

FILED / PRODUIT

Date: April 9, 2021

CT- 2019-005

Annie Ruhlmann for / pour
REGISTRAR / REGISTRAIRE

CT-2019-005

OTTAWA, ONT.

Doc. # 265

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF the acquisition by Parrish & Heimbecker, Limited of certain grain elevators and related assets from Louis Dreyfus Company Canada ULC;

AND IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the *Competition Act*.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- AND -

PARRISH & HEIMBECKER, LIMITED

Respondent

**BOOK OF AUTHORITIES OF PARRISH & HEIMBECKER, LIMITED
(COSTS)**

Table of Contents

| Tab | |
|------------|---|
| 1 | <i>Nadeau Ferme Avicole Ltee v Groupe Westco Inc.</i> , 2010 Comp Trib 1 |
| 2 | <i>Seedlings Life Science Ventures, LLC v Pfizer Canada ULC</i> , 2020 FC 505 |
| 3 | <i>Bauer Hockey Ltd v Sport Maska Inc</i> , 2020 FC 862 |
| 4 | <i>Novopharm Limited v Eli Lilly and Company</i> , 2010 FC 1154, aff'd 2011 FCA 220 |
| 5 | <i>Allergan Inc v Sandoz Canada Inc</i> , 2021 FC 186 |
| 6 | <i>Raydan Manufacturing Ltd v Emmanuel Simard & Fils (1983) Inc</i> , 2006 FCA 293 |
| 7 | <i>Illinois Tool Works Inc v Cobra Anchors Co</i> , 2003 FCA 358 |
| 8 | <i>The Commissioner of Competition v. Vancouver Airport Authority</i> , 2019 Comp Trib 6 |
| 9 | <i>Rona Inc v Commissioner of Competition</i> , 2005 Comp Trib 26 |
| 10 | <i>B-Filer Inc. et al. v The Bank of Nova Scotia</i> , 2007 Comp Trib 26 |
| 10.1 | <i>B-Filer Inc. et al. v The Bank of Nova Scotia</i> , 2007 Comp Trib 29 |
| 11 | <i>Nova Chemicals Corp v Dow Chemical Co</i> , 2017 FCA 25, aff'g 2016 FC 91 |
| 12 | <i>Sport Maska Inc v Bauer Hockey Ltd</i> , 2019 FCA 204 |
| 13 | <i>Dableh v Ontario Hydro</i> , [1994] FCJ No 1810 (TD) |
| 14 | <i>The Commissioner of Competition v The Toronto Real Estate Board</i> , 2016 Comp Trib 8 |
| 15 | <i>Apotex Inc v H Lundbeck A/S</i> , 2013 FC 1188 |
| 16 | <i>Flatwork Technologies, LLC (Powerblanket) v Brierley</i> , 2020 FC 997 |

Competition Tribunal



Tribunal de la Concurrence

Reference: *Nadeau Poultry Farm Limited v. Groupe Westco Inc. et al.*, 2010 Comp. Trib. 1
 File No.: CT-2008-004
 Registry Document No.: 0603

IN THE MATTER of the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER of an Application by Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited for an Order pursuant to section 75 of the *Competition Act*;

AND IN THE MATTER of an Application by Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited for an Interim Order pursuant to section 104 of the *Competition Act*.

B E T W E E N:

**Nadeau Ferme Avicole Limitée/
 Nadeau Poultry Farm Limited**
 (applicant)

and

**Groupe Westco Inc. and Groupe Dynaco,
 Coopérative Agroalimentaire, and Volailles
 Acadia S.E.C. and Volailles Acadia Inc./
 Acadia Poultry Inc.**
 (respondents)



Decided on the basis of the written record
 Before: Blanchard J. (presiding), H. Lanctôt and P. A. Gervais
 Date of Reasons for Order and Order: January 21, 2010
 Reasons and Order signed by: Mr. Justice E. Blanchard, Mr. H. Lanctôt and Mr. P. A. Gervais

**REASONS FOR ORDER AND ORDER DEALING WITH QUESTIONS ABOUT COSTS
 ISSUES**

may consider when exercising its discretion is set out in Rule 400(3). Rule 400 is attached as a schedule to these reasons.

[8] An award of party-party costs is not an exercise in exact science. It is only an estimate of the amount the Court considers appropriate as a contribution towards the successful party's solicitor-client costs (*Conorzio Del Prosciutto Di Parma v. Maple Leaf Meats*, 2002 FCA 417, [2003] 2 F.C. 451) It is a fundamental principle that an award of costs represents a compromise between compensating a successful party and not unduly burdening an unsuccessful party (*Apotex Inc. v. Wellcome Foundation Ltd.* (1998), 159 F.T.R. 233 (F.C.T.D), aff'd (2001), 199 F.T.R. 320 (F.C.A.).)

[9] According to Rule 400(4) of the Rules, costs awarded may be fixed on a lump sum basis by the Court or left to be assessed. The Tribunal, in *B-Filer Inc. et al. v. The Bank of Nova Scotia*, 2007 Comp. Trib. 26, stated the following with regards to lump sums:

In our view, the Tribunal should favour lump sum awards over formal taxation of bills of costs because such practice is in accordance with the direction to the Tribunal found in subsection 9(2) of the *Competition Tribunal Act* that all proceedings before it "shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit".

Having said that, when setting costs on a lump sum basis, the Tribunal is not to take a "shot in the dark". Rather, costs must be determined on a principled basis. See: *CCH Canadian Ltd. v. Law Society of Upper Canada*, (2004), 37 C.P.R. (4th) 323 (F.C.). We accept that when "fixing lump sum fees [it is appropriate] to be guided by Tariff B which operates on the principle of allowing a block of time within the range of hours set out in the various columns". See: *Donaghy v. Scotia Capital Inc.*, 2007 FC 598 at paragraph 7.

[10] Therefore in our view, costs, if allowed, should be awarded on a lump sum basis.

(1) *Should costs be awarded, if so, should they be reduced?*

[11] Nadeau submits that no costs should be awarded or that, in the alternative, costs should be reduced by 30% based on divided success and/or the conduct of the Respondents. We will deal with each of these submissions in turn.

[12] To substantiate its position that success in the matter was divided, Nadeau asserts that it was successful on (1) its application for leave pursuant to section 103.1 of the Act (2) on its application for interim relief pursuant to section 104 of the Act and (3) in establishing certain elements under section 75 of the Act.

[13] We respectfully disagree with Nadeau's submission that success was divided. The application for leave and the application for interim relief were preliminary matters which, in our view, are not determinative in our assessment of costs. The matter at issue is the section 75 application. Further, in order to be successful, Nadeau had the burden of establishing all

elements under section 75 of the Act (our emphasis). As a general rule, costs should follow the event (*Johnson & Johnson Inc. v. Boston Scientific Ltd.*, 2008 FC 817). Absent an abuse of process, a successful party should not be penalized simply because not all the points advanced by that party have found favour with the Court (*Canada v. IPSCO Recycling Inc.*, 2004 FC 1083, 259 F.T.R. 204).

[14] The Applicant further asserts that the Respondents' failure to admit paragraphs 75(1)(a) and (c) of the Act, along with divided success, warrant a reduction in costs. In our view, little time was spent addressing Nadeau's willingness and ability to meet the usual trade terms under paragraph 75(1)(c). As for paragraph 75(1)(a), this is not a case where the Respondents conceded a contentious issue late in the proceedings. Throughout the proceedings, the Respondents maintained and vigorously argued their position that the Applicant was not substantially affected in its business due to its inability to obtain adequate supplies of the product, in the market, on the usual trade terms. This issue was ultimately addressed at length by the Tribunal. In our view, no time was wasted by the Respondents in litigating this important issue.

[15] The Respondents were successful in their defence of the application. For this reason, costs will be awarded to the Respondents without reductions by reason of the above stated grounds.

(2) *Should each of the Respondents be entitled to costs?*

[16] Nadeau submits that the Respondents should have been represented by one firm of solicitors as they had corporate links, the same interests and Acadia and Dynaco essentially adopted Westco's position throughout the proceedings. Accordingly, Nadeau asserts that if costs are awarded, there should be only one set of costs (one set of fees for three counsel, one set of disbursements), to be shared among the Respondents as they see fit.

[17] According to Rule 400(3)(l) of the Rules, a factor that the Court may consider in the exercise of its discretion is "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." In *Capital Vision v. Canada (Minister of National Revenue – M.N.R.)*, 2003 FC 1253, Justice Heneghan awarded costs to multiple applicants where their interests in the matter were related but not identical. The following excerpts from Orkin's, *The Law of Costs*, at section 209.4 (looseleaf (Aurora: Canada Law Book Inc., 2000)) are also useful:

Where defendants have separate interests, each is justified in severing the defence if he or she chooses to do so, and each if successful is entitled to a separate bill of costs, unless the trial judge, in his or her discretion, sees fit to provide that there shall be but one set of costs.

[...]

While it is true that no defendant is under an obligation on being sued to hunt up some other party's solicitor instead of his or her own, a defendant will not be entitled to a separate bill of costs, if successful, when he or she is identical in

interest with a co-defendant, or is a member of a group or class with a common interest as, for example, persons entitled to one share of an estate under administration proceedings, or a group of beneficiaries in an application for construction of a will; or parties having essentially the same interests in trust lands being sold by trustees.

