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2022 FCA 96

**CSX Transportation, Inc. (Appellant)**

v.

**ABB Inc. and Canadian National Railway Company (Respondents)**

**INDEXED AS: CSX TRANSPORTATION, INC. v. ABB INC.**

Federal Court of Appeal, Stratas, Rennie and Laskin JJ.A.—By videoconference;  
Toronto, May 31, 2022.

*Administrative Law — Procedural fairness — Appeal from Federal Court decision finding, among other things, that appellant was liable under Civil Code of Québec in action for damages by respondent ABB Inc. — ABB Inc., a Quebec manufacturer, retained respondent Canadian National Railway Company (respondent) to ship generator to Kentucky — Respondent handled rail transportation in Canada while it retained appellant to handle rail transportation in United States — Appellant is Virginia corporation headquartered in Florida — Generator damaged by appellant in U.S. while being transported — ABB Inc. sued respondent, appellant — Appellant appealed Federal Court's decision on number of grounds, in particular that Federal Court not respecting procedural fairness — Whether there was breach of procedural fairness in this case — Breach of procedural fairness took place in this case, in particular, since ABB Inc. not pleading that appellant liable in any way under Civil Code — While Federal Court not erring in raising with parties question of whether they had overlooked Civil Code, to fulfil procedural fairness obligations, it had to be more specific about its concerns or put specific propositions to parties so that they could debate them in an informed way — Given procedural fairness shortcomings in this case, Federal Court's verdict on issue of appellant's liability was unsafe — Therefore, Federal Court's judgment against appellant set aside; new trial in Federal Court ordered before another judge — Appeal allowed.*

*Transportation — Federal Court finding, among other things, that appellant was liable under Civil Code of Québec in action for damages by respondent ABB Inc. — ABB Inc., a Quebec manufacturer, retained respondent Canadian National Railway Company (respondent) to ship generator to Kentucky — Respondent handled rail transportation in Canada but retained appellant to handle rail transportation in United States — Generator damaged by appellant in U.S. while being transported — ABB Inc. sued respondent, appellant — Appellant appealed Federal Court's decision — Breach of procedural fairness took place in this case, in particular, ABB Inc. not pleading that appellant liable in any way under Civil Code; Federal Court not inviting specific submissions on whether Civil Code could apply on facts of case in light of provisions of Canada Transportation Act — To fulfil procedural fairness obligations, Federal Court had to be more specific about its concerns or put specific propositions to parties so that they could debate them in informed way — Given procedural fairness shortcomings in this case, Federal Court's verdict on issue of appellant's liability*

was unsafe.

*Railways — Federal Court finding, among other things, that appellant was liable under Civil Code of Québec in action for damages by respondent ABB Inc. — ABB Inc., a Quebec manufacturer, retained respondent Canadian National Railway Company (respondent) to ship generator to Kentucky — Respondent handled rail transportation in Canada but retained appellant to handle rail transportation in United States — Generator damaged by appellant in U.S. while being transported — ABB Inc. sued respondent, appellant — Appellant appealed Federal Court's decision — Breach of procedural fairness took place in this case, in particular, given that Federal Court not inviting specific submissions on whether Civil Code could apply on facts of case in light of provisions of Canada Transportation Act, Railway Traffic Liability Regulations — To fulfil procedural fairness obligations, Federal Court had to be more specific about its concerns or put specific propositions to parties so that they could debate them in informed way — Given procedural fairness shortcomings in this case, Federal Court's verdict on issue of appellant's liability was unsafe.*

*Civil Code — Federal Court finding, among other things, that appellant was liable under Civil Code of Québec in action for damages by respondent ABB Inc. (ABB Inc.) — ABB Inc., a Quebec manufacturer, retained respondent Canadian National Railway Company (respondent) to ship generator to Kentucky — Respondent handled rail transportation in Canada but retained appellant to handle rail transportation in United States — Generator damaged by appellant in U.S. while being transported — ABB Inc. sued respondent, appellant — Appellant appealed Federal Court's decision — Breach of procedural fairness took place in this case, in particular, since ABB Inc. not pleading that appellant liable in any way under Civil Code; pleadings not suggesting that governing law was that of Quebec; Federal Court raised by itself possibility of liability of respondent, appellant under Civil Code but did this in vague, general way — To fulfil procedural fairness obligations, Federal Court had to be more specific about its concerns or put specific propositions to parties so that they could debate them in informed way — Given procedural fairness shortcomings in this case, Federal Court's verdict on issue of appellant's liability was unsafe.*

