SUPREME COURT OF NOVA SCOTIA

Citation: Geophysical Service Inc. v. Canada (Attorney General), 2013 NSSC 240

Date: 20130725
Docket: Hfx No. 408202
Registry: Halifax

Between:

Geophysical Service Incorporated

Plaintiff

v.

Attorney General of Canada

Defendant

Judge: The Honourable Justice Glen G. McDougall

Heard: March 26, 2013, in Halifax, Nova Scotia

Counsel: A. William Moreira and Scott Campbell, for the plaintiff
Patricia C. MacPhee, for the defendant

By the Court:

INTRODUCTION

[1] This motion arises out of an action wherein Geophysical Service Incorporated ("Geophysical") alleges that the defendant, represented by the Attorney General of Canada ("Canada") unlawfully interfered with its economic relations. Canada has not yet filed a defence but, instead, moves to have this claim summarily dismissed on a number of grounds.

ISSUES

[2] The following have been identified as issues:

1. Does this court lack jurisdiction to hear Geophysical's action?
2. Is Geophysical's claim barred by issue estoppel?
3. Does the statement of claim reveal a cause of action?

BACKGROUND

[3] For purposes of this decision, I will assume that all facts alleged in the Statement of Claim are true.

[4] On August 11, 2008, the Department of Public Works and Government Services tendered a request for proposals for 2D multichannel seismic acquisition northeast of the coast of Labrador. Seven months later, the contract was awarded to Fugro Jacques Geophysical Inc. ("Fugro Jacques"). Fugro Jacques engaged an Italian-flagged seismic ship, the *OGS Explorer*, to conduct the work.

[5] Geophysical Service Incorporated ("Geophysical") is a federally-incorporated company that conducts geophysical surveys and analyzes seismic data. It owns the *GSI Admiral*, the only Canadian-flagged seismic ship capable of doing the work required by the contract. It was at all relevant times suitable and available to perform the work and the Department has used it for similar work on other occasions.

[6] Though not stated in the pleadings, Geophysical admitted at the hearing that it did not bid on the seismic acquisition contract. Nevertheless, it complained to the Canadian International Trade Tribunal about the tendering process that awarded the contract to Fugro Jacques partly on the basis that it ought to have received preferential notice of the tendering process. That complaint was dismissed for reasons that will be discussed in greater length later.

[7] Geophysical then brought this action alleging unlawful interference with its economic relations. It says that Canada acted contrary to the *Coasting Trade Act*, SC 1992, c. 31, by awarding the contract to an Italian-flagged ship when a Canadian-flagged ship was available to do the work. Canada then amended the contract to falsely represent that the work was commissioned by the Department of Fisheries and Oceans in order to avoid the operation of the *Coasting Trade Act*, *ibid*.

[8] Geophysical contends that had Canada adhered to the formal requirements, Fugro Jacques would have had to apply for a licence and Geophysical would have received notice. Geophysical would have contested the application and Fugro Jacques would have been unable to obtain a licence. The *GSI Admiral* would thus have been the only ship able to do the work and therefore Canada's actions have deprived

Geophysical of the opportunity either to perform the work itself or, alternatively, to contract out the *GSI Admiral* to another bidder.

[9] Canada has brought this motion alleging:

(i) that this court does not have jurisdiction to hear the claim;
(ii) that Geophysical's action is barred by issue estoppel; and,
(iii) that Geophysical's statement of claim discloses no cause of action.

[10] I will consider each of those grounds in order

ANALYSIS

1. Does this Court lack jurisdiction to hear Geophysical's action?

[11] Canada advances this part of the motion under Rule 4.07, which allows for dismissing an action for want of jurisdiction. In relevant part, it provides that:

> 4.07 (1) A defendant who maintains that the court does not have jurisdiction over the subject of an action, or over the defendant, may make a motion to dismiss the action for want of jurisdiction.
>
> (2) A defendant does not submit to the jurisdiction of the court only by moving to dismiss the action for want of jurisdiction.

