

Federal Court



Cour fédérale

Date: 20111213

Docket: T-2121-05

Citation: 2011 FC 1459

Ottawa, Ontario, December 13, 2011

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

JEAN PELLETIER

Applicant

and

THE ATTORNEY GENERAL OF CANADA

and

**THE HONOURABLE JOHN H. GOMERY, IN
HIS CAPACITY AS EX-COMMISSIONER OF
THE COMMISSION OF INQUIRY INTO
THE SPONSORSHIP PROGRAM AND
ADVERTISING ACTIVITIES**

Respondents

REASONS FOR COST AWARD AND ORDER

I. Introduction

[1] In this cost motion, the late Jean Pelletier (Mr. Pelletier) is seeking a lump sum award for the fees and disbursements he incurred in his successful judicial review application when on June 26, 2008 Judge Teitelbaum quashed, with costs, the findings made by Commissioner Gomery in respect

of Mr. Pelletier contained in the Phase I report of the Public Inquiry into the Sponsorship Program and Advertising Activities (the Commission of Inquiry). Mr. Pelletier's cost motion dated July 25, 2008 was adjourned by Judge Teitelbaum until such time as the Federal Court of Appeal rendered a decision on the Attorney General of Canada's appeal his decision on Mr. Pelletier's judicial review application. On July 10, 2010, the Federal Court of Appeal dismissed with costs that appeal on the ground of delay.

[2] On February 1, 2011 counsel for the Attorney General of Canada filed supplementary observations in respect of this cost motion due to the fact that Mr. Pelletier passed away in January 2009. Counsel noted Mr. Pelletier's Estate had not complied with section 117 of the *Federal Courts Rules* (SOR/98-106) (the *Rules*) and consequently was barred from pursuing the cost matter. Compliance with Rule 117 was effected. Prothonotary Morneau allowed its validation and an appeal from that decision was dismissed. No appeal was taken to the Federal Court of Appeal. In these circumstances, Mr. Pelletier's cost motion is ripe for adjudication.

II. Mr. Pelletier's Cost Motion

[3] Counsel for Mr. Pelletier, on the judicial review application before Judge Teitelbaum, is a member of the same law firm that represented the Right Honourable Jean Chrétien. His costs submissions are structured in the same way taking into account however that Mr. Pelletier had received from the Government of Canada the sum of \$101,125.30 to cover some of his legal costs in this judicial review application.

[4] He seeks a lump sum award for fees and disbursements fixed at \$300,000.00. This amount was supported by the affidavit of Nadia Effendi, a lawyer at the Ottawa office of Mr. Pelletier's solicitors. She was not cross-examined.

[5] Ms. Effendi's affidavit tells us that:

- a. On a solicitor-client basis for time spent on this judicial review application fees and disbursements to Mr. Pelletier, at standard rates charged by the professionals working on Mr. Pelletier's application were \$478,496.24 for legal fees including applicable taxes and \$25,234.52 for disbursements.
- b. In the alternative to a lump sum award Mr. Pelletier sought an order directing the Assessment Officer (the Officer) to assess his costs at the maximum rate provided under Column V of the Tariff of costs and disbursements set out in the *Federal Courts Rules* (SOR/98-106) (the Tariff) totalling \$59,121.60 in fees including applicable taxes and \$25,234.52 for disbursements.
- c. As a further alternative, Mr. Pelletier sought an order directing the Officer to assess fees and disbursements at the maximum rate provided in Column IV of the Tariff yielding the amount of \$46,917.60 in fees including applicable taxes and \$25,234.52 for disbursements.
- d. As a further alternative, Mr. Pelletier looked to Column III of the Tariff which at its maximum rate would yield the amount of \$34,035.60 in legal fees including applicable taxes and \$25,234.52 for disbursements.

[6] Mr. Pelletier's counsel submitted that it was right and just that this Court fix costs in an amount greater than any amount provided for in the Tariff. Looking at the factors set out in Rule 400 of the Tariff which are to be taken into account in awarding costs, Mr. Pelletier's counsel stressed the following:

- The result of the judicial review application was significant. Judge Teitelbaum quashed the factual findings of Commissioner Gomery made against Mr. Pelletier and thereby restored the damage to Mr. Pelletier's reputation. Judge Teitelbaum found that the Commissioner had prejudged the issues, had not been impartial towards Mr. Pelletier and made disparaging remarks about him which damaged and demeaned his reputation and person.
- The issues were important to Mr. Pelletier since his legacy was at stake. The issues were factually complex in terms of the issues, the massive amount of material (280,000 pages in the Joint Application Record).
- The amount of work was extraordinary amounting to 1,193 hours of lawyers time excluding paralegals and students.
- There is a public interest in having the judicial review litigated. It related to the proper conduct of the Commission of Inquiry.

