KING'S BENCH FOR SASKATCHEWAN

Citation: **2025 SKKB 117**

Date: **2025 07 30**
File No.: KBG-RG-02571-2022
Judicial Centre: Regina

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY

PLAINTIFF

- and -

SOUTHSASK QUALITY PROCESSORS LTD.

DEFENDANT

Counsel:

Bennet Misskey	for the plaintiff
Andrew M. Mason	for the defendant

JUDGMENT
July 30, 2025

MORRIS J.

I. OVERVIEW

[1] These reasons concern an application for summary judgment brought by the plaintiff, Canadian Pacific Railway Company [CP], with respect to its claim against the defendant, SouthSask Quality Processors Ltd. [SSQP].

[2] At issue is whether CP can recover damages for unpaid demurrage charges and transportation-related services pursuant to CP's Tariff 2 – Railcar

2025 SKKB 117 (CanLII)

Supplemental Services [Tariff 2], which is incorporated by reference into an agreement between the parties effective April 1, 2016 [Siding Agreement].

[3] CP seeks summary judgment for $938,462.90 plus interest and costs on the basis that there is no genuine issue requiring a trial, and more specifically, that there are sufficient facts in the record to establish that:

(a) SSQP has failed or refused to make payments for demurrage charges and supplemental services rendered and invoiced under Tariff 2;

(b) The Siding Agreement incorporates Tariff 2 by reference, along with other applicable tariffs;

(c) Failure to make invoiced payments constitutes a breach of contract for which SSQP is liable to pay damages, plus applicable interest; and

(d) The defences raised by SSQP respecting the invoiced items can be resolved by the law of contract and the legal principles governing demurrage.

[4] SSQP contends that the action is suitable for dismissal via summary judgment, provided its position regarding the applicable law is accepted. SSQP's position is that:

(a) CP cannot charge for demurrage in the absence of an underlying contract between it and SSQP for the movement of goods;

(b) Because the Siding Agreement is not a contract for the movement of goods, it cannot ground CP's claim for demurrage;

2025 SKKB 117 (CanLII)

(c) If CP has the right to charge anyone demurrage, its right is to charge Canadian National Railway Company [CN], pursuant to CP Tariff 7 – Between Railroads; and

(d) Even if CP's position is accepted, at least part of its claim is barred by *The Limitations Act*, SS 2004, c L-16.1.

[5] SSQP submits that if CP's position on the law is accepted in its entirety, there are genuine issues with respect to the quantification of the damages that CP claims. More particularly, SSQP submits that because Tariff 2 does not permit demurrage to be charged for private railcars (non-railway owned cars) on SSQP's siding, and CP has not provided SSQP with lists of all the railcars in relation to which demurrage has been charged, CP's damages cannot be accurately quantified at this time.

[6] For the reasons that follow, I have concluded that it is appropriate to grant certain declaratory relief and to grant leave for either party to apply for summary judgment to resolve the amount owing to CP, should this be required.

II. FACTS

[7] The Statement of Claim was issued on November 2, 2022. The operative pleadings are the Third Amended Statement of Claim and the Third Amended Statement of Defence.

[8] Many of the facts in the action are uncontroversial. The dispute largely centers on the applicable law and how it relates to those facts.

[9] The evidentiary record before the Court consists of the following:

(a) Affidavit of Danny Melo, Assistant Vice President of Customer and Corporate Services for CP, sworn August 1, 2024 [First Melo Affidavit];

2025 SKKB 117 (CanLII)

(b) Affidavit of Roy Bailey, director and officer of SSQP, sworn September 30, 2024 [First Bailey Affidavit];

(c) Reply Affidavit of Danny Melo, sworn October 21, 2024 [Second Melo Affidavit];

(d) Transcript of cross-examination of Danny Melo on January 17, 2025 [Melo Cross-Examination];

(e) Transcript of cross-examination of Roy Bailey on January 17, 2025 [Bailey Cross-Examination];

(f) Affidavit of Roy Bailey, sworn February 20, 2025, in support of an application to amend SSQP's Statement of Defence [Second Bailey Affidavit]; and

(g) Reply Affidavit of Danny Melo, sworn March 26, 2025 [Third Melo Affidavit].

[10] The basic facts are as follows.

[11] CP is a federal railway company and Class 1 rail carrier that provides railway, transload, and intermodal transportation services across its rail network in accordance with the *Canada Transportation Act*, SC 1996, c 10 [*CTA*].

[12] SSQP operates an agricultural processing facility located at 13th Avenue and Pinkie Road in Regina, Saskatchewan [Processing Facility]. CP owns the only railway line that services the Processing Facility.

[13] The parties' relationship is governed by the Siding Agreement, which permits SSQP to construct and maintain trackage that connects to CP's railway line at Mile 98.6 of the CP Indian Head Subdivision.

2025 SKKB 117 (CanLII)

[14] The Siding Agreement was entered into and effective when SSQP contracted with CP as its line-haul carrier for its products to their final rail destinations. By the end of January 2020, SSQP had changed its line-haul carrier from CP to CN, but the Siding Agreement has at all times remained in effect.

[15] Because CP owns the only railway line to which the Processing Facility is connected, it is required to handle the movement of cars between the Processing Facility and a Regina interchange location (a relatively short distance away) pursuant to the *Railway Interswitching Regulations*, SOR/88-41 [*Interswitching Regulations*]. The *Interswitching Regulations* are intended to keep a shipper such as SSQP from being captive to a single line-haul carrier.

[16] Pursuant to the Siding Agreement, SSQP pays CP an annual license fee for the use of CP's right of way to accommodate SSQP's private siding. In addition to the license fee, section 9.4 of the Siding Agreement states:

> **ARTICLE 9 – FEES**
>
> …
>
> 9.4 The Fees do not include other charges related to the transportation, movement and handling of Applicants products via CPR' s railway lines that Applicant is responsible to pay CPR for, including without limitation, transportation rates as well as supplemental services under CPR's Supplementary Services Tariff No. 2 (or any applicable or replacement tariff, as amended from time to time).