[12] Canada points out that Geophysical had previously complained to the Canadian International Trade Tribunal ("CITT") and that tribunal decided not to conduct an inquiry into the complaint: **Re Geophysical Service Incorporated** (25 May 2009), PR-2009-08 (CITT). Geophysical did not seek judicial review of that decision. Canada now submits that this court should decline jurisdiction since Geophysical has accessed and exhausted an adequate alternate process in its complaint to the CITT.

[13] In its brief, Geophysical advances two counter-arguments. First, it says that Rule 4.07 is restricted to territorial jurisdiction and is not available here. Second, it submits that Canada's submissions are anchored entirely in issue estoppel and are only properly considered under the next ground. At the hearing, Geophysical also addressed Canada's arguments on its own terms and emphasized the differences between the CITT complaint and the present action.

[14] With regard to the first counter-argument, Geophysical did not provide any authorities for the proposition and instead based its argument on the language "… jurisdiction over the subject of an action, or over the defendant …", which it says signals a territorial competence limitation. Geophysical also argues that Rule 4.07(2) does the same since it prevents a claim that the court has territorial competence under section 4(b) of the *Court Jurisdiction and Proceedings Transfer Act*, SNS 2003, c 2. For its part, Canada admitted at the hearing that Rule 4.07 has typically only been used for disputes over territorial jurisdiction.

[15] I do not agree with Geophysical. Although "jurisdiction … over the defendant" may signal territorial competence, the same sentence includes the phrase "jurisdiction over the subject of an action." That phrase was entirely ignored in Geophysical's submissions. Although it could be reconciled to a territorial competence restriction by reading it to refer only to property subject to in rem proceedings, I do not see any reason it should be interpreted so strictly. In my view, "jurisdiction over the subject of an action" refers to subject-matter competence, and thus Rule 4.07 could be used to dismiss any disputes that disclose a cause of action that this court has no competence to consider. As for Rule 4.07(2), it serves the same purpose whether Rule 4.07(1) includes subject-matter competence or not and so its presence does not influence my interpretation of Rule 4.07(1). As such, I am not convinced that Rule 4.07 is limited to territorial competence.

[16] However, it is not necessary to definitively decide this question as Geophysical's second argument is meritorious. Fundamentally, Canada is not arguing that Parliament has created a complete statutory code for dealing with all issues arising out of the procurement process. Quite the opposite, Canada expressly concedes that the Supreme Court has original jurisdiction to consider the pleaded cause of action and it candidly provided case law to that effect: **Envoy Relocation Services Inc v. Canada (Attorney General)**, 2008 CanLII 21227 (ONSC); **TPG Technology Consulting Ltd v Canada**, 2011 FC 1054 (CanLII).

[17] Rather, the substance of Canada's motion is that the CITT is an adequate process which has now reached a final decision and the court should decline jurisdiction in order to enforce Geophysical's election of forum and promote finality. The doctrine of *res judicata* is tailored to meet that exact concern and the same considerations would be in issue whether conducting the analysis under Rule 4.07 or

Rule 88. As such, this is duplicative at best. At worst, it is a corruption of Rule 4.07 since it seems to me that this rule is only intended to entertain claims that the court lacks jurisdiction not that it should decline it. Canada's arguments are better dealt with as a claim of issue estoppel and I will consider them further under that ground.

2. Is Geophysical's claim barred by issue estoppel?

[18] The issue estoppel ground is advanced as a motion under Rule 88 for abuse of process. Canada argues that the same issues raised in this action have already been finally decided by the Canadian International Trade Tribunal.

[19] The leading case on applying issue estoppel to prior decisions of administrative tribunals remains **Danyluk v Ainsworth Technologies**, 2001 SCC 44, [2001] 2 SCR 460. At paragraph 33, Justice Binnie emphasized a two-step process:

> The first step is to determine whether the moving party […] has established the preconditions to the operation of issue estoppel set out by Dickson J. in *Angle, supra.* If successful, the court must still determine whether, as a matter of discretion, issue estoppel *ought* to be applied.