[18] Further, in *Merck & Co. v. Apotex Inc.*, 2006 FCA 324, Justice Malone stated for the Federal Court of Appeal at paragraph 23 that “[t]his Court has already decided, that despite raising overlapping issues, applicants in the same proceedings should not be required to share a single costs award.”

[19] Throughout the proceedings, the Respondents addressed overlapping issues collaboratively for the sake of efficiency. However, each of the Respondents made contributions to the application by preparing pleadings, witness statements, written arguments and by conducting oral examinations and making oral arguments. In our view, the Respondents’ interests were not identical and the allegations by Nadeau with regards to the *mala fide* alliance between them reasonably required each Respondent to have its own counsel both during the preparatory phase of the proceedings and the actual hearing. Accordingly, the Respondents are each entitled to costs.

(3) *What point of Tariff B should be used as the basis for a costs award?*

[20] As previously mentioned, the Tribunal has full discretion over costs and may use the factors listed under Rule 400(3) to exercise that discretion. The Tribunal, in *B-Filer*, stated that while costs are discretionary, in the absence of any order otherwise, Rule 407 directs that party-and-party costs are to be assessed in accordance with Column III of the table to Tariff B. In *Rona Inc. v. Commissioner of Competition*, 2005 Comp. Trib. 26, the Tribunal stated that there must be sound reasons to derogate from this provision.

[21] Given the complexity of the matter, the existence of the offers to settle and the circumstances of the application before the Tribunal, the Respondents request that costs be assessed in accordance with the top of Column IV of Tariff B. Nadeau submits that the applicable Tariff Column should be the mid-point of Column III.

[22] In our view, the complexity and the volume of work involved in the proceedings do not justify an increase in costs to the top of Column IV, Tariff B. The matter was neither more complex, nor excessive in terms of the work involved, than other matters that come before the Tribunal. In its reasons granting Nadeau’s application for interim relief, the Tribunal indicated that the arguments raised by the Respondents relating to the section 75 application raised complex questions of fact and law. However, the Tribunal did not state that the questions of fact and law were complex *per se*, rather it stated that such questions were ill suited for the determination in an application for interim relief and that such questions would best be addressed on a fulsome record with the benefit of *viva voce* evidence.

[23] The Tribunal also disagrees that the Applicant’s conduct or conspiracy allegations lengthened the hearing or caused the Respondents to do more work. We are of the view that the

[36] Technical compliance with Rule 420 does not necessarily lead to double costs for Westco. The Tribunal has the discretion to decide differently, depending on the circumstances. In *B-Filer*, even though the party making the offer had complied with the minimum notice requirement under the Rules, the Tribunal's consideration of the timeliness of the offer was found to militate against the application of Rule 420. The offer in that case was served approximately one month before the commencement of the hearing. In the present matter, the offers were served two weeks prior to the hearing. The Applicant's lay witness statements and expert reports had been provided by October 1, 2008. The Respondents' witness statements and reports were served by October 20, 2008 and the Applicant's reply statements and reports were served by October 28, 2008. Therefore, by the time the offers were served on the Applicant, its case in chief had essentially been prepared.

[37] In our view, the timing of the offers made by all the Respondents militates against the full application of the double costs rule. The offers were made at the last possible moment in an apparent attempt to come into compliance with the minimum notice requirement under Rule 420(3)(a) and at that time, most of the substantive pre-hearing steps in the proceedings had been completed. In these circumstances and in the exercise of our discretion, we are of the view that the Respondents are entitled to an upward adjustment as a result of the offers to settle, but not double costs. Accordingly, the Respondents will receive lump sum awards that are based upon 150% of the applicable ranges in Column III of the Tariff from November 3, 2008 by reason of their offers to settle.

(6) *Are claims under certain tariff items allowable?*

[38] Nadeau asserts that the Respondents have made inflated or improper claims under a number of the individual items listed under Tariff B. We will only deal with the items that are disputed.

i. Item 2

[39] The Respondents Acadia and Westco have multiple entries under tariff item 2 "[p]reparation and filing of all defences, replies, counterclaims or respondents' records and materials." In our view, the Respondents are not entitled to claim more than one entry each under this item (*Abbott Laboratories Ltd. v. Canada (Minister of Health)*, 2009 FC 399 at para. 10.)

ii. Item 5

[40] The Respondents have each made entries under tariff item 5 "[p]reparation and filing of a contested motion, including materials and responses thereto" relating to the motions arising out of the examinations for discovery. The orders dealing with the motions referred to by the Respondents were silent on costs. Accordingly, they must be treated as awarding no costs to any of the parties (*Research in Motion v. Visto Corp.*, 2008 FC 618, 67 C.P.R. (4th) 219 at para. 19.) The Respondents are therefore not entitled to claim any fees with respect to their entries under item 5.

viii. Item 24

[46] Fees are recoverable for “[t]ravel by counsel to attend a trial, hearing, motion, examination or analogous procedure, at the discretion of the Court” under tariff item 24. In our view, the Respondents should not be entitled to claim fees under this item for travel within their city of residence. Westco and Dynaco will only be allowed fees for two return trips to Ottawa. In our view, a third return trip was unnecessary given the fact that the parties were aware that the hearing would be adjourned early in the week. Westco will also be allowed fees for attendance at the cross-examinations of Mr. Feenstra, Ms. Cloutier and Mr. Faucher.

ix. Item 27

[47] Pursuant to the *Competition Tribunal Rules*, SOR/2008-141 parties appearing before the Tribunal must serve witness statements prior to the hearing setting out the lay witnesses’ evidence in chief in full. There is no tariff item that deals with the preparation of witness statements. However, in our view, a successful party should be entitled to claim fees for the preparation of these statements which serve to reduce hearing time. We are of the view that they should be claimed under tariff item 27 “[s]uch other services as may be allowed by the assessment officer or ordered by the Court”. We will allow a separate entry for each witness statement prepared by the Respondents. With regard to other claims made under tariff item 27, the Respondents will each be allowed one entry for work relating to the offer and one entry for undertakings.

(7) *Are the disbursements reasonable and necessary?*

[48] The Applicant disputes the amounts claimed by the Respondents for expert fees, travel accommodation and meals, photocopies, transcripts (case conferences only) and disbursements relating to the leave application. We will deal with each of these items in turn.

[49] In assessing disbursements, the Tribunal must first determine if costs were incurred, and once this has been established, whether the costs were reasonable and necessary (*Abbott Laboratories Ltd. v. Canada (Minister of Health)*, 2009 FC 399 at para. 15).

i. Expert fees

[50] Westco seeks costs for expert fees and disbursements incurred for the retention of its expert, Margaret Sanderson, in the amount of \$416,127.45. Ms. Sanderson was assisted by other CRA International Limited (“CRA”) associates. For expert fees alone, Westco claims \$391,271.00 which can be broken down as follows:

- a. For Margaret Sanderson’s time, 258.75 hours at \$600 per hour, for a total of \$155,250;
- b. For the time of Andrius Baziliauskas (associate), 308.75 hours at \$450 per hour, for a total of \$138,937.50;
- c. For the time of Courtney Stoddard (associate), 3.75 hours at \$350.00 per hour, for a total of \$1,312.50;

Federal Court



Cour fédérale

Date: 20200409

Docket: T-608-17

Citation: 2020 FC 505

Ottawa, Ontario, April 9, 2020

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

SEEDLINGS LIFE SCIENCE VENTURES, LLC

Plaintiff/
Defendant by counterclaim

and

PFIZER CANADA ULC

Defendant/
Plaintiff by counterclaim**ORDER REGARDING COSTS AND REASONS**

[1] The Defendant, Pfizer Canada ULC [Pfizer], was successful on all issues in an action for patent infringement brought by Seedlings Life Science Ventures, LLC [Seedlings]. In this Court's decision issued on January 2, 2020, the issue of costs was reserved: *Seedlings Life Science Ventures, LLC v Pfizer Canada ULC*, 2020 FC 1. Pfizer now seeks costs in a lump sum amount, over and above the tariff amount, based on 40% of its legal fees plus disbursements. For

[4] Lump sum awards are appropriate in “complex litigation conducted by sophisticated parties” (*Dow* at paragraph 13; see also *Sport Maska Inc v Bauer Hockey Ltd*, 2019 FCA 204 at paragraph 50 [*Sport Maska*]). In *Whalen*, I noted that awarding costs on an elevated scale may be appropriate in situations where parties have the means to pay them and where it is “apparent that it will better achieve the purposes of costs awards” – in particular, giving parties an incentive to litigate efficiently by internalizing the costs of conducting legal proceedings (*Whalen* at paragraphs 4 and 30).

[5] Awarding a lump sum relieves the Court from a “granular analysis” of fees and helps ensure that the costs hearing does not become an exercise in accounting (*Dow* at paragraph 11). This may “further the objective of the *Federal Courts Rules* of securing ‘the just, most expeditious and least expensive determination’ of proceedings” (*Dow* at paragraph 11, emphasis mine). Nevertheless, the quantum of a lump sum award should not be simply “plucked from thin air” and is usually based on a percentage of the party’s reasonably incurred legal fees (*Dow* at paragraphs 15–16). While a detailed accounting is to be avoided, the party seeking costs must provide enough information to satisfy the Court that the fees were reasonably incurred in the context of the litigation (*Dow* at paragraph 18).

