

Federal Court



Cour fédérale

Date: 20100804

Docket: T-970-08

Citation: 2010 FC 798

[ENGLISH TRANSLATION]

Montréal, Quebec, August 4, 2010

PRESENT: Richard Morneau, Esq., Prothonotary

BETWEEN:

OCEANEX INC.

Plaintiff

and

PRAXAIR CANADA INC.

and

**THE OWNERS AND ALL OTHERS INTERESTED IN
THE TANKTAINER "C-156" EX THE SHIP M.V. "CABOT"
and
THE TANKTAINER "C-156" EX THE SHIP M.V. "CABOT"**

Defendants

AND BETWEEN:

PRAXAIR CANADA INC.

Plaintiff by counterclaim

and

OCEANEX INC.

Defendant by counterclaim

REASONS FOR ORDER AND ORDER

[1] This is a motion by the defendant Praxair Canada Inc. (Praxair) to continue the examination for discovery of representatives of Oceanex Inc. (Oceanex), seeking the adjudication of the objections raised at that time, and finally, the production by Oceanex of a more complete affidavit of documents.

[2] The examination for discovery of Oceanex representatives took place on February 12, 2009, for Michel Parent and on February 13, 2009, for Daniel Turcotte. There was then a written exercise between the parties consisting essentially of Oceanex answers to undertakings, follow-up questions by Praxair and answers to those additional questions, ending on about March 4, 2010. That was followed by the current motion by Praxair. It must be noted right away that, after weighing the arguments of all the parties, I do not find that this motion is late and that it must be dismissed on that basis.

[3] That said, the basic dispute between the parties is essentially based on the following context.

[4] Oceanex is suing Praxair for damages that were allegedly caused to its ship, the M.V. "Cabot" on or about December 15, 2007, when liquid oxygen escaped from container C-156 owned by Praxair (the Container).

[5] In return, Praxair is suing Oceanex in a counterclaim for damages to the Container during handling or transportation of the Tank by Oceanex or by third parties acting under the direction or authority of Oceanex, essentially stevedores in Montréal or St. John's Newfoundland.

[6] For the remainder, following is a more detailed narrative of the relevant circumstances found in the written submission by Praxair:

1. Praxair produces industrial gases including liquid oxygen. Throughout 2006 and 2007, including the last shipment on December 11, 2007, Praxair contracted with Oceanex to transport its cryogenic container identified as C-156 loaded with liquid nitrogen or oxygen from Montreal to St. John's Newfoundland.
2. The container was only used on the Montreal – St. John's transportation run and was only carried by sea by Oceanex. The Bickerdike terminal in Montreal is operated by Empire Stevedoring who was at all material times Oceanex's contractor hired to receive and load cargo on Oceanex's ships. Oceanex has an office at the Bickerdike Terminal and employees who work there.

M. Parent transcript p. 51
Answer to undertaking 16

3. The container C-156 had been returned empty to Montreal by Oceanex on November 26, 2007 from the previous shipment and had been sitting in a storage area at the Bickerdike terminal since then. On December 10 [2007], Praxair booked C-156 with Oceanex to be carried to St. John's. Oceanex made arrangements with Empire Stevedoring for C-156 to be placed on a trailer supplied by Empire Stevedoring by a top lift operated by an employee of Empire and a trucker hired by Oceanex hauled it outside the terminal. On December 11 a trucker employed by Oceanex brought C-156 to Praxair's filling station in Montreal where the container was filled with liquid oxygen by Praxair, and the trucker returned the container to the terminal. The container was loaded on the "Cabot" on December 11 by Empire Stevedoring together with other cargo for Oceanex, and was carried to St. John's Newfoundland.

M. Parent transcript pages 92-94
Answer to undertakings 21, 27, 30, 38, 40

4. On December 15, 2007 the container was discharged by stevedores employed by the St. John's Shipping Association, of which Oceanex is a member. The stevedoring gangs were hired by Oceanex and supervised by Oceanex supervisors. Oceanex

operates the terminal in St. John's where the container was discharged.

M. Parent transcript pages
Answer to undertakings 50, 70

5. On the morning of December 15, 2007 after the container had been placed on the pier in St. John's, Praxair was advised by Oceanex that the container was leaking.

