

NOVA SCOTIA COURT OF APPEAL

Citation: *Geophysical Service Inc. v. Canada (Attorney General)*,
2014 NSCA 14

Date: 20140207

Docket: CA 418566

Registry: Halifax

Between:

Geophysical Service Incorporated

Appellant

v.

Attorney General of Canada

Respondent

Judges: Saunders, Oland and Bryson, JJ.A.

Appeal Heard: February 5, 2014, in Halifax, Nova Scotia

Held: Appeal allowed without costs, per reasons for judgment of
Oland, J.A.; Saunders and Bryson, JJ.A. concurring.

Counsel: A. William Moreira, Q.C., and Scott R. Campbell, for the
appellant
Patricia MacPhee, for the respondent

By the Court: (Orally)

[1] Last week, the Supreme Court of Canada released its decision in *A.I. Enterprises Ltd. v Bram Enterprises Ltd.*, 2014 SCC 12 (“*A.I. Enterprises* (SCC)”). That judgment clarified certain aspects of the law pertaining to the tort of unlawful means, sometimes previously called the tort of unlawful interference with economic relations.

[2] The unlawful means tort was central to the decision under appeal in this case. We allowed the appeal with reasons to follow and no award of costs. These are our reasons.

[3] The appellant, Geophysical Service Incorporated, brought a claim against Her Majesty the Queen in right of Canada, as represented by the respondent, the Attorney General of Canada. It alleged that through the actions of several government departments, the Federal Crown had committed the tort of unlawful interference with economic relations against it. According to its Statement of Claim, Geophysical was the owner and operator of the only Canadian flagged ship equipped and available to perform seaborne seismic surveys at the relevant times. A government contract for such survey work in Canadian waters was awarded to Fugro-Jacques Geophysical Inc. which only had a foreign flagged ship. According to the appellant, the contract was unlawfully amended to avoid requirements in the *Coasting Trade Act* which would have been to its benefit.

[4] Canada applied to have the appellant’s claim of intentional interference with economic relations summarily dismissed. *Civil Procedure Rule* 13.03(1)(a) provides that a judge must set aside a Statement of Claim which discloses no cause of action.

[5] The motion came before Justice Glen G. McDougall of the Supreme Court of Nova Scotia. In his decision (2013 NSSC 240), the judge relied upon the elements necessary for an unlawful means tort as listed in ¶ 56 of the New Brunswick Court of Appeal decision in *A.I. Enterprises Ltd. and Schelew v. Bram Enterprises Ltd. and Jamb Enterprises Ltd.*, 2012 NBCA 33 (“*A.I. Enterprises* (NBCA)”). The first element that had to be established was the existence of a valid business relationship between the claimant and the third party. That appellate court decision led to *A.I. Enterprises* (SCC).

[6] At ¶ 39 of his decision, the motions judge described this first element of the tort as “relatively uncontroversial as between the recent appellant-level decisions”. After reviewing the appellant’s Statement of Claim, the judge stated:

[41] ... In my view, this is plainly not the type of third party relationship contemplated in **AI Enterprises, supra**. At paragraph 72 of that case, Justice Robertson said of the first two elements that: “[t]he general requirement is that the defendant must have knowledge of the underlying commercial dealings between the plaintiff and the third party.” As I see it, nothing in the statement of claim alleges that there were any commercial dealings between Geophysical and Fugro Jacques or even that they were aware of each other’s existence at the time the contract was tendered.

[42] At most, Geophysical and Fugro Jacques are general competitors within the same industry but that is not a “business relationship” within the meaning of **AI Enterprises, supra**. It is worthwhile to recall again the description in **Valcom, supra**, which says at paragraph 60 that the third party in question must become “the vehicle through which harm is caused to the plaintiff.” Any harm to Geophysical is caused by Canada choosing not to enter a contractual relationship with it and/or by not alerting Geophysical to the existence of the contract; it is not caused by Canada interfering with some business relationship or expectancy between Geophysical and Fugro Jacques. As such, Fugro Jacques is neither the vehicle nor the instrument of the alleged harm caused to Geophysical.

[Emphasis added]

[7] After again reviewing the licensing requirement of the *Coasting Trade Act* and the Statement of Claim, the judge continued:

[44] However, even assuming all of that to be true, at no point in that chronology is there any direct business relationship between Geophysical and Fugro Jacques. They remain at all times rivals even if the market is regulated to privilege Canadian-flagged ships.

[45] Given that result, it is plain and obvious that the action cannot succeed under the **AI Enterprises, supra**, test for unlawful interference with economic relations. There is no need to consider whether the other more controversial elements of the test are satisfied. Since Geophysical has abandoned its alternative argument and has advanced no other potential causes of action, I grant Canada’s motion to dismiss the action.[Emphasis added]

[8] In their facta, the parties had argued the merits of the judge's dismissal of the appellant's Statement of Claim. However, with the release last week of *A.I. Enterprises* (SCC), their approach had to be somewhat different.

[9] Geophysical argued that the motions judge's decision rested on his determination that there was no valid business relationship between it and Fugro-Jacques, as required by *A.I. Enterprises* (NBCA). According to the appellant, that relationship is not a requirement, or is no longer a requirement, for the unlawful means tort. It pointed to ¶ 93 of the Supreme Court decision in *A.I. Enterprises* (SCC) where Cromwell, J. writing for the Court stated:

[93] I do not agree with the Court of Appeal that the existence of a valid business relationship between the plaintiff and the third party and the defendant's knowledge of that relationship are essential elements of the unlawful means tort. ... There need be no contract or even other formal dealings between the plaintiff and the third party so long as the defendant's conduct is unlawful and it intentionally harms the plaintiff's economic interests. ...

[10] In response, Canada urged that the appeal be heard on its merits. It took the position that the motions judge's decision was not entirely based on lack of a business relationship between Geophysical and Fugro Jacques. It also submitted that Geophysical's claim does not have a reasonable chance of success.

[11] Paragraph 93 of *A.I. Enterprises* (SCC) has clarified the law - the existence of a valid business relationship between the plaintiff and the third party is not an essential element of the unlawful means tort that must be plead. The motions judge found that it was, and that because there was no such relationship between Geophysical and Fugro Jacques, it was therefore plain and obvious that the appellant's claim could not succeed. Having carefully considered ¶ 41 and 42 of his decision, and his reiteration regarding the missing essential relationship in ¶ 44, we are of the view that his decision turned on that one element which has been overtaken by the recent jurisprudence. In the result, the judge erred in law.

[12] We would allow the appeal and order the reinstatement of Geophysical's Statement of Claim. Our disposition of this appeal is not to be taken as in any way suggesting that its pleadings have a reasonable chance of success; we were not required and did not address that matter. The appellant indicated that it may seek instructions regarding amendments to that pleading in the court below. It is aware that the respondent may challenge any such attempt. These of course are matters for the parties to address in the court below.

[13] In view of the very recent release of *A.I. Enterprises* (SCC) and its clarification of aspects of the law pertaining to the unlawful means tort which were described in its ¶ 2 as previously “unsettled” and needing clarification, there will be no award of costs.

Oland, J.A.

Concurred in:

Saunders, J.A.

Bryson, J.A.