[17] An updated version of Tariff 2 is published by CP on a periodic basis pursuant to Division IV of Part III of the *CTA*. Tariff 2 covers items including demurrage and supplemental services, such as spotting (positioning) cars already located on SSQP's private siding for SSQP. SSQP has asked CP to perform supplemental services since it changed its line-haul carrier to CN, and CP has invoiced it for these services as well as demurrage pursuant to Tariff 2.

2025 SKKB 117 (CanLII)

[18] CN does not charge SSQP for demurrage or supplemental services on CP's rail line. Both CN and CP publish tariffs advising customers that they are expected to pay the other railway's applicable tariffs when railway traffic is in that railway's care.

[19] Between 2018 and 2024, CP transported commodities from the Processing Facility to the Regina interchange location. Once SSQP changed to CN as its line-haul carrier, CP transported these commodities solely pursuant to its obligations under the *Interswitching Regulations*, and not pursuant to a line-haul contract of carriage.

[20] At all material times, CP invoiced SSQP for demurrage charges and supplemental services in accordance with Tariff 2. Invoices were made available in a downloadable format via CP's Customer Station, which is accessible through CP's website. SSQP has a subscription to use the portal, and its plant manager has used it to review and comment on CP invoices from time to time.

[21] Demurrage charges form the bulk of the damages claimed by CP. Demurrage is assessed when a shipper exceeds established time limits for the loading or unloading of rail cars.

[22] CP monitors asset use through automated systems or on-site CP crew members. Asset usage is loaded onto CP software that calculates the applicable fees and rates before being reviewed manually by CP personnel prior to monthly invoicing.

[23] SSQP has not paid demurrage charges to CP at any time since it switched its line-haul carrier to CN.

[24] SSQP admits that it has not paid $938,462.90, being the total of all of CP's unpaid invoices to it from April 2018 to July 2024.

2025 SKKB 117 (CanLII)

III. ISSUES

[25] I have found it convenient to frame the issues as follows:

(1) Is the Court able to make sufficient findings of fact to enable it to employ the summary judgment process?

(2) Is CP able to rely upon the Siding Agreement and Tariff 2 for the purposes of its claim for unpaid demurrage charges and supplemental services?

(3) Is any part of CP's claim barred under *The Limitations Act*?

(4) What relief should be granted?

IV. ANALYSIS

(1) Is the Court Able to Make Sufficient Findings of Fact to Enable it to Employ the Summary Judgment Process?

[26] Division 2 of Part 7 of *The King's Bench Rules* governs summary judgment applications.

[27] The summary judgment rules strive to achieve the fair and just adjudication of a dispute with reasonable efficiency and affordability. The focus is on a just but proportionate process: *Tchozewski v Lamontagne*, 2014 SKQB 71 at para 30 (CanLII), [2014] 7 WWR 397 [*Tchozewski*].

[28] The Court may employ the summary judgment process where it is confident that it can find the facts and apply the relevant legal principles so as to fairly resolve the dispute: *Tchozewski* at para 31. The Court may determine that it is able to decide none, some, or all of the issues raised by a summary judgment application, based on the facts it is able to find: *Tchozewski* at para 33.

2025 SKKB 117 (CanLII)

[29] In this case, I have determined that I have the necessary evidence to make the findings of fact required to determine whether Tariff 2 has applied as between the parties, as alleged by CP, and whether part of CP's claim for damages is statute-barred pursuant to *The Limitations Act*. The necessary evidence is essentially uncontroverted.

[30] I have determined that I do not have sufficient evidence before me to award judgment to CP for a specific sum.

[31] The evidence I have with respect to the demurrage incurred and charged, and the supplemental services provided and charged, is contained in the First Melo Affidavit and the Second Melo Affidavit.

[32] The First Melo Affidavit contains a schedule listing the unpaid invoices and copies of the invoices at Exhibit "C". The dates on the invoices range from April 11, 2018, to July 4, 2024.

[33] Exhibit "C" of the Second Melo Affidavit contains what is described as a compilation of invoice backup details for demurrage charges. Contained in this documentation are railcar prefixes/numbers for demurrage charges. However, this information does not extend beyond January 2022.

[34] In the circumstances, I have evidence of invoices being issued and additional backup details for the demurrage charges in some of the invoices. I have a general explanation of how CP ensures that its invoices accurately reflect charges that have been incurred: First Melo Affidavit at para. 11. I have Mr. Melo's evidence about his after-the-fact review of which railcars were supplied to SSQP from January 2018 to June 2024, and his statement that his review did not identify a single instance where a private railcar generated Tariff 2 demurrage charges while on SSQP's track.

[35] Mr. Melo's evidence about the facts underlying specific demurrage charges is based on his review of data from CP's record-keeping system, but it is not

2025 SKKB 117 (CanLII)

tendered pursuant to the business records provisions of *The Evidence Act*, SS 2006, c E-11.2. While I acknowledge that evidence based on information and belief may be admitted on a summary judgment application, I am hesitant to rely on those portions of Mr. Melo's evidence relating to specific demurrage charges that lack documentary backup.

[36] An individual can make an honest mistake in their review in spite of their best efforts, and a lack of documentary backup for their evidence prevents their summary statement(s) from being challenged. As well, in this case there is evidence that CP's invoicing system is not infallible: Melo Cross-Examination, T94, Line 17-T95, Line 21.

[37] SSQP contends that some of the railcars for which it has been charged demurrage have been private railcars, and CP has refused to provide SSQP with the necessary information to determine this (as an undertaking from the Melo Cross-Examination). Again, CP has filed documentation identifying ownership of railcars sent to the Processing Facility up to January 2022. However, CP has not filed documentation identifying ownership of railcars sent to the Processing Facility since then. As such, there is a discrepancy in the quality of the evidence that CP has asked the Court to rely upon for the purposes of alleged unpaid demurrage.

[38] While the Court may rely upon information and belief in a summary judgment application, it is not required to do so: *102007987 Saskatchewan Ltd. v Khaira*, 2023 SKKB 49 at para 54.