[7] More specifically for the purposes of this motion, Praxair argues that neither of the parties is able to establish the day or time when the Container was damaged and began leaking. However, it is clear according to Praxair that the Container was damaged during transportation. The piping and base of the Container allegedly suffered an impact and Praxair argues, primarily based on a letter dated January 15, 2008, from the Container's manufacturer, CVA, that the Container apparently somehow fell from a certain height, causing a valve on the container to rupture.

[8] What any stevedore handling the Container at any time may have known was thus seen by Praxair, and it must be agreed to a large extent, as relevant information. Thus, despite the many documents submitted to date by Oceanex in its affidavit of documents or in the written follow-up to complete the examination of its representatives, the Court is not prepared to limit the relevant information to essentially what happened on the ship M.V. Cabot during unloading in Newfoundland.

[9] For the applicable principles regarding relevance, it is appropriate to refer to *Reading & Bates Construction Co. and al v. Baker Energy Resources Corp. and al* (1988), 24 C.P.R. (3rd) 66, in which McNair J., in a general six-point reminder, first defined in points 1 to 3 the parameters that make a question or document relevant and then, in points 4 to 6, set out a series of circumstances or

exceptions that, in any case, in the end, are such that a question need not be answered or a document need not be produced.

[10] Moreover, it is clear that one of the Oceanex representatives during examination for discovery, Mr. Parent, did not know whether any stevedore had noticed a leak when the Container was on the vessel “Cabot” in St. John’s Newfoundland. It seems that some of the information in that regard was apparently provided by Oceanex following that examination for discovery, in December 2009 and March 2010. However, more detailed information may be contained in stevedore reports. Although Praxair acknowledges that those stevedores report to third parties in the dispute, it considers that Oceanex is at least able to obtain the information in question from them, due to its commercial relationships with those third parties.

[11] In that regard, Praxair refers to *Eli Lilly & Co. v. Apotex Inc.*, 2000 CarswellNat 185, in which the Court stated, at paragraph 5:

It seems to me that where one may reasonably expect, because of a relationship existing between a party and some third party, that a request for information will be honoured. It is proper to require that party to make such a request. ...

[12] The Court also agrees in principle with Praxair on this approach.

[13] Despite a directive from this Court dated May 31, 2010, referring the many difficulties in the Praxair case that seem to separate the parties and the invitation by the Court for the parties to try to reach an agreement on any or all of them, the fact remains that, on reading the Oceanex reply record, a significant number of difficulties still need to be addressed.

[14] In light of the comments above, and after hearing from counsel for the parties during a half-day hearing, it is now time for a decision on the elements separating the parties as part of this motion, essentially the undertakings by Oceanex to which there have not yet been sufficient answers according to Praxair.

[15] We will begin with the examination of Mr. Parent, and then that of Mr. Turcotte. Any specific comments below by the Court under any of the elements is in addition to the comments found under each element in the written submissions by the parties. Consequently, if there are no comments by the Court, the Court has relied on the written submissions by the parties in favour of or against a response.

Examination of Mr. Parent

[16] Additional question (AQ) 6 must be answered.

[17] The documents produced by Oceanex as part of undertakings U7 and U8 can be the subject of a written and concise examination by Praxair, to be served within thirty (30) days of these reasons for order and this order and that examination shall then be answered within thirty (30) days of being served.

[18] AQ 9 and 10(a) and (b) do not need to be answered, as the events discussed in them date back several years and Mr. Parent is no longer employed by Oceanex.

[19] As for AQ 16, and this also holds for AQs 29, 75(y), 76(h) and (l), 88 and 17(b) (under the examination of Mr. Turcotte and limited to his last known address) — for the reasons cited by Praxair in its arguments numbered 1 to 4 on page 16 of its written submissions, these questions must be answered.

[20] AQs 18(b) and (c) and AQs 113(a) to (d) do not need to be answered for the following reasons. The Court holds that, under the circumstances of this case, a search for information possibly related to past events during the transportation by Oceanex of other Praxair containers seems to lack similarities to the incident at issue. If the documents raised by Praxair in additional questions regarding three (3) past events were so relevant, Praxair should have included them in its affidavit of documents in November 2008. The fact that, in examination, Mr. Parent denied that such incidents occurred is not, in my view, a dynamic that justifies Praxair examining those documents at a later time.