[6] While lump sum awards tend to be between 25–50% of a party’s actual fees, there may be cases where a higher or lower percentage is warranted (*Dow* at paragraph 17). The court’s wide discretion to award costs is structured by the factors set out in rule 400(3), by case law, and by the objectives of costs awards (*Dow* at paragraph 19).

(1) Disallowed and Ineligible Costs

[10] First, Seedlings submits that Pfizer has claimed disallowed and ineligible costs, including costs with respect to motions for which costs have already been awarded (in excess of \$344,000), and fees for services rendered by students at law, law clerks and paralegals. Seedlings submits that these costs should be excluded from the base against which any percentage is applied, or that the applicable percentage should be further reduced.

[11] I agree with Seedlings that Pfizer cannot claim costs regarding motions that have already resulted in a costs award. As the Federal Court of Appeal wrote in *Exeter v Canada (Attorney General)*, 2013 FCA 134 at paragraph 14: “[a] judge’s decision whether or not to award costs on a motion cannot later be overridden by the judge deciding the underlying action or application.” I have reviewed the invoices of Pfizer’s counsel and I am satisfied that they include an amount of approximately \$344,000 in fees related to motions for which costs have already been awarded. Thus, I will reduce Pfizer’s legal fees by that amount.

[12] Seedlings cited a case that holds that a successful party is not entitled to claim costs for the services of articling students, law clerks or paralegals (*Apotex Inc v H Lundbeck A/S*, 2013 FC 1188 at paragraph 31, which, in turn, cites *Janssen-Ortho Inc v Novopharm Ltd*, 2006 FC 1333 at paragraph 25). In these cases, however, costs were assessed according to the Tariff. The Tariff does not make any provision for such cost items. In contrast, when a lump sum is awarded, the base amount is the actual fees paid by the party. These fees are not regulated by the Tariff, but by the agreement between the party and its solicitors. Ultimately, they are a reflection of

market forces. It is for that reason that we only award a percentage of these fees. Thus, it is not appropriate to disallow expenses related to articling students, law clerks and paralegals, as long as they were actually incurred by the party.

(2) Justification of Level of Fees

[13] Seedlings's second line of attack challenges the reasonableness of Pfizer's legal fees. That challenge is based on a comparison between the fees incurred by each party. Pfizer incurred legal fees that were three times those actually incurred by Seedlings. Pursuant to its litigation funding agreement, not all of Seedlings's counsel's fees were billed. Nonetheless, Pfizer's legal fees were more than twice the fees Seedlings would have incurred had its counsel billed all of its fees. Seedlings argues that Pfizer did not overcome its burden of proof to show that its fees were reasonable in the circumstances. It suggests that Pfizer's fees for this case ought to have been "well under \$3 million" (Seedlings's Submissions on Costs at paragraph 20).

[14] At the outset, I would like to note that we all wish legal services were more affordable. In deciding whether Pfizer's fees are reasonable, however, I am not called upon to approve the way in which the market sets lawyers' remuneration. I am simply assessing whether, given current market conditions, the amount of resources that Pfizer chose to devote to this case results from a defensible choice.

[15] In doing so, I must keep in mind that it is inherently difficult for a court to second-guess strategic litigation choices made by the parties. The court does not know each party's degree of tolerance of risk and may not have a full appreciation of the impact of its judgment on the

parties. And, of course, hindsight is always perfect. Indeed, it should not be for the losing party “to tell the winning party how they could have succeeded by doing or spending less.” *Hospira Healthcare Corporation v Kennedy Trust for Rheumatology Research*, 2018 FC 1067 at paragraph 24.

[16] I do not accept the basic premise of Seedling’s argument. There is no rule or expectation that the parties to a lawsuit should spend roughly equal amounts in legal fees. What is at stake may be different, or have a different value, for each party. Each party’s tolerance of risk may be different. The presence of a litigation funder may affect those parameters in a manner not known to the court.

[17] I am unable to conclude that Pfizer’s legal fees are unreasonable. One should keep in mind that Seedlings was suing Pfizer for an amount well in excess of \$100 million. Pfizer stood a lot to lose. Thus, Pfizer cannot be faulted for spending close to \$5 million in legal fees. While comparisons are inherently difficult, I also note that Pfizer’s fees are of the same order of magnitude as those incurred in other patent cases such as *Dow Chemical Company v Nova Chemicals Corporation*, 2017 FC 759, and *Apotex Inc v Shire LLC*, 2018 FC 1106 [*Shire*].

[18] However, Pfizer also seeks costs for its legal fees incurred in January 2020, after the judgment was issued, to be calculated “at the same rate” as its earlier legal fees. I decline to do so. As Pfizer has not provided evidence of its January fees, I have no basis upon which to calculate or estimate the costs it incurred during that month.

[21] Instead, Seedling submits that the following cases are more analogous to the present case: 10% in *Bodum USA Inc v Trudeau Corp (1889) Inc*, 2013 FC 128; 20% in *Dimplex North America Ltd v CFM Corp*, 2006 FC 1403; and 12.5% in *ABB Technology AG v Hyundai Heavy Industries Co*, 2013 FC 1050 [*ABB Technology*]. Seedlings submits that *ABB Technology* is most akin to the present case in terms of the complexity of the technology at issue, the duration of the trial and the scope of discovery. In that case, the patents at issue were for gas-insulated switchgear assemblies, the trial took 9 days, and there was extensive document productions which required the Defendant's counsel to travel to Korea. Seedlings therefore proposes that if the Court awards increased costs, 10% of Pfizer's actual fees is the most appropriate measure.

[22] In my view, the proper method for setting a percentage of fee recovery is to start at the lower end of the range suggested by the Federal Court of Appeal in *Dow*, namely, 25%, and assess whether factors listed in rule 400(3) warrant a higher figure. In this regard, the cases cited by Seedlings, in which a lesser percentage was awarded, are less current than the cases cited by Pfizer. This Court recently rejected the argument that lump sum awards in the 25% to 50% range are only available in "exceptional circumstances" (*Loblaws* at paragraph 14). Rather, based on the Federal Court of Appeal's judgments in *Dow* and *Sport Maska*, it held that "the practice of awarding lump sum costs as a percentage of actual costs reasonably incurred is well established, particularly when dealing with sophisticated commercial parties, and such costs awards tend to range between 25% and 50% of actual legal fees, although there may be cases where a higher or lower percentage is warranted" (*Loblaws* at paragraph 15, emphasis mine).

[23] Caution must be exercised, however, when considering the complexity of the case. That complexity is already reflected in the legal fees that constitutes the base amount of the calculation. Increasing the percentage of recovery simply because the case is complex would result in disproportionate compensation for the most complex cases.

[24] In this case, I see no reason to depart from the 25% starting point. Neither party has demonstrated that a greater or lesser award is justified. Nor was the case overly complex: this was a 13-day trial and there were fewer than 11 days of discoveries.

[25] Pfizer cites Seedlings's failure to seek bifurcation and its refusal to elect damages as its remedy as reasons to make an award of 40% of its legal fees. While it is common for parties to seek bifurcation in intellectual property cases, they are not required to do so. Nor is it always the case that bifurcation will expedite a trial (*Bristol-Myers Squibb Co v Apotex Inc*, 2003 FCA 263, at paragraphs 9-10). Seedlings will already face the consequences of not bifurcating the trial and not electing damages, as the costs award will be based on an amount that includes the fees Pfizer spent defending the compensation aspects of the claim, with respect to both reasonable royalty and accounting of profits. Moreover, Seedlings will have to pay for the fees of the experts Pfizer retained to provide opinion evidence about compensation issues. It is not necessary to punish Seedlings further by raising the percentage of recovery.

[26] Based on the above factors, I would award Pfizer 25% of its reasonable legal fees. Subtracting the amounts related to motions, these fees amount to \$4,367,556, 25% of which is \$1,091,889.

Federal Court



Cour fédérale

Date: 20200828

Docket: T-546-12

Citation: 2020 FC 862

Ottawa, Ontario, August 28, 2020

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

BAUER HOCKEY LTD.

**Plaintiff
Defendant by Counterclaim**

and

**SPORT MASKA INC. DOING BUSINESS AS
CCM HOCKEY**

**Defendant
Plaintiff by Counterclaim**

ORDER AS TO COSTS AND REASONS

[1] The defendant, Sport Maska Inc., doing business as CCM Hockey [CCM], was successful on all issues in an action for patent infringement brought by Bauer Hockey Ltd. [Bauer]. In this Court's decision issued on May 15, 2020, the issue of costs was reserved: *Bauer Hockey Ltd v Sport Maska Inc (CCM Hockey)*, 2020 FC 624.

I. Costs

A. *General Approach*

[5] The manner in which CCM presents its case on costs and the objections put forward by Bauer raise certain issues of principle regarding costs awards. It is thus necessary to review those basic principles before analyzing how they apply to this case.

(1) Purposes of Costs Awards

[6] In *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71, [2003] 3 SCR 371 [*Okanagan*], the Supreme Court of Canada described the purposes of costs awards. First, costs awards provide the prevailing party with a degree of indemnification for the legal costs it expended to defend its case. Second, costs awards perform a public policy function. The prospect of having to pay costs provides an incentive to make prudent use of scarce judicial resources. Third, in certain circumstances, costs may facilitate access to justice.

