



File No. App #00-013

Decision No.

IN THE MATTER OF AN APPLICATION UNDER SECTION 7(3) OF THE LABOUR ACT (COMMON EMPLOYER)

BETWEEN:

**UNITED BROTHERHOOD OF CARPENTERS & JOINERS
OF AMERICA, Local 1338**

APPLICANT

AND:

**BAYVIEW MAIN INC. and/or LYNGOR DEVELOPMENTS INC.,
ASSOCIATED RELATED ACTIVITIES OR BUSINESSES**

RESPONDENTS

COUNSEL FOR THE APPLICANT

Raymond Mitchell

**COUNSEL FOR THE RESPONDENT
(Bayview Main Inc.)**

Karen A. Campbell

LynGor Developments Inc. represented by Gordon Genge (Shareholder and Director of the Corporation)

DECISION

Background

On 5 July 2000, an Application was made pursuant to Section 7(3) of the *Labour Act*, which was revised at the time of hearing to include the recital R.S.P.E.I. 1988, Cap L-1, as amended.

The Application sought a declaration or an order that the Respondents are, and shall be treated as constituting, one employer for the purposes of the *Act*. A Reply, to this Application, was filed with the Board on 14 August 2000 by Karen A. Campbell indicating that the law firm of Patterson, Palmer, Hunt & Murphy had been retained to represent the Respondents, Bayview Main Inc. and/or LynGor Developments Inc..

The hearing of this matter was originally set for 25 October 2000; it was rescheduled three times to 29 November 2000, 23 January 2001 and the hearing eventually took place on 21, 22 and 23 March 2001.

Cases Considered

1. White Spot Ltd v. British Columbia (Labour Relations Board) [199]B.C.J. No. 295
2. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 488, Applicant and Christman Mechanical Ltd. and Christman Installations Ltd., Respondents [1994] Alta. L.R.B.R. 160
3. Shaw Pipe Protection (Camrose) Ltd., Shaw Pipe Protection Limited, Shaw Industrials Ltd./Les Industries Shaw Ltee., and Shaw Pipe Protection, Applicants and Construction and General Workers, Local Union No. 92 and United Steelworkers of America, Local No. 8931, Respondents [1991] Alta. L.R.B.R. 381
4. Saskatoon (City) (Re), [1998] S.L.R.B.D. No. 32
5. Air Liquide Canada Inc. (Re), [1999] B.C.L.R.B.D. No. 266
6. Metro-McNair Clinical Laboratories Limited Partnership (c.o.b. MDS Laboratory Services) (Re) [2000] B.C.L.R.B.D. No. 210
7. Air Canada (Re) [2000] CIRB No. 42
8. TAF Construction Ltd. (Re) [1998] B.C.L.R.B.D. No. 316
9. The United Brotherhood of Carpenters and Joiners, Local 1338 and Labourers International Union of North America, Local 1079A v. Prebilt Structures Ltd. and Williams, Murphy & MacLeod (1971) Ltd. P.E.I.L.R.B. Decision dated 1 September 1988
10. Reconsideration - The United Brotherhood of Carpenters and Joiners, Local 1338 and Labourers International Union of North America, Local 1079A v. Prebilt Structures Ltd. and Williams, Murphy & MacLeod (1971) Ltd. P.E.I.L.R.B. Decision dated 22 March 1989

Statutes Considered

Labour Act R.S.P.E.I. 1988 Cap. L-1 section 7

Texts Considered

Canadian Labour Law (second edition) Aurora, Canada Law Book, 2000, The Honourable George W. Adams, Q.C., pages 8-30 to 8-38.1

Preliminary Matters

There was no pre-hearing conference held in regards to this matter.

On the call of the Board for preliminary matters, there was a motion on behalf of the Applicant to amend the pleadings to revise the citation of the *Labour Act of Prince Edward Island* which motion was granted.

On behalf of the Respondent, LynGor Developments Inc., a letter from LynGor Developments Inc. dated 20 March 2001 addressed to Karen A. Campbell indicated that LynGor Developments Inc. would not be retaining her services to represent the company at a hearing before the PEI Labour Relations Board on Wednesday, 21 March 2001.

