

Federal Court



Cour fédérale

Date: 20190603

Docket: T-1580-09

Citation: 2019 FC 769

Ottawa, Ontario, June 3, 2019

PRESENT: Madam Justice St-Louis

BETWEEN:

ABOUSFIAN ABDELRAZIK

Applicant

and

**HER MAJESTY THE QUEEN IN RIGHT OF
CANADA AND LAWRENCE CANNON**

Defendants

ORDER AND REASONS

I. Introduction

[1] By Order dated September 18, 2018, this Court reluctantly granted the Defendants' Motion for an adjournment of the trial in order to allow for an application under section 38 of the *Canada Evidence Act*, RSC, 1985, c C-5 [*Evidence Act*].

[2] The Court then confirmed having been aware of the fact that participants had been preparing for trial for months. The Court also recognized that the Attorney General of Canada (AGC) waited until the very last minute to confirm she would bring an application under section 38 of the *Evidence Act*, and that an adjournment would cause particular prejudice to Mr. Abdelrazik, the Plaintiff, who had unequivocally confirmed his intention and readiness to proceed to trial.

[3] Finally, in respect of these proceedings, the Court granted Mr. Abdelrazik all costs in preparation of the trial that have been thrown away as a result of the adjournment, in consideration of the tardiness of the AGC's decision to bring a section 38 application and the resulting request for a stay of the trial.

[4] The parties were provided with an opportunity to reach an agreement on the quantum of the costs thrown away, but have been unable to do so. The Defendants have indicated that the parties agreed to resolve the disbursements separately, and I will thus not address this issue.

II. Positions of the parties

A. *Mr. Abdelrazik*

[5] With his submissions, Mr. Abdelrazik filed a "Plaintiff's Bill of Costs" detailing items pertaining to the fees and to the disbursements. In relation to fees, Mr. Abdelrazik calculated the "actual costs" thrown away for the period covering March 1, 2018 to September 27, 2018,

totalling \$218,185.00 plus tax. He also calculated the “solicitor-client costs”, representing 90% of the actual costs, and they total \$196,426.50 plus tax.

[6] Mr. Abdelrazik filed an affidavit by Mr. Bijon Roy, lawyer at Champ & Associates. Mr. Roy outlines the work done in preparation for trial and introduced, as Exhibit A, a copy of the receipts for the disbursements. With his reply, Mr. Abdelrazik also filed an affidavit by Ms. Angelica Go, legal assistant with Champ & Associates, outlining the actual costs incurred for “research” and “preparation of costs materials”, both items particularly challenged by the Defendants.

[7] In his submissions, Mr. Abdelrazik first outlines the legal principles regarding the costs thrown away and their application to the present case. Referring to the Court’s discretionary power under Rule 400(1) of the *Federal Courts Rules*, SOR/98-106 [the Rules] and to the factors outlined at Rule 400(3) of the Rules, Mr. Abdelrazik argues that the Court’s reference to “all costs” in its September 18, 2018 decision, and the facts leading to the adjournment of the trial support granting the costs thrown away in preparation of the trial on the solicitor-client scale.

[8] Mr. Abdelrazik further submits that the fees sought are reasonable, as they cover preparation from March 1, 2018 to September 27, 2018, and are calculated at hourly rates that are less than those charged by many Ontario counsel with similar levels of experience.

Mr. Abdelrazik stresses the unique circumstances of this case, and the fact that a lot of work will in fact have been wasted when preparation for trial resumes.

[9] He also submits that the amounts sought are fair and that, given the circumstances; it would be grossly unfair for him to recover anything less than solicitor-client fees.

[10] Finally, in reply to the Defendants' submissions, Mr. Abdelrazik agrees that this is an appropriate case for an award of costs on a lump sum basis. He stresses that this Court may take guidance from Ontario cases in which costs thrown away were awarded on a full indemnity basis, and that Justice Zinn's decision in *Teva Canada Limited v Pfizer Canada Inc*, 2017 FC 610 [*Teva*] does not mean that the principles reflected in Ontario cases cannot be considered by this Court in awarding increased costs, including in deciding whether to award them on a solicitor-client basis as per Rule 400(6)(c) of the Rules.

[11] Mr. Abdelrazik submits that costs on a solicitor-client basis are warranted as it is not always necessary to find a "reprehensible, scandalous or outrageous conduct" in order to support such an award, but it can be justified by reasons of public interest (*Quebec (Attorney General) v Lacombe*, 2010 SCC 38 at para 67 [*Lacombe*]), and can be granted "to save harmless an innocent litigant" (*Bank of Nova Scotia v Fraser*, 2001 FCA 267 [*Fraser*]). Finally, Mr. Abdelrazik maintains that all fees are legitimately "thrown away" and that, should the Court find it appropriate to award a lump sum in the form of a percentage, it ought to be calculated on his "actual costs" not on his "solicitor-client costs" which was used by the Defendants in their calculations.

