

Federal Court



Cour fédérale

Date: 20250530

Docket: T-71-24

Ottawa, Ontario, May 30, 2025

PRESENT: Madam Associate Judge Sylvie M. Molgat

BETWEEN:

QSL CANADA INC.

**Plaintiff/
Defendant by Counterclaim**

and

COMPASS MINERALS CANADA CORP.

**Defendant/
Plaintiff by Counterclaim**

ORDER

UPON MOTION by the Defendant/Plaintiff by Counterclaim, Compass Minerals Canada Corp. [Compass] for an order pursuant to Rules 91 and 94 to 97 of the *Federal Courts Rules* [Rules]:

- (i) requiring Geoffrey Lemont to re-attend for cross-examination on his affidavit sworn June 13, 2024, within 30 days of the disposition of the motion;
- (ii) compelling Mr. Lemont to answer certain questions during his cross-examination that were improperly objected to, namely questions [Q] 93-94, Q104-111, Q115-

116, Q121, Q124-128, and Q156-158, as well as any proper questions arising from his answers to those questions;

- (iii) requiring Mr. Lemont to produce the documents requested in the Direction to Attend dated July 17, 2024, [DTA] and to do so at least 24 hours in advance of his second cross-examination;
- (iv) requiring Mr. Lemont any questions that are based upon the documents listed in the DTA without further relevance objections, as well as any proper questions which arise from his answers to those questions;
- (v) that the Plaintiff/Defendant by Counterclaim, QSL Canada Inc. [QSL] pay the stenographer fees required for Mr. Lemont's reattendance for cross-examination;
- (vi) if the motion is granted in whole or in part, extending the time for Compass to serve and file its responding motion record until 30 days after receipt of the transcripts for Mr. Lemont's second cross-examination, or in the alternative, if the motion is refused, extending the time for Compass to file its responding motion record to 30 days from of the dismissal of the motion;
- (vii) that QSL pay the costs of the motion forthwith and in any event of the cause in the amount of \$8,500 or alternatively at the upper end of Column IV or Column V of the Tariff.

UPON reading the motion record of Compass, the responding motion record of QSL, and upon hearing the submissions of counsel for the parties at the hearing of the motion;

AND UPON reading the supplemental representations of the parties, filed in accordance with the oral direction of the Court;

Overview

[1] The within motion arises in the context of the cross-examination on an affidavit sworn in support of a motion by QSL. Compass argues that QSL improperly thwarted the cross-examination by refusing to produce documents requested in the DTA and by refusing to answer certain questions put to its affiant on the grounds of relevance. Compass asks the Court to order production of the documents requested and to rule on the objections. Compass also seeks an order requiring QSL's affiant to re-attend to be cross-examined, with costs.

[2] QSL contends that the issue to be decided on the motion in respect of which the affidavit was filed is one of contractual interpretation only. QSL argues that the documents listed in the DTA and questions put to its affiant are not relevant to the issues to be decided on QSL's motion.

[3] For the reasons set out below, this motion is granted in part.

Background

[4] The underlying action by QSL is a claim for unpaid invoices in the amount of \$925,550.11 pursuant to an agreement for stevedoring services provided by QSL to Compass for the handling of bulk road salt through its Beauport terminal in the Port of Quebec [Agreement].

[5] Compass has defended the action and contends that QSL failed to perform its obligations under the Agreement by failing to take reasonable steps to clean the pad on which the salt was unloaded and stored and by negligently allowing the salt to become contaminated with iron pellets.

In its Amended Defence and Counterclaim, Compass claims damages for gross negligence and breach of contract in the amount of \$4,981,818.00 set-off in defence to QSL's Claim.

[6] QSL contends that the Counterclaim by Compass is contractually prohibited. QSL has filed a motion for summary judgment and to strike the Counterclaim on the ground that the payment terms set out in the Agreement expressly provide that Compass shall pay QSL "any and all amounts due and payable pursuant to this Agreement without set-off or counterclaim and without deduction or withholding for any present or future taxes, levies, duties or other charges of any kind".

[7] The within motion arises from the cross-examination of Mr. Lemont on his affidavit sworn in support of QSL's motion [Lemont Affidavit].

