

Date: 19980507

Docket: A-314-97

CORAM: DENAULT J.A.

LÉTOURNEAU J.A.

CHEVALIER D.J.A.

BETWEEN:

MIL DAVIE INC.

Appellant

AND:

**SOCIÉTÉ D'EXPLOITATION ET
DE DÉVELOPPEMENT D'HIBERNIA LTÉE**

Respondent

Heard at Montreal, Quebec, Monday, March 30, 1998

Judgment delivered at Ottawa, Ontario,

Thursday, May 7, 1998

REASONS FOR JUDGMENT BY THE COURT

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BY THE COURT

[1] This is an appeal from an order of a judge of the Trial Division, dated March 21, 1997, which granted the motion of the Respondent alleging that the Trial Division had no jurisdiction to hear the action in damages launched by the Appellant. The motion sought an order staying the

proceedings and was made pursuant to Rule 401(c) of the *Federal Court Rules* as well as ss. 50 and 17(6) of the *Federal Court Act*.

Facts and Procedure

[2] The Appellant is seeking damages of \$17,468,000 as a result of the Respondent's decision to award to St-John Shipbuilding Ltd. (SJSL) a completion contract to allegedly finish the manufacturing of certain topside modules concerning the Hibernia oilfield project.

[3] The party which had originally won the tender process for the construction of the topside modules was incapable of fulfilling its obligations and had to be replaced. The Appellant was the only other party to have a bid for the original contract. The Appellant alleges that the Respondent's decision to award the completion contract to SJSL was made without seeking tenders, in bad faith and with malice. It alleges that the Respondent participated in a conspiracy to eliminate or restrict competition amounting to an offence under s. 45 of the *Competition Act* (R.S.C. (1985) ch. C-34) and causing undue prejudice to the Appellant. Hence the action for damages based on s. 36 of the *Competition Act* which gives jurisdiction to the Federal Court to hear such actions¹.

[4] The judge of the Trial Division granted the Respondent's motion on two basis: first that the Appellant's Statement of Claim did not clearly allege the factual basis for the alleged conspiracy contemplated by s. 45 of the *Competition Act* and, second, that the Statement of Claim disclosed no reasonable cause of action in relation to s. 45. For the sake of convenience, we reproduce the exact terms used by the judge at p. 3 of his decision:

The plaintiff's submissions must fail, in my view, because its Statement of Claim falls far short of clearly alleging the factual basis for the kind of anti-competitive conduct contemplated by section 45 of the *Act*. In none of its 135 paragraphs, does the Statement of Claim disclose specific allegations of fact which come within section 45. Three paragraphs contain general allegations of anti-competitive activity:

113. HMDC therefore acted in bad faith and with malice toward MIL, showed favouritism and engaged in restrictive trade practices contrary to the *Competition Act* and the Benefits Plan in awarding the contract to complete the work to SJSL;

124. HMDC therefore acted in bad faith and with malice toward MIL by participating in a conspiracy with SJSL to restrain or injure competition unduly;

126. HMDC acted in bad faith and with malice in the summer of 1994 in commencing secret negotiations with SJSL the only purpose and result of which was to restrain competition. . . .

However, these are mere bald assertions without accompanying specific allegations of fact. Accordingly, I have concluded that the Statement of Claim discloses no reasonable cause of action in relation to section 45 of the *Act*, the sole statutory grant of jurisdiction by Parliament upon which the plaintiff relies. Collier J. appears to have reached a similar conclusion in *Pacific Western Airlines Ltd. v. The Queen*, [1979] 2. F.C. 476 confirmed by the Court of Appeal at [1980] I F.C. 86 at 88, when he stated at p. 486:

One cannot, merely by baldly asserting, in a pleading, breach of certain Regulations said to be Canadian federal law, with nothing more, automatically invoke or attract the jurisdiction of the Court. Put another way, the deemed truth of paragraph 87 cannot support jurisdiction. The plea is deficient. I cannot see how jurisdiction can be bestowed by such a plea - one barren of any facts from which the question of jurisdiction or no can be determined.