There was a motion made by Ms. Campbell on behalf of her client, Bayview Main Inc., for an adjournment. The Board heard considerable evidence and arguments in respect of this motion. At the conclusion of the day's hearing, the Board adjourned the matter of the motion for adjournment of the entire hearing until Thursday morning, 22 March 2001.

Upon reconvening the hearing on the morning of Thursday, 22 March 2001, the Board was advised by Ms. Campbell that Mr. Leonard Oldford had informed her that both he and Mr. Weldon Glover intended to resign as Directors of Bayview-Main Inc. and he was not prepared to provide instructions to the Company's Solicitor. Ms. Campbell undertook with the Board to provide copies of the letters to Revenue Canada referred to by Mr. Leonard Oldford. The Board heard submissions from Mr. Mitchell and Mr. Genge on behalf of their respective parties. The Board concluded that the matters of the legal issues surrounding the Corporation, Bayview Main Inc., its directors, and whether the company was operable at the relevant times, were most properly dealt with in a hearing of the merits of the entire case and were in fact considerations weighing against the grant of a motion for a complete adjournment of the hearing.

There was a motion by Ms. Campbell to be removed as Solicitor of Record subject to her undertaking to provide the documents provided to Revenue Canada by the Directors Oldford and Glover. The motion was also subject to the preservation of the rights of Bayview Main Inc. to make submissions to the Board at this hearing, and on those bases Ms. Campbell was excused from the hearing.

There was a further motion by Mr. Genge for adjournment so as to establish whether or not more than the one Corporation is in existence, the status of the Corporation and that the entire matter be adjourned until it could be established that the Company is actually in existence. Mr. Mitchell argued that there was sufficient evidence before the Board in regards to the Corporation and executed documents to establish that, at all relevant times, the Corporations, Bayview Main Inc. and LynGor Developments Inc. existed.

On the basis of this Board's concurrence with the submissions of the Solicitor for the Applicant, the Board denied the motion for adjournment.

Mr. Mitchell moved to amend the pleadings of the Applicant to revise the citation of section 7(3) of the *Labour Act, RSPEI*, 1988. This motion was granted.

Upon deliberate confirmation by the Board Chair that Mr. Genge wished to proceed without legal counsel to assist in the presentation of the case for the Respondent, the Board proceeded to hear opening statements from Mr. Mitchell for the Applicant and Mr. Genge for LynGor Developments Inc.

Evidence

Submitted into evidence as Exhibit A-1 was a Certificate of Incorporation for LynGor Developments Inc. dated 4 February 1997 with attached relevant documents.

Exhibit A-2 was a Certificate of Incorporation for Bayview Main Inc. with related documents.

Exhibit A-3 was a License/Registration Certificate under the *Licensing Act* for the Province of Prince Edward Island related to LynGor Developments Inc.

Exhibit A-4 was a Voluntary Recognition Agreement between the United Brotherhood of Carpenters and Joiners of America, Local 1338 and Bayview Main Inc. dated 8 November 1999.

Exhibit A-5 was a handwritten list of reports of expense claims and payments by Bayview Main Inc. and LynGor Developments Inc. to Mr. Peter MacDonald.

Exhibit A-6 was a fax from Bayview Main Inc. dated 17 January 2000 with an attached list of current employees of Bayview Main Inc.

Exhibit A-7 was an Affidavit of Gordon Genge dated 26 May 2000 and filed in the matter of LynGor Developments Inc., Applicant and United Brotherhood of Carpenters and Joiners of America, Local 1033, Respondents.

Exhibit A-8 was a facsimile from the Government of Newfoundland, Department of Government Services and Lands, Commercial Registration Division, Registrar of Deeds and Companies, dated 24 March 2001, with two attached Notices of Directors.

Exhibit A-9 was an excerpt from the Construction Association of Prince Edward Island letter.

Exhibit A-10 was a final release bearing an indistinguishable signature, and bearing the signature of Gordon Genge as witness, dated 23 March 2000.

Exhibit A-11 was a final release executed by Mr. Peter MacDonald on 23 March 2000, and bearing the signature of Gordon Genge as witness.

