

**Date: 20070706**

**Docket: T-2682-87**

**Citation: 2007 FC 716**

**Ottawa, Ontario, July 6, 2007**

**PRESENT : The Honourable Mr. Justice O'Keefe**

**BETWEEN:**

**SINCLAIR M. STEVENS**

**Plaintiff**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Defendant**

**REASONS FOR ORDER AND ORDER**

**O'KEEFE J.**

[1] At the end of the hearing of this action, the parties made a request to make both written and oral submissions on costs. The request was granted. After the written submissions were filed and the oral hearing was held, the parties made a request to submit further written submissions. Further written submissions were received by the Court.

[2] The plaintiff seeks costs:

1. On a solicitor and client scale, equalling \$289,111 plus disbursements and goods and services tax (GST);
2. In the alternative, a lump sum award pursuant to Federal Courts Rule 400(4), equalling \$220,000 plus disbursements and GST; or
3. In the further alternative, costs under Column V of Tariff B of the *Federal Court Rules*, equalling \$144,540 plus disbursements and GST.

[3] The defendant submits that the plaintiff should be awarded his costs in this action in accordance with Column III of Tariff B, as this is not an exceptional case, and there are no special circumstances which merit the exercise of the Court's discretion under Rule 400 to increase the tariff fees. The defendant also submits that the costs related to the access to information request should not be included in the plaintiff's cost award. The defendant noted that the plaintiff's calculations do not set off the \$8,540.43 owed by the plaintiff to the defendant as a result of the defendant's success in Court files A-263-97 and T-2682-87.

[4] The parties have not agreed on the amounts for any of the proposed bills of costs. At the oral hearing, counsel for the defendant stated that the bill of costs should be assessed because of the vagueness in the description of the billed services, the number of lawyers on the file, the lack of dockets, and the number of hours claimed.

[5] Two issues must be resolved with respect to the matter of costs, namely, the type of costs and how the amount of costs is to be determined.

[6] Rule 400 of the *Federal Courts Rules, 1998* states:

400.(1) The Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.

400.(1) La Cour a le pouvoir discrétionnaire de déterminer le montant des dépens, de les répartir et de désigner les personnes qui doivent les payer.

(2) Costs may be awarded to or against the Crown.

(2) Les dépens peuvent être adjugés à la Couronne ou contre elle.

(3) In exercising its discretion under subsection (1), the Court may consider

(3) Dans l'exercice de son pouvoir discrétionnaire en application du paragraphe (1), la Cour peut tenir compte de l'un ou l'autre des facteurs suivants:

(a) the result of the proceeding;

a) le résultat de l'instance;

(b) the amounts claimed and the amounts recovered;

b) les sommes réclamées et les sommes recouvrées;

(c) the importance and complexity of the issues;

c) l'importance et la complexité des questions en litige;

(d) the apportionment of liability;

d) le partage de la responsabilité;

(e) any written offer to settle;

e) toute offre écrite de règlement;

(f) any offer to contribute made under rule 421;

f) toute offre de contribution faite en vertu de la règle 421;

(g) the amount of work;

g) la charge de travail;

(h) whether the public interest in having the proceeding litigated justifies a particular award of costs;

h) le fait que l'intérêt public dans la résolution judiciaire de l'instance justifie une adjudication particulière des dépens;

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|---|---|
| (i) any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding;   | i) la conduite d'une partie qui a eu pour effet d'abrèger ou de prolonger inutilement la durée de l'instance;   |
| (j) the failure by a party to admit anything that should have been admitted or to serve a request to admit;   | j) le défaut de la part d'une partie de signifier une demande visée à la règle 255 ou de reconnaître ce qui aurait dû être admis;   |
| (k) whether any step in the proceeding was  | k) la question de savoir si une mesure prise au cours de l'instance, selon le cas:  |
| (i) improper, vexatious or unnecessary, or  | (i) était inappropriée, vexatoire ou inutile,   |
| (ii) taken through negligence, mistake or excessive caution;  | (ii) a été entreprise de manière négligente, par erreur ou avec trop de circonspection;   |
| (l) whether more than one set of costs should be allowed, where two or more parties were represented by different solicitors or were represented by the same solicitor but separated their defence unnecessarily; | l) la question de savoir si plus d'un mémoire de dépens devrait être accordé lorsque deux ou plusieurs parties sont représentées par différents avocats ou lorsque, étant représentées par le même avocat, elles ont scindé inutilement leur défense; |
| (m) whether two or more parties, represented by the same solicitor, initiated separate proceedings unnecessarily;   | m) la question de savoir si deux ou plusieurs parties représentées par le même avocat ont engagé inutilement des instances distinctes;  |
| (n) whether a party who was successful in an action exaggerated a claim, including a counterclaim or third party claim, to avoid the operation of   | n) la question de savoir si la partie qui a eu gain de cause dans une action a exagéré le montant de sa réclamation, notamment celle indiquée dans  |

