Federal Court of Appeal

CANADA

Cour d'appel fédérale

Date: 20101217

Docket: A-454-08

Citation: 2010 FCA 351

[ENGLISH TRANSLATION]

Present: JOHANNE PARENT, Assessment Officer

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

JEAN PELLETIER

Respondent

and

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

Mis en cause

Assessment of costs on record without appearance of the parties

Toronto, Ontario, December 17, 2010.

REASONS FOR ASSESSMENT: JOHANNE PARENT, Assessment Officer

Federal Court of Appeal

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Mis en cause

REASONS FOR ASSESSMENT

JOHANNE PARENT, Assessment Officer

[1] On July 16, 2010, the Court dismissed the notice of appeal for delay, with costs. On September 2, 2010, the respondent's attorneys filed their bill of costs. Directions were subsequently issued to inform the parties that the assessment of the bill of costs would proceed in writing and to set a deadline for filing written submissions.

[2] As part of their submissions, counsel for the respondent point out that the notice of appeal, entered into the Court record on September 26, 2008, was opposing a Federal Court decision that had allowed the application for judicial review and quashed the findings pertaining to the respondent Jean Pelletier contained in the report by the Commission of Inquiry into the Sponsorship Program and Advertising Activities written by Commissioner Gomery. Mr. Pelletier passed away on January 10, 2009.

[3] In light of the Court's decision of July 16, 2010, counsel for the respondent claims to be entitled to receiving payment for their fees and disbursements in keeping with Tariff B of the *Federal Courts Rules*. They point out that, between October 2008 and January 2009, they [translation]:

> Reviewed the notice of appeal and worked on reviewing the record at trial in order to determine the content of the appeal book that would have to be filed by the Attorney General of Canada. During that same period, counsel for the respondent were in contact with the Attorney General of Canada regarding the content of the appeal book. The work done during that period was at Mr. Pelletier's instructions. (paragraph 5).

[4] Nadia Effendi's affidavit filed in supported of the bill of costs provides us with the background of the case in a very detailed sequence of events. Regarding payment of costs, paragraph 17 of that affidavit specifies that [translation]:

> On August 18, 2010, counsel for the respondent sent a letter to the Administrator of the Court maintaining that Borden Ladner Gervais is entitled to receive payment for its fees and disbursements and that Mr. Pelletier's estate had no financial interest in this appeal. A copy of the letter and of the attachment, my affidavit filed in support of the motion to dismiss, are submitted in support of my affidavit as exhibit L.

[5] That argument is reproduced at paragraph 7 of the respondent's submissions [translation]:

> In the motion filed by Mr. Pelletier's estate for dismissal of the appeal, Mr. Pelletier's estate confirmed having no financial interest in this appeal. Thus, any amount awarded by the Attorney General of Canada in this case, for costs, would be awarded entirely to the attorneys of the late Mr. Pelletier, Borden Ladner Gervais.

[6] The appellant raises two issues: 1. the attorneys' right to the costs 2. the applicable rate. Regarding the first point, the appellant argues that the attorneys are not entitled to the costs because they do not have the required interest. Following Mr. Pelletier's death, the estate of the late Mr. Pelletier did not avail itself of the provisions in rule 117 of the *Federal Courts Rules.* As such, the appellant notes that no respondent has acted in the case since Mr. Pelletier's death. In response to the allegation that the amounts awarded would be payable to the Borden Ladner Gervais law office, the appellant invokes subsection 400(7) of the *Rules*: "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." In support of that argument, the appellant refers to *Warwick Shipping Limited v. The Queen,* [1981] 2 F.C. 57 and *Vespoli v. Canada,* [1988] 2 F.C. 125.

[7] In response, counsel for the respondent point out that, contrary to the decisions cited, [translation] “the financial interest lies with the respondent's attorneys, which was transferred to them by Mr. Pelletier’s estate”.

