Federal Court  Cour fédérale

Date: 20100119

Docket: T-382-09

Citation: 2010 FC 56

[ENGLISH TRANSLATION]

Ottawa, Ontario, January 19, 2010

PRESENT: The Honourable Mr. Justice Leumieux

BETWEEN:

NANCY BOUCHARD

Plaintiff

and

MITSUBISHI MOTOR SALES OF CANADA INC.
and
MITSUBISHI MOTORS NORTH AMERICA INC.
and
MITSUBISHI MOTORS CORPORATION

Defendants

REASONS FOR JUDGMENT AND JUDGMENT

Introduction and facts

[1] This is an appeal by Nancy Bouchard, under section 51 of the *Federal Courts Rules* (the Rules), from the decision by Prothonotary Morneau (the Prothonotary) on August 27, 2009, on motions to strike the statement by the plaintiff, filed by two of the defendants under Rule 221(1)(a)

on the ground that this Court allegedly does not have jurisdiction to hear them. The claim by Nancy Bouchard is a proposed class action. The proposed class action, of which she is a member, would consist of [TRANSLATION] "Any natural person, body corporate, corporation, company or association that purchased or leased from a dealership in Canada, since June 1, 2006, a new vehicle manufactured, imported or distributed by the defendants". (Emphasis added.)

[2] This action is based on sections 36 and 45 of the *Competition Act* (the Act), which I have reproduced as Appendix A. The plaintiff alleges a conspiracy between the Mitsubishi companies and their American and Canadian dealerships to limit and control the import and free circulation of their products (new vehicles and parts) in the United States. This conspiracy artificially maintains the price of Mitsubishi vehicles in Canada 25% higher than they would be on a free-trade market. This conspiracy is manifest in several ways, including certain restrictions or obstacles to the import to Canada of Mitsubishi vehicles purchased in the United States by Canadian residents and the failure to recognize warranties from those purchases in Canada.

[3] The nature of the conspiracy alleged by Nancy Bouchard is important to the outcome of the appeal. I reproduce as Appendix B certain paragraphs of the plaintiff's statement that set out the allegations regarding this conspiracy.

[4] The two motions to strike were filed, on the one hand by the defendant Mitsubishi Motor Vehicle Sales of Canada Inc. (Mitsubishi Canada) and, on the other hand, by the defendant Mitsubishi Motors North America Inc. (Mitsubishi America or MMNA). The third defendant,

Mitsubishi Motors Corporation (Mitsubishi Japan) was not involved in this proceeding, as it was not served the action at the time of the hearing on the motions.

[5] When the Prothonotary considered the motion to strike submitted by Mitsubishi America, the latter had not filed its defence. The evidence on which Mitsubishi America based its motion to strike was the affidavit by its senior legal counsel, evidence that was allowed as an exception to Rule 221(2) because the issue before the Court was one of jurisdiction.

[6] In his decision on August 27, 2009 (reasons cited as *Nancy Bouchard v. Mitsubishi Motor Sales of Canada et al*, 2009 FC 852), Prothonotary Morneau:

1) struck the action by Nancy Bouchard against Mitsubishi America due to a lack of jurisdiction; and

2) dismissed the motion by Mitsubishi Canada, being of the view that this Court had jurisdiction to hear it.

The decision by Prothonotary Morneau

[7] The Prothonotary observed "that this statement of claim by the plaintiff is similar to, if not substantially the same as, an equivalent proceeding filed in May 2008 by the plaintiff with the Superior Court of Québec, with that proceeding being struck the Court in December 2008 against all defendants due to the lack of *ratione loci* jurisdiction under article 3148 of the *Civil Code of Quebec* (C.C.Q.)."

[8] Before Prothonotary Morneau, Mitsubishi claimed "that this Court, by proceeding with the same analysis and application of article 3148 of the C.C.Q. as that done by the Superior Court of Québec in December 2008, must arrive at the same conclusion of a lack of jurisdiction". He dismissed that argument on the ground that Mitsubishi Canada, a Canadian corporation was wrong in raising the jurisdiction of the Federal Court based on the application of article 3148 of the C.C.Q., noting that, in her statement, Nancy Bouchard cited the Act in alleging that the defendants breached the provisions of subsection 45(1) of the Act and, thus, all members of the class are entitled to claim damages from the defendants under subsection 36(1) of the Act.

[9] He found that subsection 36(3) of the Act explicitly states that this Court has jurisdiction over actions set out in subsection 36(1) of the Act and concluded as follows at paragraph 13 of his reasons:

> Consequently, with respect to Mitsubishi Canada, the jurisdiction of this Court over the plaintiff's action is therefore clearly established through subsection 36(3), and this finding means that the main remedy of Mitsubishi Canada's motion for lack of jurisdiction is without merit. (Emphasis added.)

[10] There was no appeal by Mitsubishi Canada.

[11] As for Mitsubishi America, the Prothonotary is of the view that the analysis cannot end with the presence of subsection 36(3) of the Act. He bases this on recent jurisprudence from this Court, particularly the decision by my colleague de Montigny J. in *Desjean v. Intermix Media Inc.*, [2006] F.C.J. No. 1754 (*Desjean*), a decision affirmed by the Federal Court of Appeal, 2007 FCA 365. After explaining that, in *Desjean*, the Court had to assess whether it had jurisdiction

over the American defendant Intermix Media Inc. against the allegations by *Desjean* that, through its activities, Intermix was guilty of deceptive, fraudulent and illegal practices, thus violating subsections 52(1) and 52(1.1) and paragraph 52(2)(e) of the Act, he cited paragraph 6 of the decision by de Montigny J. to illustrate the alleged activities of Intermix:

> [6] In his statement of claim for a proposed class action, Mr. Desjean alleges that Intermix offers ostensibly free software programs, such as screensavers and games, that anyone can download. Without disclosure to consumers, however, Intermix surreptitiously tacks onto these programs one or more additional programs that deliver ads and other invasive content. Thus, when Mr. Desjean installed a "free" Intermix screensaver or game on his computer, he also unwittingly installed one or more spyware programs. In this manner, known as "bundling", Intermix has spread its advertising programs onto Mr. Desjean's hard drive. [Emphasis added.]

[12] At paragraph 23 of his decision, Prothonotary Morneau adopts the finding of de Montigny J. in *Desjean* regarding the means for courts to assume jurisdiction over an out-of-country defendant:

> **23** There are three ways in which a court may assert jurisdiction over an out-of-country defendant. It may assume jurisdiction if the defendant is physically present within the territory of the court. Second, the foreign resident may consent to submit the dispute to the Canadian court's jurisdiction. Third, the court may declare itself competent to hear the case, in appropriate circumstances. This case raises the third possibility. [Emphasis added.]

[13] He considers that "here too, in the case of Mitsubishi America, we must assess whether the circumstances justify it", and cites paragraph 4 of the reasons of Pelletier J. in an appeal of the trial decision in which de Montigny J. found that the Federal Court did not have jurisdiction over Intermix:

> [4] [...] After summarizing the facts and the parties' arguments, he briefly reviewed the case law on the jurisdiction of Canadian courts

> pertaining to foreign defendants. Relying on *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 (*Morguard*), *Tolofson v. Jensen*; *Lucas (Litigation Guardian of) v. Gagnon*, [1994] 3 S.C.R. 1022 (*Tolofson*) and *Hunt v. T&N plc*, [1993] 4 S.C.R. 289 (*Hunt*), he concluded that, before exercising their jurisdiction over a foreign defendant who has no presence in Canada and who has not submitted to their jurisdiction, Canadian courts require a real and substantial connection between the defendant, the cause of action and Canada. The judge then turned to an analysis of the circumstances giving rise to the dispute, in light of the factors delineated in *Muscutt v. Courcelles* (2002), 213 D.L.R. (4th) 577 (Court of Appeal for Ontario) (*Muscutt*), to determine whether there was in fact a real and substantial connection between the respondent, the cause of action as set out in Mr. Desjean's statement of claim and Canada.
>
> [Emphasis by the Prothonotary]

[14] As indicated, in support of its motion to strike, Mitsubishi America filed an affidavit from John P. McElroy, senior legal counsel for the corporation, that Prothonotary Morneau found: "highlights as follows a wide range of factors that compare closely with the factors retained by De Montigny J. in *Desjean*".