rules 292 to 299; and	la demande reconventionnelle ou la mise en cause, pour éviter l'application des règles 292 à 299;
(o) any other matter that it considers relevant.	o) toute autre question qu'elle juge pertinente.
(4) The Court may fix all or part of any costs by reference to Tariff B and may award a lump sum in lieu of, or in addition to, any assessed costs.	(4) La Cour peut fixer tout ou partie des dépens en se reportant au tarif B et adjuger une somme globale au lieu ou en sus des dépens taxés.
(5) Where the Court orders that costs be assessed in accordance with Tariff B, the Court may direct that the assessment be performed under a specific column or combination of columns of the table to that Tariff.	(5) Dans le cas où la Cour ordonne que les dépens soient taxés conformément au tarif B, elle peut donner des directives prescrivant que la taxation soit faite selon une colonne déterminée ou une combinaison de colonnes du tableau de ce tarif.
(6) Notwithstanding any other provision of these Rules, the Court may	(6) Malgré toute autre disposition des présentes règles, la Cour peut:
(a) award or refuse costs in respect of a particular issue or step in a proceeding;	a) adjuger ou refuser d'adjuger les dépens à l'égard d'une question litigieuse ou d'une procédure particulières;
(b) award assessed costs or a percentage of assessed costs up to and including a specified step in a proceeding;	b) adjuger l'ensemble ou un pourcentage des dépens taxés, jusqu'à une étape précise de l'instance;
(c) award all or part of costs on a solicitor-and-client basis; or	c) adjuger tout ou partie des dépens sur une base avocat-client;
(d) award costs against a successful party.	d) condamner aux dépens la partie qui obtient gain de cause.

(7) Costs shall be awarded to the party who is entitled to receive the costs and not to the party's solicitor, but they may be paid to the party's solicitor in trust.

(7) Les dépens sont adjugés à la partie qui y a droit et non à son avocat, mais ils peuvent être payés en fiducie à celui-ci.

[7] Although the Court is given full discretion over the amount of costs, that discretion must be exercised properly.

[8] Solicitor and Client Costs

The plaintiff requested that he be granted solicitor and client costs. The jurisprudence of this Court has set out the parameters for granting solicitor and client costs. In *TMR Energy Ltd. v. State Property Fund of Ukraine*, (2005), 339 N.R. 254, 2005 FCA 231, Justice Décary stated at paragraph 4:

I have not been persuaded that costs should be awarded on a solicitor-client basis. Such costs are generally awarded only where “there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties” and “in exceptional cases” (*Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817; 243 N.R. 22, at 864).

[9] The plaintiff is relying on the “in exceptional cases” aspect of the test in order to receive costs on a solicitor and client basis.

[10] The plaintiff contends that this is an exceptional case because he was an innocent party with respect to the Order-in-Council. He was not consulted about the Order-in-Council and he did not write it. He was innocent as it was the defendant who picked the wrong guidelines.

[11] The plaintiff also referred to *Capital Vision Inc. v. Canada (Minister of National Revenue-MNR)* (2003), 241 F.T.R. 121, 2003 FC 1253, wherein Justice Heneghan stated at paragraphs 19 and 20:

As noted above in *Young, supra*, such costs are generally awarded in the face of “reprehensible, scandalous or outrageous conduct” by one of the parties. There is no such conduct here and the Applicants acknowledge as much. However, solicitor-and-client costs can also be awarded to indemnify an innocent party. The Applicants submit that the Minister acted oppressively in issuing the new requirements without seeking prior judicial authorization and, by doing so, put the Applicants to the necessary expenses of challenging that decision by way of application for judicial review.

In my opinion, these submissions by the Applicants do not meet the test of showing that an award of solicitor-and-client costs is justified here.