[8] Compass served Mr. Lamont with a DTA in which are listed 11 itemized categories of documents and other material Mr. Lemont was required to produce for inspection at his cross-examination as follows:

1. A copy of any records related to the cleaning of the area on which the salt was stored prior to it being stored there.
2. All photographs of the salt or the area on which it was stored at any point during the loading, unloading, or storage of the salt. This includes photographs that were taken by Mario Côté or any other QSL personnel.
3. All photographs of the area on which the salt was stored and that were taken immediately prior to or immediately after the salt's storage there. Again, this includes photographs that were taken by Mario Côté or any other QSL personnel.
4. Records showing the ships and cargo which unloaded at berth 53 in the two-week period preceding the delivery of the salt (i.e. from November 5 to November 19, 2022). A bundle of bills of lading would be acceptable, as would a logbook of some kind.
5. Any CCTV or other surveillance footage of berth 53 in the 48-hour period immediately prior to storage of the salt (i.e. from November 17-19, 2022).

6. Any reports, logs, or similar records generated by QSL which document the unloading of the salt from the M/V Bulk Valor or the loading the salt into the John D. Leitch and Algoma Mariner.
7. Any communications (emails, texts or otherwise) between members of QSL's personnel mentioning any issues with the salt, including any mention of the presence of iron ore pellets or other foreign materials.
8. Any incident report, contamination report, or other document prepared by QSL as part of an investigation into how iron ore pellets ended up in the salt.
9. A copy of the surveyor's report mentioned in Mr. Lemont's letter to Compass dated January 30, 2023. A copy of this letter is attached for ease of reference.
10. A copy of the "photographic evidence" mentioned in Mr. Lemont's letter to Compass dated January 30, 2023.
11. A copy of any notes or photographs taken by QSL personnel who were present at the Englobe inspection of the salt (including any emails sent by those personnel that comment on the inspection).

[9] QSL did not seek an order for relief from production pursuant to Rule 94(2) of the *Rules*, but advised Compass the day before the scheduled cross-examination, several weeks following service of the DTA, that Mr. Lemont would not be producing the documents requested.

[10] During his cross-examination, QSL objected to a number of questions put to Mr. Lemont on the basis that the question is not relevant to the QSL motion for which the Lemont Affidavit was filed.

[11] The issues to be decided are: (a) Should QSL's affiant be required to produce the documents requested by Compass? (b) Should QSL's affiant be compelled to answer the questions objected to on cross-examination? and (c) Should QSL's affiant be required to reattend for cross-examination at their cost?

A. *Should QSL's affiant be required to produce the documents requested by Compass?*

[12] Rules 91 and 94 of the *Rules* contain a complete code governing the production of documents for inspection on a cross-examination on affidavit. Pursuant to Rule 91(2)(b), a person to be cross-examined on an affidavit may be directed to produce “all documents and other material in that person’s possession, power or control that are relevant to the application or motion” as the case may be, other than any document for which privilege has been claimed of for which relief from production has been granted.

[13] The description of the documents required by the examining party should be “clear and concise,” not described “by broad general category, in an effort both to make the task of selecting documents a precise one and to keep the volume of documents to a reasonable level” and production of documents may only be enforced if the documents sought have been “listed, or sufficiently identified” in a DTA: *Royal Bank of Scotland plc v. Golden Trinity (The) (T.D.)*, [2000] 4 FC 211 at para. 18; *Autodata Ltd. v. Autodata Solutions Co.*, 2004 FC 1361, at para. 19.

[14] While document production may be broad in scope, it is more limited than documentary discovery and should not become a fishing expedition. Production of documents can only be required on the same basis as for any other witness (ie. if the individual who is being cross-examined has the custody or control of the document) though the scope of the requirement may be quite broad in the case of an affiant with a broad scope or authority within an organization: *Merck Frosst Canada Inc. v. Canada (Minister of Health)*, 1997 CanLII 26719 (FC) [1997] FCJ No. 1847, [Merck] at paras. 3-4, aff’d 1999 CanLII 8930 (FCA) , [1999] FCJ No. 1536; *Ottawa Athletic Club Inc. (Ottawa Athletic Club) v. Athletic Club Group Inc.*, 2014 FC 672 [Ottawa Athletic] at para. 138; *C.C. Jentsch Cellars Inc. v. O’rourke Family Vineyards Ltd.*, 2018 FC 875

[*C.C. Jentsch*] at para. 16; *Mohammed v. Canada (Immigration, Refugees and Citizenship)*, 2019 FC 193 at paras. 29-31.