This approach has been affirmed recently by the majority of the Supreme Court in **Penner v Niagara (Regional Police Services Board)**, 2013 SCC 19 at para 31.

[20] The pre-conditions for issue estoppel were listed at paragraph 25 of **Danyluk**, *supra*, and they are:

> (1) that the same question has been decided;
>
> (2) that the judicial decision which is said to create the estoppel is final; and,
>
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

An element common to each pre-condition in the administrative context is whether the decision alleged to create the estoppel is judicial (para 35) and that could appropriately be considered independently as a fourth pre-condition.

[21] I am uncertain whether a summary decision not to investigate a complaint is truly a judicial decision but Geophysical does not contest that and I will not consider it in detail. Also, Geophysical concedes that the parties to the CITT complaint and this action are the same. It disputes only Canada's assertion that the same question was decided, that the CITT decision was final, and that the court's discretion should not be exercised in Geophysical's favour.

[22] I will consider first whether the same question was decided. In **Danyluk**, *supra*, Justice Binnie approved the earlier decision of Justice Dickson (as he then was) in **Angle v Minister of National Revenue**, [1975] 2 SCR 248. Citing that case, he summarized the "same question" pre-condition in the following language: "[t]he question out of which the estoppel is said to arise must have been 'fundamental to the decision arrived at' in the earlier proceeding." Therefore, issue estoppel will not apply to bar any issue which was merely incidentally decided in an earlier proceeding; it must be an issue which it was *necessary* to decide. The corollary to that is that for every fundamental issue the issue estoppel applies to every question of fact or law that was answered in deciding it. As put by Justice Binnie at paragraph 54 of **Danyluk**, *supra*: "[t]he estoppel, in other words, extends to the issues of fact, law, and mixed fact and law that are necessarily bound up with the determination of that 'issue' in the prior proceeding."

[23] Canada argues that the CITT decision was based on the same facts and allegations and so Geophysical should be barred from advancing them here. Naturally, Geophysical contests this and says that the only decision the CITT made was whether to conduct an inquiry. In no way did it decide the actual merits of the complaint. Even if it had gone to an inquiry, Geophysical says that the process would be directed solely at a fair procurement process which has little overlap with the tort of unlawful interference with economic relations or the remedy they now seek, neither of which could have been advanced before the CITT. Further, they have also uncovered additional evidence since the CITT decision which they could not have obtained at the time of the complaint.

[24] In the main, I agree with Geophysical. Although aspects of Geophysical's argument would more properly be directed against a claim of cause of action estoppel (which has not squarely been advanced), it nevertheless convinces me that the questions in this action were not decided by the CITT. No aspect of the current claim was fundamental to the CITT's decision not to conduct an inquiry.

[25] Rather, section 30.13(5) of the *Canadian International Trade Tribunal Act*, RSC 1985, c 47, provides that the tribunal may decide not to conduct an inquiry "if it is of the opinion that the complaint is trivial, frivolous or vexatious or is not made in good faith." That requirement is supplemented and perhaps overtaken by section 7 of the *Canadian International Trade Tribunal Regulations*, SOR 93/602, which provides:

> 7. (1) The Tribunal shall, within five working days after the day on which a complaint is filed, determine whether the following conditions are met in respect of the complaint:
>
> (a) the complainant is a potential supplier;
>
> (b) the complaint is in respect of a designated contract; and
>
> (c) the information provided by the complainant, and any other information examined by the Tribunal in respect of the complaint, discloses a reasonable indication that the procurement has not been conducted in accordance with whichever of Chapter Ten of NAFTA, Chapter Five of the Agreement on Internal Trade, the Agreement on Government Procurement, Chapter K*bis* of the CCFTA, Chapter Fourteen of the CPFTA or Chapter Fourteen of the CCOFTA applies.
>
> (2) Where the Tribunal determines that the conditions set out in subsection (1) in respect of a complaint have been met and it decides to conduct an inquiry, the Tribunal shall publish a notice of the filing of the complaint in a circular or periodical designated by the Treasury Board.