[15] I cite certain excerpts from that affidavit:

> 9) MMNA is a corporation having its domicile in the State of California, more specifically in the city of Cypress.
>
> 10) MMNA does not currently have, nor did it have, at anytime during the Class Period a place of business in the Province of Quebec or in Canada.
>
> 11) MMNA does not hold or possess any assets in the Province of Quebec or in Canada, nor did it hold or possess any during the Class Period.

12) MMNA does not currently have, nor did it have at any time during the class period any employees in the Province of Quebec or in Canada.

13) MNA manufactures vehicles and car parts which through its wholesale activities may end up in the Canadian markets but MMNA is not involved, in any way in the retailing of vehicles or car parts in any Canadian market.

14) MMNA does not sell or distribute motor vehicles or any other product at the retail level in Canada nor in Quebec.

15) MMNA holds no bank accounts anywhere in Canada nor does it pay any provincial or federal taxes in the Canada.

16) MMNA is not registered with any federal authority as exercising commercial activities anywhere in Canada and is not registered in any provincial jurisdiction in Canada as a corporate entity doing business in said jurisdictions.

17) During the Class Period MMNA did not advertise its products in Canada or Quebec, or have any marketing strategy for the Canadian Market. Any advertising or marketing strategy in effect would have been exclusive to the US automobile retail market.

18) All of MMNA's management, pricing, merchandising, and operational decisions are conducted outside of Canada and in no way involve any Canadian retail market. [Emphasis added.]

[16] Mr. McElroy was not cross-examined on his affidavit. Prothonotary Morneau concluded as follows regarding the jurisdiction of this Court over Mitsubishi America:

> **22** I therefore consider that, faced with the factors above and the Federal Court's decision, as affirmed in appeal, in *Desjean*, here we must find that none of these factors, taken in isolation or as a whole, as well as vague allegations from the plaintiff's statement of claim, do not allow us to find that there is a real and substantial link between Mitsubishi America, the cause of action as set out in the plaintiff's statement of claim and Canada. [Emphasis added.]

Analysis

(a) Standard of Review

[17] Following an appeal to this Court of a decision by a prothonotary, there are two possible standards of review:

1) A *de novo* consideration of the decisions if the underlying issue was "vital to the issue of the case".

2) In all other circumstances, the appellant must establish that the Prothonotary's order was clearly wrong in that, in exercising his discretion, the Prothonotary relied on a wrong principle or a misapprehension of the facts. See the decision by Décary J. in *Merck & Co. Inc. v. Apotex*, [2014] 2 F.C.R. 459 (F.C.A.), at paragraph 19, which I repeat.

> **19** To avoid the confusion which we have seen from time to time arising from the wording used by MacGuigan J.A., I think it is appropriate to slightly reformulate the test for the standard of review. I will use the occasion to reverse the sequence of the propositions as originally set out, for the practical reason that a judge should logically determine first whether the questions are vital to the final issue: it is only when they are not that the judge effectively needs to engage in the process of determining whether the orders are clearly wrong. The

> test would now read: "Discretionary orders of prothonotaries ought not be disturbed on appeal to a judge unless: (a) the questions raised in the motion are vital to the final issue of the case, or (b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts."
> [Emphasis added.]

[18] In the case at hand, there is no doubt that the issue before the Prothonotary was vital. It was a motion to strike that was allowed. It put an end to the action by Nancy Bouchard against Mitsubishi America. I must therefore review the decision *de novo*.

(b) The parties' submissions

[19] I find that there is no need to elaborate on the written and oral submissions by the parties because, at the hearing, due to a lack of time, I allowed counsel for the plaintiff to provide a written response and counsel for Mitsubishi to make certain comments on the *Competition Act* with a right to response for the other party.

[20] Following the observations received, it seems to me that there is no difference between the parties regarding the fact that the test applicable to address the issue of the Court's jurisdiction over Mitsubishi America is that of a real and substantial connection and that the relevant factors for evaluating that test are those set out by Sharpe J. in *Muscutt*. The difference between the parties is regarding the application of those factors, which I will address later in these reasons.

[21] Regarding the scope of the *Competition Act* in the event of a conspiracy "entered into only by companies each of which is, in respect of every one of the others, an affiliate", I believe that it is premature to respond due to a lack of evidence regarding the nature of the affiliation

between the Mitsubishi respondents and a lack of submissions by the parties regarding the interpretation to be given to subsection 45(8) of the Act.

(c) The applicable principles from jurisprudence

[22] When the issue before a Court is to determine the circumstances in which it should affirm its jurisdiction (or assume jurisdiction) over a case that is before it, the recognized test in Canadian law since the Supreme Court decisions in *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393 (*Moran*) and *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 (*Morguard*) is that of a real and substantial connection between the jurisdiction of the court and the cause of action.

[23] In *Moran*, an action had been commenced before a court in that province by the estate of William Moran, an electrician, who died following an electrical shock received while removing a defective bulb manufactured by Pyle National, which carried on no business in that province; all its manufacturing and assembling operations took place in Ontario or in the United States. Pyle sold all its products to distributors and none directly to consumers. Pyle had no property or assets in that province. The Supreme Court recognized that Saskatchewan Courts had jurisdiction to hear the action in the case.

[24] In Moran, Dickson J. wrote the reasons of the Court. He is of the opinion that existing tests for determining when a tort has been committed are too arbitrary to be recognized in contemporary jurisprudence. He prefers the test of a real and substantial connection to determine that a tort "occurred in any country substantially affected by the defendant's activities or its consequences and the law of which is likely to have been in the reasonable contemplation of the parties". He applied

that test to a foreign defendant that carelessly manufactured a product in a foreign jurisdiction which then entered the Canadian market. He is of the opinion that, if it were reasonably foreseeable that the defective product would cause damage and be used where the plaintiff used it, then the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdictions over the foreign defendant. [Emphasis added.] He adds the following:

> This rule recognizes the important interest a state has in injuries suffered by persons within its territory. It recognizes that the purpose of negligence as a tort is to protect against carelessly inflicted injury and thus that the predominating element is damage suffered. By tendering his products in the market place directly or through normal distributive channels, a manufacturer ought to assume the burden of defending those products wherever they cause harm as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods. This is particularly true of dangerously defective goods placed in the interprovincial flow of commerce. [Emphasis added.]

[25] In *Morguard*, the issue before the Supreme Court was whether the courts in British Columbia should recognize a judgment by a court in Alberta in a personal action for a mortgage debt that exceeded the value of the land that Mr. De Savoye had mortgaged while residing in Alberta, but had changed for British Columbia before the taken against him by Morguard before the courts in Alberta. Notwithstanding the fact that he was served the action, the defendant took no steps to appear in Alberta. The Supreme Court ruled that the courts of British Columbia should recognize the judgment issued against the defendant in Alberta "so long as that court has properly, or appropriately, exercised jurisdiction in the action".

[26] In *Muscutt v Courcelles*, (2002) 213 D.L.R. 4th 477 (*Muscutt*), Sharpe J. of the Court of Appeal for Ontario summarized the principles applicable in determining "whether Ontario Courts

should assume jurisdiction over out-of-province defendants in claims for damage sustained in Ontario as a result of a tort committed elsewhere".

[27] The facts before Sharpe J. were as follows:

- A passenger in a motor vehicle, Mr. Muscutt, a resident of Ontario, was seriously injured in an accident in Alberta.

- He returned to Ontario, experienced pain and suffering, received medical care and lost earnings, all as a result of the harm suffered outside his province of residence.