[5] It appears that the judge's second finding that the Statement of Claim disclosed no reasonable cause of action was made pursuant to Rule 419(1)(a) of the *Federal Court Rules* which relates to the striking of pleadings although the judge made no express reference to that Rule and the motion before him was made under Rule 401(c). His reference to the case of *Pacific Western Airlines Ltd. v. The Queen*, however, tends to confirm that perception as this case was one where the action was dismissed pursuant to Rule 419(1)(a) on the ground that it did not disclose any reasonable cause of action which would fall within the jurisdiction of the Court.

[6] Counsel for the Respondent argued before us that, in any event, it was proper for the judge to apply whichever rule is appropriate in the circumstances.

[7] We recognize that there is some confusion in the case law as to the proper rule to resort to in order to raise an objection to the jurisdiction of the Court. In some cases, pleadings in an action and actions have been struck out under Rule 419(1)(a) for want of jurisdiction or for failure to establish a reasonable cause of action falling within the jurisdiction of the Court². In others, the Trial Division of the Court has expressed its preference for a motion to be made pursuant to Rule 401(c) because affidavit evidence can be adduced while no such evidence can be filed on a motion made pursuant to Rule 419(1)(a)³.

[8] Generally speaking, where an objection is taken to its jurisdiction, the Court must be satisfied that there are jurisdictional facts or allegations of such facts supporting an attribution of jurisdiction. The existence of the necessary jurisdictional facts will normally be found in the pleadings and in the affidavits filed in support of or in response to the motion. In this respect, the

prohibition contained in Rule 419(2) against the admissibility of evidence does not apply when it is the jurisdiction of the Court which is contested as opposed to a mere objection to the pleadings on the basis that they do not reveal a reasonable cause of action⁴. We mention this to dissipate any doubt as to the admissibility of affidavit evidence in the present instance. In any event, the motion in the present instance, as we have already indicated, was made pursuant to Rule 401(c) and ss. 50 and 17(c) of the *Federal Court Act*.

[9] In our view, the judge of the Trial Division misdirected himself when he concluded that there were only three general allegations or bald assertions of anti-competitive activity unsubstantiated with specific facts or a proper factual basis. Indeed paragraphs 62 to 112 and 114 to 120 of the Statement of Claim all refer to specific facts either material to the jurisdictional facts necessary under ss. 36 and 45 of the *Competition Act* to establish the jurisdiction of the Trial Division or tending to show a reasonable cause of action.

[10] For example, paragraphs 62 and 68 state that there were constant communications between the Appellant and the Respondent, but that the Respondent never disclosed to the Appellant the on-going and serious difficulties with the realisation of the contract given to the other party pursuant to the tender process. Paragraph 75 alleges an admission by the Respondent's Construction General Manager that the Respondent had been unfair to the Appellant. Paragraphs 81 to 83 assert as a fact that the Respondent, on the one hand, lied to the Canada-Newfoundland Offshore Petroleum Board (Board) in charge of approving the benefits plan when it said that it had communicated with the Appellant and, on the other hand, failed to inform the Board of the discussions that had been taking place between the Respondent and SJSL to whom the Respondent gave the completion contract. Paragraphs 98 and 99 refer to the Board's findings of fact that the Respondent had violated the terms of the benefits plan, had not provided the Appellant "with a full and fair opportunity to participate in the E & I work on a competitive basis as provided for in the Hibernia Benefits Plan" and, by failing to advise the Board of its intentions in a timely manner, had violated his commitment as well as conditions 4 and 5 of the Hibernia Benefits Plan. Finally, these paragraphs also refer to the Board's finding that there is an inextricable linkage between the Respondent's failure to provide full and fair opportunity to the Appellant and the Respondent not informing the Board in a timely manner.

[11] We could go on analyzing the other paragraphs of the Statement of Claim, but we believe there is a sufficient factual basis in those that we have reviewed to substantiate the jurisdictional facts as well as the reasonable cause of action under s. 36 of the *Competition Act* alleged by the Appellant. This is not to say, however, that the Appellant could not, in its Statement of Claim, have made a better presentation of those facts and over acts which pertain to the alleged conspiracy so as to better link them to the tortious act and, by the same token, make the jurisdiction of the Federal Court more visible.