The CITT decided not to conduct an inquiry solely because section 7(1)(c) was not satisfied. Only the Agreement on Internal Trade was relevant to its inquiry, and Article 506(2) permitted a call for tenders to be made by an electronic tendering system accessible to all Canadian suppliers. The proposal here was published on MERX, which meets that definition, and so there was no reasonable indication that the Agreement on Internal Trade was violated. It was on that basis that Geophysical's complaint to the CITT was not investigated.

[26] Geophysical also raised its concern about the *Coasting Trade Act* before the CITT, but the tribunal declined to consider that ground since it was "a mere suspicion

on the part of Geophysical." In its view, the basis of the complaint had not yet become known to Geophysical, and so it had not yet had grounds to bring the complaint under section 6(1) of the *Canadian International Trade Tribunal Regulations, supra*.

[27] Geophysical now submits that it obtained evidence that the contract was amended six and a half months after the CITT decision so the tribunal's comments on the issue no longer apply. For its part, Canada says that fresh evidence could have been admitted if Geophysical had applied to the Federal Court of Appeal for judicial review.

[28] However, I do not think it is necessary to consider that argument at length since the question about the *Coasting Trade Act, supra*, was ultimately incidental to the issue the CITT had to decide. Even if the tribunal had found for Geophysical on this issue, there is no indication that section 7(1)(c) would be satisfied. As such, the CITT would still not have conducted an inquiry. Since the application of the *Coasting Trade Act, supra*, was irrelevant to the CITT decision, it cannot form the basis of an issue estoppel.

[29] As such, the only answers that were fundamental to the CITT's decision were: (1) MERX is an electronic tendering system that is equally accessible to all Canadian suppliers; (2) the proposal in this case was published on MERX; and (3) Chapter 5 of the Agreement on Internal Trade did not give Geophysical a right to be notified of the tendering process directly. At most, therefore, those are the only issues which are barred by issue estoppel and none are in issue in this proceeding. Indeed, the facts and law at issue with regard to the tort of unlawful interference with economic relations are entirely different.

[30] Therefore, the questions decided by the CITT are not the same as the ones before this court, and this pre-condition for issue estoppel is not made out. The motion to dismiss the action for abuse of process must be denied and there is no need to assess whether the CITT decision was final or whether I should apply my residual discretion.

3. Does Geophysical's Statement of Claim disclose a cause of action?

[31] Lastly, Canada seeks summary judgment on the pleadings under Rule 13.03. More precisely, Canada moves to have the statement of claim set aside under the authority of Rule 13.03(1)(a), which provides that:

> 13.03 (1) A judge must set aside a statement of claim, or a statement of defence that is deficient in any of the following ways:
>
> (a) it discloses no cause of action or basis for a defence or contest; […]

[32] Our Court of Appeal set out the law governing summary judgment on pleadings in **Cape Breton (Regional Municipality) v Nova Scotia (Attorney General)**, 2009 NSCA 44 (CanLII). At paragraph 17, Chief Justice MacDonald considered the predecessor to Rule 13.03 and stated the test in the following terms:

> The Chambers judge would have to consider this claim at its highest, by assuming all allegations to be true without the need to call any evidence. Then even with this assumption, it must still remain "plain and obvious" that the pleadings disclose no reasonable cause of action.

He went on to adopt a passage from the Supreme Court of Canada's decision in **Hunt v Carey Canada Inc**, [1990] 2 SCR 959, where Justice Wilson said much the same at page 980, but added that: "[n]either the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case." That remains the law applicable to Rule 13.03(1)(a), and so Canada must convince me that it is plain and obvious that Geophysical's claim will fail.

[33] Also, Rule 13.03(3) specifies that no affidavit may be filed either in support or in opposition to the motion. As such, although Paul Einarsson's affidavit was relevant to the issue estoppel ground, I will ignore it entirely when assessing the pleadings.