[12] Although the Order-in-Council was flawed, in the present case, there is no evidence that the flaw was anything but an error on the part of the officials. I am not satisfied from the evidence that special circumstances exist in this case so as to warrant an award of solicitor and client costs.

[13] Lump Sum Award Pursuant to *Federal Courts Rule 400(4)*

I am not prepared to issue a lump sum award as I am of the view that the same part of Tariff B can be used to fairly set the amount of costs that the plaintiff should receive. I have considered the

jurisprudence cited by the plaintiff before coming to this conclusion. Although the action consumed much time, the issues, although complex, were not as complex as suggested by the plaintiff.

[14] Award of Costs

I am of the opinion that the plaintiff should be awarded his costs at the high end of Column V of Tariff B, plus a lump sum of \$20,000 plus disbursements and GST.

[15] The Court has held that where there are special considerations, party and party costs can be granted in excess of Column III and in excess of Tariff B, pursuant to *Federal Courts Rule* 400(4). The Court has looked at the factors set out in *Federal Courts Rule* 400(3) in considering whether there are special considerations to justify a higher cost award. In the present action, the plaintiff submitted that the following factors support an increased amount of costs:

1. The result in the proceeding

The plaintiff completely won his judicial review and had the Commission report set aside.

2. The importance and complexity of the issues

The issues were very important to the plaintiff as the Commission report effectively ended his political career. The issues raised were ones of first instance and there were no precedents except perhaps *Landreville v. The Queen* (No. 2) (1977), 75 D.L.R. (3d) 380 (F.C.T.D.), which involved a different context.

3. The amount of work

There is no doubt that a large quantity of work was expended on the file.



4. Whether the public interest in having the proceeding litigated justifies a particular award of costs

I am of the view that the issues in this judicial review as they related to the conduct of a public inquiry needed to be determined.

[16] In addition to these factors, the Court is entitled to look at other considerations. I have stated that this was a lengthy case and that the error in the Order-in-Council was not of the plaintiff's making. The plaintiff had no choice but to pursue the action in order to have the matter clarified. The fact that the Order-in-Council had no definition of conflict of interest was raised before the Commission, but not corrected.

[17] For all of the above reasons, I would grant the plaintiff his costs at the high end of Column V of Tariff B, plus a lump sum of \$20,000 plus disbursements and GST.

[18] The bill of costs shall not include any amounts for the access to information matters, as these matters were already dealt with by the Courts.

[19] The Court retains jurisdiction to deal with the issue of second counsel if the parties cannot agree.

[20] As the defendant has not seen the dockets, the plaintiff should make these available to the defendant within 10 days of the date of these reasons.

[21] The parties shall have 30 days after the receipt of the dockets and records to agree on a bill of costs in accordance with Column V of Tariff B. If agreement cannot be reached in this period of time, the parties shall within 10 days, apply to me with respect to the outstanding issues.

[22] This process is being implemented in order to avoid spending more time on an assessment. However, if agreement cannot be reached, then the motion will have to be made to me to determine how the matter will be finalized.

[23] I retain jurisdiction to deal with this matter.

**ORDER**

[24] **IT IS ORDERED that:**

1. The plaintiff shall have his costs at the high end of Column V of Tariff B, plus a lump sum of \$20,000 plus disbursements and GST.
2. The bill of costs shall not include any amounts for the access to information matters as these matters were already dealt with by the Courts.
3. The Court retains jurisdiction to deal with the issue of second counsel if the parties cannot agree and to deal with any other outstanding issues as noted in paragraph 22 of these reasons.
4. As the defendant has not seen the dockets, the plaintiff should make these available to the defendant within 10 days of the date of these reasons.
5. The parties shall have 30 days after the receipt of the dockets and records to agree on a bill of costs in accordance with Column V of Tariff B. If agreement cannot be reached in this period of time, the parties shall within 10 days, apply to me with respect to the outstanding issues.

“John A. O’Keefe”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-2682-87

**STYLE OF CAUSE:** SINCLAIR M. STEVENS  
- and -  
THE ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** September 19, 2006

**AND BY WRITTEN SUBMISSIONS BY THE PARTIES**

**REASONS FOR ORDER  
AND ORDER OF:** O'KEEFE J.

**DATED:** July 6, 2007

**APPEARANCES:**

Peter Jervis FOR THE PLAINTIFF  
Gillian Hnatiw

Kathryn Hucal FOR THE DEFENDANT

**SOLICITORS OF RECORD:**

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