[21] AQs 47, 65(a) and (b) and 70(b) must be answered. AQ 70(c) does not need to be answered as such, but with the answer under AQ 70(b), Praxair could address the third party to obtain an answer to AQ 70(c).

[22] As for AQ 74(b), the Court understands in the end, following a heated debate between counsel at the hearing, that there are statements by stevedores for which Oceanex claims a litigation privilege. However, the Court agrees with Praxair when it states the following at the top of page 26 of its written submissions under undertaking 75:

The Oceanex Affidavit of Documents does not list, describe or disclose any documents containing the statements of stevedores for

which a privilege is claimed, as required by Rule 223 (2) (ii) and (b). The Defendant was only informed during the discovery that statements had been made by undisclosed individuals to the effect that a leak had been observed on the deck of the ship in Newfoundland, and the nature of the observations was disclosed in the answer to the undertaking, some 2 years after the incident (...)

[23] Consequently, AQ 74(b) must be answered within thirty (30) days of these reasons for order and this order by serving a supplementary affidavit of records in which, as Appendix 2, Oceanex shall list the statements signed by stevedores, with their names, for which Oceanex is claiming a litigation privilege.

[24] In this regard, I do not consider that paragraph 3 of Appendix 2 of the existing Oceanex affidavit of documents is an indication that complies with the terms of Rules 223(2)(a)(ii) and 223(2)(b) of the *Federal Court* Rules (the Rules).

[25] AQ 75(r) must be answered, but not AQ 75(w), as the person in question was not on the vessel at the time of unloading. The information sought seems to me to be too distant and the question irrelevant. The same reasoning applies to refuse AQs 76(g), (h), (k) and (l) and 77(b).

[26] As for AQ 84, it seems to me that it has now been sufficiently answered and that the additional information now sought by Praxair under arguments 1 and 2 on page 29 of its written submissions are not legitimate additional questions arising from the original question 84.

[27] AQ 124(b) does not need to be answered as it is ultimately clear that the laboratory report discussed in Court provides sufficient information.

[28] AQ 124(c) must be answered.

[29] Objection 25 (page 33 of the written submissions from Praxair) is relevant and must be answered. The incident in question is related to the transportation of liquid air, like the case at hand.

Examination of Mr. Turcotte

[30] AQs 5(a) and (b) must be answered. The same is true for AQs 17(a) and 18(a) and (c).

[31] All the questions above that must be answered (for both Mr. Parent and Mr. Turcotte) must be answered by Oceanex in writing within 30 days of these reasons for order and this order. This exercise and any other measure ordered after it shall conclude the examinations for discovery between the parties.

[32] Moreover, within forty-five (45) days of these reasons for order and this order, the parties shall make every effort to reach an agreement and to transmit to the Court a joint proposal for an order containing a timeline for the remaining steps in this case.

[33] Any other remedies sought by Praxair in its motion that is not granted in these reasons for order and this order are dismissed.

[34] Given that success is shared in this motion, no costs are awarded.

“Richard Morneau”

Prothonotary

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-970-08

STYLE OF CAUSE: OCEANEX INC.
and
PRAXAIR CANADA INC.
and
THE OWNERS AND ALL OTHERS INTERESTED
IN THE TANKTAINER "C-156" EX THE SHIP
M.V. "CABOT"
and
THE TANKTAINER "C-156" EX THE SHIP
M.V. "CABOT"

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: July 27, 2010

REASONS FOR ORDER: PROTHONOTARY MORNEAU

DATED: August 4, 2010

APPEARANCES:

Louis Buteau
Marie-Claude Laplante

FOR THE PLAINTIFF/
DEFENDANT BY COUNTERCLAIM

Danièle Dion
Victor DeMarco

FOR THE DEFENDANT/
PLAINTIFF BY COUNTERCLAIM

SOLICITORS OF RECORD:

Robinson Sheppard Shapiro
Montréal, Quebec

FOR THE PLAINTIFF/
DEFENDANT BY COUNTERCLAIM

Brisset Bishop LLP
Montréal, Quebec

FOR THE DEFENDANT/
PLAINTIFF BY COUNTERCLAIM