[34] In this case, Canada submits that the statement of claim does not disclose a cause of action. It relies heavily on the New Brunswick Court of Appeal's recent decision in **AI Enterprises Ltd and Schelew v Bram Enterprises Ltd and Jamb Enterprises Ltd**, 2012 NBCA 33 (CanLII) [AI Enterprises]. In that case, Justice

Robertson set out a general model of the "interference with contractual relations by unlawful means" tort at paragraph 56:

> The plaintiff/claimant must establish: (1) the existence of a valid business relationship between the claimant and the third party; (2) the defendant knew or ought to have known of the relationship; (3) the defendant's interference prevented the formation of a contract or its performance in circumstances where there is no breach of an existing contract; (4) the defendant's impugned conduct must qualify as unlawful means or as warranting exceptional treatment; (5) the unlawful means must not be actionable directly by the claimant; (6) the defendant must have intended to cause the claimant harm; and (7) the defendant's conduct must have been the proximate cause of the claimant's loss. From the defendant's perspective, the analytical framework should embrace: (8) the defence of justification, which requires elaboration.

In Canada's view, the pleadings do not allege anything which would satisfy the first, second, third, sixth, or seventh elements of that test. Canada therefore submits that it is plain and obvious the claim should fail.

[35] Before considering the counter-arguments raised by Geophysical, it is useful to trace some of the recent developments of the tort briefly. In **Cheticamp Fisheries Co-Op Ltd v Canada**, [1995] NSJ No 127 (QL) (CA) [**Cheticamp**], the tort was described in simpler terms. At paragraph 18, Justice Chipman noted that the trial judge had proceeded on the basis that the tort consisted of three elements: "(1) unlawful conduct by the defendant; (2) carried out deliberately with the intention of causing damage to the business of the plaintiffs; and (3) damage thereby caused to the business of the plaintiffs." Justice Chipman applied that definition of the tort (para 24), and he went on to say that "[t]his tort is best known by the branch thereof that deals with interference with contractual relations" (para 25). Taken at face value, therefore, this formulation of the tort seems much broader than the elaboration of it in **AI Enterprises**, *supra*.

[36] However, **AI Enterprises**, *supra*, is consistent with **Cheticamp**, *supra*. The other elements it contains largely arise by exploring the meaning of "unlawful conduct" with a view to the purpose of the intentional economic torts. In **AI Enterprises**, *supra*, the New Brunswick Court of Appeal relied on a number of cases in formulating its test, most notably **OBG Ltd v Allan**, [2007] UKHL 21 [**OBG**]; **Correia v Canac Kitchens**, 2008 ONCA 506 [**Correia**]; **Alleslev-Krofchak v Valcom Limited**, 2010 ONCA 557 [**Valcom**]; and 671122 **Ontario Ltd v Sagaz**

Industries Canada Inc, 1998 CanLII 14850 (ONSC) [**Sagaz**]. At paragraph 107 of **Correia**, *ibid*, the Ontario Court of Appeal stated that: "[t]he intentional torts exist to fill a gap where no action could otherwise be brought for intentional conduct that caused harm through the instrumentality of a third party." This was applied in **Valcom**, *ibid*, when Justice Goudge says at paragraph 60 that:

> [T]o qualify as 'unlawful means', the defendant's actions (i) cannot be actionable directly by the plaintiff and (ii) must be directed at a third party, which then becomes the vehicle through which harm is caused to the plaintiff.

The expanded criteria in **AI Enterprises**, *supra*, can largely be derived from that basic statement as well as the elements listed at paragraph 61 of **Sagaz**, *supra*. Although there are still some important differences, they are irrelevant for present purposes.

[37] In its brief, Geophysical attacked the argument that it had no cause of action on two fronts. First, it said that its statement of claim actually does allege every necessary element of the test in **AI Enterprises**, *supra*. Second, it said that the law with relation to this tort is not settled in Nova Scotia and that it would be inappropriate to arbitrarily select **AI Enterprises**, *supra*, and the other successors to **OBG**, *supra*, as definitive and decide the case on that basis. The brief emphasized that **AI Enterprises**, *supra*, itself is currently under appeal to the Supreme Court and is scheduled to be heard this month.

