretation of the contract. It is unnecessary to do so, and I would not want to fetter or influence how the Governor in Council might exercise its discretion, should CN pursue that avenue of recourse.

[35] I would dismiss the appeal, with costs.

"Donald J. Rennie"
J.A.

"I agree
Wyman W. Webb J.A."

"I agree
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE FEDERAL COURT DATED AUGUST 24, 2017, DOCKET NUMBER t-1292-15 (2017 FC 783)

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