Date: 19980626 Docket: C.A. 145672

NOVA SCOTIA COURT OF APPEAL

Cite as: Canadian National Railway Company v. Sydney Steel Corporation, 1998 NSCA 138

Freeman, Hallett and Cromwell, JJ.A.

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY	)	Robert G. Belliveau, Q.C.
&	)	Michelle C. Award
Appellant	)	for the Appellant
- and -	)	
	)	David A. Miller, Q.C. &
	)	Nancy I. Murray
SYDNEY STEEL CORPORATION	)	
for the Respondent	)	
Respondent	)	Appeal Heard:
	)	June 12, 1998
	)	Judgment Delivered:
	)	June 26, 1998

THE COURT: Appeal dismissed per reasons for judgment of Cromwell, J.A.; Hallett and Freeman, JJ.A. concurring.

CROMWELL, J.A.:

I. Introduction:

Sysco contracted with CNR to supply rails for 1996. There is a dispute between them about whether the rails were of the stipulated quality. Actions arising from this dispute have been commenced in Nova Scotia and Quebec. In the Nova Scotia action, which was commenced first, Sysco, as plaintiff, claims against CNR as defendant, for unpaid invoices, loss of profit on the balance of the rails contracted for, damages for injury to its commercial reputation and further relief. In the Quebec action, CNR, as plaintiff, alleges breach of contract by Sysco, the defendant, and claims damages for the cost of removal and replacement of rails already in service which had been supplied under the contract.

Sysco brought an application in the Quebec Superior Court to stay or dismiss CNR's Quebec action on the basis of *forum non conveniens* and *lis alibi pendens*. The Court dismissed the application. Tannenbaum, J. of the Superior Court concluded that, apart from the issue of what law applies to the contract, "... both jurisdictions are equally suited to try the issues". He also decided, applying Article 3114 of the **Civil Code**, that the contract was governed by Quebec law. Being of the view that the "law of the jurisdiction that is applicable should ... determine which jurisdiction is more suitable or convenient", he therefore concluded that Quebec was the more convenient forum and dismissed Sysco's application. This decision was upheld by the Quebec Court of Appeal.

CNR brought an application before Hood, J. in Chambers in the Supreme Court of Nova Scotia to stay Sysco's Nova Scotia action on the basis that Nova Scotia is not the convenient forum. She decided that CNR had not established that Quebec is the more convenient forum. CNR now seeks leave to appeal from Hood J's decision to this Court. The issue raised is whether Hood, J. made any reviewable error in refusing to stay the Nova Scotia action.

II. Analysis:

The order which gives rise to this appeal is an interlocutory, discretionary order. This Court will set it aside only if persuaded that the learned Judge applied a wrong principle of law or that the order gives rise to an injustice: see **Exco Corp. v. Nova Scotia Savings & Loan Co.** (1983), 59 N.S.R. (2d) 77 (N.S.S.C. A.D.)

The principles about when a court ought to stay proceedings on the basis of *forum non conveniens* are well established. They have been enunciated recently by both the Supreme Court of Canada and this Court: see **Amchem Products Inc. v. Workers' Compensation Board** , [1993] 1 S.C.R. 897; **Wall v. 679927 Ontario Ltd. et al** (1997), 156 N.S.R. (2d) 360 (N.S.C.A.); **Dennis v. Salvation Army Grace General Hospital Board et al** (1997), 156 N.S.R. (2d) 372 (N.S.C.A.). In the words of Justice Sopinka in **Amchem**, ".... the existence of a more appropriate forum **must be clearly established to displace the forum** selected by the plaintiff." (at p. 921) At another point in his reasons, Justice Sopinka stated that it must be

established **that "another forum .... is clearly more appropriate**." (p. 931). The question before Hood, J. was whether CNR had discharged this burden and shown that Quebec was clearly the more appropriate forum.

The *forum conveniens* analysis, properly applied in two different *fora*, may result in the conclusion that one forum is not clearly more appropriate than the other. In **Amchem**, Justice Sopinka specifically referred to this possibility and assumed that the practical problems flowing from it would either be resolved by the parties or by the judgment of the first Court to make a final decision on the merits. He said, at p. 914:

> In some cases, both jurisdictions would refuse to decline jurisdiction as, for example, where there is no one forum that is clearly more appropriate than another. The consequences would not be disastrous. If the parties chose to litigate in both places rather than settle on one jurisdiction, there would be parallel proceedings, but since it is unlikely that they could be tried concurrently, the judgment of the first court to resolve the matter would no doubt be accepted as binding by the other jurisdiction in most cases.