[38] However, that second argument was abandoned at the hearing, with Mr. Moreira, counsel for Geophysical, saying:

> The cases are inconsistent. The cases are not uniform. I don't- It is not my position that "this is all on its way to the Supreme Court for hearing in a couple of months and for decision in a couple of years and let's wait to hear from the Supreme Court." Because I'm willing to address this motion on the basis of what I submit is the most restrictive of the analyses by Canadian courts, which is the *AI Enterprises*, the *AK / Valcom* case, and the *Correia v Canac Kitchens* case, all appellate level decisions since the decision of the House of Lords in *OBG*.

Mr. Moreira then went through each of the seven elements in **AI Enterprises**, *supra*, and drew a correspondence to the statement of claim. Given that position, I will assume for the purposes of this decision that a claim for unlawful interference with

economic relations can only be made out if the test in **AI Enterprises**, *supra*, **Valcom**, *supra*, and **Correia**, *supra*, is satisfied.

[39] The first element of the tort is relatively uncontroversial as between the recent appellate-level decisions. Indeed, even the test in **Sagaz**, *supra* (which was initially preferred by Geophysical in its brief), included among its elements at paragraph 61: "(1) the existence of a valid business relationship or business expectancy between the plaintiff and another party." Geophysical states that this third party requirement is pled at paragraph 4 of the Statement of Claim.

[40] Paragraph 4 is a description of the process mandated in the *Coasting Trade Act, supra*. To paraphrase, it states that, pursuant to section 3(1), any foreign or non-duty ship must have a licence in order to engage in the coasting trade (some seismic activity is now excepted from that under section 3(2)(c.1), but that provision was only added in 2012). Such a licence can be issued to foreign ships, pursuant to section 4(1), but only if the Canadian Transportation Agency has determined that no Canadian ship is suitable and available to perform the work. The statement of claim asserts that, upon application for a licence, the Canadian Transportation Agency would directly notify any owners of Canadian-flagged ships which may be suitable, including Geophysical, and provide them an opportunity to object to the issuance of a licence. Geophysical would invariably do so whenever a seismic ship was involved and frequently succeeded in securing the work for the *GSI Admiral*.

[41] Mr. Moreira submitted that that creates a valid business relationship or business expectancy between Geophysical and Fugro Jacques. I disagree. 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.

[43] The licencing requirement of the *Coasting Trade Act, supra,* does not change that basic relationship. At most, the statement of claim alleges that:

> (1) Geophysical is the only company with a Canadian-flagged seismic ship capable of performing the relevant contract;
>
> (2) under these circumstances, any other company seeking the work would ordinarily need to apply to the Canadian Transportation Agency for a licence;
>
> (3) had the licencing process been engaged, the Canadian Transportation Agency would have denied Fugro Jacques' application, leaving Geophysical as the only company capable of performing the contract; and
>
> (4) Canada falsely altered the contract in order to intentionally avoid that obligation and deny Geophysical the opportunity to perform the contract.

[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.

CONCLUSION

[46] The motion alleging a lack of jurisdiction is denied. Accessing an adequate alternate process may preclude a plaintiff from re-litigating the same issue in this court but that is not because the court has lost jurisdiction.

[47] Rather, promoting finality is a matter of public policy and it is best considered under the issue estoppel analysis. In that regard, the CITT decided Geophysical's complaint on very narrow grounds. It did not decide the same questions that are at issue here and therefore the pre-conditions for applying issue estoppel are not satisfied.

[48] However, Canada is correct that the statement of claim does not disclose the material facts required to support a finding of unlawful interference with economic relations as that tort was argued before me. No other cause of action has been advanced, and for that reason, the action is dismissed.

[49] If the parties cannot agree on costs, I invite them to file written submissions within thirty days of the release of this decision.

McDougall, J.