[15] As to relevance, a document is relevant to the cross-examination if its production may assist the Court in determining whether summary judgment should be granted and the Counterclaim struck. It is not limited to what is pleaded but also includes documents which might reasonably contain information which may directly or indirectly enable the party requesting production to advance their own case or damage the case of their adversary. The Court should also exercise its discretion to ensure proportionality is a factor and to avoid unduly onerous productions: *Merck; Stanfield v. Canada (Minister of National Revenue)*, 2004 FC 584 at paras. 20-22; *Apotex Inc. v. Eli Lilly and Co.*, 2005 FCA 134 at para. 9; *Stella Jones Inc. v. Mariana Maritime S.A.*, [2000] FCJ 2033 (FCA); *Agustawestland International Ltd. v. Canada (Public Works)*, 2005 FC 627 [*Agustawestland*] at para. 12; *C.C. Jentsch* at para. 21; *Serena fashions Ltd. v. Serena Fashions Alberta Ltd.*, 2022 CanLII 110510 (FC) at para. 33.

[16] Rule 94 of the *Rules* makes production of the documents and other material requested in a DTA mandatory while providing that the Court may, on motion, relieve the person being examined from the requirement to produce where the Court is of the opinion that the document or materials are irrelevant or where it would be unduly onerous to produce them: Rule 94(2) of the *Rules*; *Sierra Club of Canada v. Canada (Minister of Finance)*, 1998 CanLII 8773 (FC) [*Sierra Club*] at para. 12; *Whitford v. Red Pheasant First Nation*, 2022 FC 436 [*Whitford*] at para. 141; aff'd 2023 FCA 17 and 2023 FCA 18.

[17] A chart of the documents and materials listed in the DTA and a summary of the parties' positions is included as Schedule "B" to the responding motion record of QSL. Mr. Lamont has objected to producing the documents and materials itemized #1 to #11 on the following grounds:

QSL objects on the basis of relevance. This is not an examination for discovery. The documents requested are not relevant to the motion for summary judgment, nor will they assist the Court in determining whether summary judgment ought to be granted. The Court will not weigh evidence, make findings of fact or determine liability in the motion for summary judgment. Moreover, the witness does not have access to the document, nor does he have any knowledge about such documents and would not be able to provide any useful evidence about the document.

[18] The relevance of any documents requested, and any questions put to Mr. Lamont, should be determined by the issues raised in QSL's motion. The scope of those issues is disputed.

[19] QSL submits that the only issue to be decided is one of statutory interpretation, i.e. whether Compass' Counterclaim is contractually barred by the payment terms set out in paragraph 8 d) of the Agreement. Compass contends that its right to refuse payment for services not properly performed pursuant to the Agreement is also a live issue on the QSL's motion.

[20] Given that QSL not only seeks summary judgment, but also seeks to have the Counterclaim struck, I agree with Compass that the issue of the performance of the contract is relevant to and cannot be simply detached from the payment obligation.

[21] As the moving party, QSL needs to set out specific facts and adduce evidence showing that no reasonable issue for trial exists. If it meets this threshold, the evidentiary burden will fall on Compass "who cannot rest on its pleadings and must come up with specific facts showing there is a genuine issue for trial." Both parties must "put [their] best foot forward" and the responding party must "lead trump or risk losing": *Saskatchewan (Attorney General) v. Witchekean Lake First*

Nation, 2023 FCA 105 [*Witchekan*] at paras. 23-24 and 55 citing *CanMar Foods Ltd. v. TA Foods Ltd.*, 2021 FCA 7, *Canada (Attorney General) v. Lameman*, 2008 SCC 14, *Milano Pizza Ltd. v. 6034799 Canada Inc.*, 2018 FC 1112 and *Gemak Trust v. Jempak Corporation*, 2022 FCA 141.

[22] Contrary to QSL’s assertion, a motion for summary judgment pursuant to Rule 215 does indeed require a judge to weigh the parties’ arguments and evidence to determine whether there is a genuine issue with respect to a claim or defence that can only be resolved at trial. “Even if there is a genuine issue of fact or law for trial with respect to a claim or defence, the Court may nevertheless determine that issue by way of summary trial (Rule 215(3)). In such cases, judges have greater powers to decide disputed questions of fact.” [References omitted]: *Witchekan* at paras. 27-28 & 31-32.

[23] As regards striking the Counterclaim, QSL needs to show that it is “plain and obvious,” that the Counterclaim has no reasonable prospect of success: Rule 221(1) of the *Rules*; *Hunt v. Carey Canada Inc.*, [1990] 2 SCR 959; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42.

[24] I am of the view that most of the documents and materials requested by Compass are relevant in that they might reasonably contain information which may directly or indirectly enable it to advance its own case or damage the case of QSL and assist the motions judge in determining whether there is a genuine issue for trial and whether Compass’ Counterclaim should be struck.

