

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Arcadia International v. Janmeja, 2008 NSSC 140

Date: 20080509

Docket: SH 286770

Registry: Halifax

Between:

Arcadia International, LLC, a Minnesota
Limited Liability Company; North Loop, LLC,
a Minnesota Limited Liability Company

Plaintiffs

and

Ashish Janmeja

Defendant

Revised Decision:

The text of the original decision has been corrected according to the erratum dated May 30, 2012. The text of the erratum is appended to this decision.

Judge:

The Honourable Justice John M. Davison

**Final Written
Submissions:**

Received from counsel

Counsel:

W. Harry Thurlow, for the plaintiffs
Philip Whitehead and Andrew Trider, for the defendant

By the Court:

[1] A hearing came before me in chambers on January 30, 2008, February 1st, 2008 and February 4th, 2008 for an order to enforce a judgment made by the U.S. District Court of Minnesota against the defendant. The judgment was by way of default. The

plaintiffs submitted the Minnesota judgment should be entered as a judgment of the Supreme Court of Nova Scotia.

[2] On March 28, 2008 I filed a written decision dismissing the application and awarding the defendant costs. I requested and received written submissions from counsel for all parties on the issue of costs.

[3] The defendant submitted the appropriate tariff is Tariff A set out in **Civil Procedure Rule 63**. In the alternative he advanced Tariff C. It is the position of counsel for the plaintiffs that Tariff C governs chambers matters and it is the only Tariff that should be used. In his brief counsel states "... Tariff A is usually reserved for trials". No authority was mentioned to support the statement.

[4] Tariff A reads as follows:

TARIFF A

Tariff of Fees for Solicitor's Services Allowable to a Party

Entitled to Costs on a Decision or Order in a Proceeding

In applying this Schedule the “length of trial” is to be fixed by a Trial Judge.

The length of trial is an additional factor to be included in calculating costs under this Tariff and therefore two thousand dollars (\$2000) shall be added to the amount calculated under this tariff for each day of trial as determined by the judge.

Amount Involved	Scale 1 (-25%)	Scale 2 (Basic)	Scale 3 (+25%)
Less than \$25,000	\$3,000	\$4,000	\$5,000
\$25,000 - \$40,000	\$4,688	\$6,250	\$7,813
\$40001 - \$65000	\$5,138	\$7,250	\$9,063
\$65,001 - \$90000	\$7,313	\$9,750	\$12,188
\$90,001 - \$125,000	\$9,188	\$12,250	\$15,313
\$125,001 - \$200,000	\$12,563	\$16,750	\$20,938
\$200,001 - \$300000	\$17,063	\$22,750	\$28,438
\$300,001 - \$500,000	\$26,063	\$34,750	\$43,438
\$500,001 - \$750,000	\$37,313	\$49,750	\$63,188
\$750 001 - \$1,000,000	\$48,563	\$64,750	\$80,938

more than \$1 000,000

The Basic Scale is derived by multiplying the amount involved by 6.5%

[5] Tariff C reads as follows:

TARIFF C

Tariff of Costs payable following an Application heard in Chambers by the Superior Court of Nova Scotia

For applications heard in Chambers the following guidelines shall apply:

(1) Based on this Tariff C costs shall be assessed by the Judge presiding in Chambers at the time an order is made following an application heard in Chambers.

(2) Unless otherwise ordered, the costs assessed following an application shall be in the cause and either added to or subtracted from the costs calculated under Tariff A.

(3) In the exercise of discretion to award costs following an application, a Judge presiding in Chambers, notwithstanding this Tariff C, may award costs that are just and appropriate in the circumstances of the application.

(4) When an order following an application in Chambers is determinative of the entire matter at issue in the proceeding, the Judge presiding in Chambers may multiply the maximum amounts in the range of costs set out in this Tariff C by 2, 3 or 4 times, depending on the following factors:

(a) the complexity of the matter,

(b) the importance of the matter to the parties,

(c) the amount of effort involved in preparing for and conducting the application.