- He brought an action before the Ontario Superior Court against the defendants, who were residents of Alberta. In *Muscutt*, Sharpe J. adopted the test of a real and substantial connection to determine whether the Ontario court should assume jurisdiction to hear the case. He developed eight useful factors for assessing the existence of such a connection:

    1. The connection between the *forum* and the plaintiff's claim
    2. A connection between the *forum* and the defendant
    3. Unfairness to the defendant in assuming jurisdiction
    4. Unfairness to the plaintiff in not assuming jurisdiction
    5. The involvement of other parties to the suit
    6. The court's willingness to recognize and enforce a judgement from another country rendered on a similar jurisdictional basis
    7. Whether the case is interprovincial or international in nature
    8. Comity and the standards jurisdiction, recognition and enforcement in other countries in the international community

[28] In his reasons, Sharpe J. citing the Supreme Court of Canada in *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 (Amchem), distinguishes between assuming jurisdiction and *forum non conveniens*. He quotes Sopinka J. in *Amchem*, at page 912: "Frequently, there is no single forum that is clearly the most convenient or appropriate for the trial of the action but rather several which are equally suitable alternatives." According to the Judge, the doctrine of *forum non conveniens* allows a court to decline to exercise its jurisdiction if another *forum* is more appropriate considering the following elements:

1. The location of the majority of the parties
2. The situation regarding evidence – the location of key witnesses and evidence
3. Contractual provisions that specify the applicable law
4. The avoidance of multiplicity of proceedings and the possibility of contradictory judgments
5. The applicable law and its weight in comparison to the factual questions to be decided
6. Geographical factors suggesting the natural forum
7. Depriving a party of an advantage available in the chosen *forum*.

[29] As in *Desjean*, at trial and in appeal, I agree with the factors chosen by Sharpe J. in *Muscutt* to assess the existence of a real and substantial connection between the forum and the elements relevant to the action. I find that, for the reasons cited by Sharpe J., these factors reflect very well the basic principles of international private law as assessed by the Supreme Court. I will explain.

[30] As noted by La Forest J. in *Morguard* and Le Bel J. in *Spar Aerospace Ltd. v. Mobile Satellite Corp.*, [2002] 4 S.C.R. 205 (*Spar*):

> 14. The private international law rules engaged in the case at bar are derived largely from a web of interrelated principles that underlie the private international legal order. […]
>
> …
>
> 20. [...] "the twin objectives sought by private international law in general [...] [are] order and fairness." [...] [Emphasis added.]

[31] In *Morguard*, La Forest J., citing author Hessel E. Yntema in "The Objectives of Private International Law", notes: "As is evident throughout his article, what must underlie a modern system of private international law are principles of order and fairness, principles that ensure security of transactions with justice."

[32] As indicated, La Forest J. in *Morguard* set out the obligation of a court to give full faith and credit to the judgments given by a court in another province, so long as that court "has properly, or appropriately, exercised jurisdiction in the action", being of the view "[b]oth order and justice militate in favour of the security of transactions."

[33] Later in his judgment, La Forest J. adds that the recognition of a judgment based on the test of having properly and appropriately exercised jurisdiction may "[...] meet the requirements of order and fairness to recognize a judgment given in a jurisdiction that had the greatest or at least significant contacts with the subject matter of the action. But it hardly accords with principles of order and fairness to permit a person to sue another in any jurisdiction, without regard to the contacts that jurisdiction may have to the defendant or the subject-matter of the suit … Thus,

fairness to the defendant requires that the judgment be issued by a court acting through fair process and with properly restrained jurisdiction." La Forest J. thus recognizes the difficulty that arises when a defendant resides outside the jurisdiction of the court. He is also aware that "If the courts of one province are to be expected to give effect to judgments given in another province, there must be some limit to the exercise of jurisdiction against persons outside the province." The solution, according to La Forest J., is the application of the test of real and substantial connection. [Emphasis added.]

[34] An overview of jurisprudence from the Supreme Court of Canada, not only in *Moran* and *Morguard*, but in:

1) *R. v. Libman*, [1985] 2 S.C.R. 178, a case in which the issue was which court should hear the trial of a person accused of international fraud and conspiracy to commit fraud.

2) *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, in which the issue was the jurisdiction of the British Columbia Supreme Court in a case involving an action brought before it by a resident of that province who was seeking damages against Quebec companies that had manufactured goods from asbestos fibres.

3) *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, in which the issue was to determine the rule for choosing the applicable law regarding motor vehicle accidents involving residents of different provinces.

4) *Spar*, above, in which the issue was to determine the court's jurisdiction in the context of prejudice suffered in carrying out an international contract.

5) *Beals v. Saldanha*, [2003] 3 S.C.R. 516, in which the issue was recognition by a court in Ontario of a foreign judgment for damages against residents of Ontario made by a court in the State of Florida.

shows the scope and flexibility of the concept of a real and substantial connection that was the test applied in each of the cases.

[35] The inherent flexibility the Supreme Court wanted to associate with the real and substantial connection test is easily seen in the following excerpts from jurisprudence:

1. In *Moran*, Dickson J. noted at paragraph 12:

> "Generally speaking, in determining where a tort has been committed, it is unnecessary, and unwise, to have resort to any arbitrary set of rules" [being of the opinion that] "The place of acting and the place of harm theories are too arbitrary and inflexible to be recognized in contemporary jurisprudence." [Emphasis added.]

2) This passage led La Forest J. to write the following in *Morguard*, at paragraph 47:

> [...] At the end of the day, he rejected any rigid or mechanical theory for determining the situs of the tort. Rather, he adopted "a more flexible, qualitative and quantitative test", posing the question, as had some English cases there cited, in terms of whether it was "inherently reasonable" for the action to be brought in a particular jurisdiction, or whether, to adopt another expression, there was a "real and substantial

> connection" between the jurisdiction and the wrongdoing. [...] [Emphasis added.]

3) A few years later, La Forest J. wrote the reasons of the Court in *Hunt*, in which he stated the following regarding the flexibility behind the test of a real and substantial connection:

> **58** In *Morguard*, a more accommodating approach to recognition and enforcement was premised on there being a "real and substantial connection" to the forum that assumed jurisdiction and gave judgment. Contrary to the comments of some commentators and lower court judges, this was not meant to be a rigid test, but was simply intended to capture the idea that there must be some limits on the claims to jurisdiction. Indeed I observed (at p. 1104) that the "real and substantial connection" test was developed in *Indyka v. Indyka*, [1969] 1 A.C. 33, in a case involving matrimonial status (where sound policy demands generosity in recognition), and that in a personal action a nexus may need to be sought between the subject-matter and the territory where the action is brought. I then considered the test developed in *Moran v. Pyle National (Canada) Ltd.*, *supra*, for products liability cases as an example of where jurisdiction would be properly assumed. The exact limits of what constitutes a reasonable assumption of jurisdiction were not defined, and I add that no test can perhaps ever be rigidly applied; no court has ever been able to anticipate all of these. [...] [Emphasis added.]

4) In Hunt, at page 326 of the Supreme Court Reports, he writes:

> **56** [...] Whatever approach is used, the assumption of and the discretion not to exercise jurisdiction must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contacts or connections. [...] [Emphasis added.]

5) The following year, La Forest J. wrote in *Tolofson*:

> **40** To prevent overreaching, however, courts have developed rules governing and restricting the exercise of jurisdiction over extraterritorial and transnational transactions. In Canada, a court may

> exercise jurisdiction only if it has a "real and substantial connection" (a term not yet fully defined) with the subject matter of the litigation; see *Moran v. Pyle National (Canada) Ltd.*, 1973 CanLII 192 (SCC), [1975] 1 S.C.R. 393; *Morguard*, *supra*; and *Hunt*, *supra*. This test has the effect of preventing a court from unduly entering into matters in which the jurisdiction in which it is located has little interest. In addition, through the doctrine of *forum non conveniens* a court may refuse to exercise jurisdiction where, under the rule elaborated in Amchem, supra (see esp. at pp. 921, 922, 923), there is a more convenient or appropriate forum elsewhere. [Emphasis added.]

6) According to Sharpe J. in *Muscutt*, the general language used by the Supreme Court to express the content of a real and substantial connection was "to allow flexibility". He stated the following:

> **36** The language that the Supreme Court has used to describe the real and substantial connection test is deliberately general to allow for flexibility in the application of the test. In *Morguard*, at pp. 1104-1109, the Court variously described a real and substantial connection as a connection "between the *subject-matter of the action* and the territory where the action is brought", "between the jurisdiction and the *wrongdoing*", "between the *damages suffered* and the jurisdiction", "between the *defendant* and the *forum* province", "with the *transaction or the parties*", and "with the *action*" [Emphasis added]. In *Tolofson*, at p. 1049, the Court described a real and substantial connection as "a term not yet fully defined". [Emphasis added.]

7) The application of the real and substantial connection test is not limited to civil offences; it applies to criminal law (*Libman*) and contract law, which highlights the need for flexibility and the ability to adapt to circumstances.