[39] Ultimately, I am confident that I have sufficient evidence before me to fairly adjudicate some of the key issues, and to make certain declarations. However, I am not confident that I have sufficient evidence to award judgment to CP for a specific sum.

2025 SKKB 117 (CanLII)

(2) Is CP Able to Rely Upon the Siding Agreement and Tariff 2 for the Purposes of its Claim for Unpaid Demurrage Charges and Supplemental Services?

(a) SSQP's Primary Argument

[40] SSQP's primary argument is that CP cannot charge it for demurrage in the absence of an underlying contract between it and SSQP for the movement of goods. In other words, while SSQP contracted with CP as its line-haul carrier, CP was able to charge SSQP for demurrage. However, since SSQP changed its line-haul carrier to CN, CP is no longer able to charge SSQP for demurrage. The interswitching services that CP has provided pursuant to the *Interswitching Regulations* are not a contract of carriage between SSQP and CP; rather, they are a service that CP is required to provide by law.

[41] SSQP grounds its argument based on the reasoning in *Canadian National Railway Company v Neptune Bulk Terminals (Canada) Ltd.*, 2006 BCSC 1073, [2007] 2 WWR 623 [*Neptune*]; and *Goderich-Exeter Railway Company Limited v Shantz Station Terminal Ltd.*, 2020 ONCA 560, 152 OR (3d) 285 [*Shantz*].

[42] CP says that *Neptune* and *Shantz* establish that demurrage cannot be charged in the absence of a contract between parties, but not that the contract must be one for the movement of goods. CP points to *Railink Canada Ltd. (Southern Ontario Railway) v Fedmar Limited*, 2009 CanLII 15893 (Ont Sup Ct) [*FedMar*], as a case where the ability to charge demurrage did not depend on the respective parties having a contract for the movement of goods with each other.

[43] I will proceed to examine these cases.

2025 SKKB 117 (CanLII)

Neptune

[44] In *Neptune*, Wedge J. characterized the narrow issue before her as follows:

> [3] Neptune does *not* challenge the right of CN to exact demurrage from customers with whom it contracts to move goods. The narrow issue is whether CN has established a basis in law to demand demurrage from a third party, in this case, Neptune, with whom it does not have a contract for the carriage of goods.
>
> [Emphasis in original]

[45] Neptune Bulk Terminals (Canada) Ltd. [Neptune] operated a bulk terminal located in North Vancouver, British Columbia, that unloaded commodities from railcars and loaded their contents onto ships. It had various contracts with shippers for this purpose, but no contracts with CN, nor any contracts with shippers for the movement of their commodities from the terminal: *Neptune* at paras 29-31.

[46] The dispute between Neptune and CN began when CN advised Neptune that as a terminal operator, it would be required to provide "terminal authorization" for CN to send railcars to it, and that upon providing such authorization, CN would regard Neptune as undertaking to unload the railcars upon presentation and to pay any demurrage charges for delayed unloading: *Neptune* at paras 49-50. Neptune disagreed with being responsible for demurrage, advising CN that this superimposed a contractual relationship where one did not exist: *Neptune* at para 52.

[47] Thereafter, CN amended its published tariff made pursuant to the *CTA* to indicate that "demurrage charges shall be assessed against the operator of the facility that is responsible for unloading the car" rather than the shipper with whom CN contracted: *Neptune* at para 56.

2025 SKKB 117 (CanLII)

[48] CN began charging Neptune for demurrage. Neptune refused to pay on the basis that it had no contractual relationship with CN that could ground CN's requests for payment: *Neptune* at para 67.

[49] Before the Court, CN made several arguments for its authority to charge Neptune for demurrage. Two are relevant to the case at bar.

[50] CN's principal argument was that its published tariff imposed liability on Neptune for demurrage regardless of whether a contract of carriage existed between them: *Neptune* at para 82. Wedge J. rejected this argument. At para. 107, she stated that tariffs published by CN become enforceable when a party enters into a contract with CN which incorporates the terms of the tariff.

[51] For present purposes, I note that CP does not contend that it can charge demurrage to SSQP in the absence of a contract which incorporates the terms of Tariff 2. Rather, CP relies upon the Siding Agreement as incorporating Tariff 2.

[52] However, SSQP focuses on Wedge J.'s frequent reference in *Neptune* to a contract of carriage as what would require Neptune to pay demurrage to CN:

> [95] Demurrage is one of those rates or charges a railway company is entitled to exact from its customers because it relates to the movement of traffic. …
>
> …
>
> [96] CN is paid by its customers to move their goods from origin to unloading at the destination terminal. If demurrage is part of the rate for the movement of goods, it follows that demurrage is chargeable to the party who contracts with CN to have the goods moved.
>
> …
>
> [98] In any event, it is my respectful view that the real issue is whether Neptune holds a contract of carriage with CN such

2025 SKKB 117 (CanLII)

that CN can exact demurrage for the delay in the unloading of railcars at Neptune's terminal.

…

[100] In several cases argued before the Agency, CN has taken the position that whether a party is a shipper under the *CTA*, and therefore entitled to benefits under the statute, depends on the existence of a contract of carriage with CN. That, in my view, is the correct position as a matter of law.

…

[103] Neptune's circumstances resemble those of Scotia Terminals as described by the Agency in the above decision. It does not contract with CN for the carriage of goods. It does not pay freight on its own behalf or on behalf of the party whose commodities it unloads. It does not issue or receive bills of lading. It takes rail traffic delivered by CN, but only pursuant to the contracts of carriage CN holds with its customers, who are the shippers or cargo owners. The terminal authorization and five-day notice procedures are administrative processes which assist both CN and Neptune to meet the needs of the same client, which is the cargo owner or the shipper.

[104] It is true, as CN argues, that the *CTA* does not expressly limit the application of a tariff to the party with whom CN contracts. Nor, however, does the *CTA* expressly or by implication permit CN to impose its tariffs on parties with whom it has no contract of carriage. The *CTA* does not authorize railway companies to impose tariffs on third parties. It requires railway companies to publish tariffs in order to inform prospective customers as to the nature and amount of the rates, charges and penalties they will be expected to pay pursuant to the contract of carriage.

