Federal Court of Appeal Orders Security for Costs Payable by Foreign Corporation

October 05, 2018

***Safe Gaming System Inc. v. Atlantic Lottery Corporation*, 2018 FCA 180**

In Safe Gaming System Inc. v. Atlantic Lottery Corporation the Federal Court of Appeal ordered a foreign appellant to pay security into court in order to proceed with its appeal (2018 FCA 180).

By way of background, the appellant Safe Gaming System Inc. (SGS) commenced an action in the Federal Court alleging that the "MyPlay" responsible gambling system, which was available on video lottery terminals in the province of Nova Scotia from 2009 to 2014 and allowed players to set money limits on gambling, infringed SGS's Canadian patent. The Federal Court dismissed the action for patent infringement, and ruled that the patent was invalid (2018 FC 542). SGS was ordered to pay costs in an amount to be agreed upon, or determined following cost submissions.

SGS appealed the trial decision in June 2018. On August 30, 2018 the trial judge issued supplementary reasons and judgment fixing costs in the amount of $1.175 million, payable forthwith by SGS to the respondents (2018 FC 871).

The respondents sought an order from the Federal Court of Appeal, under Rules 416 and 417 of the Federal Courts Rules, for security for costs in the amount of $588,500. This amount represented the balance of the cost award that exceeded the amount already held as security by the Federal Court, plus security for the costs of the appeal.

The Federal Court of Appeal granted the motion, concluding that the requirements of Rule 416 were satisfied because SGS is a Wyoming corporation that does not carry on any business in Canada or have assets of material value. There were no grounds to refuse the order because SGS did not demonstrate that it is impecunious. SGS argued that it lacked the resources to pay security, at least in the time frame requested in the motion, but the Court commented that "…the appellant had the resources to prosecute lengthy and complex litigation and the Federal Court ordered that costs be paid forthwith. In these circumstances, greater evidence is needed to demonstrate lack of resources."

The Court held that the motion for security for costs was not premature. It had been over a month since costs were fixed and ordered payable forthwith, and the fact that the respondents had instituted an appeal of the cost award, seeking to have the cost award increased, did not render the motion premature.

The order granted by the Federal Court of Appeal required SGS to post security by November 5, 2018, failing which appeal would be stayed for one month, and the respondents would thereafter be at liberty to move for the appeal to be dismissed on account of failure to post security and delay.

The respondents in this case are represented by BLG LLP.

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