(d). The motion to strike

[36] The Prothonotary struck the plaintiff's statement of claim and dismissed her action on the grounds that this Court did not have jurisdiction over just Mitsubishi America following a motion filed by it under Rule 221(1)(a), which authorizes this Court, on a motion, to order that a pleading, or anything contained therein, be struck out if it discloses no reasonable cause of action. Rule 221(2) states that no evidence shall be heard on a motion for an order under paragraph 1(a).

[37] The principles applicable to striking-off under Rule 221(1)(a) are well-established and can be summarized as follows:

1. This rule allows this Court to strike an action for lack of jurisdiction (*MIL Davie Inc. v. Société d'Exploitation et de Développement d'Hibernia Ltée*, [1998] F.C.J. No. 614 (*MIL Davie*), at paragraph 7)

2. Rule 221(2), which prevents evidence from being heard, does not apply in the case of a motion to strike under Rule 221(1)(a) on the grounds of a lack of jurisdiction (*MIL Davie*, at paragraph 8)

3. Generally speaking, when an objection is taken to its jurisdiction, the Court must be satisfied that jurisdictional facts <u>or allegations of such facts</u> [emphasis added] supporting an attribution of jurisdiction can be found in the pleadings and in the affidavits filed in support of or in response to the motion (*MIL Davie*, at paragraph 8).

4. In the case of a motion to strike, the Court must assume that the facts

alleged in the statement are accurate (*Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at page 991 (*Hunt/Carey*). See also *Moran*, at paragraph 13).

5. In this case, the burden was on Mitsubishi America to demonstrate that its motion was "plain and obvious" (see *Hunt/Carey*, at p. 972). In other words, Mitsubishi America had to show this Court that it was obvious and beyond doubt that this Court did not have jurisdiction over it (see *Hodgson v. Ermineskin Indian Band No. 942*, [2000] F.C.J. No. 2042, at paragraphs 4 and 5).

(e) Application of the principles to this case

[38] With a view to a *de novo* review of the motion to strike filed by Mitsubishi America and given all the evidence before me, I find, for the following reasons, that Nancy Bouchard's appeal must be allowed. The result is that the Mitsubishi America motion to strike is dismissed.

[39] Mitsubishi America had a heavy onus to overcome. It had to demonstrate, based on all the evidence on record, that it was plain and obvious that this Court, applying the real and substantial connection test, did not have jurisdiction over it.

[40] As for the evidence before me, I must assume, for the purposes of this motion, that the facts set out in Nancy Bouchard's statement are true. Moreover, I accept as true the facts in the affidavit by Mr. McElroy, as he was not cross-examined.

[41] A full reading of the plaintiff's statement, particularly paragraphs in the chapter entitled [TRANSLATION] "Conspiracy by the respondents", clearly shows, not vaguely or imprecisely, the

nature of the alleged prejudice resulting from the alleged conspiracy: a higher purchase price paid by Canadian consumers than they would pay without the conspiracy by the defendants. The remedy set out in paragraph 78E of the statement is to order the respondents, jointly and severally, to pay all members of the class an amount equal to a formula based on the price of Mitsubishi vehicles. I note that the alleged conspiracy between the respondents and the alleged negative consequences are not limited to one province, but are seen across the country. I also note that no damages are being sought from the Mitsubishi dealerships.

[42] The affidavit by Mr. McElroy, considered overall, is limited in scope, in my view, as the facts that he relates aim to demonstrate the absence of Mitsubishi America in Canada (except for the fact that the affiant states in paragraph 13 of his affidavit that "MMNA manufactures vehicles and car parts which through its wholesale activities may end up in Canadian markets but MMNA is not involved, in any way in the retailing of vehicles or car parts in any Canadian market"), which indicates a certain presence in Canada in terms of distribution. [Emphasis added.] On reading his affidavit, I note more specifically that Mr. McElroy did not deny the existence of a conspiracy between the three Mitsubishi companies to limit the free circulation of their vehicles in Canada. Moreover, his affidavit did not deny that the defendants were related or associated and why.

[43] Regardless, jurisprudence on the real and substantial connection test states that a connection between the defendant and the *forum* is an important factor, but not a necessary factor. In *Muscutt*, at paragraph 74, Sharpe J. finds that: "[...] In my view, to hold otherwise would be contrary to the Supreme Court of Canada's direction that the real and substantial

connection test is flexible. It would also be contrary to the weight of Canadian appellate authority outlined above. [...]" In *Saldanha*, writing for the majority, Major J. adopted the same position at paragraphs 22 and 23 of his reasons:

> **22** Modern ideas of order and fairness require that a court must have reasonable grounds for assuming jurisdiction where the participants to the litigation are connected to multiple jurisdictions.
>
> **23** *Morguard* established that the courts of one province or territory should recognize and enforce the judgments of another province or territory, if that court had properly exercised jurisdiction in the action, namely that it had a real and substantial connection with either the subject matter of the action or the defendant. A substantial connection with the subject matter of the action will satisfy the real and substantial connection test even in the absence of such a connection with the defendant to the action. [Emphasis added.]

[44] In *Muscutt*, Sharpe J. noted that the defendant had no contact with the forum in Ontario, but found that the Ontario court had jurisdiction based on the real and substantial connection test. According to him, that test requires that all relevant factors be identified for each case. The factors set out in *Muscutt* are useful, but none are determining and necessary; new factors are possible if required by the principles of order and fairness. All relevant factors must be weighed together and the weight afforded them can vary.

[45] I also believe that the Prothonotary felt that he was bound by *Desjean* when he struck Mitsubishi America from the cause of action, despite the fact that there were significant differences between the two cases.

[46] *Desjean* does not at all address the principles applicable to a striking-off, although the motion by Mitsubishi was filed under Rule 221(1)(a). In that case, however, De Montigny J. recognized at paragraph 22 of his reasons that the assumption of jurisdiction against a foreign defendant always raises complex issues.

[47] In *Desjean*, my colleague analyzed the doctrine of *forum non conveniens*; he was of the view that California was a more appropriate forum than Canada to hear the case and, for that reason, exercised his discretion to refuse jurisdiction over Intermix. The impact of the doctrine of *forum non conveniens* on the assumption of jurisdiction over an absent defendant was not argued before the prothonotary. I note that, at paragraph 44 of *Muscutt*, Sharpe J. was of the view that the discretion resulting from the concept of *forum non conveniens* "provides both a significant control on assumed jurisdiction and a rational for lowering the threshold required for the real and substantial connection test." [Emphasis added.]

[48] In *Desjean*, there was no allegation, as there is here, of a conspiracy across Canada between the parties alleged to be related or associated, which conspiracy had a significant impact on the price paid for Mitsubishi vehicles in this country. The cause of action in *Desjean* was limited to an allegation of misleading information from the Internet that disrupted Mr. Desjean's computer when he downloaded the Intermix products. De Montigny J. found that, in the circumstances before him, the connections between the defendant and Canada and between Canada and the subject matter of the action were not sufficient or substantial. He states the following at paragraph 35 of the decision:

> **35** Furthermore, it would be manifestly unfair to subject Intermix to this Court's jurisdiction since it would, in effect, mean a U.S.-based operator of a Web site, with no business assets in Canada and no physical presence in the jurisdiction, could be sued in this country as well as in any other country from which a plaintiff might choose to download its products. Despite the inconvenience for plaintiffs in a similar situation of having to pursue their claims in foreign jurisdictions, this is only one factor to be taken into consideration. As the law now appears to stand, this is not enough to bring a claim within the jurisdiction of a Canadian court. It would put much too great an onus on foreign Web site operators or any foreign commercial undertakings with no real presence in Canada which happen to deal with Canadian residents. [Emphasis added.]

[49] Two decisions by the Supreme Court of Canada, the first in *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641 (*General Motors*) and the second in *R. v. Libman*, [1985] 2 S.C.R. 178 (*Libman*), lead me to believe that, in this case, the factor of the connection between Canada and the subject matter of the action filed by Nancy Bouchard is of particular importance.