…

[106] If any party assumes the risk of delay in the unloading of railcars, it must be the party who pays the freight and all related tariff charges for the movement of its goods (that is, the cargo owner or shipper) pursuant to the contract of carriage, and not the terminal operator.

[107] In summary, I conclude that *Tariff CN 6060-H* is binding only on parties with whom CN contracts for the carriage of

2025 SKKB 117 (CanLII)

> goods. Tariffs published by CN become enforceable when a party enters into a contract with CN which incorporates the terms of the tariff. As there was no contract of carriage between the parties in this case, Neptune is not liable for demurrage charges described in the tariff.

[53] CN argued in the alternative that there was an express or implied contract between it and Neptune for Neptune to pay demurrage in accordance with CN's tariff when Neptune agreed to accept, and did accept, the railcars hauled by CN to Neptune's terminal: *Neptune* at para 108.

[54] Wedge J. rejected this argument, but not on the basis that such an argument could never succeed. Rather, she rejected it based on the facts of the case before her. She concluded that in none of the correspondence between the parties was there any express or implied agreement concerning the payment of demurrage: *Neptune* at paras 122, 128, and 133. Further, the parties' obligations arose from their respective contracts with their respective customers – the shippers – such that no consideration flowed between Neptune and CN: *Neptune* at para 123.

Shantz

[55] In *Shantz*, the Ontario Court of Appeal characterized the issue before it as follows:

> [2] The issue at the core of this appeal concerns the source of a railway's entitlement to charge demurrage, specifically whether a contract is required as the foundation for the claim.

[56] Goderich-Exeter Railway Company Limited [GEXR] was the party claiming demurrage. CN contracted with Parrish and Heimbecker Limited [P&H] to carry its grain to a facility [Shantz Station] where it was unloaded by the respondent, Shantz Station Terminal Ltd. [SSTL], a subsidiary of P&H. CN had an agreement with GEXR whereby GEXR transported the grain for its final leg to the Shantz Station. GEXR claimed demurrage from P&H and SSTL because its railcars were detained for

2025 SKKB 117 (CanLII)

longer than the "free time" stipulated in GEXR's tariffs at the Shantz Station: *Shantz* at para 4.

[57] The trial judge dismissed GEXR's claim, and the Court of Appeal upheld the trial judge's decision, summarizing that "A contract, express or implied, between a railway and a shipper is the required basis for a claim for demurrage": *Shantz* at para 6.

[58] The Court of Appeal rejected GEXR's claim that the *CTA* authorized it to charge demurrage to persons with whom it had no contract at all:

> [55] Taken together, GEXR submits that these provisions entail that a railway is entitled to charge demurrage in accordance with its published tariff in the absence of having any contract with the person to whom it wishes to levy that charge. It notes that the respondents at no time complained under s. 120.1 of the *CTA* that GEXR's tariff charges for demurrage were unreasonable.
>
> [56] I disagree with GEXR's submission. Although a railway is entitled to payment of lawfully payable rates in exchange for service it is obliged to provide, the entitlement to payment must be from a person who has contracted, expressly or impliedly, to have the railway carry or deliver freight. …

[59] In doing so, the Court affirmed the correctness of Wedge J.'s reasoning in *Neptune*: *Shantz* at paras 57-59. It stated the following at paras. 66-67:

> *Conclusion*
>
> [66] There is no common law right to charge demurrage to a non-contracting party. The provisions of the *CTA* concerning tariffs do not authorize the charging of demurrage to persons who have no contract with the railway.
>
> [67] The *CTA* regulates what a railway may charge to persons who expressly or impliedly contract for their services, and how those persons are to be notified, before expressly or impliedly contracting for those services, what those rates and charges will be. As the court stated in *Neptune Bulk Terminals*, "The *CTA* does not authorize railway companies to impose tariffs on third parties": at para. 104. Or, to adopt the respondents' formulation,

2025 SKKB 117 (CanLII)

> the existence of an issued and published tariff is a necessary, but not a sufficient, condition for a railway to charge demurrage.

[60] The Court also rejected GEXR's contention that there was an implied contract between it and P&H or SSTL. It noted that Courts have recognized that privity of contract may exist only between the shipper and the originating carrier, and not necessarily between the shipper and the connecting or destination carrier: *Shantz* at para 73. It was open to the trial judge to find, on all the facts, that there was no implied acceptance of GEXR's terms by P&H, and to refuse to find an implied contract: *Shantz* at para 82.

2025 SKKB 117 (CanLII)

FedMar

[61] *FedMar* involved an appeal from a Small Claims Court decision in which the trial judge found Federal Marine Terminals, a Division of FedMar Limited [FedMar] liable to Railink Canada Ltd., c.o.b. as The Southern Ontario Railway [SOR] for $5,471 in demurrage charges.

[62] SOR owned various rail lines in the City of Hamilton, Ontario, which connected to the much longer lines of both CP and CN. SOR's services included shuttling railcars between the longer lines and its spur lines. One of its spur lines serviced FedMar, whose business was stevedoring (the loading and unloading of ships).

[63] The trial judge described the typical circumstances that would involve SOR and FedMar as follows (as quoted by the appeal judge in *Fedmar*):

> [3] …
>
> …
>
> 9. A typical transaction which would bring SOR and FedMar together would be as follows:

> a. An end customer would ship steel by rail from some originating point within North America to be delivered to FedMar's Hamilton terminal.
>
> b. The end customer would contract separately with a main rail line such as Canadian National for this shipping.
>
> c. Through a standing contract between the main rail line and SOR, the freight would be handed off to SOR for delivery to FedMar's premises.
>
> d. SOR would provide FedMar with an electronic advice that the shipment will be ready for delivery to FedMar's spur line after a specific time.
>
> e. FedMar decides when it would like the rail car bearing the shipment to be placed on its spur line. FedMar then instructs SOR accordingly on behalf of a stated end customer. Even though the instructions are stated to be on behalf of the end customer, I find that FedMar makes its own decisions as to the scheduling of car deliveries.
>
> f. FedMar keeps the rail car until such time as it decides it not longer needs it. FedMar instructs SOR by email when the car can be removed.
>
> 10. Rail cars can be kept on the FedMar premises for different periods of time. The marshalling of rail cars is also affected by the fact that with only one spur line, in order to remove a car that was placed ahead of others, the unloading of those others would need to be completed before all can be removed.
>
> 11. There is no direct express contract between SOR and FedMar. As noted above, SOR has a contract with a main line railway company who in turns contracts with the end customer, FedMar, has a contract with the end customer for the provision of its services.