(Such applications might include, but are not limited to, successful applications for Summary Judgment, judicial review of an inferior tribunal, statutory appeals and applications for some of the prerogative writs such as certiorari or a permanent injunction.)

Length of Hearing of Application	Range of Costs
Less than 1 hour	\$250 - \$500
more than 1 hour but less than ½ day	\$750 - \$1000
More than ½ day but less than 1 day	\$1000 - \$2000
1 day or more	\$2000 per day

[6] The wording in the tariffs lends support to the submission of Mr. Thurlow but as appears the Court of Appeal in **Keating et al** v. **Bragg et al** (1997), 160 N.S.R. (2d) 363 determined the presiding judge was not in error in considering a hearing to be a proceeding. Hallett J.A. stated at p. 366:

9 It is clear from the wording of the Tariff that it applies to "proceedings". The term is not defined in the Tariff.

10 The word "proceedings", as defined in Civil Procedure Rule 1.05(w), is a helpful starting point in determining its meaning in the Tariff:

CPR 1.05(w)

"proceeding" means any action, suit, cause or matter, or any interlocutory application therein, including a proceeding formerly commenced by a writ of summons, third party notice, counterclaim, petition, originating summons, originating motion, or in any other manner; (Emphasis added)

11 The appellants' application, which was commenced by an originating notice, is a proceeding within the meaning of the Civil Procedure Rules. Every application to court is not a proceeding within the meaning of that term in Tariff A but where an application involved several days of hearing, including the adducing of evidence, it is not an error by the presiding judge to consider it a proceeding for the purpose of awarding party and party costs. It is a matter within the discretion of the presiding judge, taking into account the extent to which the proceeding mirrors a trial proceeding.

12 This application involved four days of hearing which included extensive viva voce evidence. Justice Goodfellow did not err in applying Tariff A to determine the party and party costs that ought to be awarded.

[7] In this application I referred in my written decision to the evidence before me in these terms:

[7] This application was advanced by the filing of a number of affidavits and by the cross-examination of affiants. The plaintiffs filed the affidavits of Scott Ritter, Shawn Gardner, Vice President with Venture Bank and Robert A. Gust, a practising attorney in Minneapolis and counsel for the plaintiffs in this matter. The defendant filed his own affidavit, the affidavit of Gerry Power, who works with the defendant, Barry Coleman, who is a friend and business associate of the defendant and Dan Knight, a former employee with Arcadia.

[8] To consider the issue of complexity there was agreement on the law as enunciated in Beals v. Saldanha, [2003] 3 S.C.R. 416 but of relevance is the amount involved and the substantial dispute on the facts. As in Keating et al v. Bragg et al, *supra*, there were “several days of hearing including the adducing of evidence” and I would find the hearing was a proceeding. Nevertheless I find only use of Tariff C to be the appropriate method for reasons including the reference to “chambers” in the heading of Tariff C.

[9] I agree with the comments of Mr. Whitehead counsel for the defendant that the proceeding was determinative of the entire matter at issue and as set out in paragraph (4) of Tariff C in reference to factors I would multiply the maximum amounts by 3. This would set costs at \$14,250.00 by multiplying \$2,000 by 3 for two full days and \$750.00 by 3 for hearings longer than one hour and less than a half day.

[10] The only reference to disbursements in the briefs filed by counsel is the reference to the cost of the transportation expense of the witness Dan Knight from Minnesota to Nova Scotia. I would direct this disbursement be fully recovered from the plaintiffs. Counsel for the defendant indicates this amount is \$1,373.38 but this

expense together with other disbursements could be determined by the taxing officer under **Civil Procedure Rule 63.10A**.

Davison, J.

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Counsel: W. Harry Thurlow, for the plaintiffs
Philip Whitehead and Andrew Trider, for the defendant

ERRATUM:

The case cited in the first sentence in paragraph 1 should be Beals v. Saldanha.