[50] On behalf of the members of the proposed class, Nancy Bouchard alleges that they suffered damages caused by the conspiracy between the Mitsubishi defendants, related companies. That is the subject matter of the action. This remedy is authorized by the *Competition Act* and its constitutionality was upheld by the Supreme Court of Canada in *General Motors*, which involved a similar provision of the federal *Combines Investigation Act* stating that any person who suffers loss or damage from conduct contrary to a provision of Part IV of the Act may, in any court of competent jurisdiction, sue for and recover damages (former Act). Section 31.1 of the former Act is now in section 36 of the *Competition Act*. Dickson C.J. wrote

the reasons of the Court. He is of the opinion that section 31.1 creates a civil cause of action for certain infractions of the former Act.

[51] He considers that the former Act is valid federal legislation under the general trade and commerce power of the Parliament of Canada. The purpose of that former Act was to eliminate activities that reduce market competition; it was national in scope. The regulation of competition is of national interest. He is of the view that "Section 31.1 [...] is sufficiently related to a valid legislative scheme to have constitute validity conferred on it. The provision is functionally related to the general objective of the legislation, and to the structure and the content of the scheme. As one of an arsenal of remedies created by the Act, it serves to reinforce other sanctions of the Act and takes on meaning only by reference to them. The section provides a private remedy only for particular violations of the Act and does not create a private right of action at large. The intimate tie between the purpose of the Act and a privately initiated and privately conducted enforcement mechanism is a strong indication that s. 31.1 is enmeshed in the fabric in the Act." [Emphasis added.] Dickson C.J. found that section 31.1 is an essential provision in the valid nature of the Act and complements the penal provisions of the former Act.

[52] In *Libman*, the issue before the Supreme Court was whether, in applying the real and substantial connection test, Canada could try, in Canada, a resident accused of fraud and conspiracy to commit fraud as a result of operating a business in Toronto selling fraudulent shares by telephone. That business solicited people in the United States; the shares being sold were those of two mining companies that were purported to be operating gold mines in Costa Rica. The American buyers sent the purchase price to offices administered by Mr. Libman's associates in Panama or in

San José (Costa Rica), where Mr. Libman usually went to meet with his associates and receive his share of the proceeds of the sale of shares, which he then brought back to Toronto.

[53] La Forest J. wrote the reasons of the Supreme Court. He analyzed the jurisprudence to identify the circumstances that justify a state exercising its penal jurisdiction to try charges against a national. According to La Forest J.:

> **16** The cases reveal several possibilities [...]. One is to assume that jurisdiction lies in the country where the act is planned or initiated. Other possibilities include the place where the impact of an offence is felt, where it is initiated, where it is completed, or again where the gravamen, or essential element of the offence took place. It is also possible to maintain that any country where a substantial or any part of the chain of events constituting an offence takes place may take jurisdiction.
> [Emphasis added.]

[54] He found some solutions to be insufficient, stating the following:

> **17** Though counsel for Mr. Libman argued that exclusive jurisdiction belongs to the country where the gravamen of the offence took place or where it was completed, a review of the English authorities does not really support that position. What it shows is that the courts have taken different stances at different times and the general result, as several writers have stated, is one of doctrinal confusion, a confusion compounded by the fact that the discussion often focuses on the specific offence charged, a discussion made more complicated by the further fact that some offences are aimed at the act committed and others at the result of that act.

[55] He argues against mechanical solutions that have no relation to the relevant issues of principle. His solution is that of a real and substantial link between the offence and the country. He writes the following at paragraph 74 of his reasons:

> **74** I might summarize my approach to the limits of territoriality in this way. As I see it, all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada. As it is put by modern academics, it is sufficient that there be a "real and substantial link" between an offence and this country, a test well‑known in public and private international law; see *Williams* and *Castel*, *supra*; *Hall*, *supra*. As Professor Hall notes (p. 277), this does not require legislation. It was the courts after all that defined the manner in which the doctrine of territoriality applied, and the test proposed simply amounts to a revival of the earlier way of formulating the principle. It is in fact the test that best reconciles all the cases. The only ones that do not fall within it are those like *Harden* and *Rush* which, in my view, should no longer be followed. [Emphasis added.]

[56] He is of the view that there were sufficient links to justify the trial in Canada, even though the victims of the fraud and conspiracy were outside Canada. In his analysis of jurisprudence, La Forest J. finds that it has always recognized the interest of the state in punishing a guilty party if the adverse effects of a conspiracy were seen in its territory.

[57] That is also what Cumming J. of the Ontario Superior Court of Justice found in *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.*, [2002] O.J. No. 298 (*Vitapharm*), a decision issued a few months before the decision by Sharpe J. in *Muscutt*. The Court of Appeal for Ontario dismissed an appeal of the decision by Cumming J. in *Vitapharm* (*Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.*, 163 OAC 189), agreeing with his decision and the reasons that the judge provided.

[58] In *Vitapharm*, the facts and the issue before the Ontario Court were similar to those before me: a class action for damages suffered in Canada as a result of a global conspiracy to set the prices

of certain vitamins. The plaintiffs based their action for damages on section 36 of the *Competition Act* for violation (admitted in penal law in several cases) of section 45 of the same Act.

[59] Several defendants were Swiss companies that claimed to have no connection to Canada, while recognizing, in some cases, that they had marketed their products in Canada through Canadian subsidiaries.

[60] On the one hand, Cumming J. dismissed the claim by some defendants that an "[...] agreement made outside of Canada to lessen competition or fix prices in the Canadian market is not conduct contrary to s. 45 of the *Competition Act* such as to give rise to a claim for damages under s. 36 of that Act." He also finds: "Canadian courts assume jurisdiction over foreign parties if there is a "real and substantial connection" between Ontario and the subject matter of the litigation" [and] "Jurisdiction can now be founded solely on strong connections between the subject matter of the action and the forum." [Emphasis added.]

[61] Cumming J. is of the opinion that: "The fact that a defendant is not itself present in Ontario is one relevant factor to be considered. [adding] However, the ultimate issue for a Canadian court is whether the subject matter of the action has a real and substantial connection to Ontario and the foreign defendant is connected to that subject matter." [Emphasis added.]

[62] According to Cumming J.:

> **96** The subject matter of each action before the Court is an alleged tort in Ontario through an unlawful conspiracy relating to price-fixing and the allocation of markets. The subject matter of the causes

> of action can relate to the locus of the damage, as well as to the locus of the alleged wrong which gave rise to the damage. This means the defendants can be said to be proper parties if the alleged price-fixing agreement and their actions to implement it could result in their being tortfeasors with respect to harm and damages caused in Ontario.
>
> **97** There must be a causal connection between the alleged damage and the defendants to establish a realistic possibility that the defendants may be responsible in law for the damage through their unlawful conduct. [adding] However, the ultimate issue for a Canadian court is whether the subject matter of the action has a real and substantial connection to Ontario and the foreign defendant is connected to that subject matter." [Emphasis added.] In such instance the Ontario court has jurisdiction with respect to the proceeding and the foreign defendants. It is sufficient in the first instance to set forth allegations in the pleadings that *prima facie* meet this test. [Emphasis added.]

[63] He adds as conclusion at paragraph 101 of his reasons:

> The participants in a conspiracy entered into geographically beyond Canada with the purpose of fixing prices and allocating markets within Canada (amongst other countries) would know, and indeed would intend, that damages (through artificially high prices) would be sustained in Canada, including Ontario, as a result of their agreement. [Emphasis added.]

[64] Cumming J. examined another element that is of interest to us; he determined that the balance of convenience: "[…] favours trying all of the defendants in each action together." He explains as follows:

> **78** […] The claims against all defendants in a given action arise out of the same alleged conspiracy. The issues will involve common questions of fact and law. It is logical that the claims against all the alleged conspirators in an alleged single price-fixing scheme be tried together. Each of the alleged co-conspirators is a necessary and proper party.

> **79** […] If this court were to decline jurisdiction, the plaintiffs would be required to proceed with a multiplicity of actions in several different jurisdictions resulting, at the least, in added expense and the possibility of inconsistent results. It is probable, from a practical standpoint, that to require the plaintiffs to bring multiple proceedings in different jurisdictions would result in the plaintiffs being unable to pursue their claims.
>
> **80** Principles of order, fairness and comity support Ontario having jurisdiction of the actions at hand. Significant inconvenience and unnecessary expense is avoided by the plaintiffs not having to pursue their claims against different alleged co-conspirators in different jurisdictions. Ensuring access to justice for aggrieved persons who seek to bring forward a claim in court is an important consideration supporting the hearing of these actions in Ontario. Furthermore, the moving defendants have not shown any prejudice such as to be able to claim relief from joinder. [Emphasis added.]