B. *The Defendants*

[12] The Defendants filed an affidavit by Ms. Linda Ott, legal assistant with the Department of Justice Canada, introducing a letter from Ms. Elizabeth Richards dated September 5, 2018, advising that the AGC would be filing an application under section 38 of the *Evidence Act*.

[13] In their submissions, the Defendants challenge the scope of the costs qualified as “thrown away” by the Plaintiff, arguing that most costs claimed are not truly thrown away.

[14] However, recognising that an accurate assessment of costs thrown away at this stage would undoubtedly prove complex and time consuming, the Defendants argue that a lump sum award, as contemplated by Rule 400(4) of the Rules, would promote the objectives of the Rules.

[15] Relying on case law from the Federal Court, the Defendants indicate that lump sum awards generally range between 25% and 50% of actual fees and that, in this case, an award of 25% would be an accurate approximation of the portion of the work actually thrown away as a result of the adjournment. They ask, however, that two items be deducted from the calculation, hence the “research” of \$9,671.80 and the “preparation of costs materials” of \$3,186.00.

[16] Regarding the Plaintiff’s claim for costs on solicitor-client scale, the Defendants respond that such a scale is not applicable as it is very rarely granted and there is no evidence of a reprehensible, scandalous or outrageous conduct. The Ontario decisions, relied upon by the Plaintiff, have not been followed by the Federal Court (*Teva* at paras 6–7).

[17] The Defendants argue that a lump sum award of 25% of the costs claimed on a solicitor-client basis, minus the two items to be deducted, is appropriate. They submit that an amount of \$45,757.05 plus tax is therefore adequate.

III. Decision

[18] I agree with the parties that this is an appropriate case for an award of costs on a lump sum basis, as contemplated by Rule 400(4) of the Rules. As the Defendants stated, an accurate assessment of costs thrown away at this stage would prove complex and time consuming.

[19] I must first decide if the circumstances of this case warrant the grant of the costs thrown away on a solicitor-client scale. Mr. Abdelrazik submitted jurisprudence from Ontario Courts where thrown-away costs were awarded on a full indemnity basis. I agree with Justice Zinn's position in *Teva* that this is not in keeping with this Court's jurisprudence. In my view, the AGC was punished, so to speak, for the last minute adjournment, precisely by the Court granting the Plaintiff the thrown-away costs. Once granted, the determination of the quantum of these costs thrown away should follow the principles developed in regards to the quantum of the costs on the merits.

[20] Despite best efforts by Mr. Abdelrazik to demonstrate otherwise, I am satisfied that full indemnity, or solicitor-client costs that amount to 90% of the actual costs, are still, in this Court, exceptional. The Supreme Court of Canada confirmed that solicitor-client awards "are very rarely granted, for example if a party displays "reprehensible, scandalous or outrageous conduct" (*Young v Young*, [1993] 4 SCR 3, at p 134) or if justified by reasons of public interest

(Provincial Court Judges' Assn of New Brunswick v New Brunswick (Minister of Justice), 2005 SCC 44, [2005] 2 SCR 286, at para 132; *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3, at p 80)" (*Lacombe* at para 67).

[21] I have not been convinced that the circumstances at hand amount to strong public interest reasons or to a reprehensible, scandalous or outrageous conduct on the part of the AGC, or warrant the need to "chastise or punish reprehensible conduct and to save harmless an innocent litigant from the otherwise unnecessary expense of litigation" (*Fraser* at para 8).

[22] I agree with Mr. Abdelrazik that the lump sum award, if calculated as a percentage, should represent a percentage of his "actual costs", hence of the amount of \$218,185.00 plus tax. I am satisfied that the items he included are justified, and will not deduct the two items challenged by the AGC.

[23] Given the particular circumstances at hand, a lump sum of 30% of the "actual costs" is justified, and I will thus grant Mr. Abdelrazik costs thrown away (fees) in the amount of \$65,455.50 plus tax, payable forthwith.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Defendants shall pay forthwith to the Plaintiff the sum of \$65,455.50 plus applicable taxes.

"Martine St-Louis"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1580-09

STYLE OF CAUSE: ABOUSFIAN ABDELRAZIK v HER MAJESTY THE
QUEEN IN RIGHT OF CANADA AND LAWRENCE
CANNON

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: MOTION IN WRITING

ORDER AND REASONS: ST-LOUIS J.

DATED: JUNE 3, 2019

APPEARANCES:

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FOR THE APPLICANT

Mr. J. Sanderson Graham
Mr. Andrew Gibbs
Mr. Kirk Shannon

FOR THE DEFENDANTS

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FOR THE APPLICANT

FOR THE DEFENDANTS
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