[12] As an alternative ground in support of its motion to stay the action, namely that the Federal Court lacked jurisdiction to hear the matter and that only the courts of Newfoundland had such jurisdiction, the Respondent relied, in particular, on sections 4 and 215 of the *Canada-Newfoundland Atlantic Accord Implementation Act*, S.C. 1987, c. 3 (the *Implementation Act*) and subsection 17(6) of the *Federal Court Act*. Although the Respondent's motion specifically mentioned these issues, the Trial Judge decided not to deal with them. He stated the following:

Because of my finding concerning section 45 of the *[Competition] Act*, I need not deal with the defendant's submissions concerning subsection 17(6) of the *Federal Court Act* and section 4 of the *Federal Accord Act*.

[13] This Court must now deal with this argument, since the Respondent has raised it again and submits that had the Trial Judge dealt with these issues, he would have had to stay the plaintiff's action on this basis.

[14] The provisions on which the Respondent's argument is based read as follows:

Canada-Newfoundland Atlantic Accord Implementation Act:

4. In case of any inconsistency or conflict between

(a) this Act or any regulations made thereunder, and

(b) any other Act of Parliament that applies federal laws and provincial laws to offshore areas or any regulations made under that Act,

this Act and the regulations made thereunder take precedence.

215. (1) Every court in the Province has jurisdiction in respect of matters arising in the offshore area under this Part or Division VI of Part II or under any laws made applicable by this Part or that Division to the offshore area, to the same extent as the court has jurisdiction in respect of matters arising within its ordinary territorial division.

(2) For the purposes of subsection (1), the offshore area shall be deemed to be within the territorial limits of the judicial centre of St. John's.

(3) Nothing in this section limits the jurisdiction that a court may exercise apart from this section.

(4) In this section, "court" includes a judge thereof and any provincial court judge or justice.

Federal Court Act:

17. . . .

(6) Where an Act of Parliament confers jurisdiction in respect of a matter on a court constituted or established by or under a law of a province, the Trial Division has no jurisdiction to entertain any proceeding in respect of the same matter unless the Act expressly confers that jurisdiction on the Court.

[15] The gist of the Respondent's argument is that according to section 4 of the *Implementation Act*, the said Act prevails in the event of any inconsistency or conflict between itself and any other Act of Parliament that applies federal and provincial laws to offshore areas, and that in so far as the action in the case at bar does not involve an issue of Canadian maritime law (section 22 of the *Federal Court Act*), an issue relating to navigation or shipping, or any other issue coming under any other Act of Parliament other than, in an incidental manner, the *Competition Act*, the Federal Court lacks jurisdiction.

[16] We do not agree. First, as shown above, under subsection 36(3) of the *Competition Act*, the Federal Court has jurisdiction over any civil action in which a person claims to have suffered damage as a result of conduct contrary to any provision of Part VI of that Act, that is, an offence in relation to competition. This is in fact such a case. Second, according to the very wording of section 4 of the *Implementation Act*, the *Implementation Act* takes precedence over another Act of Parliament only if the other Act of Parliament applies federal laws to offshore areas and there is an inconsistency or conflict between the *Implementation Act* and the other Act of Parliament. In the case at bar, we cannot see how the *Implementation Act* bars the Federal Court from exercising its jurisdiction to enforce the *Competition Act*. Although the *Implementation Act* clearly does confer jurisdiction on the courts of Newfoundland in a number of areas, Parliament did not deprive the Federal Court of jurisdiction in any other areas. In the instant case, the *Competition Act* raised in support of the action is not, strictly speaking, an Act of Parliament that applies federal laws to offshore areas, and there is not, in respect of the subject of the action, any inconsistency or conflict between it and the *Implementation Act*.

[17] As for the argument relating to subsection 17(6) of the *Federal Court Act*, it must be analysed in connection with section 215 of the *Implementation Act*. According to the Respondent, since Parliament did not expressly confer jurisdiction on the Federal Court when conferring jurisdiction on the courts of Newfoundland, under section 215 of the *Implementation Act*, over the matters referred to therein, the Federal Court no longer has jurisdiction over those matters. The Respondent may be right, but only in respect of the matters referred to in that section. In so far as section 215 of the *Implementation Act*, an Act of Parliament, confers jurisdiction on the courts of Newfoundland in respect of matters arising under Part IV⁵ (Revenue Sharing) or Division VI (Royalties) of Part II (Petroleum Resources) without expressly mentioning the Federal Court's jurisdiction, the Federal Court may no longer have jurisdiction in such matters. This nevertheless does not mean that it loses jurisdiction over any other action where, as in the case at bar, Parliament did not see fit to bar it from exercising its jurisdiction over the part concerned (section 45 is in Part I).