[65] In *Muscutt*, at paragraph 75, Sharpe J. noted:

> **75** It is apparent from *Morguard*, Hunt and subsequent case law that it is not possible to reduce the real and substantial connection test to a fixed formula. A considerable measure of judgment is required in assessing whether the real and substantial connection test has been met on the facts of a given case. Flexibility is therefore important. [Emphasis added.]

[66] However, he is of the view that it is good to identify certain useful factors:

> […] the factors emerging from the case law that are relevant in assessing whether a court should assume jurisdiction against an out-of-province defendant on the basis of damage sustained in Ontario as a result of a tort committed elsewhere. […].
> [Emphasis added.]

[67] After considering all the evidence on record in light of jurisprudence on the matter, I find that there is a real and substantial connection between Mitsubishi America and the subject matter of

the action by Nancy Bouchard — collection of damages suffered from an alleged conspiracy between the respondents, an action directly authorized under the *Competition Act*.

[68] I apply the factors from *Muscutt* in a flexible manner and, in that regard, I accept for the purposes of my decision only that the evidence shows that Mitsubishi America had no physical presence in Canada, but as we have seen, this factor is important but is not necessary and, in this case, the importance of this factor is diminished by the fact that vehicles or parts from that defendant "through its wholesale activities may end up in the Canadian market."

[69] The following factors argue in favour of exercising this Court's jurisdiction over Mitsubishi America: (1) the connection between the *forum* and the members of the proposed class is very important because the Parliament of Canada itself has recognized that it was in the public interest for a civil action to be created to compensate victims who have suffered damage from a conspiracy under the act; (2) the defendant Mitsubishi America, has significant connections to the *forum*, Canada, because the adverse effects of the alleged conspiracy between the Mitsubishi defendants targets Canadian consumers of Mitsubishi vehicles and that conspiracy is between Mitsubishi companies that are apparently related and, moreover, vehicles from Mitsubishi America circulate in Canada, in terms of distribution; but not in retail; (3) for the reasons cited by Cumming J. in *Vitapharm*, there is no evidence on record of unfairness to Mitsubishi America if this court assumes jurisdiction. On the other hand, however, the harm to the plaintiff and the members of the proposed class if the court does not exercise its jurisdiction is an important factor; they will be required to sue Mitsubishi America in the United States with inconveniences and expenses that that action includes; (4) the fact that the action by Nancy

Bouchard continues against Mitsubishi Canada favours the assumption of jurisdiction to avoid the possibility of contradictory judgments and a multiplicity of proceedings with similar evidence; (5) Mitsubishi America argues that the sixth factor, that of desire to recognize and enforce a judgment from another country made on a similar jurisdictional basis is in its favour. It cites de Montigny J. in *Desjean* at paragraph 37. I do not consider this factor to be important here. There is no evidence before me of the circumstances in which the Attorney General of Canada would exercise discretion to not recognize a foreign judgment in this matter; (6) the international nature of Nancy Bouchard's case favours the defendant Mitsubishi America for the reasons cited by Sharpe J. at paragraphs 95 to 100 of *Muscutt*; and (7) given the lack of evidence regarding the last factor, I consider it to be neutral under the circumstances.

[70] The weighting of factors and the balance clearly favours the assumption of jurisdiction by this Court over Mitsubishi America. The plaintiff and the defendant Mitsubishi America both have significant connections with Canada for the reasons cited. Based on the evidence before me, Mitsubishi faces no injustice if this Court assumes jurisdiction, but the opposite is not true for the plaintiff if the Court states that it does not have jurisdiction. I find that the factors in favour of Mitsubishi America for not assuming jurisdiction are not as important as those in favour of assuming jurisdiction over it.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that this appeal is allowed with costs after assessment based on the highest units in column IV of the Tariff. The motion to strike by Mitsubishi America is dismissed. It must file its defence within thirty days of this judgment.

"François Lemieux"

_____

Judge

APPENDIX A

Sections 36 and 45 of the *Competition Act*

Recovery of damages

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.

Evidence of prior proceedings

(2) In any action under subsection (1) against a person, the record of proceedings in any court in which that person was convicted of an offence under Part VI or convicted of or punished for failure to comply with an order of the Tribunal or another court under this Act is, in the absence of any evidence to the contrary, proof that the person against whom the

Recouvrement de dommages-intérêts

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.

Preuves de procédures antérieures

(2) Dans toute action intentée contre une personne en vertu du paragraphe (1), les procès-verbaux relatifs aux procédures engagées devant tout tribunal qui a déclaré cette personne coupable d'une infraction visée à la partie VI ou l'a déclarée coupable du défaut d'obtempérer à une ordonnance rendue en vertu de la présente loi par le Tribunal ou par un autre tribunal, ou qui l'a punie pour ce défaut,

action is brought engaged in conduct that was contrary to a provision of Part VI or failed to comply with an order of the Tribunal or another court under this Act, as the case may be, and any evidence given in those proceedings as to the effect of those acts or omissions on the person bringing the action is evidence thereof in the action.

constituent, sauf preuve contraire, la preuve que la personne contre laquelle l'action est intentée a eu un comportement allant à l'encontre d'une disposition de la partie VI ou n'a pas obtempéré à une ordonnance rendue en vertu de la présente loi par le Tribunal ou par un autre tribunal, selon le cas, et toute preuve fournie lors de ces procédures quant à l'effet de ces actes ou omissions sur la personne qui intente l'action constitue une preuve de cet effet dans l'action.

Jurisdiction of Federal Court

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

Compétence de la Cour fédérale

(3) La Cour fédérale a compétence sur les actions prévues au paragraphe (1).

Limitation

(4) No action may be brought under subsection (1),

Restriction

(4) Les actions visées au paragraphe (1) se prescrivent :

(a) in the case of an action based on conduct that is contrary to any provision of Part VI, after two years from

a) dans le cas de celles qui sont fondées sur un comportement qui va à l'encontre d'une disposition de la partie VI, dans les deux ans qui suivent la dernière des dates suivantes :

(i) a day on which the conduct was engaged in, or

(i) soit la date du comportement en question,

(ii) the day on which any criminal proceedings relating thereto were finally disposed of, whichever is the later; and

(ii) soit la date où il est statué de façon définitive sur la poursuite;

(b) in the case of an action based on the failure of any person to comply with an order of the Tribunal or another court, after two years from

b) dans le cas de celles qui sont fondées sur le défaut d'une personne d'obtempérer à une ordonnance du Tribunal ou d'un autre tribunal, dans les deux ans qui suivent la dernière des dates suivantes :

(i) a day on which the order of the Tribunal or court was contravened, or

(i) soit la date où a eu lieu la contravention à l'ordonnance du Tribunal ou de l'autre tribunal,

(ii) the day on which any criminal proceedings relating thereto were finally disposed of, whichever is the later.

R.S., 1985, c. C-34, s. 36; R.S., 1985, c. 1 (4th Supp.), s. 11.

PART V

[Repealed, R.S., 1985, c. 19 (2nd Supp.), s. 29]

Conspiracy

45. (1) Every one who conspires, combines, agrees or arranges with another person

(a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,

(b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,

(c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or

(d) to otherwise restrain or injure competition unduly,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.

(ii) soit la date où il est statué de façon définitive sur la poursuite.

L.R. (1985), ch. C-34, art. 36; L.R. (1985), ch. 1 (4e suppl.), art. 11.

PARTIE V

[Abrogée, L.R. (1985), ch. 19 (2e suppl.), art. 29]

Complot

45. (1) Commet un acte criminel et encourt un emprisonnement maximal de cinq ans et une amende maximale de dix millions de dollars, ou l'une de ces peines, quiconque complote, se coalise ou conclut un accord ou arrangement avec une autre personne :

a) soit pour limiter, indûment, les facilités de transport, de production, de fabrication, de fourniture, d'emmagasinage ou de négoce d'un produit quelconque;

b) soit pour empêcher, limiter ou réduire, indûment, la fabrication ou production d'un produit ou pour en élever déraisonnablement le prix;

c) soit pour empêcher ou réduire, indûment, la concurrence dans la production, la fabrication, l'achat, le troc, la vente, l'entreposage, la location, le transport ou la fourniture d'un produit, ou dans le prix d'assurances sur les personnes ou les biens;

d) soit, de toute autre façon, pour restreindre, indûment, la concurrence ou lui causer un préjudice indu.