[25] While Rule 94(1) only requires an affiant to produce documents in his own possession and control—as opposed to the possession and control of a party—the fact is that Mr. Lamont is Vice-President of Sales for QSL and has remained such despite his apparent retirement. As to whether the documents and materials requested in the DTA are in Mr. Lamont’s “possession,

power or control,” I am satisfied, based on the material before me that those that are not in his personal possession remain within his power or control.

[26] Bearing in mind that this is not examination for discovery, the principle of proportionality, and the objectives of Rule 3 of the *Rules*, I turn to the itemized request in the DTA, and find as follows:

Item #1: Normal cleaning of the working areas before and after being included in the Scope of Work & Rates under the Agreement, these records are relevant to the performance of the contract and should be produced.

Items #2, #3 and #10: Mr. Lemont having indicated in his January 30, 2023, letter denying responsibility on behalf of QSL for any contamination of the cargo of salt that QSL remains available to provide “ample photographic evidence” of their observations, the photographs should be produced.

Items #4 and #6: These records are relevant to the performance of the contract and should be produced.

Item #5: This constitutes a request more akin to documentary discovery. It is not clear that surveillance footage exists and/or is available. As a matter of proportionality, this need not be produced.

Items #7 and #11: These requests are overly broad and extend beyond the scope of documentary production required on a cross-examination and strays into the realm of discovery of documents. As a matter of proportionality, they need not be produced.

Items #8 and #9: Mr. Lemont having indicated in his letter of January 30, 2023, that QSL conducted an investigation which included an inspection by a QSL-appointed surveyor, these records should be produced.

B. Should QSL's affiant be compelled to answer the questions objected to on cross-examination?

[27] The parties do not dispute that cross-examination on an affidavit is narrower in scope than an examination for discovery in that the rules of relevance are more limited. It is well established that the scope of cross-examination is not restricted to the “four corners” of the affidavit and may arise from stated facts and subjects addressed in the affidavit and the purposes for which it was filed: *Merck* at paras. 4-8; *Sierra Club* at paras. 10-11; *Agustawestland* at para. 12; *Ottawa Athletic* at paras. 130–133; *CBS Canada Holdings Co. v. Canada*, 2017 FCA 65 at para. 29.

[28] Questions should be fair, *bona fide*, and relevant to: (a) the issues on the motion; (b) the matters raised in the affidavit, even if those matters are not relevant to the motion; or (c) the credibility and reliability of the affiant's evidence: *Farmobile, LLC v. Farmers Edge Inc.*, 2021 FC 1427 at paras. 24-31.

[29] The Lemont Affidavit was sworn in support of QSL's motion for summary judgment and to strike Compass' Counterclaim. Mr. Lemont was involved in the negotiation of the Agreement between the parties at issue in this litigation and has deposed to the stevedoring services rendered to Compass by QSL under the Agreement and the invoices rendered for such services.

[30] Given the issues raised on the motion, questions about facts which were not necessarily set out in the Lemont Affidavit but that concern the performance of QSL's obligations under the

Agreement, arise from facts alleged in his affidavit and are, in my view, relevant to the issue of whether there is a genuine issue for trial.

[31] As a witness, however, Mr. Lemont is under no obligation to inform himself about factual elements beyond those facts of which he has first-hand knowledge relevant to the Agreement between the parties which is the subject of QSL's motion.

[32] The parties disagree on the scope of cross-examination and whether the questions put to Mr. Lamont are proper and relevant. Mr. Lamont has objected to answering some twenty-one (21) questions on the grounds of relevance and/or proportionality.

[33] A chart of the objections and refusals and a summary of the parties' positions is included as Schedule "A" to the responding motion record of QSL. The disputed questions have been regrouped according to the following five (5) general themes: (i) handling or mishandling of the salt; (ii) similar incidents at QSL's Beauport Terminal; (iii) QSL operational documentation and investigations relating to the salt; (iv) QSL communications and photographs of the salt; and (v) existence and effect of a lockout at QSL's facilities during the relevant period.

[34] Turning now to those objections, I find as follows:

(Q.128): Question allowed. This question is relevant as it concerns the unloading of the cargo of salt raised in the Lemont Affidavit and disputed facts relating to the performance of the Agreement.

(Q.104, Q.105 & Q.106): Objections upheld. These questions regarding similar incidents at QSL's Beauport Terminal are not relevant to the issues raised on QSL's motion.

(Q.93, Q.94 & 108): Questions allowed. These questions are relevant as they concern QSL's investigation into the alleged contamination of the cargo of salt and disputed facts relating to the performance of the Agreement.

(Q.107): Objection upheld. Questions concerning investigations by QSL into any accidents which may occur at the Beauport facility are not relevant to the issues raised on the motion.

