

Federal Court



Cour fédérale

Date: 20111213

Docket: T-2118-05

Citation: 2011 FC 1458

Ottawa, Ontario, December 13, 2011

**PRESENT:** The Honourable Mr. Justice Lemieux

**BETWEEN:**

**THE RIGHT HONOURABLE  
JEAN CHRÉTIEN**

**Applicant**

**and**

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

**ATTORNEY GENERAL OF CANADA**

**Respondents**

**REASONS FOR COST AWARD AND ORDER**

**I. Introduction**

[1] In this cost motion, the Right Honourable Jean Chrétien (Mr. Chrétien) 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. Chrétien contained in the Phase I report of the Public Inquiry into the Sponsorship Program and Advertising Activities (the Commission of Inquiry). Mr. Chrétien's cost motion had been adjourned by Judge Teitelbaum until such time as the Federal Court of Appeal rendered a decision on the Attorney General of Canada's appeal of Judge Teitelbaum's decision on Mr. Chrétien's judicial review application. On October 26, 2010, the Federal Court of Appeal dismissed the appeal with costs to Mr. Chrétien. On August 4, 2011 the Applicant filed a supplementary motion record which counsels for the Respondents advised the Court they did not intend to reply.

## **II. Mr. Chrétien's Cost Motion**

[2] 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. Chrétien's solicitors. She was not cross-examined.

[3] 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. Chrétien totalled \$399,269.29 at standard rates charged by the professionals working on Mr. Chrétien's application.
- b. In the alternative to a lump sum award, Mr. Chrétien 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 \$137,190.65 including applicable taxes.

- c. As a further alternative, Mr. Chrétien 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 \$113,569.13 including applicable taxes.
- d. As a further alternative, Mr. Chrétien looked to Column III of the Tariff which at its maximum rate would yield the amount of \$88,442.45 including applicable taxes.

[4] Mr. Chrétien'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. Chrétien'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. Chrétien and thereby restored the damage to Mr. Chrétien's reputation. Judge Teitelbaum found that the Commissioner had prejudged the issues, had not been impartial towards Mr. Chrétien and made disparaging remarks about him which damaged and demeaned his reputation and person.
- The issues were important to Mr. Chrétien since his legacy was at stake. The issues were factually complex and the material massive (280,000 pages in the Joint Application Record).
- The amount of work was extraordinary amounting to 1,707 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**

[5] 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.

[6] In summary form, the Respondents submitted that, in substance, Mr. Chrétien 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 vastly exceeds the maximum amount \$114,744.72 provided for fees in Column V of the Tariff which is the highest column available.” Mr. Chrétien is not entitled to solicitor-client costs based on the settled factors governing such award.

[7] Counsel for the Attorney General of Canada submitted the Court should exercise its discretion to award Mr. Chrétien 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 no credit should be given to Mr. Chrétien’s counsel time sitting in on Mr. Jean Pelletier’s case because no benefit flowed from such attendance; Mr. Chrétien’s hearing in fact was longer than Mr. Pelletier’s. The reduction sought was for six (6) days attendance and forty hours for items 14 A and B, and (2) since no evidence was provided for disbursements, that issue should be referred to the Officer.

[8] The result is that counsel for the Attorney General of Canada sought an order that Mr. Chrétien is to be awarded \$36,205.20 in fees excluding disbursements to be taxed but including applicable taxes.

[9] Counsel for the Attorney General of Canada 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 cost 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.

[Emphasis added]

[10] Counsel for Commissioner Gomery submissions were similar 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. Chrétien's Reply and Supplementary submissions**

[11] In reply, counsel for Mr. Chrétien:

1. Dealt with an allegation submitted in the Attorney General's response that Mr. Chrétien had received funds from the Government of Canada to pay his legal fees for his judicial

review application. The material provided in reply demonstrated to this Court that Mr. Chrétien did receive funds but they were related to proceedings in 2005 challenging Commissioner Gomery's decision not to recuse himself, a proceeding which was discontinued by Mr. Chrétien. In other words, such legal fees had nothing to do with the judicial review proceeding at hand for which Mr. Chrétien received no funds from the Government of Canada.

2. The issue of the appropriate disbursements should not be sent to the Officer for assessment. In its reply, counsel for Mr. Chrétien attached the affidavit of Betsy Spencer 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 only relevant to Mr. Chrétien's judicial review application. 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.
3. While Mr. Chrétien did not seek solicitor-client costs, it would not be inappropriate to award Mr. Chrétien 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. Chrétien's judicial review application. It was to defend his public reputation that was damaged by the conduct of the Commission of Inquiry. An award of solicitor-client costs is an appropriate way to assist with the public rehabilitation of Mr. Chrétien's reputation.

[12] In supplementary submissions dated August 4, 2011, Mr. Chrétien's counsel provided information why the Government of Canada denied Mr. Chrétien's request for indemnification of his legal costs incurred as a respondent in the Attorney General's appeal from Judge Teitelbaum's decision. More importantly however, counsel made submissions on the costs award made by the Federal Court of Appeal for the costs and disbursements Mr. Chrétien incurred as the Respondent in the Court of Appeal from Judge Teitelbaum's decision. I will deal with those submissions in the Analysis portion of these reasons.

## **V. Analysis**

[13] On October 26, 2011, Justice Mainville, on behalf of his colleagues who dismissed with costs the Attorney General's appeal from Justice Teitelbaum's decision to Mr. Chrétien, provided written reasons for the cost award to Mr. Chrétien for fees and disbursements incurred in resisting the Attorney General's appeal (See, *Canada (Attorney General) v Chrétien*, 2011 FCA 53).

[14] Before the Federal Court of Appeal, Mr. Chrétien sought for his costs and disbursements incurred a lump sum award fixed at \$70,000.00. Counsel for the Attorney General argued for a lump sum award based on the Tariff of the *Federal Courts Rules* yielding a lump sum of \$11,282.70 exclusive of disbursements but inclusive of applicable taxes.

[15] Justice Mainville summarized the principles applicable to increased cost awards that is cost awards beyond the maximum provided in the Tariff. 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]

[16] In his supplementary submissions, counsel for Mr. Chrétien noted that in the alternative to the \$70,000 lump sum payment, Mr. Chrétien had sought costs at the maximum rate under Column V which would yield \$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.

[17] Counsel notes 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.

[18] Applying the reasoning of the Court of Appeal to Judge Teitelbaum's proceeding counsel for Mr. Chrétien submits that the amount yielded 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 inclusive of disbursements sought.

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

[20] Applying Justice Mainville's reasoning to Mr. Chrétien's costs for the judicial review application before Judge Teitelbaum I draw the following conclusions applicable to such costs:

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.

[21] 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.

[22] 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.

[23] 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.

[24] 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).

[25] 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.

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

**ORDER**

**THIS COURT ORDERS that** a lump sum of \$200,000.00 is awarded to Mr. Chrétien for fees and disbursements and applicable taxes, payable forthwith by the Attorney General of Canada.

“François Lemieux”

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Judge