This was an appeal from a Federal Court decision finding, among other things, that the appellant was liable under the *Civil Code of Québec* in an action for damages by the respondent ABB Inc.

ABB Inc., a Quebec manufacturer, retained the respondent Canadian National Railway Company (respondent) to ship a generator to Kentucky. The respondent handled the rail transportation in Canada. It retained the appellant to handle the rail transportation in the United States. There was no contractual relationship between ABB Inc. and the appellant. The appellant had no knowledge of the arrangements between the respondent and ABB Inc. The appellant is a Virginia corporation headquartered in Florida. While the generator was being transported by the appellant in the United States, it was damaged. ABB Inc. sued both the respondent and the appellant. The appellant appealed the Federal Court's decision on a number of grounds. One ground was that the Federal Court did not respect procedural fairness. The appellant said it was taken by surprise by the Federal Court's finding that it was liable under the Civil Code.

The issue was whether there was a breach of procedural fairness in this case.

*Held*, the appeal should be allowed.

A breach of procedural fairness took place in this case. In particular, ABB Inc. did not plead that the appellant was liable in any way under the Civil Code. The pleadings did not suggest that the governing law was that of Quebec; during the trial the Federal Court raised by itself the possibility of liability of the respondent and the appellant under the Civil Code but did this in only a vague and general way; the Federal Court did not invite specific submissions on whether the Civil Code could apply on the facts of the case in light of the provisions of the *Canada Transportation Act* and the *Railway Traffic Liability Regulations*. In the end, the Federal Court found the appellant liable under the Civil Code. It appeared to have assumed that, as a matter of private international law, the Civil Code could apply to the appellant, a foreign entity operating entirely outside Canada without any contractual or other relationship with ABB Inc..

A court has an obligation to decide cases on all relevant law. Thus, the Federal Court did not err in raising with the parties the question whether they had overlooked the Civil Code. However, to fulfil the obligations of procedural fairness, the Federal Court had to be more specific about its concerns or put specific propositions to the parties so that they could debate them in an informed way. Without having to flesh out the issues in much detail for the parties, the Federal Court had to flag the issues with enough particularity to facilitate the making of submissions. Given the procedural fairness shortcomings in this case, the Federal Court's verdict on the issue of the appellant's liability was unsafe. Further, had the issues between the parties been fully defined and clear, the appellant might have taken different tactical and evidentiary steps in the case. These could well have affected the outcome of the case.

Therefore, the judgment of the Federal Court against the appellant was set aside, and, as the whole proceeding was tainted by procedural unfairness as far as the appellant was concerned, a new trial in the Federal Court was ordered concerning the appellant's liability and any related or consequential issues before another judge of the Federal Court.

#### STATUTES AND REGULATIONS CITED

*Civil Code of Québec*, CQLR, c. CCQ-1991.

*Canada Transportation Act*, S.C. 1996, c. 10.

*Railway Traffic Liability Regulations*, SOR/91-488.

#### CASES CITED

##### REFERRED TO:

*Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40, [2003] 2 S.C.R. 63; *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74, 157 O.A.C. 203 (C.A.); *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689; *Pinder Jr. v. Canada*, 2016 FCA 317; *Tervita Corporation v. Commissioner of Competition*, 2013 FCA 28, [2014] 2 F.C.R. 352, 360 D.L.R. (4th) 717, rev'd on other grounds, 2015 SCC 3, [2015] 1 S.C.R. 161.

