SUPREME COURT OF NOVA SCOTIA

Citation: *Canadian Lebanese Chamber of Commerce and Industry N.S. Society v. O'Leary*, 2018 NSSC 46

Date: 20180307
Docket: Hfx No. 466661
Registry: Halifax

Between:

The Canadian Lebanese Chamber of Commerce and Industry N.S. Society

Plaintiff

v.

Terrence Thomas Kevin O'Leary

Defendant

LIBRARY HEADING

Judge:	The Honourable Justice Mona M. Lynch
Heard:	December 7, 2017, in Halifax, Nova Scotia
Written Submissions by Plaintiff:	January 31, 2018
Written Submissions by Defendant	February 20, 2018
Written Decision:	March 7, 2018

Subject: Judicial Notice; Costs on Chambers Motion

Summary: The defendant applied to dismiss an action for want of jurisdiction or stay the action in favour of a more appropriate forum. The motion was dismissed after a hearing of one half day. The plaintiff asks the court to take judicial notice of certain statements of fact and seeks costs in the amount of $12,000. The defendant suggests costs of $1,000, and asks that judicial notice not be taken.

Issues: (1) Should judicial notice be taken of the statements put forward by the plaintiff?

(2) What is the appropriate costs award?

Result: Judicial notice is not taken as the facts were not so notorious or generally accepted as to not be the subject of debate among reasonable persons and were not readily accessible from a source of indisputable accuracy. Costs in the amount of $3,500 inclusive of disbursements awarded to be payable forthwith.

SUPREME COURT OF NOVA SCOTIA

Citation: *Canadian Lebanese Chamber of Commerce and Industry N.S. Society v. O'Leary*, 2018 NSSC 46

Date: 20180307
Docket: Hfx No. 466661
Registry: Halifax

Between:

The Canadian Lebanese Chamber of Commerce and Industry N.S. Society

Plaintiff

v.

Terrence Thomas Kevin O'Leary

Defendant

Judge:	The Honourable Justice Mona M. Lynch
Heard:	December 7, 2017, in Halifax, Nova Scotia
Written Submissions by Plaintiff:	January 31, 2018
Written Submissions by Defendant:	February 20, 2018
Written Decision:	March 07, 2018
Counsel:	Gavin Giles, Q.C, for the Plaintiff Christopher W. Madill, for the Defendant

By the Court:

Background:

[1] This is a costs decision after a motion by the defendant to dismiss the action for want of jurisdiction or to stay the action in favour of a more appropriate forum. The plaintiff started the action on August 9, 2017 and the defendant filed the motion seeking dismissal or stay on August 23, 2017. The matter was scheduled for a half-day hearing on December 7, 2017.

[2] On December 7, 2017, the motion was dismissed by the court after finding that the Supreme Court of Nova Scotia had territorial competence and that the defendant had not discharged the burden of showing that another jurisdiction was the more appropriate forum to hear the action.

Position of the Parties:

[3] The plaintiff seeks a lump sum award pursuant to *Civil Procedure Rule (CPR)* 77.08 to provide a substantial contribution to, but not a complete indemnity for, the legal expenses incurred on the motion. The legal fees for the motion, including disbursements and HST, were over $21,000. The plaintiff seeks a cost award substantially increased over the amounts set out in Tariff C of the CPR in the amount of $12,000.

[4] The defendant suggests the maximum costs award under Tariff C for a hearing taking less than a half day, $1,000, is a reasonable award.

Authorities:

[5] CPR 77.02 contains the general discretion that a presiding judge may make any order about costs as the judge is satisfied will do justice between the parties and nothing in the Rules limits that general discretion, except costs awarded after acceptance of a formal offer to settle.

[6] CPR 77.05 provides that the provisions of Tariff C apply to a motion, unless the judge hearing the motion orders otherwise. CPR 77.06(3) provides that party and party costs of a motion must, unless the presiding judge orders otherwise, be

assessed in accordance with Tariff C. CPR 77.07 provides that a judge who fixes costs may add an amount to, or subtract an amount from, tariff costs and provides examples of factors that may be relevant. CPR 77.08 allows a judge to award lump sum costs instead of tariff costs.

[7] Tariff C provides guidelines for Chambers matters and a range of costs. The relevant range in this matter is between $750 and $2,000 for a matter scheduled for a half day but heard in less than a half day.

Analysis:

[8] The plaintiff asks me to consider that the defendant is a wealthy man who touts himself as a leading high tech entrepreneur and investment guru; who prefers to be called "Mr. Wonderful"; who professes his knowledge and love of money; and who derides the death of money. The plaintiff indicates that I require no more evidence on these points than the defendant's statements on a television program called "The Shark Tank". The plaintiff asks me to adopt these statements by way of judicial notice.

[9] The defendant submits that the statements of fact set out in the plaintiff's brief are not matters of which the court can properly take judicial notice. The defendant also submits that the statements along with the statement that the plaintiff is all but impecunious are irrelevant to the costs decision.

[10] In **R. v. Find,** 2001 SCC 32, at para. 4, the court said about judicial notice:

> 48 In this case, the appellant relies heavily on proof by judicial notice. Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy: *R. v. Potts* (1982), 66 C.C.C. (2d) 219 (Ont. C.A.); J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 1055.

The statements of fact set out by the plaintiff regarding the defendant are not so notorious or generally accepted as not to be the subject of debate among reasonable persons. I do not find the facts to be uncontroversial or beyond reasonable dispute. Fortunately, or unfortunately, I have never watched the television program "The

Shark Tank", and I have no evidence as to whether it is a "readily accessible source of indisputable accuracy", but I doubt it would fall into that category.

[11] I will not be taking judicial notice of the statements of fact put forward by the plaintiff. Even if I could take judicial notice of the statements, none of the statements are relevant to my decision on a costs award in this matter.

[12] In relation to the plaintiff being "all but impecunious", I do have evidence that the plaintiff is a not-for-profit organization. However, the financial circumstances of the plaintiff are of little to no relevance in this decision.

[13] The plaintiff refers to authorities which were costs decisions after a trial (**Williamson v. Williams,** 1998 NSCA 195); two day hearings (**Taylor v. Dairy Farmers of Nova Scotia,** 2011 NSSC 160; **Homburg Invest Inc. v. 3258949 Nova Scotia Ltd.,** 2014 NSSC 102) and a four day hearing (**Trinity Western University v. Nova Scotia Barrister's Society,** 2015 NSSC 100). While I understand that the plaintiff is referring to those cases to cite principles in costs awards, the cases are not comparable to this matter.

[14] The defendant cites **The Armour Group Limited v. Halifax Regional Municipality,** 2008 NSSC 123 at para. 20 for the principle that going beyond Tariff C in chambers requires special circumstances and **Richards v. Richards,** 2013 NSSC 269 for the examples of those special circumstances.

[15] The matter was heard in less than a half day. The matter was not complex. There was not an element of public interest or an unsettled question of law. There was no conduct or misconduct of a party of solicitor. There was no less costly process to determine the issue. There were no expert witnesses. The motion was not determinative of the entire matter.

[16] More than one counsel appeared for both sides on the motion. The matter was important to the parties. There were lengthy affidavits and briefs prepared. I recognize that the plaintiff's legal fees are substantial on this motion.

Conclusion:

[17] The award of costs that is just and appropriate in the circumstances and would do justice between the parties is $3,500 inclusive of disbursements. The costs are payable forthwith.

Lynch, J.