Exhibit A-12 was a collective agreement between The Association of Commercial and Industrial Contractors of Prince Edward Island, Labour Relations Committee, Carpenters Trade Sector and United Brotherhood of Carpenters and Joiners of America, Local 1338, Affiliated with the Nova Scotia and Prince Edward Island Regional Council of Carpenters and Millwrights and Allied Workers, which agreement was made 30 August 2000.

The Board heard sworn testimony from Mr. Peter MacDonald, Michael Reginald Gaudet and Roddy Campbell on behalf of the Applicant, and on behalf of the Respondent, LynGor Developments Inc. Mr. Gordon Genge testified. Under subpoena was Mrs. Shirley M. Genge, but the matter of her testimony was adjourned until Friday, 23 March 2001. There was no evidence entered on behalf of the Respondent, Bayview-Main Inc.

On the morning of 23 March 2001, Mr. Gordon Genge advised the Board that Mrs. Shirley Genge would not be responding to the subpoena. Mr. Mitchell indicated on behalf of his client that, rather than pursue the matter further, he requested that the Board draw an adverse inference in the fact that Mrs. Genge refused to abide by the provisions of the subpoena.

Findings of Fact

LynGor Developments Inc. is a Corporation duly incorporated under the laws of the Province of Newfoundland and Labrador, which company was incorporated on 4 February 1997. Shirley M. Genge of 92 Main Street N., Glovertown, Newfoundland was the incorporator of this company. A Form 6, Notice of Director's , under the *Corporations Act of Newfoundland*, was filed with the Registry of Companies on 12 January 1998 and indicated that Gordon Genge of 92 Main Street N., Glovertown, Newfoundland, became a Director of this Corporation and Shirley Genge of that same address ceased to be a Director of the Corporation. The annual return of LynGor Developments Inc. filed with the Registry of Companies on 28 March 2000 shows the registered address as 92 Main Street N., Glovertown, Newfoundland and that the company's main types of business were contracting and manufacturing.

Bayview-Main Inc. is a Corporation duly incorporated under the laws of Newfoundland and Labrador, which company was formed on 4 May 1998. The Registry of Company Records indicates that the Directors of this Corporation are Gordon W. Genge, Leonard Oldford and Weldon Glover. The registered address of Bayview-Main Inc. is 1 Bayview Heights, Glovertown, Newfoundland. The Form 6, Notice of Directors, filed with the Registry of Companies on 4 May 1998, indicates that Gordon W. Genge of 92 Main St N., Glovertown, Newfoundland, is an estimator and Leonard Oldford, PO Box 155, Gambo (?), Newfoundland, as a carpenter-foreman and Weldon Glover, PO Box 63, Glovertown, Newfoundland is a carpenter-foreman. The annual return filed with the Registry of Companies on 18 January 1999 indicates that Bayview-Main Inc. of 1 Bayview Heights, Glovertown, Newfoundland, was carrying on a main type of business of contracting and manufacturing.

The License/Registration Certificate under the *Licensing Act* was tendered into evidence as Exhibit A-3 having been issued by the Province of Prince Edward Island, Corporate Section, Department of Community and Cultural Affairs, on 5 July 1999 to LynGor Developments Inc., c/o Taylor MacLellan, PO Box 35, Summerside, PEI. This license listed the Head Office of the Corporation as Chelton Beach, Albany RR # 2, PEI and principal place of business at that same Chelton Beach address. The nature of the business was recorded as carpentry or any business incidental to carpentry.

A facsimile message from the Government of Newfoundland and Labrador, Department of Government Services and Lands, Commercial Registration Division, Registry of Deeds and Companies, dated 24 March 2001, was addressed to Russell Prine, and sent from Judy, Companies, re: Bayview-Main Inc. and LynGor Developments Inc. The facsimile states that, effective up to 14 February 2001, the recorded Director of LynGor Developments Inc. was Gordon Genge was 92 Main Street N., Glovertown, Newfoundland and the registered Directors of Bayview-Main Inc. were Gordon W. Genge, Leonard Oldford and Weldon Glover. That facsimile was tendered into evidence as Exhibit A-8.