[64] FedMar submitted that the reasoning in *Neptune* precluded it from being liable for demurrage to SOR, since it had no express contract with SOR. Both the trial judge and the appeal judge disagreed.

2025 SKKB 117 (CanLII)

[65] The appeal judge concluded that there was an implied contract between FedMar and SOR, stating at paras. 13-14, and 18:

> [13] In *Neptune*, the party held responsible for the demurrage fees had no control whatsoever over the timing or the delay. They were in no way responsible for that delay. In the case before me, and the deputy judge, it is clear that all of the delay was the direct result of the actions, inactions and timing of FedMar. (I further note that FedMar has paid demurrage charges in the past). As such, in my view, the learned trial judge rightly found them responsible for demurrage; the charges attributable to their delay.
>
> [14] It is apparent to me that a distinct business relationship exists between SOR and FedMar whether borne out by a precise paper contract or not. It is clear that SOR is mandated to deliver the goods to FedMar on a timetable dictated by FedMar. So too, FedMar controls when the cars are to be returned post unloading. FedMar is the entity who controls this sequence pursuant to "An implied understanding" (as Rand J. puts it in *North-West* [*North-West Line Elevators Association v Canadian Pacific Railway and Canadian National Railway*, [1959] SCR 239]) between SOR and FedMar. I further note that Rand J. references "equipment placed at the disposal of shipper or consignee".
>
> …
>
> [18] Whether there is a paper contract or not, there is clearly a common understanding between these two parties. SOR was required and mandated to deliver the goods to FedMar at their request. FedMar alone controls the timing of receipt and return of the cars. This may also be seen as a relationship of convenience.

[66] On the basis of this common understanding, FedMar was liable to pay demurrage to SOR. As a final note, it would appear that the railcars for which demurrage was being charged by SOR originated from a line-haul carrier such as CN; that is, they were not SOR's railcars.

2025 SKKB 117 (CanLII)

(b) A Contract is Necessary to Charge for Demurrage, but not Necessarily a Contract of Carriage

[67] I begin by noting that none of *Neptune*, *Shantz*, or *FedMar* are binding on this Court. That said, I conclude that none of this jurisprudence establishes that a contract of carriage is necessary for a party to charge another party for demurrage.

[68] The cases establish that a party cannot unilaterally impose demurrage charges on another party in the absence of a contract.

[69] In *Neptune*, there was no dispute that CN did not have a contract of carriage with Neptune. However, at paras. 108-133, Wedge J. analysed whether there was an express or implied contract between the parties with respect to payment for demurrage, concluding:

> [133] In summary, it is my view that no contract for the payment of demurrage exists between CN and Neptune. Neptune did not expressly contract with CN to pay demurrage on the shipments. Nor did Neptune, by its conduct, imply that it would pay demurrage on the shipments. With respect to all of the shipments in the Sample, the contract of carriage was between CN and the shipper or owner of the cargo. CN must look to its contractual partners for payment of the rates and charges stipulated in its tariffs.
>
> [Emphasis added]

[70] Similarly, in *Shantz*, there was no dispute that GEXR did not have a contract of carriage with P&H or SSTL. However, the Court of Appeal analysed whether there was an implied contract between GEXR and P&H or SSTL that supported payment for demurrage. It concluded that there was not: *Shantz* at paras 69-86. In doing so, however, the Court of Appeal acknowledged that an implied contract (as opposed to a contract of carriage) could support a claim for demurrage, referencing *FedMar*: *Shantz* at paras 76-77.

2025 SKKB 117 (CanLII)

[71] In *FedMar*, there was no contract of carriage between SOR and FedMar. However, an unwritten implied understanding (an implied contract) between SOR and FedMar was sufficient for SOR to be able to charge FedMar for demurrage: *FedMar* at para 18.

[72] I conclude that it is not necessary for parties to have a contract of carriage between them for one party to charge another for demurrage. However, there must be a contract, express or implied, that permits one party to charge the other for demurrage.

(c) The Siding Agreement, Which Incorporates Tariff 2, Enables CP to Charge SSQP for Demurrage and Supplemental Services Pursuant to Tariff 2

[73] The Siding Agreement appears to be a critical agreement between CP and SSQP that enables railcars to be transported to the Processing Facility for loading. It entered into effect on April 1, 2016. At that time, CP was SSQP's line-haul carrier. According to Mr. Bailey, the Siding Agreement was a renewal of a previous agreement: First Bailey Affidavit at para. 3.

[74] The Siding Agreement has remained in effect since April 1, 2016. It requires payment of certain fees. These include an annual license fee. As admitted in para. 3 of the Third Amended Statement of Defence, the Siding Agreement also incorporates Tariff 2 through section 9.4, which states:

> **ARTICLE 9 – FEES**
>
> …
>
> 9.4 The Fees do not include other charges related to the transportation, movement and handling of Applicants products via CPR' s railway lines that Applicant is responsible to pay CPR for, including without limitation, transportation rates as well as supplemental services under CPR's Supplementary Services Tariff No. 2 (or any applicable or replacement tariff, as amended

2025 SKKB 117 (CanLII)

from time to time).

[Emphasis added]

[75] The First Melo Affidavit attaches at Exhibit "B" a copy of each version of Tariff 2 that was published during the date range of the invoices attached at Exhibit "C".

[76] As aforementioned, Tariff 2 is published by CP on a periodic basis pursuant to Division IV of Part III of the *CTA*. Item 11 describes demurrage fees for "railway supplied cars". Item 100 contains definitions that apply in Tariff 2, and states that "CP cars or railway cars" include "cars owned by CP and/or operated similarly by other railways, unless stated otherwise." This definition has not changed throughout any of the iterations of Tariff 2 attached as Exhibit "B" to the First Melo Affidavit. CP relies on this definition to charge demurrage for "railway supplied cars" regardless of whether the cars are owned by CP or another railway, such as CN.