APPEAL from a Federal Court decision (2020 FC 817, [2020] 4 F.C.R. 303) finding, among other things, that the appellant was liable under the *Civil Code of Québec* in an action for damages brought by the respondent ABB Inc. Appeal allowed.

#### APPEARANCES

*Christopher Hubbard* and *Gabrielle Schachter* for appellant.

*Ryan R. Lee* and *Thomas Hanson* for respondent Canadian National Railway Company.

#### SOLICITORS OF RECORD

*McCarthy Tétrault LLP*, Toronto, for appellant.

*Watson Goepel LLP*, Vancouver, for respondent Canadian National Railway Company.

*The following are the reasons for judgment and judgment rendered in English by*

STRATAS J.A.:

[1] The appellant, CSX Transportation, Inc. [CSXT], appeals from the judgment of the Federal Court (*per* Grammond J.): 2020 FC 817.

[2] A Quebec manufacturer, ABB Inc., retained the respondent Canadian National Railway Company [CN] to ship a generator to Kentucky. CN handled the rail transportation in Canada. CN retained CSXT to handle the rail transportation in the United States. There was no contractual relationship between ABB Inc. and CSXT. CSXT had no knowledge of the arrangements between CN and ABB Inc. CSXT is a Virginia corporation headquartered in Florida.

[3] While the generator was being transported by CSXT in the United States, it was damaged. ABB Inc. sued both CN and CSXT. The Federal Court, among other things, found CSXT liable under the *Civil Code of Québec*, CQLR, c. CCQ-1991.

[4] In this Court, CSXT appeals on a number of grounds. One ground is that the Federal Court did not respect procedural fairness. CSXT says it was taken by surprise by the Federal Court's finding that it was liable under the Civil Code.

[5] We agree with CSXT that a breach of procedural fairness took place in this case. Thus, the appeal must be allowed.

[6] The following circumstances, taken together, lead us to the conclusion that there was a breach of procedural fairness:

- ABB Inc. did not plead that CSXT was liable in any way under the Civil Code. The pleadings did not suggest that the governing law was that of Quebec. The pleadings were never amended, no party sought to amend the pleadings, and the Federal Court did not raise the issue of the pleadings. While there are circumstances where courts and parties can proceed with issues outside of the scope of the pleadings, the failure to amend the pleadings can result in uncertainty about precisely which issues are on or off the table. That was the case here, especially in light of the following events.
- During the trial the Federal Court raised by itself the possibility of liability of CN and CSXT under the Civil Code. But it did this in only a vague and general way, going no further than asking whether the Civil Code had any bearing on the matter. The Federal Court never put to the parties any particular theory of liability under the Civil Code or provide any particulars of what it had in mind. It never explicitly asked the parties to make submissions on how CSXT could be liable under the terms of the Civil Code.
- The Federal Court did not invite submissions on choice of law and private international law and, in particular, on the issue whether the Civil Code—Quebec legislation—could apply to CSXT, an entity resident in the United States and an entity that had no contractual relationship with ABB Inc. For example, having had no notice of the issue, the parties did not address with specificity or at all the limits of extra-territorial application of provincial laws: see *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40, [2003] 2 S.C.R. 63.

- The Federal Court did not invite specific submissions on whether the Civil Code could apply on the facts of the case in light of the provisions of the *Canada Transportation Act*, S.C. 1996, c. 10 and the *Railway Traffic Liability Regulations*, SOR/91-488, interpreted in accordance with their text, context and purpose, and whether they ousted the Civil Code. Nor did it invite submissions on whether CSXT was an “implied party” or other issues under the Civil Code. It just expressed an interest in the Civil Code and how it might interact with this case. The parties were left virtually to guess about what exactly should be argued under the Civil Code.
- At the behest of the parties near at the end of the trial, the Federal Court called for supplementary written submissions. Later, counsel for CN was unclear as to what aspects of the Civil Code were in play for the purposes of those submissions and sought clarification and particulars from the Federal Court: Appeal Book, page 88. Importantly, this was a sign that, at this late stage, the parties were unclear as to what exactly was in issue and what should be argued.
- Most significantly, the Federal Court responded in a way that did not assist the parties or clarify any lack of clarity (Appeal Book, page 91):

With respect to CN's request for clarification, the Court's understanding is as follows. At the hearing, the Court asked the parties whether they had considered that the Civil Code of Quebec could govern certain aspects of the case. As a result, CN asked for the opportunity to make supplementary written submissions. It should be emphasized that in asking that question, the Court did not intend to express a preliminary opinion on the matter not to direct the parties as to how they should argue their case. Nevertheless, if that may be of assistance, the Court's question was not limited to any specific aspect of the case.

