



**NO. ON LIST:**

**SUPERIOR COURT OF JUSTICE**

**DATE:** October 19, 2022

**COURT FILE NO:** CV-22-682698

**SHORT TITLE:** 12563789 Canada v TikiTours

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**COUNSEL SHEET FOR JUDGE'S REGULAR MOTIONS**

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**MOVING COUNSEL(S)**

**RESPONDING COUNSEL(S)**

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**APPEARING FOR**

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- PLAINTIFF/PETITIONER/APPLICANT  
 DEFENDANT/RESPONDENT  
 OTHER-SPECIFY:

- PLAINTIFF/PETITIONER/APPLICANT  
 DEFENDANT/RESPONDENT  
 OTHER-SPECIFY:

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**Endorsement**

1. The defendants move for an injunction requiring the plaintiffs to store two boats that are the subject of the litigation until ownership of the boats has finally been determined.
2. I decline to grant the injunction.
3. The injunction arises in the context of a shareholder/partnership dispute between the two sides. The partnership envisaged that four boats would be purchased and



that each side would have a 50% interest in up in a partnership that operated them for tourist purposes.

4. It appears that the plaintiffs took possession of two of the boats and paid the defendants for them, if not in full, very close to it. The plaintiffs have operated the boats during the last tourist season. The boats are currently in storage for the winter and will not be used again until the spring of 2023.
5. The defendants are concerned that ownership of the boats is jointly held between the plaintiffs and the defendants (or some of them). The defendants are concerned that this exposes them to regulatory and civil liability in the event of safety issues. There is no evidence of safety violations before me.
6. Although there is a serious issue to be tried, I am not satisfied that the defendants will suffer irreparable harm if the injunction is granted nor does the balance of convenience favour the defendants.
7. With respect to irreparable harm, the defendants seem to be concerned about the possibility that the plaintiffs would change title to the boats or dispose of them. The plaintiffs are amenable to a consent order that restrains either side from changing title and restrains disposition of the two boats in the plaintiffs' possession in the absence of consent or a court order.



8. The defendants also appear to be concerned about potential irreparable harm in the event of liability arising while the boats are being operated by the plaintiffs. I offered the defendants a potential practical solution by suggesting a provisional order that would remove the defendants from title until title and the other partnership issues are resolved at trial coupled with an order restraining any transfer of the boats. The defendants declined such an order.
9. I am not satisfied that the abstract possibility of liability based on alleged safety concerns with respect to which there is no evidence before me constitutes irreparable harm to the defendants.
10. In my view the balance of convenience also strongly favours the plaintiffs. They have effectively paid the defendants in full for the boats and operated them during the last tourist season. To restrain their operation until trial would mean that the plaintiffs have paid the full price for the boats but are deprived of their use. All because of speculative safety concerns on the part of the defendants. The defendants must demonstrate substantially more than speculative concerns about liability to tip the balance of convenience in their favour.
11. I make the following orders as a result of today's hearing:
  - i. On consent, the plaintiffs will not dispose of the boats without the defendants' consent or further court order.
  - ii. On consent, there will be no change of ownership to the boats until trial.



- iii. On consent, the plaintiff will ask the boats' insurer to amend the policy to reflect that the boats are being operated by Shaka Wasaga and to add Shaka Wasaga as an additional insured.

12. The action will proceed according to the following schedule:

- i. Affidavits of documents together with copies of documents listed therein will be exchanged by November 19, 2022. The affidavits of documents of both sides shall contain copies of all correspondence between themselves and Transport Canada.
- ii. Examinations for discovery will be completed by March 10, 2023.
- iii. There will be no refusals on the examinations for discovery other than for privilege. A party can object to a question but will be required to answer it. Admissibility of evidence given in answers to such questions will be determined by the trial judge if a party seeks to admit that evidence at trial.
- iv. Undertakings given on discovery will be answered by March 31, 2023.
- v. Mediation will occur by April 14, 2023.
- vi. The trial will be delivered by April 21, 2023.

#### **Costs**

13. The plaintiffs seek their costs of this motion on a substantial indemnity scale in the amount of \$27,065.09. The plaintiffs submit they are entitled to substantial



indemnity costs because they served an offer to settle, and the result of the motion was equal to or better than their offer. That offer was delivered less than seven days before the motion. While the court has discretion to award substantial indemnity costs in those circumstances, in my view this is a case more appropriate for partial indemnity costs.

14. The plaintiffs' partial indemnity costs come to \$20,768.51.
15. The defendants have delivered a bill of costs which reflects partial indemnity costs of \$11,583.21 and substantial indemnity costs of \$16,564.92.
16. The defendants note that the two lead counsel are at similar stages in practice and should have similar rates. While that may be the case, that does not necessarily mean that the two sides devoted equal time and effort to the motion.
17. The motion was more significant for the plaintiffs than it was for the defendants. One could therefore expect the plaintiffs to put in significantly more time and effort than the defendants would. For the plaintiffs it was their livelihood that was at stake. In those circumstances I am prepared to award the plaintiffs their partial indemnity costs which I fix at \$20,768.51 as requested.

Date: October 19, 2022

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Koehnen J.