CNR's submissions on the appeal have two main thrusts. The first is that Hood, J. committed reviewable errors in her assessment of the evidence, particularly that relating to the comparative scope of the two actions and to the juridical advantage of more extensive discovery in Nova Scotia. The second thrust

is that, quite apart from the arguments just described, Sysco is bound by the factual and legal conclusions reached by the Quebec Courts and those findings compel the Nova Scotia courts, through the operation of the principles of issue estoppel or comity, to find that Quebec is the more convenient forum.

Turning to the first group of submissions, the appellant argues that the Chambers judge erred in concluding that: “the breadth of the proceedings is no greater in one jurisdiction than the other ...”. Both actions arise out of alleged breaches of the same contract. The damages claimed in the Quebec action are significantly greater than those claimed in the Nova Scotia action. However, the Nova Scotia proceedings could easily encompass the claims made in the Quebec action because they could be asserted by way of counterclaim in the Nova Scotia proceedings. Accordingly, even if the learned Chambers judge misapprehended the scope of the two actions as they are presently framed, I do not think that this consideration could or should have affected her conclusion on the overall issue of convenience.

The appellant also submits that the learned Chambers judge erred in concluding that the respondent would lose a juridical advantage if the Nova Scotia action were to be stayed, particularly that the scope of discovery in Nova Scotia is broader than in Quebec. Both parties have assumed that the scope of discovery is capable of being a judicial advantage if established on the facts. The evidence before the Chambers judge supports the conclusion that broad discovery is

especially important to Sysco in these proceedings. No similar claim is made by CNR. The evidence also supports her conclusion that the rights of discovery in Nova Scotia are broader than those in Quebec. The Chambers judge did not err in this respect.

I now turn to the second group of arguments relating to issue estoppel and comity.

CNR submits that the Quebec decisions in this case settle three issues relevant to the *forum conveniens* question because Sysco is bound by those findings according to the principle of issue estoppel. These findings are submitted to be that there is no juridical advantage in pursuing the action in Nova Scotia, that the contract was concluded in Quebec and that Quebec law applies to this contract.

Counsel were unable to refer us to any case holding that findings of a court in another jurisdiction are binding on the domestic court when exercising its discretionary authority to decline jurisdiction on the basis of *forum non conveniens*. I have a serious question in my mind whether issue estoppel applies at all when courts in different jurisdictions are applying a balancing test such as this for the purpose of determining their own exercise of jurisdiction. It does appear to be clear, for example, that in the context of recognition of judgments from other jurisdictions, the receiving court is to apply its own conflict of law principles and make its own determination about the jurisdiction of the other court. see: James G. MacLeod, **The**

Conflict of Laws (1983), at p. 602 and J.-G. Castel, **Canadian Conflict of Laws**, (4th, 1997) at para. 155. I am inclined to the view that the same approach should be taken to the discretionary authority to decline jurisdiction. I also doubt that issue estoppel should be applied where, as here, the nature of the claims asserted in the two actions, while arising from the same contract, is nonetheless significantly different.

There is authority for the proposition that findings on interlocutory applications relating to jurisdiction are not binding on the parties in proceedings in another jurisdiction. In **Morse Typewriter Co. v. Cairns** (1992), 7 C.P.C. (3d) 136 (Ont. Ct. Gen. Div.), MacDonald, J. held that findings of a New York Court in interlocutory proceedings relating to its jurisdiction did not give rise to issue estoppel in related Ontario proceedings. She said at p. 140:

> .....The factual findings of the learned District Judge in the New York action were for the purpose of appraising jurisdictional issues. As the Alberta Court of Appeal held in *Talbot v. Pan Ocean Oil Corp* (1977), 4 C.P.C. 107, 3 Alta. L.R. (2d) 354, 5 A.R. 361 [at p. 114 C.P.C.]:
>
> > "Leaving aside special situations, interlocutory applications, in general, are not designed nor intended to adjudicate finally on issues of fact or law raised by the pleadings in an action. Rather, they have to do with some aspect of bringing such issues to trial."

See also **Bluewater Agromart Ltd. v. Paul's Machine and Wedding Corp.** (1993), 16 O.R. (3d) 404 (Gen. Div.) at p. 408.

In **Coughlan v. Westminer Canada Holdings Ltd.** (1991), 105 N.S.R. (2d) 68 (S.C.T.D.) there was no suggestion that the findings of an Ontario Court concerning certain alleged juridical advantages were binding on the parties before the Nova Scotia Courts considering a stay application.

The practical difficulties of acceding to CNR's argument are illustrated by the present case. It would seem, for example, that the Quebec Courts applied a different test to the forum conveniens question than would be applied in common law Canada. Tannenbaum, J. stated that the issue before him was "...which of the two Courts [i.e. those of Quebec or Nova Scotia] are better suited and more convenient." In this Province and throughout common law Canada by virtue of the **Amchem** decision, that is not the test. It is, as noted above, whether the moving party has clearly demonstrated that the other jurisdiction is plainly more convenient. I mention this only as an example of the difficulty with the proposition that issue estoppel applies in this context. I do not think, however, that it is necessary to decide the point in this case for the following reason.

