

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Nova Scotia Real Estate Commission v. Lorway, 2006 NSSC 256

Date: 20060818

Docket: SH 247204

Registry: Halifax

Between:

The Nova Scotia Real Estate Commission,
a body corporate

Plaintiff

v.

Charles Lorway, Q.C. and Duncan MacEachern, carrying on business as a
partnership under the firm name and style of Lorway MacEachern

Defendant

The Nova Scotia Barristers' Society, a body corporate

Intervenor

DECISION ON COSTS

Judge: The Honourable Justice Suzanne M. Hood

Heard: In Chambers on February 7, 2006, in Halifax, Nova
Scotia

**Written Decision
on Costs:** August 18, 2006

Counsel: Alan J. Stern, Q.C., for the plaintiff
Tony Mozvik, for the defendants
Raymond F. Larkin, Q.C. for the Intervenor

By the Court:

[1] The applicant applied for an interlocutory injunction and I rendered my decision on the matter on March 13, 2006 dismissing the application.

In the decision I stated:

If the parties cannot agree upon costs, I will accept written submissions.

The parties have been unable to agree upon costs and have made written submissions.

[2] The respondents say they should have their costs payable forthwith in the amount of \$2,500.00 plus disbursements, including the cost of travel by counsel from Sydney to Halifax. The applicant says costs should be in the cause and the travel costs should be taxed. In any event, it says a costs award of \$2,500.00 is too high.

[3] Costs are dealt with in *Civil Procedure Rule 63* and *CPR 63.05(1)* provides:

63.05.

(1) Unless the court otherwise orders, the costs of any interlocutory application, whether ex parte or otherwise, are costs in the cause and shall be included in the general costs of the proceeding.

[4] In *Natural Beauty Products Ltd. (Receiver of) v. Body Reform Canada Ltd.*, 1990 CarswellNS 449 (NSCA), Hart, J.A. said in para. 7:

7 The appellant has also argued that the trial judge should not have awarded costs to the respondent in the court below and with this ground of appeal I am inclined to agree. Costs on interlocutory matters are usually 'in the cause' so that if after full trial it becomes apparent that a different view should have been taken of the interlocutory application the party applying should not be penalized with costs. ...

That was a decision where an application for an interlocutory injunction was dismissed.

[5] In *North American Trust Co. v. Salvage Assn.*, 1998 CarswellNS 446 (NSCA), Bateman, J.A. referred to the decision of Davison, J. in *Uniglobe Travel (Atlantic) Inc. v. Fundy Travel Ltd.* (1991), 113 N.S.R. (2d) 340 (N.S.T.D.) where, in para. 46, she quotes Justice Davison at p. 340 as follows:

46 On the question of costs, I have already made reference to the comments of Mr. Justice Hart in *National Beauty Products Limited v. Body Reform (Canada) Limited*, S.C.A. 02250, April 6, 1990 decision, the import of which is that where the issue in the interim proceeding is similar to that which will eventually be decided following full trial, costs should be costs in the cause. ... (emphasis in original)

[6] In para. 47, Bateman, J.A. says:

47 I agree with this interpretation. In my view, *Natural Beauty Products* is not to be taken as authority for the general proposition that costs on all interlocutory matters are to be costs in the cause.

She dismissed the appeal from an order of costs payable forthwith.

[7] The *North American Trust Co.* case involved a Chambers application for an order compelling the plaintiff to produce officers for discovery.

[8] Furthermore, in *North American Trust Co.*, Bateman said as follows in para. 43:

43 In my view Rule 63.05 (1) simply requires a judge on an interlocutory application to specifically address the entitlement to costs, failing which this default provision will apply.

I did not specifically address the issue of costs in my decision. In my view, the default provision applies and costs should be in the cause.

[9] In any event, the issue for trial is the same as that on the application; that is, the interpretation of s. 3(d) of the *Real Estate Trading Act*, S.N.S.1996, c. 28. In such a case, costs are to be in the cause.

[10] I therefore do not need to deal with the issue of travel costs of counsel claimed as a disbursement. These costs can be dealt with after the trial at taxation, if the respondent is successful at trial, or by the trial judge.

[11] Although the Nova Scotia Barristers' Society was an Intervenor, no one has sought costs against them and they are not seeking costs.

Hood, J.