In 1999, the general contractor on the West Royalty Elementary School project was Schurman Construction. Schurman Construction is signatory to the collective agreement between the Association of Commercial and Industrial Contractors of Prince Edward Island, Labour Relations Committee, Carpenters Trade Sector and the United Brotherhood of Carpenters and Joiners of America, Local 1338, affiliated with the Prince Edward Island Regional Council of Carpenters, Millwrights and Allied Workers. Article 16.01 of the collective agreement binding the Applicant Union and Schurman Construction prevents any work in the carpenter trade jurisdiction being sub-contracted to a non-union employer.

The Applicant Union asserts that LynGor Developments Inc. submitted a bid and was awarded the carpentry work at the West Royalty Elementary School project, Queens County, Province of Prince Edward Island. Mr. Genge would assert that he simply caused the bid process to commence by issuing general direction that the documents be picked up at the general contractor's office. The fact that LynGor is listed in certain trade newsletters indicating they bid on the project, he would assert, is simply assumptions drawn by persons in the offices where the bid papers were picked up.

On 8 November 1999, Gordon Genge, on behalf of Bayview-Main Inc., signed a voluntary recognition agreement with the Applicant Union and the Company proceeded to carry on business as a unionized shop. A copy of this agreement was tendered into evidence as Exhibit A-4.

The work was carried out at the West Royalty Elementary School project by carpenters who were then concurrently employed by both Bayview-Main Inc. and LynGor Developments Inc. There is the evidence of Peter Kenneth MacDonald, carpenter and employee of both Bayview-Main Inc. and LynGor Developments Inc., that his assignments were received and directions received from Gordon Genge, Mr. MacDonald along with a number of other employees were assigned to various projects including the West Royalty Elementary School project and other projects which LynGor Developments Inc. was the bidding and successful contractor.

Exhibit A-5, a handwritten ledger of expenses and reimbursements of employees expenses incurred on behalf of the respective companies, LynGor Developments Inc. and Bayview-Main Inc., clearly indicate that Mr. MacDonald was employed simultaneously by both companies and would indicate that Shirley M. Genge and Gordon Genge were carrying out management and financial management responsibilities for both Corporations. While there is the assertion from the Respondent Company, LynGor Developments Inc., that Shirley Genge acted solely for LynGor Developments Inc., this Board is satisfied beyond doubt that the evidence would indicate otherwise and we must accept the assertions of the Applicant in this regard, especially given that Shirley Genge declined to

appear to give testimony pursuant to a subpoena issued by the Applicant Union. While she was in attendance for two of the three days of the hearing, on the third day, when she was to be called as a witness, she declined to attend.

There is documented evidence before the Board that, on 17 January 2000, Gordon Genge forwarded, on Bayview-Main Inc. letterhead, a remittance to the Applicant Union. The address for Bayview-Main Inc. was handwritten in as RR # 2, Albany, PEI C0B 1M0. A list of employees forwarded with this document included some thirteen (13) employees and named Weldon Glover, Peter MacDonald, Gordon W. Genge, Shirley M. Genge, Rod Taylor and Craig Wakely among them. This evidence leads the Board to the finding of fact that there definitely was an intermingling of the employees of both Companies.

The findings of fact that Mr. Gordon Genge, for all relevant times, was involved with both Companies is bolstered by reference to Exhibit 7, which was an affidavit sworn by Gordon Genge on 26 May 2000, wherein at para 6 he states:

While I am a Director and Shareholder of both Company, the fact is that each Company is completely unrelated to the other - Bayview-Main Inc. is a company incorporated in Newfoundland and is entirely devoted to millwork manufacturing, being the construction of furniture and kitchen cabinets, by way of example. On the other hand, LynGor is a general contractor incorporated on Prince Edward Island.

In May of 2000, the Applicant Union was advised that Bayview-Main Inc. was performing carpentry work, in the construction industry, using non-union carpenters at a project site at Greenwich National Park, Greenwich, Prince Edward Island. When Mr. Genge was contacted, he informed the Applicant that the work was actually being done by LynGor Developments Inc., a non-union employer. On the list of employees of LynGor Developments Inc. at the Greenwich National Park project were Gordon Genge, Weldon Glover, Rod Taylor and Craig Wakely. An information picket was set up at the Greenwich National Park job site on 25 and 26 May 2000. There were meetings of representatives of Applicant Union with Gordon Genge and Weldon Glover on 26 May 2000, and subsequent meetings between Gordon Genge and representatives of the Applicant Union. On 5 July 2000, the Applicant Union filed an Application for a Declaration that the Respondents are and shall be treated as constituting one employer pursuant to section 7(3) of the *Labour Act*.

