

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Nova Scotia Power Inc. v. AMCI Export Corporation, 2005 NSSC 127

Date: 20050429

Docket: S.H. 219171

Registry: Halifax

Between:

Nova Scotia Power Incorporated, a body corporate

Plaintiff

v.

AMCI Export Corporation, a body corporate

Defendant

Judge: The Honourable Justice C. Richard Coughlan

Heard: April 26, 2005 (in Chambers), at Halifax, Nova Scotia

Decision: April 29, 2005 (Orally)

Written Release: May 26, 2005

Counsel: David G. Coles, for the Plaintiff
Craig M. Garson, Q.C., and Stanley W. MacDonald for
the Defendant

Coughlan, J.: (Orally)

[1] The defendant, AMCI Export Corporation, applies for an order:

... (i) vacating/setting aside the Attachment Order issued by the Prothonotary of the Supreme Court of Nova Scotia on January 18, 2005, (ii) ordering the Sheriff to transfer, return or release to the Defendant any and all property attached pursuant to the Attachment Order and (iii) setting a date for the hearing of an application to assess damages and costs against the Plaintiff.

[2] On April 13, 2004, Nova Scotia Power Incorporated issued an Originating Notice and Statement of Claim, which Statement of Claim was amended February 8, 2005. The Attachment Order was issued January 18, 2005.

[3] Civil Procedure Rule 49.01 provides the Prothonotary shall grant and issue an Attachment Order when the Plaintiff files an affidavit and a bond which comply with the Rule.

[4] Rule 49.12 provides the mechanism by which the Court reviews an Attachment Order. On the hearing of the application, including any amendment to the affidavit or bond used in support of the original grant of the Attachment Order, the Court may do any of the things authorized by the Rule. It is to be remembered

the original Attachment Order is made on an *ex parte* basis, while an application pursuant to Rule 49.12 is made with notice to all parties.

[5] The applicant, in order to succeed, must satisfy the Court on a preponderance of evidence there is just cause to vacate the Attachment Order.

[6] AMCI says the Attachment Order should not have been issued as Nova Scotia Power Incorporated failed to establish any of the grounds for granting an Attachment Order as set out in Civil Procedure Rule 49.01(1)(a) to (f), and it should be vacated “for other just cause” pursuant to Civil Procedure Rule 49.12(c).

[7] Civil Procedure Rule 49.01(1)(a) to (f) provides:

Where a defendant,

(a) resides out of the jurisdiction, or is a corporation that is not registered under the *Corporations Registration Act*;

(b) conceals himself or absconds within the jurisdiction with intent to avoid service on him of any document;

(c) is about to leave or has left the jurisdiction with intent to change his domicile, defraud his creditors, or avoid service of a document;

(d) is about to remove or has removed his property or any part thereof permanently out of the jurisdiction;

(e) has concealed, removed, assigned, transferred, conveyed, converted or otherwise disposed of all or any part of his property with intent to hinder or delay his creditors, or is about to do so;

(f) has fraudulently incurred a debt or liability in issue in a proceeding;

[8] The provisions on which Nova Scotia Power Incorporated initially relied were Rule 49.01(1)(a), (c) and (e). On February 18, 2005, an affidavit of Eric Besseling was filed in which he stated he had been advised the conditions set out in Rule 49.01(1)(d) were met.

[9] The defendant, AMCI Export Corporation, is a body corporate with head office at Latrobe, Pennsylvania, United States of America, and is registered under the provisions of the *Corporations Registration Act*, R.S.N.S. 1989, c. 101.

[10] Nova Scotia Power Incorporated concedes that Rule 49.01(1)(c) does not apply in this case.

[11] AMCI says the terms of Rule 49.01(1)(a) do not apply as it is registered under the *Corporations Registration Act*. Nova Scotia Power Incorporated says the provision is disjunctive and applies if either the defendant resides out of the jurisdiction or is a body corporate not registered under the *Corporations Registration Act*, and the provision applies as AMCI is resident outside of Nova Scotia. From a grammatical reading of Rule 49.01(1)(a), it appears to be disjunctive. The placement of the word “or” between “resides out of the jurisdiction” and “is a company that is not registered under the *Corporations Registration Act*” is a disjunctive phrase.

[12] Does the provision make sense being interpreted disjunctively?

[13] The *Corporations Registration Act* applies to corporations generally, both Nova Scotian and non-Nova Scotian corporations. (For the purposes of this application the effect, if any, the *Act* has with regard to a Dominion corporation need not be considered.) Sections 9 and 10 of the *Act* provide in part:

9 (1) Every corporation holding a certificate of registration shall appoint and have a recognized agent resident within the Province, service upon whom of any order, summons, process, notice or other document shall be deemed to be

sufficient service upon the corporation, and if any corporation fails to appoint and have such agent it shall be liable to a penalty not exceeding one hundred dollars.

(2) A statement showing the name and address of such agent and from time to time a statement showing any change of such agent or his address, shall be filed with the Registrar, and until such statement is so filed a corporation shall be deemed not to have complied with the provision of this Section with respect to appointing and having such agent.

....

10 (1) Every corporation holding a certificate of registration shall, annually in the month during which the anniversary of the incorporation of the corporation occurs, file with the Registrar a statement showing the name of its recognized agent in the Province, the names of its directors and of its officers and such other information as the Registrar requires.

(2) Instead of filing the statement required by subsection (1), a Dominion corporation or foreign corporation may file with the Registrar a copy of the annual statement or similar document required to be filed in the jurisdiction in which the corporation is incorporated if such statement or document includes all of the information required to be included in a statement filed pursuant to subsection (1).

(3) The statement required by subsection (1) or (2) shall be signed by the recognized agent of the corporation resident within the Province or, with the consent in writing of the Registrar, by the secretary-treasurer or other officer of the corporation on having knowledge of the facts.

[14] Every corporation registered under the *Act* must have a recognized agent resident in Nova Scotia and is required to file an annual statement showing its recognized agent in the Province, the names of its directors and officers, and such

other information as the Registrar requires. A Nova Scotia corporation which fails to file the necessary statement giving the current information as to its recognized agent, directors and officers, could have its registration under the *Act* revoked. In that case, there would be a Nova Scotia company not registered pursuant to the *Corporations Registration Act* and not having supplied the required information.

[15] A disjunctive reading of the Rule makes sense, in that, in one case the defendant, individual or corporate, is resident outside the jurisdiction and in the other, a body corporate, which is resident in Nova Scotia, incorporated under the laws of Nova Scotia, is not registered under the *Corporations Registration Act*.

[16] Civil Procedure Rule 49.01(1)(a) applies if either the defendant resides out of the jurisdiction in one case or, in another, if a body corporate is not registered under the *Corporations Registration Act*. In this case, AMCI is resident out of the jurisdiction and, therefore, the first part of Rule 49.01(1)(a) applies.

[17] I have found grounds to support the granting of the Attachment Order existed pursuant to Civil Procedure Rule 49.01(1)(a) and the applicant has not

satisfied me of the existence of just cause why I should order the Attachment Order be vacated or dissolved in whole or in part.

[18] The application is dismissed. I will order costs in the amount of \$750.00 payable in any event of the cause.

Coughlan, J.