

NOVA SCOTIA COURT OF APPEAL

Citation: Lyn-Gor Development Inc. v. Canada (Attorney General), 2005 NSCA

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Date: 20050125

Docket: CA 234131

Registry: Halifax

Between:

Lyn-Gor Development Inc., a body Corporate

Applicant/Appellant

v.

The Attorney General of Canada

Respondent

- and -

The SGE Group

Respondent

Date: 200501

Docket: 234134

Registry: Halifax

Between:

Lyn-Gor Development Inc., a body corporate

Applicant/Appellant

- and -

BMS Services (1998) Ltd., a body corporate, VCI
Controls Inc., a body corporate, Dave Pace Plumbing
and Heating Limited, a body corporate, and
Power Electrical Systems Limited, a body corporate

Respondents

Judge: Cromwell, J.A.

Application Heard: January 20, 2005, in Halifax, Nova Scotia, In Chambers

Held: Application dismissed.

Counsel: Gordon W. Genge, as agent for the appellant
Angela Green, for the respondent, Attorney General of Canada
and Defence Construction (Canada) 1951 Limited
Harvey Morrison, for the respondent, The SGE Group Inc.

Decision:

- [1] The appellant has filed notice of appeal from two orders made by McDougall, J. in Supreme Court Chambers.
- [2] In consolidated actions, S.H. No. 176156 and 174015, **Lyn-Gor Development Inc. v. The Attorney General of Canada and SGE Group Inc.**, McDougall, J. ordered that:
1. Gordon Walter Genge be prohibited from representing Lyn-Gor Development Inc. in this proceeding;
 2. Lyn-Gor Development Inc. pay \$10,000.00 into court as security for the Attorney General of Canada's costs in this matter on or before December 6, 2004;
 3. Lyn-Gor Development Inc. pay \$15,000.00 into court as security for the SGE Group Inc.'s costs in this matter no later than December 6, 2004;
 4. Lyn-Gor Development Inc., on or before November 6, 2004, pay costs of the application to the Attorney General of Canada in the amount of \$750.00; and
 5. Lyn-Gor Development Inc., on or before November 6, 2004, pay costs to the SGE Group in the amount of \$1,500.00.
- [3] In action S.H. No. 196526, **BSM et al. v. Lyn-Gor and Defence Construction Canada (1951) Limited** (Third Party), McDougall, J. ordered that:
1. Gordon Walter Genge be prohibited from representing Lyn-Gor Development Inc.;
 2. Lyn-Gor Development Inc. pay \$10,000.00 into the Court as security for Defence Construction Canada (1951) Limited's cost in this matter no later than December 6, 2004;
 3. Lyn-Gor Development, on or before November 6, 2004, pay costs to Defence Construction Canada (1951) Limited in the amount of \$750.00.
- [4] McDougall, J. set out the factual background to these matters in his oral reasons. Lyn-Gor is a body corporate under the laws of Newfoundland and Labrador and is registered to carry on business in Nova Scotia. Its agent in Nova Scotia is Mr. Gordon W. Genge who claims to be a resident of Nova Scotia. Mr. Genge also claims to have residency in Newfoundland and Labrador, Prince Edward Island and New Brunswick.

- [5] I would note, parenthetically, that in the material filed in this Court, Mr. Genge gives his address as No. 10 - 118 Wyse Rd., Dartmouth, Nova Scotia on Lyn-Gor's notice of appeal, but in his affidavit sworn in New Brunswick on the 2nd of December, Mr. Genge indicates that he is "of Borden - Carleton in the Province of Prince Edward Island."
- [6] The Chambers judge noted that Mr. Genge indicated that he has more than one residence in Newfoundland and Labrador and, in fact, "claims to reside in the place where he happens to wake up on any given day regardless of the time he might spend in that place." The trial judge found that Lyn-Gor does not have an office in Nova Scotia but that it has at least two offices in Newfoundland and one in Prince Edward Island. According to the Chambers judge's findings, it has no assets, either real or personal, in Nova Scotia.
- [7] The judge found that Lyn-Gor is a private corporation owned by Gordon W. Genge and his wife, Shirley M. Genge. The evidence before the judge was to the effect that Lyn-Gor had revenues of \$3.5 million for the year ended April 30, 2003. Mrs. Genge claimed not to be able to recall what revenues were earned for the year ended April 30th, 2004 or what liabilities and expenses the company had during that period. She could not recall what salary she was paid by the company, even though this was her only source of income. Nor could she recall the name of the company's accountants but she could recall that they were located in Clarenville, Newfoundland.
- [8] The judge found that Lyn-Gor's financial situation was at best uncertain and that because it has virtually no assets in Nova Scotia, and was involved in numerous other legal proceedings, the defendants have a legitimate concern that it might not be in a position to pay them costs if awarded. He also found that there was no evidence to suggest that Lyn-Gor was impecunious and that there was no suggestion that Lyn-Gor would not be able to proceed if security for costs was ordered.
- [9] The judge also found as a fact that Mr. Genge clearly does not reside in Nova Scotia. Therefore, he is not eligible to represent the company in proceedings pursuant to **Civil Procedure Rule 9.08(2)** which states that a body corporate may commence, carry on or defend a proceeding by a duly authorized officer **resident in the Province** (Emphasis added).
- [10] The judge concluded his reasons as follows:

[26] It is uncertain where Mr. Genge's residency might actually be. It is not up to the applicants or the court to guess. And certainly it is not the place where Mr.

Genge might happen to find himself on any particular day. There has to be an element of permanency to it which is certainly not the case with Mr. Genge's periodic stay-overs at a local motel/hotel. ...

- [11] A stay of execution pending appeal is a discretionary order and the starting point is that there is no automatic stay pending appeal: see **McPhail v. Desrosiers** (1998), 165 N.S.R. (2d) 32 (C.A. Chambers) at para. 8; **Hiltz and Simone v. Nova Scotia Attorney General** (1998), 167 N.S.R. (2d) 353 (C.A. Chambers) at para. 10. For a stay to be granted other than in exceptional circumstances, the applicant must show that there is an arguable issue on appeal, that if the stay is not granted and the appeal is successful, the appellant will have suffered irreparable harm and that the appellant will suffer greater harm if the stay is not granted than the respondent would suffer if the stay is granted: **Fulton Insurance Agency v. Purdy**, [1990] N.S.J. No. 361 (Q.L.) (C.A. Chambers).
- [12] Assuming, without deciding, that the appeal raises arguable issues, the main focus of debate in this case turns on the second requirement, that is, whether the applicant has established that it will suffer irreparable harm if the stay is refused and the appeal succeeds.
- [13] Mr. Genge has filed an affidavit in each of the files saying simply that Lyn-Gor does not presently have the "liquid assets" to pay the security for costs ordered by McDougall, J. and that if Lyn-Gor does not pay the security, it will lose its ability to pursue its action prior to the hearing of the appeal. Furthermore, Mr. Genge says that given Lyn-Gor's financial situation at the present time, he is concerned that the corporation would not be able to proceed with this appeal if he were not permitted to represent Lyn-Gor.
- [14] I also have before me the affidavit of Allan Keith who is a senior contracting specialist in the real property contracting section of Public Works and Government Services Canada. He indicates that Lyn-Gor Inc. has provided security in connection with a significant contract it is performing. That security consisted of two irrevocable letters of credit, one dated September 3, 2004 in the amount of \$173,288.00 and the other dated October 12, 2004, in the amount of \$321,394.00.
- [15] Based on all of the evidence before me, I am not satisfied that Lyn-Gor is not capable of posting the security without jeopardizing its financial situation. I attach little weight to the general and unsupported assertion made by Mr. Genge that Lyn-Gor does not have sufficient liquid assets and in any event, the question is not whether the corporation has liquid assets but whether it has the capacity to post the security without jeopardizing its

financial situation or its ability to pursue the action or the appeal. The evidence clearly does not support any such conclusion.

- [16] There is nothing before me to substantiate the bald assertion made by Mr. Genge about his concern that Lyn-Gor would not be able to proceed with the appeal if he is not permitted to represent the company.
- [17] Uncertainty as to Mr. Genge's place of residence has led to difficulties in serving documents. This became apparent during the hearing in Chambers. This situation must be rectified immediately.
- [18] I, therefore, will issue an order:
1. that the stay applications in both of these files be dismissed;
 2. that on or before February 15, 2005, (the date on which the appeal book for these appeals is due to be filed) Lyn-Gor will deposit with the Registrar of this Court and serve on all parties to the appeal, the name and address for service including a full street and mailing address in Nova Scotia of the solicitor or duly authorized officer resident in the Province who will be representing Lyn-Gor on these appeals. Thereafter, delivery of documents to that address will be considered service upon Lyn-Gor on the day of such delivery. In the event of Lyn-Gor's failure to comply with this order, any party to the appeal may, on notice, apply to the Chambers judge for further directions.
- [19] Lyn-Gor will pay the costs of these applications in the amount of \$750.00 to the Attorney General of Canada and Defence Construction Canada (1951) Limited jointly and in the amount of \$750.00 inclusive of disbursements to SGE Group Inc. These costs are payable forthwith.

Cromwell, J.A.