III. The Respondents submissions

[7] Counsel for the Attorney General of Canada and counsel for the Commission of Inquiry made submissions opposing the level of costs requested. The Attorney General of Canada did not

object to a lump sum award being made by this Court. Both counsel urged the Court to base the lump sum award as closely as possible to Column III of the Tariff pointing to Rule 407 of the *Rules*.

[8] In summary form, the Respondents submitted that in substance Mr. Pelletier was asking the Court to award him costs on a solicitor-client basis pointing to the fact that by his own calculations he is seeking the amount of \$300,000.00 which including a second counsel fee is at least three times an award under Column V of the Tariff which is the highest column available and five times the amount he would be awarded under Column III not counting the amounts he received from the Government of Canada. Mr. Pelletier is not entitled to solicitor-client costs based on the settled factors governing such awards, they argued.

[9] Counsel for the Attorney General of Canada submitted the Court should exercise its discretion to award Mr. Pelletier a lump sum award according to the highest range in Column III of the Tariff including a second counsel fee but with the following qualifications: (1) that the number of hours claimed under item 14 A and 14 B should be, in both cases, reduced to 35 hours and (2) in terms of disbursements in the absence of proof thereof that the parties attempt to sort them out themselves and, if not able to, that issue be referred to the Officer.

[10] The result is that counsel for the Attorney General of Canada sought an order that Mr. Pelletier is to be awarded \$26,340.00 in legal fees excluding disbursements but including taxes.

[11] He quoted the following extract from the Federal Court of Appeal's decision in *Sherman v Canada (Minister of National Revenue)*, 2004 FCA 29 for the proposition that the purpose of the

costs rules is not reimbursement of all the expenses and disbursements incurred by a party in litigation but rather to provide partial compensation:

The purpose of the costs rules is not to reimburse all the expenses and disbursements incurred by a party in the pursuit of litigation, but to provide partial compensation. The costs awarded, as a matter of principle, are party-and-party costs. Unless the Court orders otherwise, Rule 407 requires that they be assessed in accordance with column III of the table to Tariff B. As the Federal Court properly said in *Apotex Inc. v. Wellcome Foundation Ltd.* 1998 CanLII 8792 (FC), (1998), 159 F.T.R. 233, Tariff B represents a compromise between compensating the successful party and burdening the unsuccessful party.

[12] Counsel for Commissioner Gomery made similar submissions to those of the Attorney General of Canada except that he opposed a lump sum award and asked the Court to order the assessment of costs in accordance with Column III of the Tariff.

IV. Mr. Pelletier's Reply

[13] In reply, counsel for Mr. Pelletier made the following submissions:

1. The issue of the appropriate disbursements should not be sent to the Officer for assessment. In its reply, counsel for Mr. Pelletier attached the affidavit of Patricia Prudhomme who prepared the Bills of Costs which were appended to Ms. Effendi's affidavit. She deposed that the disbursements included in those Bills of Costs are relevant to Mr. Pelletier's judicial review application only. She explained the workings of the law firm's computerized accounting system of recording expenditures. She provided other details related to specific items. She was not cross-examined.
2. While Mr. Pelletier did not seek solicitor-client costs it was argued it would not be inappropriate to award Mr. Pelletier solicitor-client costs because there exists in this

case special circumstances citing *Capital Vision, Inc. v Canada (Minister of National Revenue - M.N.R.)* [2003] FCJ No 1580 (FC); *Church of Jesus Christ of Latter Day Saints v King*, (1998) 41 OR 3d 389 (CA) and *King v Canada (Attorney General)* [2000] FCJ No 1558 (FCA). Counsel anchors his submissions on the purpose of Mr. Pelletier's judicial review application. It was to defend his public reputation that was damaged by the conduct of the Commission. An award of solicitor-client costs is an appropriate way to assist with the public rehabilitation of Mr. Pelletier's reputation.

V. Analysis and Conclusions

[14] This Court's task in this matter was much simplified with the October 26, 2011 reasons for cost order in the matter of the Right Honourable Jean Chrétien's costs in the Federal Court of Appeal whereby, as noted, dismissed with costs the Attorney General of Canada's appeal from Judge Teitlebaum's decision.