[7] According to rule 400(1) of the *Federal Courts Rules*, SOR/98-106, the trial judge has full discretion over costs. The exercise of this discretion, however, must be guided by recognized principles, to ensure consistency and foreseeability. The most basic principle is that the losing party must ordinarily pay costs to the successful party: *Okanagan*, at paragraph 20. In addition, rule 400(3) lists a number of factors that the Court may take into consideration in awarding costs. Many of those factors are linked to the purposes of costs awards described in *Okanagan*.

[8] One aspect of the public policy function of costs that is highly relevant in this case is the encouragement of settlement. In awarding costs, the judge may consider “any written offer to settle:” rule 400(3)(e). Moreover, rule 420 provides a mechanism whereby costs are doubled where a party obtains a result less favourable than an offer to settle that was refused. The purpose of that rule is “to deter parties from incurring costs and inflicting them on others by creating a financial incentive to compromise their claims:” *Leuthold v Canadian Broadcasting Corporation*, 2014 FCA 174, at paragraph 11 [*Leuthold*].

(2) Lump Sum Awards

[9] The usual method for assessing costs is a tariff. The principle of a tariff is the division of proceedings into discrete units, to which a fixed value, or a range or values, is assigned. In addition to promoting consistency, the use of a tariff caps the amount of costs that a party may claim in respect of various steps of the proceedings. A party that chooses to expend more, or to hire a lawyer who charges a higher rate, will not be able to transfer these additional expenses to the other party in case of success: *Yeti Coolers, LLC v Howsue Holdings Inc*, 2019 FC 571 at paragraph 5. As a result, costs awards are not expected to provide full indemnification, but rather only a “reasonable contribution” to the prevailing party’s legal costs: *Consorzio del Prosciutto di Parma v Maple Leaf Meats Inc*, 2002 FCA 417, [2003] 2 FC 451 at paragraphs 8-9.

[10] There is considerable variation in the amount of legal fees that parties are prepared to devote to their cases, depending on the nature of the parties, the area of law, the value in dispute and many other factors. As a result, the cap on costs that flows from the application of the tariff results in widely different consequences. Where the nature of the case is such that the parties are

justified in expending a significant amount of legal fees, the tariff simply does not provide a level of indemnification sufficient to further the purposes of costs awards: *Nova Chemicals Corp v Dow Chemical Co*, 2017 FCA 25 at paragraph 13 [*Nova Chemicals*].

[11] Nowhere is this more apparent than in intellectual property disputes. It is well known that assessing costs according to the tariff usually leads to an award that is below 10% of the prevailing party's actual legal fees. Given the amounts in dispute, the prospect of paying a cost award of this magnitude fails to provide a significant incentive to settle. Neither does it afford a reasonable contribution to the prevailing party's legal expenses.

[12] For that reason, this Court has often awarded costs in a lump sum that is significantly higher than the amount resulting from the application of the tariff. While the Federal Court of Appeal noted, in *Nova Chemicals*, at paragraph 13, that the discrepancy between costs assessed according to the tariff and a party's actual legal fees cannot be the sole reason for awarding a lump sum, it nevertheless validated this Court's practice of awarding lump sums that fall in the range of 25%-50% of actual costs.

[13] This, indeed, has become the norm in intellectual property disputes involving sophisticated parties. These cases typically involve very substantial amounts. The parties are represented by teams of lawyers whose hourly rates are well beyond what the framers of the tariff may have contemplated. Given the resources at their disposal, the parties are able to respond to the financial incentives provided by the costs regime and make rational calculations.

These reasons, in addition to the insufficiency of awards made according to the tariff, justify lump sum awards.

[14] Lump sum awards are typically calculated as a percentage of the legal fees actually incurred by the successful party. The objective is to simplify the process and to avoid complex calculations or accounting exercises. There is, however, no rigid guideline regarding the percentage of recovery to be used. In the interests of consistency and predictability, I proposed to set the starting point at 25% and to analyze whether the circumstances of a specific case warrant a higher or lower number: *Seedlings Life Science Ventures, LLC v Pfizer Canada ULC*, 2020 FC 505, 172 CPR (4th) 375, at paragraph 22 [*Seedlings*]; see also *Teva Canada Limited v Janssen Inc*, 2018 FC 1175, at paragraphs 35–36 [*Teva*].

(3) Costs and Litigation Conduct

[15] In their submissions, both parties insisted heavily on each other's conduct before and during the trial as a factor weighing in favour of a higher or lesser costs award. It is thus necessary to clarify the role of litigation conduct in the assessment of costs, especially where they are awarded on a lump sum basis.

[16] The public policy function of costs is not restricted to the encouragement of settlement. The following paragraphs of rule 400(3) make it clear that costs awards may be used to sanction and deter various kinds of conduct hampering the efficient resolution of a case:

| | |
|---|--|
| (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), |
|---|--|

particular, pre-trial conduct – requires information that is often unavailable to the trial judge. A detailed assessment is bound to be lengthy and cumbersome. It will likely make proceedings more, not less, complex, contrary to *Hryniak*'s spirit. For instance, in their cost submissions, the parties in this case engaged in detailed criticism of each other's conduct. If anything, these submissions show that their relationship is more acrimonious than what was apparent at trial. This is simply not a useful exercise.

[21] At the risk of stating the obvious, I would also add that costs submissions are not the proper forum to reargue the merits. In particular, it does not assist a party to suggest that the case was close or that it did not expect to lose. Neither are costs awards a way to obtain an opinion on issues that the Court did not need to address in its judgment on the merits.

B. *Tariff or Lump Sum*

[22] It is appropriate to award costs on a lump sum basis in this case. Both parties are sophisticated litigants and are in a position to respond to incentives provided by costs. CCM provided evidence that costs awards according to the top of columns IV and V of the tariff would amount respectively to 6% and 7.5% of its actual legal fees. Those circumstances, which are common in intellectual property disputes, justify a lump sum award.

[23] Bauer challenges CCM's right to a lump sum and argues that an award according to the tariff would be more appropriate. However, it does not take issue with the discrepancy between the tariff and actual legal fees nor the fact that this case falls within the category of cases in which a lump sum is normally awarded. Rather, it asserts that CCM's litigation conduct

Federal Court



Cour fédérale

Date: 20101118

Docket: T-811-08

Citation: 2010 FC 1154

Ottawa, Ontario, November 18, 2010

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

NOVOPHARM LIMITED

Plaintiff

and

ELI LILLY AND COMPANY

Defendant

SUPPLEMENTARY REASONS FOR JUDGMENT AND JUDGMENT

[1] In my Reasons for Judgment and Judgment in this proceeding (see 2010 FC 915), I reserved on the issue of costs pending the receipt of further submissions from the parties. These are my supplementary reasons concerning that outstanding issue.

[2] Novopharm Limited (Novopharm) advances a claim to lump sum costs including disbursements of \$701,702.62. This figure comprises \$427,736.00 for assessable counsel fees with the balance made up of disbursements. Novopharm's claim to counsel fees is based on an assessment at the high end of Column V, Tariff B.

[7] While I agree that this litigation was unusually acrimonious and was undoubtedly prolonged by the strategic manoeuvrings of the parties, I am not in a position to attribute fault in a meaningful way to one party over the other. I do not agree, though, that the success of the case was divided or that Column III is the appropriate basis for assessing Novopharm's costs. It is more common in cases of this type for the upper end of Column IV to be applied. Furthermore, the successful party is generally not penalized for raising substantive issues that are not ultimately accepted by the Court: see *Sanofi-Aventis Canada Inc. v. Novopharm Limited*, 2009 FC 1139. On this basis, I would award costs to Novopharm at the upper end of Column IV.

[8] I am also prepared to allow Novopharm to recover for more than one counsel. Although the authority of an Assessment Officer to allow for more than one counsel fee may be limited by the Tariff, the jurisdiction of the Court in fixing costs is not so circumscribed: see Rules 400(1), 400(4) and 400(6). Novopharm will be entitled to claim for two first counsel and one second counsel for preparation and attendance (where engaged) at trial, including the preparation of the outline of opening argument. Preparation time shall be allowed at one day for every day of trial including argument. For the following pre-trial and post-trial matters Novopharm shall be entitled to claim for one first counsel and one second counsel (where in attendance):

- (a) preparation of pleadings and motion materials and attendance on motions where costs were awarded to Novopharm (offset by any costs awarded to Lilly) or for pre-trial conferences;

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20110705

Docket: A-387-10

Citation: 2011 FCA 220

**CORAM: NOËL J.A.
EVANS J.A.
DAWSON J.A.**

BETWEEN:

ELI LILLY AND COMPANY

Appellant

and

**TEVA CANADA LIMITED
(formerly known as NOVOPHARM LIMITED)**

Respondent

Heard at Ottawa, Ontario, on June 22, 2011.

Judgment delivered at Ottawa, Ontario, on July 5, 2011.

REASONS FOR JUDGMENT BY:

EVANS J.A.

CONCURRED IN BY:

NOËL J.A.
DAWSON J.A.

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20110705

Docket: A-387-10

Citation: 2011 FCA 220

**CORAM: NOËL J.A.
EVANS J.A.
DAWSON J.A.**

BETWEEN:

ELI LILLY AND COMPANY

Appellant

and

TEVA CANADA LIMITED

Respondent

REASONS FOR JUDGMENT

EVANS J.A.