The Quebec Courts have held that, apart from the consideration of which law is applicable to the contract, both jurisdictions are equally convenient. I will assume, for the purposes of this part of my analysis, that that conclusion should be accepted by the Nova Scotia Courts. However, no matter what the correct position is with respect to issue estoppel on the other questions, I am of the view that it

cannot apply to the choice of law issue for two reasons.

Issue estoppel applies when the same issue has been finally determined between the same parties. It cannot apply here, in my opinion, because the Quebec Courts did not address the same issue in this respect as is before the Nova Scotia Courts and because the Quebec decision on choice of law was not final because it is not binding on a Quebec trial judge dealing with that issue.

The choice of law issue in Quebec is not the same issue as in Nova Scotia because the underlying legal principles applicable are not the same. From my review of the reasons of Justice Tannenbaum in the Superior Court, which were affirmed by the Court of Appeal for Quebec, it appears that his conclusion that Quebec law governs this contract was dictated by provisions of the **Civil Code of Quebec**. Different common law principles will come into play in determining that issue in litigation in Nova Scotia.

In common law Canada, a determination for the purposes of an interlocutory application of the law governing a contract is not binding on the trial judge hearing the action: see **CanadianOxy Holdings Inc. v. Gerling Global General Insurance Co.** (1997), 11 C.P.C. (4th) 356 (Alta. C.A.). There is no evidence before us that the rule is different in Quebec. It must be assumed, therefore, that the finding of the Quebec Courts concerning choice of law on an

interlocutory application is not a final determination of that issue because it would be open to the judge at trial in Quebec to make his or her own determination of that question. Not being a final decision, it does not give rise to issue estoppel. I, therefore, conclude that for the purposes of litigation in Nova Scotia, Sysco is not precluded by the Quebec holding from arguing that Quebec law does not apply if the action proceeds in this province.

Assuming, contrary to Sysco's position and the findings of Hood, J. that the factors are otherwise evenly balanced, the question then becomes whether the choice of law consideration would affect Hood, J.'s conclusion having regard to the onus as described in **Amchem**. I do not think it could. The learned judge held that it was not appropriate to determine the applicable law on the interlocutory application before her and even if Quebec law applied, it was not a significant factor in the overall assessment of convenience. I am not persuaded that in reaching either of these conclusions, Hood, J. made any error in principle or that her decision gives rise to an injustice.

That being so, I conclude that even if the findings of the Quebec Courts, other than on the question of choice of law, are binding on the parties in the Nova Scotia proceedings (and I make no such finding), the result is that the balance of convenience would be considered equal. The Quebec holding with respect to choice of law is not binding and there is no basis for interfering with Hood, J.'s decision that the choice of law issue is not significant from the point of view of

overall assessment of inconvenience. Even on this assumption there is no clear balance of convenience in favour of Quebec, and accordingly, CNR's application was rightly dismissed.

The appellant further submits that the Chambers judge erred in failing to recognize or apply the principle of comity in the circumstances of this case. I do not accept this submission. The reasons of Justice Sopinka in **Amchem** make it clear that there is no failure to adhere to the principle of comity when two courts conclude on the basis of similar considerations and principles that more than one forum is convenient. As Justice LaForest put it in **Morguard Investments Ltd. v. DeSavoye**, [1990] 3 S.C.R. 1077 at 1096, comity "... is the recognition which one nation [or jurisdiction] allows within its territory to the ... judicial acts of another ..." [Emphasis added] In my view, there is no failure to give effect to the principle of comity where two jurisdictions that are convenient conclude that differently framed actions in both jurisdictions may continue. The principle of *forum conveniens* may itself be considered as an expression of comity to the extent that a court with jurisdiction over the case will decline to exercise it where another court is clearly more convenient. To the extent, if any, that comity is relevant to the question beyond that, it would seem that if any deference is to be shown, it would be to the jurisdiction in which proceedings were first commenced, in this instance Nova Scotia: see **The Abidin Daver** [1984] 1 Lloyd's Law Reports 339 per Lord Diplock at 344.

III. Disposition:

For these reasons, I would dismiss the appeal with costs fixed at $1500 plus reasonable disbursements payable forthwith.

Cromwell, J.A.

Concurred in:

Hallett, J.A.

Freeman, J.A.

C.A. No.145672

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY	)	
	)	
Appellant	)	
- and -	)	REASONS FOR JUDGMENT BY:
	)	
SYDNEY STEEL CORPORATION	)	
	)	CROMWELL, J.A.
	)	
Respondent	)	
	)	
	)	
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