- The Federal Court did not give notice of any related issues such as private international law, the applicability of the Civil Code in light of specific provisions of the *Canada Transportation Act*, or any other related issues.
- Thus, without clarification in the pleadings or from the Federal Court, all the parties could do is take a stab at the matter.
- In the end, in extensive reasons the Federal Court found CSXT liable under the Civil Code. The Federal Court appears to have assumed that, as a matter of private international law, the Civil Code could apply to CSXT, a foreign entity operating entirely outside Canada without any contractual or other relationship with ABB Inc.

[7] A court has an obligation to decide cases on all relevant law. Thus, the Federal Court did not err in raising with the parties the question whether they had overlooked the Civil Code.

[8] However, to fulfil the obligations of procedural fairness, the Federal Court had to be more specific about its concerns or put specific propositions to the parties so that they could debate them in an informed way. To do this, it had to invite submissions on the particular issues in the Civil Code it was concerned about, including the applicability

of the Civil Code under private international law and its applicability in the face of provisions of the Canada Transportation Act.

[9] The Federal Court need not have fleshed out the issues for the parties in much detail at all. Rather, it only had to flag the issues with enough particularity to facilitate the making of submissions. On procedural fairness in this context, see *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74, 157 O.A.C. 203 (C.A.); the comments of the Supreme Court in *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689 concerning procedural fairness concerning new issues in appeal courts are also helpful to first-instance courts.

[10] Given the procedural fairness shortcomings in this case, we consider the Federal Court's verdict on the issue of CSXT's liability to be unsafe. The parties tried their best to anticipate what was of concern regarding the Civil Code and related issues. Even then, the parties' submissions on the applicability of the Civil Code were sparse at best and did not address larger issues of private international law. Had the Federal Court received fully informed submissions on all relevant issues, the submissions and the outcome might have been different. Indeed, we cannot rule out the possibility that if the Federal Court had put specific concerns to the parties, the parties might have decided to file additional evidence or file additional authorities.

[11] Further, had the issues between the parties been fully defined and clear, CSXT might have taken different tactical and evidentiary steps in the case. These could well have affected the outcome of the case.

[12] As long as procedural fairness is afforded to the parties, a court can consider issues that have to be decided even though they have not been pleaded: *Pinder Jr. v. Canada*, 2016 FCA 317; *Tervita Corporation v. Commissioner of Competition*, 2013 FCA 28, [2014] 2 F.C.R. 352, 360 D.L.R. (4th) 717, at paragraph 72, rev'd on other grounds, 2015 SCC 3, [2015] 1 S.C.R. 161. However, now that additional issues are in play, we consider it advisable for the parties to amend their pleadings in the Federal Court in order to embrace these issues.

[13] Therefore, we will allow the appeal with costs, set aside the judgment of the Federal Court against CSXT, and, as the whole proceeding is tainted by procedural unfairness as far as CSXT is concerned, order a new trial in the Federal Court concerning CSXT's liability and any related or consequential issues before another judge of the Federal Court. The last-mentioned component of our judgment is necessary because the judge who issued the judgment of the Federal Court has already expressed his views on some of the issues.

[14] In retrying the matter, the Federal Court should not consider itself bound or influenced, one way or the other, by the Federal Court's reasons for judgment in this case on the issues affecting the liability of CSXT, including the Civil Code issues and whether the Civil Code can even apply in the first place. These issues as against CSXT should be regarded as unresolved. They should be given an independent, fresh look, informed by the submissions of the parties.