Date: 20081126

Docket: A-335-08

Citation: 2008 FCA 374

Present: **LÉTOURNEAU J.A.**

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY

Appellant

and

CANADIAN TRANSPORTATION AGENCY
and THE ATTORNEY GENERAL OF CANADA

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on November 26, 2008.

REASONS FOR ORDER BY: LÉTOURNEAU J.A.

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REASONS FOR ORDER

LÉTOURNEAU J.A.

[1] The respondent, the Canadian Transportation Agency (CTA), makes a motion pursuant to Rule 369 of the *Federal Courts Rules* to have an e-mail dated December 26, 2007 removed from the materials filed by the appellant, Canadian Pacific Railway Company (CPR), as well as from the Agreement as to the content of the Appeal Book.

[2] The e-mail came from Marc Shannon, counsel to the CPR. The CTA submits that the filing in the appeal proceedings was inadvertent and that the document was not before it when it issued its decision on December 28, 2007.

[3] A brief summary of the facts is necessary to understand the litigation about the e-mail.

[4] On November 14, 2007, the CTA invited several parties to participate in a consultation related to "Multi-Car Block" incentives and related allowances and disallowances and the effect they should have upon statutory-revenue (for crop year 2006-07) under the Western Grain Revenue Cap Program.

[5] The invitation was sent by way of e-mail from a website address of the CTA. The consultation was a two-stage process. The Railways (CN and CPR) had until November 28, 2007 to provide comments to the CTA on issues contained in the attached Consultation Document. The non-Railway participants then had until December 7, 2007 to provide their comments to the CTA on the attached Consultation Documents as well as rebuttal comments to the Railway submissions. A copy of the non-Railway participants would be sent by the CTA to all parties. The consultation process would be closed by December 7, 2007.

[6] The CPR objected that it wanted to make a reply to the non-Railway participants' submissions: see Appeal Book, Tab 12. It appears from the cross-examination of Jim Riegle, an employee of the CTA, that the CTA seemingly dismissed the CPR's objection: see transcript of

cross-examination at page 27. I could not find the actual response of the CTA, but it is almost certain the objection was dismissed because the procedural aspects of the consultation process had been determined and there was an urgency to deal with the issues. Hence the tight time-frame for the consultation and the release of the CTA's decision before the end of 2007.

[7] On December 26, 2007, two days before the release of the CTA's decision, counsel for the CPR sent rebuttal submissions to the non-Railway participants' submissions. They were sent by e-mail to the CTA website address where they stayed until opened in early January 2008 by Karen Tucker, upon her return from Christmas vacation: see affidavit of Jim Riegle, August 12, 2008 at paragraph 5.

[8] According to Mr. Riegle, the rebuttal submissions of the CPR were not put before the Agency as they were only dealt with in January 2008. The CTA's decision was already written and sent to translation by the time the CPR's rebuttal submissions were received in the electronic mailbox on December 26, 2007: *ibidem*, at paragraph 7 and see Mr. Riegle's cross-examination at page 36. In addition, the consultation was a two-stage process which ended on December 7, 2007: *ibidem.*

[9] Counsel for the CPR submits that the rebuttal submissions were before the CTA and therefore should be included in the Appeal Book. If they were not, they should still be part of the Appeal Book because they are relevant to the determination of the appeal. Counsel relies upon Rules 343 and 344, especially 344(*g*).

[10] I am satisfied that the rebuttal submissions of the CPR were not before the CTA when it made its decision and were not considered by the CTA. For this reason alone, they should not be part of the record on appeal: see *1185740 Ontario Ltd. v. Canada (Minister of National Revenue – M.N.R.)*, [1999] A.C.F. no. 1432; *Paquette v. Canada (A.G.)*, 2002 FCA 441; *Sawridge Band v. Canada*, 2006 FCA 52; *Stawicki v. Canada (Canada Revenue Agency)*, 2006 FCA 262.

[11] There is also another reason why the impugned material should not be part of the record on appeal.

[12] The CTA determined, as it was entitled to do, the form and length of its consultation process which, as previously mentioned, was subject to a tight schedule. The CPR was not given a right to rebut the non-Railway participants' submissions. It could neither unilaterally force the CTA to accept its rebuttal submissions nor overrule the CTA's decision not to allow such submissions by simply putting submissions in the electronic mailbox of the CTA. To allow these submissions to be part of the appeal record would allow the CPR to do indirectly what it could not do directly.

[13] For these reasons, the CTA's motion to expunge the impugned material from the Appeal Book and the Agreement as to the content of the Appeal Book will be allowed.

"Gilles Létourneau"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-335-08
STYLE OF CAUSE:	CANADIAN PACIFIC RAILWAY COMPANY v. CANADIAN TRANSPORTATION AGENCY and THE ATTORNEY GENERAL OF CANADA

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	LÉTOURNEAU J.A.
DATED:	November 26, 2008

WRITTEN REPRESENTATIONS BY:

Glen H. Poelman Ryan C. Penner	FOR THE APPELLANT
Glenn Hector	FOR THE RESPONDENT Canadian Pacific Railway Company

SOLICITORS OF RECORD:

MACKLEOD DIXON LLP Calgary, Alberta	FOR THE APPELLANT
Legal Services Directorate Gatineau, Québec	FOR THE RESPONDENT Canadian Pacific Railway Company