Introduction

[1] This is an appeal by Eli Lilly and Company (Lilly) from a decision of the Federal Court (2010 FC 915). In that decision, Justice Barnes (Judge) granted to Teva Canada Limited (Teva) a declaration under subsection 60(1) of the *Patent Act*, R.S.C. 1985, c. P-4, that Lilly's Canadian Patent No. 2,209,735 ('735 patent) was invalid for lack of utility. Teva was formerly Novopharm Limited and is referred to in the Judge's reasons as Novopharm.

disbursements to reflect the fact that Teva increased the expense of the litigation by pleading multiple grounds of invalidity, all but one of which the Judge rejected.

[54] I do not agree. The Judge considered this argument and rejected it (at para. 7), on the ground that success in the action was not divided, and the successful party is not normally penalized for raising issues on which it does not prevail. The Judge also noted that, because of the frequent complexity and unusual expense of patent litigation, costs are regularly awarded on a basis higher than the mid-point of Column III.

[55] I see no error of principle in the Judge's exercise of the broad discretion over the award of costs conferred by rule 400 of the *Federal Courts Rules*, SOR/98-106. Since Teva obtained the relief that it was seeking (a declaration that the '735 patent was void), the Judge was correct to conclude that success was not divided. Nor am I persuaded that the Judge committed a reversible error when he decided not to penalize Teva for unsuccessfully raising multiple grounds of invalidity. In patent litigation, grounds of invalidity are often interrelated.

Conclusions

[56] For these reasons, I would dismiss the appeal with costs.

“John M. Evans”

J.A.

“I agree
Marc Noël J.A.”

“I agree
Eleanor R. Dawson J.A.”

Federal Court



Cour fédérale

Date: 20210226

Docket: T-2023-18

Citation: 2021 FC 186

Ottawa, Ontario, February 26, 2021

PRESENT: THE CHIEF JUSTICE

BETWEEN:

ALLERGAN INC.

Plaintiff

and

SANDOZ CANADA INC.

Defendant

and

KISSEI PHARMACEUTICAL CO., LTD.

Defendant/Patent Owner

AND BETWEEN:

SANDOZ CANADA INC.

Plaintiff by Counterclaim

and

ALLERGAN INC. and KISSEI PHARMACEUTICAL CO., LTD.

Defendants by Counterclaim

favoured: *Barzelex Inc v EBN Al Waleed (The)*, [1999] FCJ No 2002 at para 11 (TD), aff'd 2001 FCA 111; *Pfizer Canada Inc v Novopharm Ltd*, 2010 FC 668 at para 57.

[24] Regardless of whether parties favour a lump sum award or an amount fixed in accordance with Tariff B, counsel are encouraged to be prepared to address costs, ideally on consent, at the conclusion of the proceeding or shortly thereafter: *Conorzio*, above.

[25] The “default” level of costs in this Court is the mid-point of Column III in Tariff B: Rule 407; *Sanofi-Aventis Canada Inc v Novopharm Limited*, 2009 FC 1139 at para 4 [*Sanofi-Novopharm FC*], aff'd 2012 FCA 265; *Apotex v Sanofi-Aventis*, 2012 FC 318 at para 5 [*Apotex v Sanofi-Aventis*]; *Dennis v Canada*, 2017 FC 1011 at para 8; *Bernard v Professional Institute of the Public Service of Canada*, 2020 FCA 211 at para 38. Column III is intended to provide partial indemnification (as opposed to substantial or full indemnification) for “cases of average or usual complexity”: *Thibodeau*, above, at para 21; *Novopharm Ltd v Eli Lilly and Co*, 2010 FC 1154 at para 5 [*Novopharm v Eli Lilly*].

[26] In recognition of the particular attributes of intellectual property proceedings, it is common for increased costs to be awarded in those proceedings: see, e.g., *Conorzio*, above, at para 6; *Lainco Inc c Commission scolaire des Bois-Francs*, 2018 FC 186 at para 8(c). Those particular attributes include greater than average complexity, sophisticated parties, legal bills far in excess of what is contemplated by Column III of Tariff B, and “giving parties an incentive to litigate efficiently”: *Seedlings Life Science Ventures, LLC v Pfizer Canada ULC*, 2020 FC 505 at para 4 [*Seedlings*]. For cases that involve drug patent disputes and a cost award fixed by reference to the tariff, the high end of Column IV is often considered to be reasonable and

appropriate: *Sanofi-Novopharm FC*, above, at para 13, aff'd 2012 FCA 265; *Novopharm v Eli Lilly*, above, at para 7; *Apotex v Sanofi-Aventis*, above. See also Federal Court of Appeal and Federal Court Rules Committee, *Review of the Rules on Costs: Discussion Paper*, October 5, 2015, at page 8.

[27] For essentially the same reasons identified immediately above, it is also increasingly common in intellectual property cases to award a significant lump sum amount “well in excess of the Tariff”: *Vengo*, above, at para 85; *Bauer Hockey Ltd v Sport Maska Inc*, 2020 FC 862 at para 12 [*Bauer*]. In this regard, a lump sum award in the range of 25-50% of actual fees, plus reasonable disbursements, is often made: *Nova v Dow*, above, at paras 17 and 21; *Seedlings*, above, at para 6; *Bauer*, above, at para 13. See also *Loblaws Inc v Columbia Insurance Company*, 2019 FC 1434 at para 15. In approaching this assessment, it should be kept in mind that determining the level of a lump sum award “is not an exact science”: *Nova v Dow*, above, at para 21.

[28] In recognition of the fact that Tariff B no longer provides an adequate level of partial indemnification, the Federal Courts Rules Committee decided in 2016 that the amount recoverable under Tariff B should be increased by approximately 25%: *Minutes of the October 28, 2016 Meeting of the Rules Committee*. Following a further consultation with the bar, a sub-committee of the Rules Committee is preparing proposed amendments for publication in Part I of the *Canada Gazette* and approval of the Governor in Council. In the meantime, it is relevant to bear in mind that the existing tariff “is considered particularly inadequate in Intellectual Property litigation [and in] maritime proceedings”: Report from the Federal Court of Appeal and Federal Court Rules sub-Committee on Costs (June 3, 2016), at section D.

[29] The principal factors the Court may consider in its determination of a cost award are set forth in a non-exhaustive list in Rule 400(3), which is reproduced in Appendix 1 below.

[30] The general rule is that the successful party is entitled to have its costs, even if it was not successful in respect of each and every argument it pursued: *Okanagan Indian Band*, above, at paras 20-21; *Raydan Mfg Ltd v Emmanuel Simard & Fils Inc*, 2006 FCA 293 at paras 2-5 [*Raydan*]. However, the Court may depart from this approach in cases of truly “divided success” or “mixed results”: *Eurocopter v Bell Helicopter Textron Canada Ltée*, 2012 FC 842 at paras 23 and 56 [*Eurocopter FC*] aff’d 2013 FCA 220 at paras 10 and 15; *Sanofi*, above, at paras 8-9; *Apotex v Sanofi-Aventis*, above, at para 11; *Bristol-Myers Squibb Canada Co v Teva Canada Limited*, 2016 FC 991 at paras 9-14.

[31] The jurisprudence is split on the issue of whether the successful defence of a patent infringement action, or success with respect to only some grounds of invalidity, constitutes “divided success” when the defendant in the main action is not successful with respect to one or more other allegations of invalidity. In one line of cases, the cost award in favour of the defendant who prevailed on the infringement issue was reduced to reflect the fact that it did not succeed with respect to some or all of its allegations of invalidity: see e.g., *Fournier Pharma Inc v Canada (Health)*, 2012 FC 1121 at paras 4-6; *GlaxoSmithKline Inc v Pharmascience Inc*, 2008 FC 849 at para 4. In a second line of cases, it has been explicitly held that this type of outcome does not constitute “divided success” or “mixed results” and that therefore the defendant is entitled to its costs: *Raydan*, above; *Illinois Tool Works Inc v Cobra Anchors Co*, 2003 FCA 358 at paras 10-11; *Betser-Zilevitch v Petrochina Canada Ltd*, 2021 FC 151 at para 11 [*Betser-Zilevitch 2*]; *Johnson & Johnson Inc v Boston Scientific Ltd*, 2008 FC 817 at para 4. This is so

regardless of whether the defendant's allegations of invalidity were made in a defence to the main action or in a separate Counterclaim: *Raydan*, above, at paras 6-7; *Eurocopter FC*, above, at para 11. Notwithstanding my sympathy for the approach taken in the first line of cases, I consider myself bound by this second line of cases.

[32] With this in mind, I further consider that where a defendant in the main action prevails with respect to either the plaintiff's allegation of infringement or one or more of its allegations of invalidity, an assessment of an appropriate lump sum award should begin at the mid-point of the 25%-50% range discussed at paragraph 27 above, plus reasonable disbursements. This would be subject to any adjustment to reflect factors that may support a departure from this level of award in such a case.

[33] I recognize that this Court has recently suggested that the proper method for determining a lump sum award based on a percentage of fees is to start at the lower end of the 25%-50% range: *Seedlings*, above, at para 22; *Bauer*, above, at para 14. However, in *Seedlings*, this was because neither party had demonstrated that a greater or lesser award was justified (*Seedlings*, above, at para 24), and in *Bauer* the Court adopted the 25% starting threshold "[i]n the interests of consistency and predictability": *Bauer*, above, at para 14.