[8] The appellant argues that there are two issues. I instead believe that there are three: 1. the respondent’s status in the context of the costs assessment 2. the attorneys’ right to the costs 3. the applicable rate. I note the appellant’s argument that the respondent did not comply with the provisions of rule 117 of the *Federal Courts Rules*, as well as the Court’s decision of June 23, 2009 dismissing the motion for dismissal of appeal on the grounds [translation] “that the deceased’s estate did not continue the proceeding and that, as a result, it does not legally have the status to ask for it to be dismissed”. Research in the Court record seems to indicate that at no time after that Court decision did the respondent avail itself of Rule 117 of the *Federal Courts Rule* and ask for a continuance of proceedings after Mr. Pelletier’s death. Like the Court of Appeal did on June 23, I therefore find [translation] “that the respondent does not legally have status” for continuing this case and charging costs for it.

[9] Regarding the allegation that the amounts to be awarded further to assessment of the bill of costs should be paid to the firm of attorneys who represented Mr. Pelletier until his death, Rule 400(7) is clear: costs are awarded to the party, not to its solicitor. The case law cited by the appellant precedes Rule 400(7) but does not appear to be questioned. In *Warwick Shipping Limited v. The Queen*, [1981] 2 F.C. 57, the Court stipulates at pages 65 and 66 [translation]:

> However, a major obstacle stands in the way in terms of the proceeding, in allowing applications. After Mr. Fearon’s death, nothing was done to have his executors

> continue the proceeding themselves, in keeping with Rules 1724 and 1725. Unlike section 479 of the *Quebec Code of Civil Procedure*, the *Federal Court Rules* do not provide for diversion of costs to the solicitors of the party that is entitled to them. This point was stressed by Noël A.C.J. in *National Capital Commission v. Bourque (No. 2)*, [1971] F.C. 133 and reiterated in *Osborn Refrigeration Sales and Service Inc. v. The Ship Atlantean I, its owners, its operators and any other person with interests in said ship*, [1979] 2 F.C. 661. The applicants maintain that Rule 2(2) and Rule 5 (the gap rule) of the Court Rules may apply in order to implement Quebec practices in this area, but that argument must be rejected. The *Federal Court Rules* provide for costs, and there is no need to make up for any failing from a lack of a provision on diversion of costs to one party's solicitors. Therefore, the solicitors of the late Mr. Fearon, who brought those motions, are not parties entitled to collect costs.

[10] Several years later, in *Vespoli v. Canada*, [1988] 2 F.C. 125, that decision was referenced by Mr. Justice Pinard, who came to the same conclusions. Rule 400(7) of the *Federal Courts Rules* as well as the case law that preceded it are consistent: costs in a case before the Federal Courts are costs between parties and belong to the parties, not to their solicitors. The potential transfer of financial interests between the client and their attorney should not, in my opinion, substitute for the *Federal Courts Rules*.

[11] In light of the foregoing, I cannot recognize the respondent's status as a party to the assessment, nor the attorneys' right to costs. Therefore, it will not be necessary to rule on the final point, namely the applicable rate here, although under Rule 407 of the *Federal Courts Rules*, column V of Tariff B should not, in my opinion, apply unless a Court order or direction specifies using a column other than column III.

[12] Therefore, for the reasons set out in the previous paragraphs, no certificate of assessment will be issued.

"Johanne Parent"
Assessment Officer

FEDERAL COURT OF APPEAL

COUNSEL OF RECORD

DOCKET:	A-454-08
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. JEAN PELLETIER v. THE HONOURABLE JOHN H. GOMERY, IN HIS CAPACITY AS EX-COMMISSIONER OF THE COMMISSION OF INQUIRY INTO THE SPONSORSHIP PROGRAM AND ADVERTISING ACTIVITIES

ASSESSMENT OF COSTS ON RECORD WITHOUT APPEARANCE OF THE PARTIES

REASONS FOR ASSESSMENT:	Johanne Parent, Assessment Officer
DATE OF REASONS:	December 17, 2010

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