As pointed out above, there were a number of hearings scheduled which were, for one reason or another, postponed in the fall of 2000 and in early 2001. It was the evidence of Mr. Genge that the Directors of Bayview-Main Inc. experienced irreconcilable differences and it is the intent of those Directors to resign from the Company. However, the records would indicate that, as of the date of the hearing, those resignations have not been received by the Registry of Companies in Newfoundland nor has a Corporate meeting been held. In any event, all of the evidence regarding the subsequent developments in respect to Bayview-Main Inc. are irrelevant for purposes of the matter currently before the Board which is the formation of the Corporations, the bidding on the West Royalty Elementary School project, the voluntary recognition agreement, the conduct of the Corporations during that period from November 1999 to the date of this Application on 5 July 2000.

Issues

The sole issue to be decided by the Board is whether there are grounds for granting the relief sought by the Applicant Union that the Board issue a Declaration or Order that the Respondents Bayview-Main Inc. and LynGor Developments Inc. are and shall be treated as constituting one employer for the purposes of the *Act*.

Conclusion

The provisions of subsection 7(3) of the *Labour Act* R.S.P.E.I. 1988 Cap L-1:

Where, in the opinion of the board, associated or related activities or businesses are carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination thereof, under common control or direction, the board may treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Part.

The Board has previously considered this legislation and, in the decision United Brotherhood of Carpenters and Joiners, Local 1338 and Labourers' International Union of North America, Local 1079A v. Prebilt Structures Ltd. and Williams, Murphy and MacLeod (1971) Ltd., PEILRB decision dated 1 September 1988. The test to be considered is set out at para 4 of that decision as follows::

Prior to reaching its decision, the Board is directed towards three (3) questions.

- a) *Is there in existence more than one Corporation, firm or business entity?*
- b) *Are the entities under common control or direction?*
- c) *Are the activities described in the Application related or associated activities in contemplation of section 7(3)?*

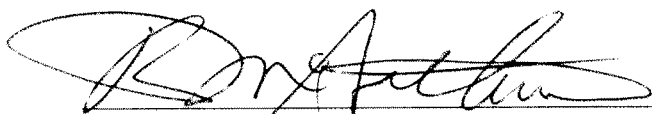
The documents filed with this Board in regards to the incorporation of the respective Respondents in the Province of Newfoundland, and the licensing of LynGor Developments Inc. in Prince Edward Island, the affidavits of Gordon Genge tendered as Exhibit A-7, the report out of the Registry of Companies, Newfoundland and Labrador updated as of 14 February 2001, and tendered as Exhibit A-8, and the oral evidence presented at the hearing before this Board, very clearly establishes that Bayview-Main Inc. and LynGor Developments Inc. were two bodies corporate in existence and conducting business during all periods of time relevant to this Application. The evidence of the Respondent, LynGor Developments Inc. in regards to the subsequent demise of the Corporative, Bayview-Main Inc. and the stated intent of at least two (2) of those Directors to resign is, in this Board's estimation, entirely irrelevant for matters related to the Application before it. To allow employers to form corporations and then, subsequent to Applications before this Board, allege that the corporations are now defunct and not subject to the agreements that they had entered into with the respective Unions would entirely frustrate the purposes of the legislation and trample the rights of employees and Unions respectively.