[34] In my view, there are very good reasons for beginning with the mid-point of the 25%-50% range in complex drug patent proceedings under the Regulations. In particular, the Court is still in the process of effecting a change in the litigation culture in the area of drug patent disputes. For many years, trials of such disputes have typically taken several weeks and pre-trial processes have been complicated, lengthy and costly. This contrasts with the experience

elsewhere, such as in the U.K., were trials apparently are ordinarily of much shorter duration. Given that the shift from paper-based applications to full trials under the new Regulations was not accompanied by a lengthening of the 24-months statutory stay period, the Court adopted a standard of 10 days as the new default duration for drug patent trials, unless the Court determines that additional time is required: *Case and Trial Management Guidelines for Complex Proceedings and Proceedings under the PM(NOC) Regulations*, at para 37 (available on the Federal Court website <www.fct-cf.gc.ca>). This policy was adopted after considerable consultation with representatives of the drug patent bar.

[35] Adopting the mid-point of the 25%-50% range as the starting point for determining a lump sum cost award to the prevailing party in this type of proceeding would provide a better incentive than the lower end of this range for parties to conduct their litigation in a manner that permits the Court to achieve its objective of shorter trials in the drug patent area. This is particularly so given that legal costs tend to be very small compared to what is at stake in these types of proceedings. This has been repeatedly drawn to the Court's attention by representatives of the intellectual bar over the course of the last several years, in support of their efforts to persuade the Court to increase its cost awards in complex IP litigation. Moreover, the parties to such disputes generally are very sophisticated commercial litigants who can be assumed to calibrate the strategic decisions made over the course of the proceeding with a keen eye on the economic consequences of those decisions.

[36] In addition to the foregoing general principles applicable to legal fees, disbursements are typically assessed in full, provided they are reasonable: *MediaTube Corp v Bell Canada*, 2017 FC 495, at para 21.

B. *Analysis of the relevant factors in this case*

[37] I have considered all of the circumstances of this proceeding, including the various submissions made by each of the parties with respect to costs, in determining the appropriate cost award to issue in this case. Below is my assessment of the factors addressed in the parties' respective submissions.

(1) Lump sum versus assessment pursuant to Tariff B

[38] In my view, it is reasonable and appropriate in this case to award costs on a lump sum basis, calculated as a percentage of the prevailing party's legal fees. This was a complex drug patent proceeding, the parties are sophisticated litigants, their legal fees were substantially above the amounts contemplated by Tariff B, and the parties "are in a position to respond to the incentives provided by an elevated award of costs": *Bauer*, above, at para 22.

[39] For the reasons discussed at paragraphs 34-35 above, I consider that the appropriate starting point in determining a lump sum award in this case is the middle of the 25%-50% range that is typically used when granting lump sum awards in intellectual property proceedings. Coincidentally, this is also the approximate proportion (36%) of the overall legal fees claimed by Sandoz (before HST) that relate to the claim construction issue, in respect of which it prevailed.

(2) The result of the proceeding

[40] Sandoz succeeded in defending Allergan's patent infringement allegation in the main action of this proceeding. However, it was unsuccessful with respect to the other two principal

issues in dispute, namely, its Counterclaim based on obviousness and the relevance of the prosecution history of the '002 Patent.

[41] I am sympathetic to Allergan's position that it should be entitled to a set-off for its costs incurred in (i) successfully defending Sandoz's Counterclaim, which was a distinct action under subsection 60(1) of the Act (*Farmobile, LLC v Farmers Edge Inc*, 2018 FC 1269 at para 46), and (ii) dealing with the prosecution history issue. Among other things, Sandoz made a strategic decision to bring that Counterclaim, rather than simply defending Allergan's action based on claims construction – which proved to be the decisive issue in permitting Sandoz to launch its generic product on the market. Sandoz also made the strategic choice to raise the prosecution history issue.

[42] In my view, there should be consequences for having advanced and then failed to succeed on these issues. This is particularly so given the substantial costs that Allergan had to incur to address them, and given the very real practical result that Allergan achieved by avoiding the declaration of invalidity *in rem* that was sought by Sandoz. Granting Allergan its costs in relation to these issues, or at least reducing the award to which Sandoz would otherwise be entitled, would be entirely consistent with the important rationale of sanctioning behaviour that increases the duration and expense of litigation: *Okanagan Indian Band*, above, at para 25. This would also be entirely consistent with Rule 406(6)(a), which permits the Court to award or refuse costs in respect of a particular issue or step in a proceeding.

[43] However, the controlling jurisprudence does not permit me to grant Allergan its costs in relation to the two issues on which it prevailed, or to reduce Sandoz's award to reflect Allergan's

success on those issues: see discussion at paragraph 31 above. While I recognize that Sandoz effectively initiated the dispute by serving a Notice of Allegation on Allergan, this does not provide a basis for departing from that jurisprudence.

[44] The situation with respect to Kissei is very different. It did not participate in the trial and only participated to a very limited degree in the pre-trial phase of these proceedings. It did not take a position with respect to the patent infringement issue. Instead, it filed only a short defence to Sandoz's Counterclaim and incurred some additional costs, primarily in respect of the examinations of one of its representatives and one of the inventors of the '002 Patent. It was successful in that defence. Accordingly, it can legitimately be viewed as having been a successful party.

(3) The importance and complexity of the issues

[45] This factor is already reflected in what I consider to be the appropriate starting point for the determination of a lump sum award in a drug patent proceeding, namely, the mid-point of the 25%-50% range: see discussion at paragraphs 32-35 above.

[46] Although the trial in this proceeding ultimately concerned only one patent and a single allegation of invalidity based on obviousness, I do not consider that this warrants a reduction from the above-mentioned starting point. As this Court has observed, "[p]atent litigation is typically complex, and obviousness is typically among the most complex legal issues that are raised in patent litigation": *Teva Canada Limited v Janssen Inc*, 2018 FC 1175 at para 14. This

Date: 20060905

Docket: A-447-05

Citation: 2006 FCA 293

**CORAM: RICHARD C.J.
LÉTOURNEAU J.A.
PELLETIER J.A.**

BETWEEN:

RAYDAN MANUFACTURING LTD.

Appellant

and

EMMANUEL SIMARD & FILS (1983) INC.

Respondent

Heard at Ottawa, Ontario, on September 5, 2006.

Judgment delivered from the Bench at Ottawa, Ontario, on September 5, 2006.

REASONS FOR JUDGMENT OF THE COURT BY:

RICHARD C.J.

CORAM: RICHARD C.J.
LÉTOURNEAU J.A.
PELLETIER J.A.

BETWEEN:

RAYDAN MANUFACTURING LTD.

Appellant

and

EMMANUEL SIMARD & FILS (1983) INC.

Respondent

REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Ottawa, Ontario, on September 5, 2006)

RICHARD C.J.

[1] This is an appeal from an order of Justice Simon Noël of the Federal Court dated July 12, 2005, (2005 FC 973), in which he refused to allow costs to the appellant (defendant) after having dismissed the respondent's claim for patent infringement and granted, in part, the appellant's counterclaim for patent invalidity. The main issue in this appeal

was whether the trial judge properly exercised his discretion under rule 400(1) of the *Federal Courts Rules*, when he refused to award costs to the appellant on the ground that it was a case of “mixed results”.

- [2] In our opinion, the outcome of this appeal is governed by the decisions of this Court in *Gorse v. Upwardor Corp.* (1992), 140 N.R. 295 (F.C.A.), and, more recently, in *Illinois Tool Works Inc. v. Cobra Anchors Co.*, (2003) 312 N.R. 184 (F.C.A.), 2003 FCA 358, where it was held that a trial judge’s discretion in the allocation of costs must be exercised judicially with regard to the principles and factors enumerated at rule 400(3) of the *Federal Courts Rules*. These decisions further held that a defendant in a patent infringement case need not be successful in both its defence of non-infringement and invalidity in order to be entitled to its costs. If successful in defending the main action of patent infringement, such a defendant is entitled to costs.

- [3] In the instant case, the respondent sued the appellant for patent infringement. The appellant raised a two-part defence: first that its products did not infringe the respondent’s patent and, second, that the respondent’s patent was in any event invalid under section 59 of the *Patent Act*. The appellant also brought a counterclaim against the respondent under section 60 of the *Patent Act*, repeating each of the alleged defences. The trial judge, having found that the appellant’s product does not infringe the patent, dismissed the action and granted the counterclaim, but only to the extent that the respondent had admitted invalidity in relation to one specific claim of the patent. The trial judge then refused to allow costs on the ground that “mixed results” were arrived at. He explained his refusal at paragraph 83:

For the reasons mentioned above, I will dismiss the action and grant the counterclaim only in part because of the admission made in relation to claim 9. More specifically, claim 7 is valid for the construction given to such claim as detailed in the above reasons. Also, claim 9, was admitted, is

invalidated. No costs will be allowed because of the mixed results arrived at which indicate that each party has received an outcome justified by the conclusion (see *Saint John Shipbuilding and Dry Dock Co. v. Kingsland Maritime Corp.* (1981), 126 D.L.R. (3d) 332 at para. 26 (F.C.A.); see also *R.B. v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at paras. 155-156 [emphasis added]).

