# IN THE SUPREME COURT OF NOVA SCOTIA

**Citation:** PCI Chemicals Canada Company v. ABB Trasmissione & Distribuzione S.p.A, 2005 NSSC 18

**Date:** 20041223
**Docket:** S.H. 192518
**Registry:** Halifax

**Between:**

PCI Chemicals Canada Company

Plaintiff

v.

ABB Trasmissione & Distribuzione S.p.A.

Defendant

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| **Judge:** | The Honourable Justice C. Richard Coughlan |
| **Heard:** | December 23, 2004 (in Chambers), at Halifax, Nova Scotia |
| **Decision:** | December 23, 2004 (Orally) |
| **Written Decision:** | January 28, 2005 |
| **Counsel:** | Jane E. O'Neill, for the Plaintiff<br>Daniela F. Bassan, for the Defendant |

**Coughlan, J.:** (Orally)

[1] The plaintiff applies for an order pursuant to Civil Procedure Rule 43.01 for an injunction restraining the defendant from proceeding with an action commenced against the plaintiff in Italy.

[2] I have read the material filed, including the affidavits of Jane O'Neil, Sebastiano Zimmitti and Roberto Marinoni, the briefs and authorities submitted by counsel, and heard the submissions by counsel.

[3] PCI Chemicals Canada Company (PCI) commenced action against ABB Trasmissione & Distribuzione S.p.A. (ABB). The action was for damages for the cost of repairs and lost profit and/or contribution for negligence in the manufacture of a transformer for use by PCI, a company incorporated in Nova Scotia, at its chlorate plant in Dalhousie, New Brunswick.

[4] On June 30, 2003, ABB applied for an order setting aside the Nova Scotia action for lack of jurisdiction. On September 15, 2003, ABB filed a claim in Italy seeking:

> ... to declare the absence of any obligation to compensate on the part of the petitioner ABB T & D S.p.A., and in any case the absence of any right to compensation whatsoever on the part of PCI Chemicals Canada Company against the petitioner in respect of the facts described in the writ served to the petitioning company on 29 April 2003 and produced as exhibit 3.

[5] LeBlanc, J., of this Court, heard the application to set aside the Nova Scotia action and, by order dated January 26, 2004, dismissed the action, concluding there was sufficient "real and substantial connection" between the subject matter of the action and Nova Scotia for the Court to assume jurisdiction. On January 16, 2004, ABB filed a defence in the Nova Scotia action.

[6] The first hearing of the Italian proceeding was held May 11, 2004. No one appeared at the hearing for PCI, other than to contest service of the writ.

[7] The Italian Court found the Writ of Summons was regularly served and declared PCI in "default", as understood by Italian law, and scheduled the next hearing for February 16, 2005. If PCI appears before the Court, it has until

January 20, 2005 to put forward any objections relating to the proceedings or the merits of the case which may not be detected by the Court.

[8] Mr. Marinoni says in his affidavit at para. 9:

> In accordance with the Italian legal institution of "default", the absent party, PCI, maintains the right of entry of appearance until the hearing of remittal of the case to the panel. However, PCI cannot fulfill anymore those acts which are foreclosed to it. For example, should PCI appear at the next hearing, PCI could not petition for any counterclaim or, should PCI appear after the next hearing for the discussion on the evidence, PCI could not petition for the admission of evidence.

[9] In his affidavit, Mr. Zimmitti says at para. 4:

> In accordance with the Italian legal institution of "contumace", PCI Chemicals Canada Company is entitled to file a defence on the merits of the claim in Court of Milan file number G.R. 60195/03. PCI Chemicals Canada Company is not entitled to file a counterclaim in that action but is not precluded from bringing a new action seeking the same relief as would be sought in a counterclaim.

[10] The witnesses PCI intend to call in the Nova Scotia action are in Canada or the United States. The estimated cost of fees for a trial level decision on a jurisdictional challenge in Italy is between Euro 20,000 and 30,000 - approximately $39,000.00 to $47,000.00 Canadian.

[11] ABB witnesses are located in Italy.

[12] The leading case in Canada dealing with anti-suit injunctions is *Amchem Products Inc. v. British Columbia (Workers Compensation Board)*, [1993] 1 S.C.R. 897. In giving the Court's judgment, Sopinka, J. stated at p. 930:

> No consistent approach appears to emerge from these cases other than recognition of the principle that great caution should be exercised when invoking the power to enjoin foreign litigation.

and again at p. 930:

> In order to resort to this special remedy confident with the principles of comity it is preferable that the decision of the foreign court not be pre-empted

> until a proceeding has been launched in that court and the applicant for an injunction in the domestic court has sought from the foreign court a stay or other termination of the foreign proceedings and failed.

[13] Sopinka, J. then continues to explain the balance of the test concerning anti-suit injunctions, and concludes at p. 934:

> The result of the application of these principles is that when a foreign court assumes jurisdiction on a basis that generally conforms to our rule of private international law relating to the forum non conveniens, that decision will be respected and a Canadian court will not purport to make the decision for the foreign court. The policy of our courts with respect to comity demands no less. If, however, a foreign court assumes jurisdiction on a basis that is inconsistent with our rules of private international law and an injustice results to a litigant or "would-be" litigant in our courts, then the assumption of jurisdiction is inequitable and the party invoking the foreign jurisdiction can be restrained. The foreign court, not having, itself, observed the rules of comity, cannot expect its decision to be respected on the basis of comity.

[14] In this case, PCI has not applied to the Italian Court for a stay or other termination of the Italian proceeding, and failed. There is nothing that persuades me the preferred practice should not be followed in this case. There is no evidence before me that the Italian Court has assumed jurisdiction on a basis inconsistent with our rules of private international law and an injustice results to a litigant in our courts.

[15] The fact situation in this case is different from the facts in *Hudon et al. v. Geos Language Corporation et al.* (1997), 34 O.R. (3d) 14, Ontario Court (General Division) Divisional Court. In that case, the Court found there was a strong personal advantage to the plaintiff, a permanently disabled person, in being able to proceed with the action in Ontario.

[16] In *Bell'O International LLC v. Flooring and Lumber Co.* (2001), 11 C.P.C. (5th) 327, the plaintiff originally chose Ontario as its forum, and it was clear Ontario was an appropriate forum. The judge stated the fact the plaintiff picked Ontario and then New Jersey as the forum made the case very different from the ordinary anti-suit injunction case.

[17] I dismiss the application.

[18] I award ABB costs in the amount of $750.00 in the cause.

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**Coughlan, J.**