[15] Justice Mainville wrote the reasons for judgment (See *Canada (Attorney General) v Chrétien*, 2011 FCA 53). Before the Federal Court of Appeal, Mr. Chrétien's counsel sought a lump sum award of \$70,000.00 for fees and disbursements incurred in resisting the Attorney General's appeal. Alternatively, the Mr. Chrétien sought an Order directing the Assessment Officer to assess his costs at the maximum rate provided under Column V of the Tariff yielding the amount of \$14,037.41 including applicable taxes (\$9,561.50 for fees and \$4,475.91 for disbursements).

[16] Counsel for the Attorney General agreed a lump sum award to Mr. Chrétien was appropriate but the cost award should be based on the Tariff yielding a lump sum of \$11,282.70 exclusive of disbursements but inclusive of applicable taxes.

[17] Justice Mainville took the opportunity of outlining the principles applicable to increased costs awards that is cost awards beyond the maximum provided in the Tariff, and their application to the facts of Mr. Chrétien's successful appeal. He wrote the following at paragraphs 3 to 9 of his Reasons for Order:

The principles applicable to increased cost awards have been previously canvassed by our Court and can be summarized as follows:

- a. An award of party-and-party costs is normally determined in accordance with column III of the table to Tariff B and does not seek to compensate a party for the legal costs it incurred, but rather represents a contribution towards a successful party's legal costs.
- b. However, in its discretion, the Court may increase these costs in order to provide appropriate party-and-party costs if circumstances warrant such an award.
- c. In exercising its discretion, the Court may consider the factors set out under section 400 of the Rules, including notably the amounts claimed and recovered, the importance and complexity of the issues, the amount of work involved, the conduct of a party, and whether the public interest in having the proceeding litigated justifies a particular award of costs.
- d. The increased costs are also to be awarded as party-and-party costs, as they do not indemnify the successful party for its solicitor-and-client costs.
- e. Solicitor-and-client costs are only awarded in exceptional circumstances such as where a party has shown bad faith or inappropriate, reprehensible, scandalous or outrageous conduct; reasons of public interest may also justify solicitor-and-client costs.

- f. An award of costs is not an exact science and is rather a matter of discretion based on good judgment and common sense.

(Sections 400 and 407 of the Rules, *Consorzio del Prosciutto di Parma v. Maple Leaf Meats Inc.*, 2002 FCA 417 (CanLII), 2002 FCA 417, [2003] 2 F.C. 451; *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 157 (CanLII), 2004 FCA 157, 325 N.R. 134; *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 FCA 278 (CanLII), 2004 FCA 278, 243 D.L.R. (4th) 759; *Mackin v. New Brunswick (Minister of Finance)*; *Rice v. New Brunswick*, 2002 SCC 13 (CanLII), 2002 SCC 13, [2002] 1 S.C.R. 405 at paragraph 86.)

The respondent justifies his request for additional costs on the basis of the results of the proceeding, the importance of the issues, the public interest in having the proceeding litigated and the conduct of the appellant.

The results of the proceeding alone are not a factor justifying increased costs. Moreover, the conduct of the appellant in pursuing this appeal was not reprehensible and also does not justify an increase in costs.

However, I recognize that the importance of the issues decided in the appeal, as well as the public interest in pursuing the appeal, justify an increase in costs. The appeal concerned the reputation of a former Prime Minister of Canada and the proper conduct of federal commissions of public inquiry. These were important and complex issues of public importance. Consequently the appellant will be awarded costs in addition to those set out in Tariff B.

As to the quantum of costs, this is a matter of discretion based on the factors set out above. The respondent seeks \$70,000 being almost the equivalent of his solicitor-and-client costs. There is no justification here for an award on a solicitor-and-client basis. On the other hand, the appellant proposes to apply Tariff B for an award of \$11,282.70 exclusive of disbursements (which the respondent estimates at \$4,475.91) but including taxes. As I have already noted, an increased award of costs beyond the amounts provided in Tariff B is justified in this case, and I cannot therefore accept the appellant's position limiting costs to the tariff.

Taking into account the time spent by the respondent's counsel to prepare the appeal and the importance and complexity of the issues raised, an award of \$25,000 plus all disbursements and applicable taxes appears to me appropriate in this case. Though this amount is insufficient to compensate the respondent fully for the legal costs incurred in this appeal, it constitutes nevertheless a significant contribution towards these costs while remaining within acceptable standards of party-and-party costs awards. It represents a compromise between compensating the successful party while not unduly burdening the unsuccessful party.