- [4] In our opinion, the trial judge did not properly exercise his discretion under rule 400(1) in refusing costs to the appellant. Rule 400(3) enumerates many factors that would justify the exercise of judicial discretion to deny costs to a successful party, but we see nothing in the trial judge's reasons or in the facts that would warrant such a result.
- [5] The fact that the counterclaim was granted only in part was no reason in itself to deny costs to the appellant. The entire proceeding was conducted as a single action and the counterclaim was an integral part of the defence to the main action. There is no indication that the attack on validity was vexatious, improper or otherwise inappropriate. The trial judge did not take into consideration the end result of the proceedings, as required by rule 400(3), when he concluded that "mixed results" were arrived at.
- [6] The respondent submitted that this Court should draw a distinction between invalidity raised as a defence under section 59 of the *Patent Act* and invalidity raised as a counterclaim under section 60 of the *Patent Act*. The respondent's argument is that invalidity raised under section 60 has a larger impact in that it results in a declaration in rem available to anyone.
- [7] From the point of view of costs, that distinction does not reflect the reality of a patent trial. Once invalidity is raised, whether as a defence or by way of counterclaim, the trial judge is bound to deal with it. The issues are the same in

Federal Court of Appeal Decisions

Illinois Tool Works Inc. v. Cobra Anchors Co.

Court (s) Database: Federal Court of Appeal Decisions

Date: 2003-09-30

Neutral citation: 2003 FCA 358

File numbers: A-522-02

Notes: Digest

Date: 20030930

Docket: A-522-02

Citation: 2003 FCA 358

CORAM: RICHARD C.J.

LÉTOURNEAU J.A.

NOËL J.A.

BETWEEN:

ILLINOIS TOOL WORKS INC.

ITW CANADA and ITW CANADA HOLDINGS COMPANY

Appellants/Plaintiffs

and

COBRA FIXATIONS CIE LTÉE/COBRA ANCHORS CO. LTD.

Respondent/Defendant

Heard at Montreal, Quebec, on September 29 and 30, 2003.

Judgment delivered from the Bench at Montreal, Quebec, on September 30, 2003.

REASONS FOR JUDGMENT OF THE COURT BY:

LÉTOURNEAU J.A.

Date: 20030930

Docket: A-522-02

Citation: 2003 FCA 358

CORAM: RICHARD C.J.

LÉTOURNEAU J.A.

NOËL J.A.

BETWEEN:

ILLINOIS TOOL WORKS INC.

ITW CANADA and ITW CANADA HOLDINGS COMPANY

Appellants/Plaintiffs

and

COBRA FIXATIONS CIE LTÉE/COBRA ANCHORS CO. LTD.

Respondent/Defendant

REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Montreal, Quebec, on September 30, 2003)

LÉTOURNEAU J.A.

[1] We are in substantial agreement with the findings and conclusions of the trial judge in this case indexed as *Illinois Tool Works Inc. et al. v. Cobra Anchors Co.*, (2002), 221 F.T.R. 161.

[2] The trial judge concluded that the respondent's products, i.e., anchors identified by the trade-marks WallDriller and Picture Hook, did not infringe the appellants' patent. He was of the view that these products did not possess two of the features which he found to be essential elements of the invention claimed by the appellants, namely "a drilling end including means for allowing passage of an elongated fastener through and beyond said drilling end" and "for causing said drilling end to deflect upon advancement of said fastener through said body". There was cogent evidence to support such finding.

[3] As for the appellants' contention forcefully put to us that it is possible to obtain with the respondent's WallDriller (the Picture Hook anchor is not operating with a fastener) the same result as with their patented device, we agree with the trial judge that that result can only be achieved by way of an abuse and alteration of the respondent's product.

[4] We are of the view that the respondent's cross-appeal attacking the validity of the patent in issue cannot succeed.

[5] The trial judge made no reviewable error in holding that the prior art references cited at trial did not render the invention obvious or demonstrate that it lacked inventiveness.

[6] As to the allegation that the patent is invalid on the ground that it overclaims, it was properly rejected by the trial judge. Specifically, the evidence at trial allowed him to conclude that a person skilled in the art would have read the separation between drilling and tapping as being a non-essential element of the invention.

[7] However, we believe that the respondent's cross-appeal relating to the allocation of costs in the Trial Division should be allowed. We are satisfied that the trial judge did not properly exercise his discretion in assessing costs.

[8] It will be recalled that the trial judge denied costs to the respondent on the basis that success in the proceedings was divided. He expressed himself in the following terms in paragraph 130 of his decision:

The claim of infringement will be dismissed; the counterclaim alleging invalidity will also be dismissed. The plaintiff is entitled to a declaration that its patent is valid and subsisting as regards the defendant. The defendant, plaintiff by counterclaim, is entitled to a declaration that its WallDriller and Picture Hook products do not infringe the ITW patent. Since each party has achieved a part of the relief which it sought, this is effectively a case of divided success. For that reason, there will be an order that each party shall bear its own costs.

The judge's conclusion has its roots, in our view, in a misapprehension of the facts and, as a result, of the legal principles applicable in the present case.

[9] It is not contested that a trial judge has discretion to award costs or not. However, such costs ought to be allocated on a principled basis: *Harris v. Canada*, [2002] 2 F.C. 484, at page 560. Indeed, Rule 400 and followings enumerate the principles and factors to be considered by a judge in the exercise of his or her discretion.

[10] The facts of the present instance bring to light the following sequence of events. The respondent was sued for patent infringement by the plaintiffs/appellants. In response to the lawsuit, the respondent raised a defence which, as is often the case in these matters, had two components: first, it submitted that its products did not infringe the plaintiffs' patent and, second, that the plaintiffs' patent was in any event invalid. The respondent's defence did not have to be accepted in its entirety for the lawsuit to be dismissed. It needed to succeed on only one of its two components in order to achieve that result and it did: as previously mentioned, the trial judge found that the respondent's products do not infringe the plaintiffs' patent. Therefore, the plaintiffs' action was dismissed.

[11] On the facts of this case, we cannot understand how and why the dismissal of the plaintiffs' lawsuit can amount to, result in, or become a divided success. With respect, the trial judge did not properly take into consideration the end result of the proceedings before him, as required by Rule 400(3)(a). This Court came to a similar conclusion in *Gorse v. Upwardor Corp* (1992), 40 C.P.R. (3d) 479 (F.C.A.) where the facts and the legal issue relating to costs were analogous, if not identical, to those of the present instance. The following excerpt from that decision at pages 483-484 is herein applicable:

It is trite to say that the discretion must be exercised judicially. The learned trial judge stated the basis of his decision as to costs in the following terms.

In the result, this litigation is seen to be futile. The plaintiffs' claim and the defendant's counterclaim are both to be dismissed. It is true - probably - that the defendant would not have been provoked into asserting the counterclaim if the plaintiffs had not commenced their action in the first place. Much of the litigation was generated on account of the defendant's counterclaim, when a relatively simple defence of the plaintiffs' assertion of infringement could have been successfully established. In these circumstances a not unjust result will be obtained by not awarding any costs to any party.

It seems to me that it is a good deal easier for a judge, at the end of a proceeding after he has made up his mind as to its disposition, to decide what minimal pleadings and arguments a party might have advanced and still succeeded than for counsel, with a duty to represent that party to the best of his or her professional ability, to reach such conclusions in advance. An attack on the validity of a patent expressly found "not strong" (p. 172), can scarcely be called frivolous or unnecessary to the defence of an action claiming its infringement. There are many reasons for a judicial exercise of discretion to deny costs to a successful party but, with respect, no such reason was disclosed by the learned trial judge or is otherwise apparent here. The mere prolongation of a trial, without more, by reliance on an ultimately unsuccessful defence is no such reason.

In conclusion, the respondent was entitled to costs as the winning party and there were no valid reasons given to refuse to award them to that party in these circumstances.

[12] For these reasons, the appeal will be dismissed with costs and the respondent's cross-appeal will be allowed to the extent of vacating the trial judge's decision regarding costs. On all other aspects, the cross-appeal will be dismissed with costs. Proceeding to render the decision the trial judge should have rendered, the plaintiffs' action will be dismissed with costs.

"Gilles Létourneau"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-522-02

(APPEAL FROM AN ORDER OF THE FEDERAL COURT DATED JULY 29, 2002,
NO. T-2313-96)

STYLE OF CAUSE: ILLINOIS TOOL WORKS INC.

ITW CANADA and ITW CANADA HOLDINGS COMPANY v. COBRA FIXATIONS
CIE LTÉE/

COBRA ANCHORS CO. LTD.

Competition Tribunal



Tribunal de la concurrence

PUBLIC VERSION

Reference: *The Commissioner of Competition v Vancouver Airport Authority*, 2019 Comp Trib 6

File No.: CT-2016-015

Registry Document No.: 429

IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 79 of the *Competition Act*, RSC 1985, c C-34 as amended;

BETWEEN:

The Commissioner of Competition
(applicant)

and

Vancouver Airport Authority
(respondent)



Dates of hearing: October 2-5, 9-10, 15-17 and 30-31, November 1-2 and 13-15, 2018

Before: D. Gascon (Chairperson), P. Crampton C.J. and Dr. D. McFetridge

Date of Reasons for Order and Order: October 17, 2019

REASONS FOR ORDER AND ORDER

[817] Section 8.1 of the CT Act gives jurisdiction to the Tribunal to award costs of proceedings before it in accordance with the provisions governing costs in the *Federal Courts Rules*, SOR/98-106 (“**FC Rules**”). Accordingly, pursuant to FC Rule 400(1), the Tribunal has “full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.” A non-exhaustive list of factors that the Tribunal may consider when exercising its discretion is set out in FC Rule 400(3). It is a fundamental principle that an award of costs represents a compromise between compensating a successful party and not unduly burdening an unsuccessful party (*Apotex Inc v Wellcome Foundation Ltd* (1998), 159 FTR 233 (FCTD), 84 CPR (3d) 303, aff’d (2001), 199 FTR 320 (FCA)).