(Q.109): Objection upheld. Any steps taken by QSL are not relevant to the issues raised on the motion.

(Q.121): Objection upheld. The question regarding bills of lading for any number of unidentified ships are not relevant to the issues raised on the motion.

(Q.127): Question allowed. This question is relevant as it concerns QSL's investigation into the alleged contamination of the cargo of salt and disputed facts relating to the performance of the Agreement.

(Q.115): Question allowed. This question seeks information within the personal knowledge of Mr. Lemont and is relevant to Items 2 and 3 in the DTA and disputed facts relating to the performance of the Agreement.

(Q.116): Question allowed. This question seeks information within Mr. Lemont's personal knowledge which is relevant to Items 2 and 3 in the DTA and disputed facts relating to the performance of the Agreement.

(Q. 124, Q.125 & Q.126): Questions allowed. These questions seeking information within Mr. Lemont's personal knowledge are relevant as they concern the alleged contamination of the cargo of salt and disputed facts relating to the performance of the Agreement.

(Q.110, Q.111, Q.156, Q.157 & Q.158): Objections upheld. Questions concerning a lockout at QSL's facilities are not relevant to the issues raised on the motion.

C. Should QSL's affiant be required to reattend for cross-examination at their cost?

[35] Where an affiant fails to produce documents or other materials required to be produced, or fails to answer a proper question, Rule 97 of the *Rules* provides, *inter alia*, that the Court may order that they re-attend for cross-examination at their own expense, order that they answer any question improperly objected to as well as any proper question arising from the answer or that the party on whose behalf the person is being examined pay the costs of the examination.

[36] Given my findings above, it is in my view appropriate to order that Mr. Lemont reattend for cross-examination on his affidavit sworn in support of QSL's motion, at QSL's expense, that he produce the documents identified herein for inspection and answer any proper questions arising therefrom (*Whitford* at para. 163).

[37] While counsel for the parties should be encouraged to do so prior to the scheduled cross-examination as a matter of professional courtesy, the time of production is explicitly set out in Rules 91(2)(c) and 94(1) of the *Rules*. The Court has no jurisdiction to order early production: *Sierra Club of Canada v. Canada (Minister of Finance)*, 1999 CanLII 7756 (FC); (1999) 163 FTR 109 at paras. 16-19; *Ottawa Athletic* at para. 141.

Extension of Time

[38] In the event the motion is granted in whole or in part, Compass seeks an extension of time to serve and file its responding motion record in response to QSL's motion. QSL does not oppose this relief. In the circumstances, and considering the relevant factors, I am satisfied that it is in the interests of justice to grant the extension of time requested: *Canada (Attorney General) v. Hennelly* (1999), 244 NR 399 (FCA) at paras. 3-4; *Canada (Attorney General) v. Larkman*, 2012 FCA 204 at para. 62.

Costs

[39] Rule 400 of the *Rules* provides the Court with full discretionary power over the amount of costs and the determination of by whom they should be paid.

[40] A number of the questions refused concern documents and other material listed in the DTA. In the circumstances and given the mandatory language in Rule 94(1) of the *Rules* it was incumbent upon QSL to seek relief from production. QSL did not do so. Such a motion would have reduced the scope of the present motion or even obviated the need for it.

[41] Compass having been mostly successful on the motion, I find that it is entitled to its costs which, in the exercise of my discretion, I hereby fix in the all-inclusive amount of \$5,000.

THIS COURT ORDERS that:

1. The motion is granted in part.

2. Mr. Lemont shall produce for inspection the following documents and materials listed in the Direction to Attend dated July 17, 2024: Items # 1, 2, 3, 4, 6, 8, 9, 10.
3. Mr. Lemont shall, within 30 days of the date of this Order re-attend for cross-examination on his affidavit sworn June 13, 2024, and answer questions based on the documents to be produced and well as any proper questions arising from his answers to those questions.
4. Mr. Lemont shall provide answers to the following questions put to him on cross-examination and any proper question arising from the answer: Questions #. 93, 94, 108, 115, 116, 124, 125, 126, 127 and 128.
5. QSL shall pay the stenographer fees associated with Mr. Lemont's reattendance for cross-examination.
6. Compass shall serve and file its responding motion record within 30 days after receipt of the transcripts of Mr. Lemont's cross-examination.
7. Costs of the motion, fixed in the all-inclusive amount of \$5,000 shall be paid by the Plaintiff/Defendant by Counterclaim, QSL Canada Inc., to the Defendant/Plaintiff by Counterclaim, Compass Minerals Canada Corp.

"Sylvie M. Molgat"
Associate Judge