[18] In our view, the appeal must be allowed with costs.

"Pierre Denault"

J.A.

"Gilles Létourneau"

J.A.

"François Chevalier"

D.J.A.

1. S. 36(1) and (3) reads:

36(1) Any person who has suffered loss or damage as a result of a) conduct that is contrary to any provision of Part VI, or b) the failure of any person to comply with an order of the Tribunal or another court under this Act. may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

(3) For the purposes of any action under subsection (1), the Federal Court is a court of competent jurisdiction.

2. *Pacific Western Airlines Ltd. v. The Queen* [1980] 1 F.C. 86 (F.C.A.); *Lake Babine Indian Band v. Williams* [1996] 194 N.R. 44 (F.C.A.); *Mobarakizadeh v. Canada* [1993] 23 Imm. L.R. (2d) 93 (F.C.T.D.)

[3.](#) *Concept Omega Corporation v. Logiciels K.L.M. Ltée* [1987] 12 F.T.R. 291 (F.C.T.D.); *Banerd v. Canada et al* [1994] 88 F.T.R. 14 (F.C.T.D.); *Cairns v. Farm Credit Corp.* [1992] 2 F.C. 115 (F.C.T.D.)

[4.](#) *Erasmus v. Canada* [1993] 1 C.N.L.R. 59 (F.C.A.)

[5.](#) Parliament's reference in subsection 215(1) to "this Part" has to mean Part IV, or "Revenue Sharing", which includes sections 206 to 217, not Part III as indicated in the respondent's documents (paragraph 37 of the memorandum and paragraph 10 of the affidavit of Desnes Bajzak).

[6.](#) Voici le libellé des par. 36(1) et (3) : 36(1) Toute personne qui a subi une perte ou des dommages par suite : a) soit d'un comportement allant à l'encontre d'une disposition de la partie VI; b) soit du défaut d'une personne d'obtempérer à une ordonnance rendue par le Tribunal ou un autre tribunal en vertu de la présente loi, peut, devant tout tribunal compétent, réclamer et recouvrer de la personne qui a eu un tel comportement ou n'a pas obtempéré à l'ordonnance une somme égale au montant de la perte ou des dommages qu'elle est reconnue avoir subis, ainsi que toute somme supplémentaire que le tribunal peut fixer et qui n'excède pas le coût total, pour elle, de toute enquête relativement à l'affaire et des procédures engagées en vertu du présent article. (3) La Cour fédérale a compétence sur les actions prévues au paragraphe (1).

[7.](#) *Pacific Western Airlines Ltd. c. La Reine*, [1980] 1 C.F. 86 (C.A.F.); *Lake Babine Indian Band v. Williams* [1996] 194 N.R. 44 (C.A.F.); *Mobarakizadeh v. Canada* [1993] 23 Imm. L.R. (2d) 93 (C.F. 1^{re} inst.).

[8.](#) *Concept Omega Corporation v. Logiciels K.L.M. Ltée* [1987] 12 F.T.R. 291 (C.F. 1^{re} inst.); *Banerd v. Canada et al.* [1994] 88 F.T.R. 14 (C.F. 1^{re} inst.); *Cairns c. Société du crédit agricole*, [1992] 2 C.F. 115 (C.F. 1^{re} inst.).

[9.](#) *Erasmus v. Canada* [1993] 1 C.N.L.R. 59 (C.A.F.).

[10.](#) Lorsque le législateur, au paragraphe 215(1) mentionne "la présente partie", il réfère nécessairement à la partie IV, partant du "Partage des recettes", couvert par les articles 206 à 217, et non pas la partie III comme les documents de l'intimée - paragraphe 37 du mémoire et paragraphe 10 de l'affidavit de Desnes Bajzak - l'indiquent.