I would consequently award the respondent, for the appeal and all related motions, including this motion, party-and-party costs of \$25,000 plus disbursements incurred and applicable taxes on these costs and the disbursements. The assessing officer should be directed to assess costs accordingly.

[Emphasis added]

[18] In his supplementary submissions, counsel for Mr. Chrétien had noted that in the alternative to the \$70,000 lump sum payment, Mr. Chrétien sought costs at the maximum rate under Column V which would have been \$9,561.50 fees and \$4,475.91 for a total of \$14,037.41 and that the Court of Appeal awarded Mr. Chrétien \$25,000.00 plus disbursements and applicable taxes.

[19] Counsel for Mr. Chrétien noted that the award of costs by the Federal Court of Appeal was 2 ½ times the maximum fees which would have been allowed under Column V.

[20] Applying the reasoning of the Court of Appeal Mr. Chrétien's counsel argued that the amount set by Column V of the Tariff is \$114,744.72 for fees and if that amount was multiplied by 2.5 the result would be a fee portion cost award of \$286,861.68 contrasted with the lump sum award for fees in the amount of \$300,000.00 including disbursements.

[21] Counsel for the Attorney General chose not to reply to Mr. Chrétien's supplementary submissions by letter to this Court dated October 14, 2011.

[22] In Mr. Chrétien's case I made a lump sum award for all costs and disbursements of \$200,000.00. In doing so I reasoned as follows:

1. Solicitor-client costs are not appropriate;
2. Increased costs beyond the columns provided for is appropriate;
3. An award of party-party costs does not seek to compensate a party for legal costs but represents a contribution towards such costs;
4. It is appropriate in this case that the lump sum award represent a significant contribution to the costs incurred by Mr. Chrétien while remaining within acceptable standards for party-party costs representing a compromise between compensating the successful party while not unduly burdening the unsuccessful party.

Counsel for Mr. Chrétien suggested that if I applied the factor of 2.5 to the maximum legal fees taxable under Column V the yield is \$286,861.68 in fees whereas the lump sum figure sought is \$300,000.00 including disbursements.

While I agree that a reference to the taxable legal fees under Column V of the Tariff is a useful indicia of the gauge of legal fees for the lump sum award in this case, the use of a simple multiplier destroys, in my view, the compromise which Justice Mainville spoke about.

We know that the lump sum award of \$70,000.00 sought by Mr. Chrétien (which included disbursements and taxes) came close to his solicitor-client costs. Yet, his award of \$25,000.00 plus disbursements represents slightly less than one half of his total costs incurred.

I appreciate that costs on the preparation and hearing of the judicial review application required the expenditure of considerably more time in legal resources than the appeal before the Federal Court of Appeal did. The contrast is telling in the Column V calculations for

legal fees (\$114,744 for the judicial review and a little less than \$10,000 for the appeal).

Balancing all of the factors mentioned by Justice Mainville with appropriate adjustment including those sought by the Attorney General in terms of attendance of counsel at the Jean Pelletier hearing, I grant Mr. Chrétien a lump sum award of \$200,000.00 which includes disbursements and taxes and approximates close to one half of Mr. Chrétien's total legal bill.

Counsel for Mr. Chrétien has satisfied me that the disbursements charged are appropriate. I award no costs on this motion.

[23] I appreciate Mr. Pelletier was not a former Prime Minister. He was however a very well-known public figure whose reputation was tarnished by the Commission of Inquiry.

[24] He, like Mr. Chrétien, fought to reverse the damage caused to his reputation. He had to incur substantial legal costs to obtain vindication. He should be partly compensated for it.

[25] I must take into account Mr. Pelletier's \$101,125.50 from the Government of Canada in respect of his legal costs in this matter. To achieve the compromise Justice Mainville spoke about that amount must be taken into account. If that is done, Mr. Pelletier will have been responsible for \$400,000.00 in fees and disbursements a like figure to that incurred by Mr. Chrétien. In my view both should be treated similarly.

[26] I award Mr. Pelletier a lump sum of \$200,000.00 covering all legal fees, disbursements and taxes. Being similarly situated as Mr. Chrétien, Mr. Pelletier's Estate will be responsible for approximately one half of the funds he expended to defend himself.

[27] I am likewise satisfied the disbursements he is claiming are appropriate. No costs will be awarded on this cost motion.

ORDER

THIS COURT ORDERS that the lump sum of \$200,000.00 is awarded to Mr. Pelletier's Estate covering all fees, disbursements and taxes in this motion payable forthwith by the Attorney General of Canada.

“François Lemieux”

Judge