[77] Demurrage is not charged for private cars on a private siding. It can be charged for railway supplied cars on a private siding: Melo Cross-Examination, T75, Lines 12-14. This is because private cars are not used to supply other North American customers and orders, while railway supplied cars are used to do so: Melo Cross-Examination, T42, Lines 1-10.

[78] The reason demurrage is charged on railway supplied cars is explained in Tariff 2. The following is extracted from the version of Tariff 2 that was effective during 2018, attached as part of Exhibit "B" to the First Melo Affidavit:

> **Asset use (demurrage)**
>
> Efficient asset use is a key component of providing low-cost transportation and fluid operation of our railway. Rail car dwell, either in railway yards or at loading facilities is inefficient, consumes capacity and is an area where improvements can be

2025 SKKB 117 (CanLII)

> realized. Reduced dwell translates into faster, more reliable cycle times and better service.

[79] More recent iterations of Tariff 2 have included a similar explanation. The following is extracted from the version of Tariff 2 that was effective February 3, 2024:

> **Asset use**
>
> **Terms and events**
>
> *Shipper and receivers are responsible to ensure the efficient use of CP's assets (including tracks, yards and railcars). This helps CP protect network fluidity and availability of equipment. <u>When extended use of railway supplied cars or CP track occurs for reasons not attributable to CP, asset use fees may apply</u>.*
>
> [Italics emphasis in original]
>
> [Underline emphasis added]

[80] The above explanations are consistent with Mr. Melo's evidence:

> Q Okay. So if you pick up a car that is not owned by a private company but owned by another railway such as CN, and you pick that up at a CN inter-switch location and deliver it to SSQP's private siding, do you charge demurrage on that charge while it is on the SSQP siding?
>
> A Yes.
>
> Q And why do you do that?
>
> A It's a railway-supplied asset sitting on private track, and that asset needs to be utilized as designated free time. <u>That asset is not just used by a single shipper; it is used by the entire North American rail network</u>. So demurrage is intended to drive the efficient utilization of the asset. And if there's excessive time used on a railway-supplied asset, the charges under demurrage apply not only at CP, but at CN and every other Class 1 railroad.
>
> [Melo Cross-Examination, T20, Line 13-T21, Line 6]
>
> [Emphasis added]

2025 SKKB 117 (CanLII)

[81] As aforementioned, SSQP had changed its line-haul carrier to CN by the end of January 2020. As such, SSQP pays CN freight charges to transport its commodities. In contracting with CN, SSQP is subject to CN's tariffs, including CN Tariff 9000, which is attached as Exhibit "B" to the Second Melo Affidavit. At page 37 of this document, the following is stated:

> **Regulations**
>
> **CN Tariff 9000-Series** is applicable at points on CN in North America. CN's rail network may not extend the entire length of any given shipment and therefore shipments may require the participation of other independently operated railway carriers at any point from origin to destination. In such instances, CN may undertake to invoice a single freight rate (including the applicable fuel surcharge) for the entire transportation. Nevertheless, when traffic moves over such other participating carriers, which may have a different service offering than that provided by CN, all shipments shall be under the exclusive control, and subject to the applicable tariffs, of these participating carriers while traffic is in their care.
>
> [Emphasis added]

[82] Notably, CN has not charged SSQP for demurrage since SSQP changed to CN as its line-haul carrier: Bailey Cross-Examination, T24, Lines 6-9. Consequently, SSQP's position that CP is unable to charge it for demurrage on CN railcars – a position that I do not accept – would mean that SSQP has been completely free from demurrage charges for CN railcars. Put another way, SSQP has been at liberty to hold CN railcars captive, regardless of the railcars being needed for other shippers using the North American rail network.

[83] SSQP contends that CP's Tariff 7 – Between Railroads [Tariff 7] suggests that CP is to be charging CN for any demurrage at the Processing Facility arising from CP carrying out its obligations under the *Interswitching Regulations*. In theory, this would result in CP charging CN for demurrage on CN's own railcars (and other railway supplied cars), pursuant to CP's Tariff 2. CN would be responsible for indemnifying

2025 SKKB 117 (CanLII)

itself by collecting the demurrage charges from SSQP. Effectively, this would not change SSQP's obligation to pay for demurrage pursuant to Tariff 2; it would simply change who it is required to pay.

[84] Tariff 7 is exhibited to the Second Bailey Affidavit. It includes the following, which SSQP emphasizes:

> **Application** *Item 1*
>
> In addition to any other applicable tariff, the prices, charges and rules of this Tariff apply, as amended from time to time, to or from facilities served by Canadian Pacific (CP). Prices in this Tariff apply as published at the time the service was rendered or the event occurs, in the currency of the country in which the service or event occurs, unless otherwise specified. The connecting railway is responsible to collect switching fees and pay CP for switching provided under this Tariff. For notifications of updates to this Tariff, subscribe using CP Customer Station.
>
> **Definitions** *Item 2*
>
> …
>
> **connecting railway** the railway sending railcars to, or receiving railcars from CP for the purpose of switching
>
> …
>
> **interswitching** the non-linehaul movement of a railcar in Canada between an applicable rail-served facility and a switching interchange; regulated by the Canada Transportation Agency
>
> …
>
> **switching interchange** the closest physical location to an applicable rail-served facility at which CP and the connecting railway can exchange railcars, unless otherwise agreed
>
> …

2025 SKKB 117 (CanLII)

What's included *Item 3*

Switch fees in this Tariff include the core Rail Direct service elements described in Tariff 1 Item 25 (except linehaul movement from origin to destination) and are based on the two-way movement of a loaded railcar in one direction and the same railcar empty in return (or vice versa).