Idem

(2) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in contravention of subsection (1), it shall not be necessary to prove that the conspiracy, combination, agreement or arrangement, if carried into effect, would or would be likely to eliminate, completely or virtually, competition in the market to which it relates or that it was the object of any or all of the parties thereto to eliminate, completely or virtually, competition in that market.

Evidence of conspiracy

(2.1) In a prosecution under subsection (1), the court may infer the existence of a conspiracy, combination, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties thereto, but, for greater certainty, the conspiracy, combination, agreement or arrangement must be proved beyond a reasonable doubt.

Proof of intent

(2.2) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in contravention of subsection (1), it is necessary to prove that the parties thereto intended to and did enter into the conspiracy, combination, agreement or arrangement, but it is not necessary to prove that the parties intended that the conspiracy, combination,

Idem

(2) Il demeure entendu qu'il n'est pas nécessaire, pour établir qu'un complot, une association d'intérêts, un accord ou un arrangement constitue l'une des infractions visées au paragraphe (1), de prouver que le complot, l'association d'intérêts, l'accord ou l'arrangement, s'il était exécuté, éliminerait ou éliminerait vraisemblablement la concurrence, entièrement ou à toutes fins utiles, sur le marché auquel il se rapporte, ni que les participants, ou l'un ou plusieurs d'entre eux, visaient à éliminer la concurrence, entièrement ou à toutes fins utiles, sur ce marché.

Preuve de complot

(2.1) Lors d'une poursuite intentée en vertu du paragraphe (1), le tribunal peut déduire l'existence du complot, de l'association d'intérêts, de l'accord ou de l'arrangement en se basant sur une preuve circonstancielle, avec ou sans preuve directe de communication entre les présumées parties au complot, à l'association d'intérêts, à l'accord ou à l'arrangement, mais il demeure entendu que le complot, l'association d'intérêts, l'accord ou l'arrangement doit être prouvé hors de tout doute raisonnable.

Preuve d'intention

(2.2) Il demeure entendu qu'il est nécessaire, afin d'établir qu'un complot, une association d'intérêts, un accord ou un arrangement constitue l'une des infractions visées au paragraphe (1), de prouver que les parties avaient l'intention de participer à ce complot, cette association d'intérêts, cet accord ou cet arrangement et y ont participé mais qu'il n'est pas nécessaire de prouver que les parties avaient l'intention

agreement or arrangement have an effect set out in subsection (1).

Defence

(3) Subject to subsection (4), in a prosecution under subsection (1), the court shall not convict the accused if the conspiracy, combination, agreement or arrangement relates only to one or more of the following:

(a) the exchange of statistics;

(b) the defining of product standards;

(c) the exchange of credit information;

(d) the definition of terminology used in a trade, industry or profession;

(e) cooperation in research and development;

(f) the restriction of advertising or promotion, other than a discriminatory restriction directed against a member of the mass media;

(g) the sizes or shapes of the containers in which an article is packaged;

(h) the adoption of the metric system of weights and measures; or

(i) measures to protect the environment.

Exception

(4) Subsection (3) does not apply if the

que le complot, l'association d'intérêts, l'accord ou l'arrangement ait l'un des effets visés au paragraphe (1).

Défense

(3) Sous réserve du paragraphe (4), dans des poursuites intentées en vertu du paragraphe (1), le tribunal ne peut déclarer l'accusé coupable si le complot, l'association d'intérêts, l'accord ou l'arrangement se rattache exclusivement à l'un ou plusieurs des actes suivants :

a) l'échange de données statistiques;

b) la définition de normes de produits;

c) l'échange de renseignements sur le crédit;

d) la définition de termes utilisés dans un commerce, une industrie ou une profession;

e) la collaboration en matière de recherches et de mise en valeur;

f) la restriction de la réclame ou de la promotion, à l'exclusion d'une restriction discriminatoire visant un représentant des médias;

g) la taille ou la forme des emballages d'un article;

h) l'adoption du système métrique pour les poids et mesures;

i) les mesures visant à protéger l'environnement.

Exception

(4) Le paragraphe (3) ne s'applique pas si le complot, l'association d'intérêts,

conspiracy, combination, agreement or arrangement has lessened or is likely to lessen competition unduly in respect of one of the following:

(a) prices,

(b) quantity or quality of production,

(c) markets or customers, or

(d) channels or methods of distribution,

or if the conspiracy, combination, agreement or arrangement has restricted or is likely to restrict any person from entering into or expanding a business in a trade, industry or profession.

Defence

(5) Subject to subsection (6), in a prosecution under subsection (1) the court shall not convict the accused if the conspiracy, combination, agreement or arrangement relates only to the export of products from Canada.

Exception

(6) Subsection (5) does not apply if the conspiracy, combination, agreement or arrangement

(a) has resulted in or is likely to result in a reduction or limitation of the real value of exports of a product;

l'accord ou l'arrangement a réduit ou réduira vraisemblablement et indûment la concurrence à l'égard de l'un des sujets suivants :

a) les prix;

b) la quantité ou la qualité de la production;

c) les marchés ou les clients;

d) les voies ou les méthodes de distribution,

ou si le complot, l'association d'intérêts, l'accord ou l'arrangement a restreint ou restreindra vraisemblablement les possibilités pour une personne d'entrer dans un commerce, une industrie ou une profession ou d'accroître une entreprise commerciale, industrielle ou professionnelle.

Défense

(5) Sous réserve du paragraphe (6), dans des poursuites intentées en vertu du paragraphe (1), le tribunal ne peut déclarer l'accusé coupable si le complot, l'association d'intérêts, l'accord ou l'arrangement se rattache exclusivement à l'exportation de produits du Canada.

Exception

(6) Le paragraphe (5) ne s'applique pas si le complot, l'association d'intérêts, l'accord ou l'arrangement, selon le cas :

a) a eu pour résultat ou aura vraisemblablement pour résultat une réduction ou une limitation de la valeur réelle des exportations d'un produit;

b) a restreint ou restreindra

(b) has restricted or is likely to restrict any person from entering into or expanding the business of exporting products from Canada; or

(c) has prevented or lessened or is likely to prevent or lessen competition unduly in the supply of services facilitating the export of products from Canada.

(d) [Repealed, R.S., 1985, c. 19 (2nd Supp.), s. 30]

Defences

(7) In a prosecution under subsection (1), the court shall not convict the accused if it finds that the conspiracy, combination, agreement or arrangement relates only to a service and to standards of competence and integrity that are reasonably necessary for the protection of the public

(a) in the practice of a trade or profession relating to the service; or

(b) in the collection and dissemination of information relating to the service.

Exception

(7.1) Subsection (1) does not apply in respect of an agreement or arrangement between federal financial institutions that is described in subsection 49(1).

Exception

(8) Subsection (1) does not apply in respect of a conspiracy, combination, agreement or arrangement that is entered

vraisemblablement les possibilités pour une personne d'entrer dans le commerce d'exportation de produits du Canada ou de développer un tel commerce;

c) a empêché ou diminué la concurrence indûment dans la fourniture de services visant à promouvoir l'exportation de produits du Canada, ou aura vraisemblablement un tel effet.

d) [Abrogé, L.R. (1985), ch. 19 (2e suppl.), art. 30]

Moyens de défense

(7) Dans les poursuites intentées en vertu du paragraphe (1), le tribunal ne peut déclarer l'accusé coupable s'il conclut que le complot, l'association d'intérêts, l'accord ou l'arrangement se rattache exclusivement à un service et à des normes de compétence et des critères d'intégrité raisonnablement nécessaires à la protection du public :

a) soit dans l'exercice d'un métier ou d'une profession rattachés à ce service;

b) soit dans la collecte et la diffusion de l'information se rapportant à ce service.

Exception

(7.1) Le paragraphe (1) ne s'applique pas à un accord ou à un arrangement visé au paragraphe 49(1) lorsque cet accord ou arrangement a lieu entre des institutions financières fédérales.

Exception

(8) Le paragraphe (1) ne s'applique pas à un complot, une association d'intérêts, un accord ou un arrangement intervenu exclusivement entre des personnes morales

into only by companies each of which is, in respect of every one of the others, an affiliate.