As to the second part of the test, there is ample documentary evidence to establish that the two Corporations, Bayview-Main Inc. and LynGor Developments Inc., were under common control and direction. The evidence of Peter MacDonald is very telling in regards to the fact that he took direction from Gordon Genge in regards to work performed for each of these companies and did so on a weekly, if not daily, basis. His work was performed on an interchanging basis for each of these Corporations. Most definitely, there was an intermingling of resources and a common pool of employees shared by the two Corporations. Mr. Genge testified that he was only associated with Bayview-Main Inc. on the basis of consulting with his two associates, Weldon Glover and Leonard Oldford. However, the Board must accept the evidence of Peter MacDonald that, in terms of the ongoing operations of the two Corporations, the vast majority of direction was received from Gordon Genge in respect of both Companies. As well, the evidence of Mr. Gaudet would indicate that, for all intents and purposes, in regards to dealing with both LynGor Developments Inc. and Bayview-Main Inc., the spokesperson for Bayview-Main Inc. was always Gordon Genge, despite the fact that Weldon Glover was present at meetings with Mr. Gaudet and Mr. Genge. Gordon Genge executed the voluntary recognition agreement between the Applicant Union and Bayview-Main Inc. Gordon Genge and Shirley Genge presented the remittances for expenses incurred and reimbursement of expenses set out in Exhibit A-5. Remittances of union dues were carried out by Gordon Genge and/or Shirley Genge. The Board is entirely satisfied that the two (2) Corporations were under common control and direction. The second part of the test is obviously met.

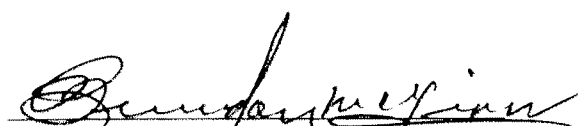
As to the third part of the test, the incorporation records of both companies indicate that they are in the business of contracting and manufacturing. The license for LynGor Developments Inc. to carry on business in Prince Edward Island recites "Nature of Business" as "CARPENTRY OR ANY BUSINESS INCIDENTAL TO CARPENTRY". The evidence of Mr. Peter MacDonald and Mr. Roddie Campbell would very clearly indicate to the Board that the activities carried out at the West Royalty Elementary School project would fall within the purview of "carpentry". It is the same set of skills in carpentry work as is set out in the collective agreement which skills were employed in this project. As pointed out by the counsel for the Applicant Union, the evidence of Peter MacDonald, the evidence of Roddie Campbell, and even the evidence of Gordon Genge would indicate that the activities of Bayview-Main Inc. in regards to the West Royalty Elementary School project being installation, preparation and manufacturing and installation of cabinetry and the activities of LynGor Developments Inc. in regards to carpentry and construction are related or associated duties as contemplated in the purview of section 7(3) of the *Act*.

In summary, the Board is entirely satisfied that the three-part test as dictated by the provisions of section 7(3) and interpreted in the Prebilt Structures Ltd. decision of this Board have all been met in the circumstances of this case. The Board concludes that the Applicant, United Brotherhood of Carpenters and Joiners of America, Local 1338, is entitled to the declaration that the Respondents are and shall be treated as constituting one employer for the purposes of the *Act*. Pursuant to sections 7(3), 53, and 54(3) of the *Act*, given the protracted nature of the bringing of this Application, the eventual filing of documents, the eventual hearing of the matter, the time elapsed up to the issuance of the decision and given that one of the effects of issuing the Order amounts to the imposition of a collective agreement, the Board, considering all the practicalities of the ongoing bidding and estimating process as pointed out on behalf of the Respondent Corporation, rules that the effective date of the Respondent, LynGor Developments Inc. being certified as a unionized employer, will be the date of the issuance of this

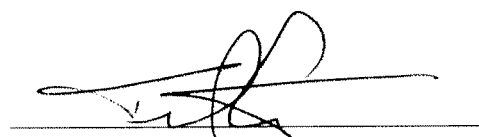
Order. Stated otherwise, the Board rules that the Respondent LynGor Developments Inc. is not, pursuant to this Order, required to pay collective agreement rates on work performed prior to the date of the issuance of this Order.



Robert MacArthur
Chair

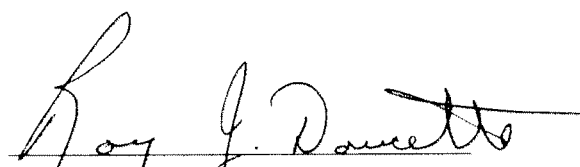


Brendon McGinn
Member



Ted Crockett
Member

This Decision made by the Prince Edward Island Labour Relations Board on 20 July 2001 and issued under the hand of its Chief Executive Officer.



Roy J. Doucette
Chief Executive Officer