Switch movements are subject to the terms, conditions and rates published in Tariffs 1-9, with any applicable fees assessed to the connecting railway. Some examples include:

• Asset use under Tariff 2 Items 10-15

• Intra-terminal switching under Tariff 2 Item 23 for railcars ordered but not used, which applies to empty railcars that are:

o received by CP under switching for loading and are returned by the customer to CP empty

o provided by CP to a connecting railway under switching for loading and are returned to CP empty

[85] CP disputes SSQP's interpretation of Tariff 7. In the Third Melo Affidavit, Mr. Melo states:

> 5. In further reply to paragraph 2 of the Bailey Affidavit, CPKC's Tariff 7 – Between Railways ("Tariff 7") found in Exhibit A" of the Bailey Affidavit, is used by CPKC to address situations where another railway is directly responsible to pay CPKC. It does not deal with charges directly assessed to a customer.
>
> 6. For example, Item 10 in Tariff 7 deals with "interchange errors," which means that another railway has sent CPKC a railcar in error. In that instance, the shipper, consignee, or payor of freight is irrelevant and in many cases unknown to CPKC as the railcar was not intended to be delivered onto CPKC's line. The only party that CPKC can hold accountable for costs associated in that instance is the railway that misdelivered the car.

2025 SKKB 117 (CanLII)

> 7. In instances like the example cited in paragraph 6 above, or where another railway delivers railcars to CPKC without shipper instructions, unwanted equipment may begin to dwell on CPKC's lines. To mitigate costs and inefficiencies created by this situation, Tariff 7 contemplates that asset use or other charges associated with incremental movements be assessed against the relevant railway. Once again, this has no direct applicability to shippers like SSQP nor this proceeding.

[86] I accept Mr. Melo's explanation for the purpose of Tariff 7. It contemplates circumstances where CP has a contractual basis to charge a connecting railway, but not a shipper.

[87] For example, a connecting railway's cars may dwell on CP's rail lines, thereby tying up their use, through the fault of a connecting railway. This is contemplated by Items 10 and 11 in Tariff 7:

> **Interchange errors** *Item 10*
>
> Railcars received by CP at interchange must be safe to travel, properly loaded and ready to move. Full shipping instructions must have been received by CP at or prior to the time of interchange delivery. Railcars must be delivered to the interchange indicated on the bill of lading for linehaul movement, or to the switching interchange for interswitching or reciprocal switching.
>
> **Interchange error** *Item 11*
>
> This fee will be assessed to the connecting railway when a railcar is offered to CP:
>
> that is unsafe or improperly loaded
>
> that is an empty railcar unsuitable for loading
>
> without full shipping instructions
>
> at a location other than nearest interchange to the cusoter, unless otherwise agreed in advance
>
> in error, requiring CP to forward the railcar to the correct railway

2025 SKKB 117 (CanLII)

> that is not completely ready to continue moving, accessible or not intended to move on CP

[88] Based on the foregoing, I do not accept that Tariff 7 precludes CP from charging SSQP pursuant to Tariff 2, or requires CP to invoice CN for SSQP's Tariff 2 charges. Rather, I accept that through section 9.4 of the Siding Agreement, SSQP has expressly agreed to pay CP for demurrage charges and supplemental services pursuant to Tariff 2.

[89] Further, as in *FedMar*, it is SSQP that has control over the usage of railway supplied cars at the Processing Facility that can result in demurrage charges pursuant to Tariff 2.

[90] Apart from demurrage, which CP has assessed pursuant to Tariff 2, it has also charged SSQP for certain supplemental services pursuant to Tariff 2.

[91] During his cross-examination, Mr. Bailey did not dispute that if CP has provided supplemental services pursuant to Tariff 2, SSQP should pay them:

> A Look, if there is a service that we require for the railroad to do, like, moving a car or something like that, and there was a charge for it, we believe we should pay those charges. What I'm saying is in all this action is we don't believe that CP is accurately charging us.
>
> Q What do you mean by "accurate," sir?
>
> A Correctly.
>
> Q In what sense?
>
> A Well –
>
> Q Can you give me any specific examples?
>
> A Best I can answer is the demurrage charges.
>
> Q And what about the demurrage charges do you believe to be incorrect?

2025 SKKB 117 (CanLII)

> A I don't believe you can charge demurrage on cars that you don't own.
>
> [Bailey Cross-Examination, T38, Line 17-T39, Line 8]
>
> [Emphasis added]

[92] SSQP's Third Amended Statement of Defence specifically references it disputing CP's ability to charge demurrage pursuant to Tariff 2, but not supplemental services such as "spotting" railcars. There is evidence that SSQP has requested such services relatively recently, and that CP has provided them: Bailey Cross-Examination, T44, Line 5-T45, Line 12; see also First Melo Affidavit, Exhibit "C": invoice dated March 20, 2024, for "Intra-Plant Switch – Tariff 2 Item 21".

[93] Based on all of the foregoing, I conclude that the Siding Agreement has permitted CP to charge SSQP for demurrage and supplemental services pursuant to Tariff 2.

(3) Is Any Part of CP's Claim Barred Under *The Limitations Act*?

[94] SSQP's Third Amended Statement of Defence pleads that part of CP's claim is barred by s. 5 of *The Limitations Act*. In sum, SSQP contends that any invoice that was payable more than two years before the action commenced, on November 2, 2022, is statute-barred.

[95] The following provisions of *The Limitations Act* are relevant:

> **Basic limitation period**
>
> **5** Unless otherwise provided in this Act, no proceedings shall be commenced with respect to a claim after two years from the day on which the claim is discovered.
>
> **Discovery of claim**
>
> **6**(1) Unless otherwise provided in this Act and subject to subsection (2), a claim is discovered on the day on which the

2025 SKKB 117 (CanLII)

> claimant first knew or in the circumstances ought to have known:
>
> (a) that the injury, loss or damage had occurred;
>
> (b) that the injury, loss or damage appeared to have been caused by or contributed to by an act or omission that is the subject of the claim;
>
> (c) that the act or omission that is the subject of the claim appeared to be that of the person against whom the claim is made; and
>
> (d) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it.
>
> (2) A claimant is presumed to have known of the matters mentioned in clauses (1)(a) to (d) on the day on which the act or omission on which the claim is based took place, unless the contrary is proved.
>
> …
>
> **Burden of proof**
>
> **18** If, in a proceeding, a limitation period is raised against a claimant, the claimant has the burden of proving that:
>
> (a) the limitation period has not expired; or
>
> (b) there is no limitation period that applies to the claim.
>
> **Proceedings commenced after expiry**
>
> **19** If, after the commencement of a proceeding, it is established that a limitation period applicable to the claim had expired before the commencement of the proceeding, the claim is barred and the proceeding shall not be maintained.