R.S., 1985, c. C-34, s. 45; R.S., 1985, c. 19 (2nd Supp.), s. 30; 1991, c. 45, s. 547, c. 46, s. 590, c. 47, s. 714.

Where application made under section 79 or 92

45.1 No proceedings may be commenced under subsection 45(1) against a person against whom an order is sought under section 79 or 92 on the basis of the same or substantially the same facts as would be alleged in proceedings under that subsection.

R.S., 1985, c. 19 (2nd Supp.), s. 31.

qui, considérées individuellement, sont des affiliées de chacune des autres personnes morales en question.

L.R. (1985), ch. C-34, art. 45; L.R. (1985), ch. 19 (2e suppl.), art. 30; 1991, ch. 45, art. 547, ch. 46, art. 590, ch. 47, art. 714.

Demande en vertu de l'article 79 ou 92

45.1 Il ne peut être entamé de procédures en application du paragraphe 45(1) contre une personne qui fait l'objet d'une demande d'ordonnance en vertu de l'article 79 ou 92 lorsque les faits soulevés au soutien de la demande d'ordonnance sont les mêmes ou en substance les mêmes que ceux qui seraient soulevés dans les procédures prévues à ce paragraphe.

L.R. (1985), ch. 19 (2e suppl.), art. 31.

APPENDIX B

1. After indicating that Mitsubishi Canada and Mitsubishi America imported, distributed, sold and leased Mitsubishi vehicles and their parts and accessories, in Canada and the United States respectively, and that Mitsubishi Japan manufactured and coordinated the worldwide distribution, sales and leading of Mitsubishi vehicles and their parts and accessories, the plaintiff argued in paragraph 7 of her claim:

> [TRANSLATION]
>
> 7. Moreover, the defendants are related companies, work together to import and sell all Mitsubishi brand vehicles, parts and accessories in Canada and the United States. However, the retail sale of vehicles is done through dealerships that are not affiliated with the respondents (*sic*);

2. She then explained the functioning of the North American Free Trade Agreement (NAFTA) signed on December 17, 1992, with a view to eliminating several customs duties, taxes and tariffs on trade and to facilitating the free movement of goods, which resulted in motor vehicles manufactured for sale in Canada and the United States being substantially the same and, after noting the evolution in the 1990s of the difference in prices on the respondents' products between Canada and the United States and the impact of the exchange rate between the two countries, particularly from 1999 to 2003, allowing United States residents to save thousands of dollars on the purchase of Mitsubishi products from Canadian dealerships, she finds that that evolution and lost profits explain why the respondents [TRANSLATION] "conspired among themselves and with their American and

Canadian dealerships to restrict the free movement of their products by the Canadian-American border through various measures to isolate both markets from each other."

3. Nancy Bouchard explained at paragraph 19 of her statement that [TRANSLATION] "even in 2008, when the Canadian dollar was almost at parity with the American dollar, Canadian prices were approximately 25% higher. Examples were taken from the respondents' North-American websites.

4. In a section of her statement entitled [TRANSLATION] "Conspiracy by the respondents (sic)", the applicant argued:

> a. As a result of competition in Canada, it would be normal for the prices of Mitsubishi products to drop to gradually reach the prices of American Mitsubishi products. However, the defendants, through their conspiracies, behaviours and instructions with their dealers, have artificially kept the prices of cars in Canada approximately 25% higher by preventing the importation of new vehicles from the United States to Canada;
>
> b. To prevent Canadian consumers from taking advantage of the buying opportunities in the United States, and to increase their prices at the expense of those consumers, the defendants conspired together with their affiliated agents and dealers to maintain and charge consumers artificially higher prices that they could have asked for in a true free market for Mitsubishi vehicles;
>
> c. The main goal of this conspiracy was to increase their profits in Canada and to prevent the natural erosion of Canadian prices by competition;
>
> d.The defendants and their dealerships secretly committed anticompetitive practices to increase or maintain high prices of Canadian Mitsubishi vehicles by working together to not

have competition on the Canadian market, thus eliminating any possibility of competitive prices;

e. To artificially increase the price of vehicles sold in Canada, the defendants conspired with their dealerships and engaged in a series of actions, agreements and directives among themselves, their subsidiaries, their agents and their dealerships to reduce competition in the Canadian market so fewer Mitsubishi vehicles would enter it;

f. The manner in which the defendants and their dealerships accomplished such a conspiracy was particularly by controlling and restricting the movement of new Mitsubishi motor vehicles from the United States to Canada;

g. Since June 1, 2006, the defendants have been able to maintain the price of their products in Canada artificially high through the following tactics:

i. The defendants asked and required that their network of dealerships in Canada not honour the warrantee applicable to vehicles sold by American dealerships;

ii. The defendants announced a limited warranty to discourage any Canadian buyers from purchasing Mitsubishi products in the United States. Even in 2008, the official site of the defendant Mitsubishi America referred to the warranty and maintenance manual, which indicated "Vehicles registered and operating outside of the United States are not covered under the terms of this limited warranty" as seen in a copy of the excerpt from said manual, filed in support hereof as Exhibit P-6;

iii. The defendants agreed with and prohibited Canadian dealerships from purchasing vehicles in the United States, thus forcing them to purchase all their vehicles at a Canadian price that was higher than the price offered to American dealerships;

iv. The defendants agreed with and prohibited American dealerships from selling vehicles to Canadian dealerships;

v. The defendants refused to provide or made it difficult to obtain the letter of compliance with

manufacturer recalls, a letter required by Transport Canada to allow a vehicle to be imported. That document shows that all repairs subject to manufacturer recall letters have been made to the vehicle in question;

vi. The defendants made financing and/or long-term leasing methods for their American Mitsubishi products difficult for Canadian residents, to the point that a Canadian resident could not finance a Mitsubishi vehicle purchased in the United States through financing methods usually available to Canadians;

vii. The defendants refused or failed to provide all safety recall letters to owners of Mitsubishi vehicles imported to Canada;

h. The exact details of the agreements and directives given by the defendants to the dealerships are currently known to the respondents. However, the result of the tactics and agreements is that Canadian consumers who wish to obtain protection typically offered by the Mitsubishi manufacturer in 2008 had to pay an average of 25% more;

i. Those agreements between the defendants and the dealerships successfully aimed to increase or maintain unreasonably high prices for Mitsubishi products in Canada, to the detriment of consumers;

j. To carry out the elements of the conspiracy to artificially increase or maintain prices on Mitsubishi products in Canada, the defendants used a series of actions, agreements and directives among themselves, their subsidiaries, their agents and their dealerships to reduce competition in the Canadian market for new Mitsubishi products;

k. The agreements and conduct described above had the following effects, among others:

i. Competition in the sale of new vehicles between American and Canadian Mitsubishi vehicles was eliminated or restricted;

ii. The price of the Mitsubishi vehicles purchased by the plaintiff and the other members of the proposed class was unreasonably and artificially high;

iii. The availability of new Mitsubishi vehicles in Canada was limited to smaller quantities than those normally available on a competitive market in which American Mitsubishi vehicles enter the country;

l. It is important to note that new Mitsubishi vehicles sold in Canada are not, or almost not, modified by dealerships. Consequently, consumers and indirect buyers who purchase the vehicles from dealerships suffer entirely from the damage of the vertical restriction of trade imposed on the Mitsubishi products market in Canada;

m. From the consumer's standpoint, the entire illegal overpricing imposed by the defendants on the dealerships is passed on by them to the consumers in the form of higher prices;

n. In fact, in negotiations between a consumer and a dealership, the dealership uses the price invoiced by the defendants (cost price to the dealership) and/or the manufacturer's suggested retail price. Those two prices, which are higher in Canada than in the United States, are set by the defendants. [Emphasis added.]

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-382-09
STYLE OF CAUSE:	NANCY BOUCHARD v. MITSUBISHI MOTOR SALES OF CANADA INC. *et al.*
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	November 9, 2009
SUBSEQUENT SUBMISSIONS:	(1) By the Plaintiff on November 16, 2009 (2) By the Defendant on November 16, 2009
REASONS FOR JUDGMENT AND JUDGMENT	LEMIEUX, J.
DATED:	January 19, 2010

APPEARANCES:

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Éric Vallières	FOR THE DEFENDANTS

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