[96] Section 5 establishes the basic two-year limitation period from when a claim is discovered. Section 6 establishes what is necessary for a claim to be discovered. A claim is discovered when a claimant knows or in the circumstances ought to have known (through the exercise of reasonable diligence) the matters in ss. 6(1)(a)-(d).

2025 SKKB 117 (CanLII)

Subsection 6(2) establishes that a claimant is presumed to have known the matters mentioned in ss. 6(1)(a)-(d) on the day(s) on which the act(s) or omission(s) on which the claim is based took place, unless the contrary is proved. Subsection 6(2) operates alongside s. 18, which states that when a limitation period is raised against a claimant, the claimant has the burden of establishing that the limitation period has not expired: see *Saskatchewan (Highways and Infrastructure) v Venture Construction Inc.*, 2020 SKCA 39 at para 36, 447 DLR (4th) 316 [*Venture Construction*]. Section 19 establishes that a claim commenced after a limitation period has expired is barred and cannot be maintained.

[97] In this case, CP's invoices to SSQP each contained a date by which payment was due. Typically, the due date was 15 days after the invoice date.

[98] Once payment was past-due, default had occurred. This constituted the omission grounding the cause of action for breach of contract, for the purposes of s. 6(2) of *The Limitations Act*.

[99] CP has not filed evidence establishing that it was unaware of any element of discoverability in s. 6(1) for any invoice that was due more than two years before it commenced its action.

[100] CP's position, as articulated in its brief, is that it did not know, nor should it have known, that it was appropriate to commence an action until September 21, 2021, when it received correspondence from SSQP's counsel disputing CP's authority to charge SSQP for demurrage.

[101] CP's position cannot succeed. It knew its invoices were not being paid. CP's evidence from the First Melo Affidavit includes the following:

> 6. Between 2018 and 2024, CPKC transported commodities from SSQP's Processing Facility on the basis of shipment orders submitted by SSQP. In the course of these shipments, SSQP

2025 SKKB 117 (CanLII)

> incurred various Asset Use, Switching, Handling, Special requests fees set out in Tariff 2.
>
> 7. Based on my review of CPKC's accounts, SSQP has paid CPKC only $3,444.00 CAD of amounts owing under Tariff 2 since February 2018. As of July 19, 2024, the amount outstanding is $938,462.90 ("**Outstanding Amount**"). Marked and attached hereto as **Exhibit "C"** is a schedule of unpaid invoices issued by CPKC to SSQP. This schedule attaches copies of the invoices and lists them by number, date, Tariff Item and amount.
>
> 8. The vast majority of outstanding charges owing by SSQP is for asset use fees under Tariff 2. This includes demurrage charges (Item 11) and also for situations where a railcar is held, staged, or unable to continue while in transit to its destination (Item 15). Item 16 of Tariff 2 provides that the Shipper and Consignee are ultimately responsible for asst [*sic*] use fees in Canada.
>
> …
>
> 17. CPKC has made numerous requests for payment from SSQP for unpaid invoice amounts. Despite these demands for payment, SSQP has not made any further payments to CPKC.

[102] This evidence – along with the invoices found at Exhibit "C" of the First Melo Affidavit – makes it clear that SSQP was defaulting on the invoices issued by CP from April 2018 onward. Yet, CP chose to wait to commence an action.

[103] CP has filed no evidence suggesting that it was engaged in any type of dispute resolution process with SSQP with a realistic possibility of a successful resolution and an ascertainable end point: *Venture Construction* at para 71. Rather, the evidence that CP has filed establishes that it was dealing with repeated non-payment with no sign of abatement.

[104] In the result, CP has not displaced the presumption in s. 6(2) of *The Limitations Act* with respect to invoices that were due more than two years before CP commenced this action. The result is that CP's claim for any invoices for which

2025 SKKB 117 (CanLII)

payment was due before November 2, 2020 – being two years before the Statement of Claim was issued – is statute-barred pursuant to ss. 5, 6, and 19 of *The Limitations Act*.

(4) What Relief Should be Granted?

[105] I advised counsel during the hearing that I would consider making declarations if I was not in a position to grant judgment for a specific sum. Counsel did not object to this suggestion. Further, counsel for SSQP indicated that if I made rulings with respect to CP's rights, the parties may be able to resolve what was owing amongst themselves.

[106] I am prepared to make the following declarations at this time:

(1) SSQP and CP are bound by the Siding Agreement, which incorporates by reference CP's Tariff 2 – Railcar Supplemental Services;

(2) Tariff 2 permits CP to charge SSQP for demurrage on railway supplied cars intended for use at SSQP's Processing Facility, and such cars include cars that are owned by CP or other railways, including CN, while the cars are in CP's care;

(3) Tariff 2 permits CP to charge SSQP for the supplemental services that are listed therein; and

(4) Sections 5, 6, and 19 of *The Limitations Act* apply to bar CP from claiming damages arising from the non-payment of any invoices for which payment was due before November 2, 2020.

[107] Given CP has been primarily successful, I consider it appropriate to award CP costs for this application, payable forthwith.

2025 SKKB 117 (CanLII)

[108] Either party has leave to apply for summary judgment to resolve the amount owing to CP, should this be required. It would likely be most efficient to make such an application before me. Should the parties anticipate a further summary judgment application being required, they should contact the Local Registrar to set up a case conference with me.

V. DISPOSITION

[109] CP's summary judgment application is allowed, in part. An order may issue reflecting the relief I have granted in paragraphs 106-108, above.

J.
M.J. MORRIS

2025 SKKB 117 (CanLII)