[818] In *Consorzio del Prosciutto di Parma v Maple Leaf Meats Inc*, 2002 FCA 417 (“*Maple Leaf Meats*”), the FCA described the approximation of costs as a matter of judgment rather than an accounting exercise. An award of costs is not an exercise in exact science. It is only “an estimate of the amount the Court considers appropriate” (*Maple Leaf Meats* at para 8). The costs ordered should not be excessive or punitive, but rather reflect a fair relationship to the actual costs of litigation. The question for the Tribunal is therefore to determine what, in the circumstances, are necessary and reasonable legal costs and disbursements (*Nadeau Ferme Avicole Ltée v Groupe Westco Inc*, 2010 Comp Trib 1 at para 49).

[819] With respect to legal costs, there is agreement between the parties on the amount to be paid to the successful party. However, in this case, the success on the issues in dispute has been divided; the Commissioner has prevailed on the product and geographic market definitions, on paragraph 79(1)(a) and on the PCI. A fair amount of time was spent by VAA disputing those issues. In the circumstances, the Tribunal is of the view that the legal costs to be paid to VAA should be reduced, by about a third. This is particularly so given that VAA persisted in spending time on market definition, paragraph 79(1)(a) and PCI, notwithstanding the Tribunal’s encouragement to move along to the issues in respect of which VAA ultimately proved to be the successful party. The Tribunal thus fixes the Tariff B legal costs to be paid to VAA by the Commissioner at \$70,000.

[820] Turning to disbursements, in addition to the travel and transcript costs agreed upon, VAA claims expert fees of \$1,834,848 for Dr. Reitman and of \$379,228 for Dr. Tretheway, as well as electronic discovery and document management fees of \$291,290, for a total exceeding \$2.6 million. The Commissioner submits that these disbursement amounts are excessive and should be substantially reduced.

[821] The Tribunal is satisfied that both parties have provided, in their respective bills of costs, detailed information and sufficient support to explain the disbursements incurred and the basis of their various claims. The bills of costs were prepared in accordance with Column III of Tariff B of the FC Rules, and evidence has been provided regarding the billing, payment and justifications of the services provided and expenses incurred. With respect to experts, details regarding the tasks performed by each expert (and their teams), as well as the amount of time spent per task, have been provided. The question is not whether the disbursements at issue were incurred but whether they are reasonable, necessary and justified.

[822] The Tribunal notes that the expert fees claimed by VAA are substantially higher than the fees of the Commissioner’s sole expert witness, Dr. Niels, which totalled \$1,333,209 for his two

reports. Since Dr. Reitman did not have to construct his own data set to perform his analyses and was essentially responding to Dr. Niels' analysis, the Tribunal agrees with the Commissioner that his total fees should be reduced. Expert-related costs are not automatically recoverable in their entirety, and can be adjusted by the Tribunal when they do not appear reasonable. With respect to the expert fees of Dr. Tretheway, the Tribunal is also of the view that they should be reduced as they include expenses incurred prior to the Application and the Tribunal struck a portion of his report (i.e., question 4) on the ground that it was inadmissible expert evidence.

[823] Turning to the disbursements claimed by VAA for electronic discovery and document management, they essentially relate to the fees charged by a third-party provider. The Tribunal agrees with VAA that it would be unfair to expect a party to comply with the requirements of electronic discovery and document management for an electronic hearing, without allowing for a recovery of the fees incurred for that purpose. The use of an effective document management system is essential to the seamless functioning of electronic hearings before the Tribunal, and it has a fundamental impact at each step of the proceedings (whether it is oral discoveries, motions, preparation of witness statements and expert reports, document production, or the hearing itself). Fees incurred in that respect are disbursements which, in principle, should be recoverable by the successful party.

[824] However, there are nonetheless limits to such disbursements. Only the amounts incurred after the filing of the Application can be properly claimed. In this regard, the e-discovery charges incurred by a party to comply with compulsory production orders under section 11 of the Act as part of the Bureau's prior, underlying investigation should not form part of claimed disbursements, even though many documents produced in that context may end up being directly related to subsequent filings before the Tribunal. In *Commissioner of Competition v Canada Pipe*, 2005 Comp Trib 17 ("*Canada Pipe 2005*"), the Tribunal held that it would be against public policy to order costs against the Commissioner for "the expense of complying with an order mandated by the Act and ratified by a Court of competent jurisdiction" (*Canada Pipe 2005* at para 12). Accordingly, the amount of disbursements claimed by VAA for electronic discovery and document management will need to be reduced to exclude such amounts.

[825] As stated above, the Tribunal favors lump sum awards as it simplifies the assessment process. In fact, there is now "a judicial trend to grant costs on a lump sum basis whenever possible" (*Philip Morris Products SA v Marlboro Canada Ltd*, 2015 FCA 9 at para 4). A lump sum award saves time and trouble for the parties by avoiding precise and unnecessarily complicated calculations. Lump sum awards also align with the objective of promoting the "just, most expeditious and least expensive determination" of proceedings, as provided by FC Rule 3, which echoes the direction found in subsection 9(2) of the CT Act to deal with matters as informally and expeditiously as the circumstances and considerations of fairness permit.

[826] In his submissions on costs, the Commissioner argued that the Tribunal should consider FC Rule 400(3)(h) in making its assessment, and the broad public interest in having proceedings litigated before the Tribunal. Relying on *Commissioner of Competition v Visa Canada Corporation*, 2013 Comp Trib 10 ("*Visa Canada*"), where the Tribunal made no award on costs as there was a broad public interest in bringing the case, the Commissioner submits that there was a similarly broad public interest in bringing the present case as it would clarify the interpretation of section 79 of the Act, its defenses, and its application to entities such as VAA.

The Tribunal disagrees. The Tribunal does not find the “public interest” argument in this case to be as “compelling” as it was in *Visa Canada*, where the matter before it was more novel (*Visa Canada* at paras 405, 407). All cases brought forward by the Commissioner have a public interest dimension and contribute to clarify contentious competition law matters, but that does not mean that the Commissioner can escape costs awards in all cases.

[827] In light of the foregoing, and taking into consideration the conditions of reasonableness and necessity, the Tribunal concludes that \$1,850,000 would be an acceptable amount for VAA’s disbursements, instead of the total exceeding \$2.6 million claimed by VAA. However, as with the legal costs, success on the issues in dispute in this case should be taken into account. The Tribunal is of the view that the disbursements to be paid to VAA should also be reduced by about a third. The Tribunal thus fixes the disbursements to be paid to VAA by the Commissioner at \$1,250,000.

[828] The Commissioner will therefore be required to pay to VAA a total lump sum amount of \$70,000 in respect of Tariff B legal costs, and of \$1,250,000 in respect of disbursements.

X. ORDER

[829] The Application brought by the Commissioner is dismissed.

[830] Within 30 days from the date of this Order, the Commissioner shall pay to VAA an amount of \$70,000 in respect of legal costs, and of \$1,250,000 in respect of disbursements.

[831] These reasons are confidential. In order to enable the Tribunal to issue a public version of this decision, the Tribunal directs the parties to attempt to reach an agreement regarding the redactions to be made to these reasons in order to protect confidential evidence and information. The parties are to jointly correspond with the Tribunal by no later than the close of the Registry on October 31, 2019, setting out their agreement and any areas of disagreement concerning the redaction of the confidential version of the decision. If there is any disagreement, the parties shall separately correspond with the Tribunal setting out their respective submissions with respect to any proposed, but contested, redactions from these confidential reasons. Such submissions are to be served and filed by the close of the Registry on October 31, 2019.

DATED at Ottawa, this 17th day of October, 2019.

SIGNED on behalf of the Tribunal by the Panel Members.

(s) Denis Gascon J. (Chairperson)
(s) Paul Crampton C.J.
(s) Dr. Donald McFetridge

Competition Tribunal



Tribunal de la Concurrence

OFFICIAL ENGLISH TRANSLATION

Citation: Rona Inc. v. Commissioner of Competition, 2005 Comp. Trib. 26

File No. : CT-2003/007

Registry document No. : 101

IN THE MATTER OF the *Competition Act*, R. S .C. 1985, c. C-34, as amended;

AND IN THE MATTER OF the *Competition Tribunal Act*, R. S. 1985, c. 19 (2nd Supp.), as amended.

AND IN THE MATTER OF the acquisition of Réno-Dépôt Inc. by RONA Inc.;

AND IN THE MATTER OF the application to vary a consent agreement pursuant to subsection 106(1) of the *Competition Act*;

BETWEEN:

RONA Inc.
(Applicant)

and

Commissioner of Competition
(Respondent)



Decided on the basis of the written arguments filed by the parties

Members: Blais J. (presiding), Lemieux J., and L. Riedle

Date of reasons and order: August 19, 2005

Reasons and order signed by: Mr. Justice P. Blais, Mr. Justice F. Lemieux, Ms. L. Riedle

REASONS FOR ORDER AND ORDER RESPECTING COSTS

As I understand Rule 420(2)(b), where a defendant makes an offer to a plaintiff which is rejected and the plaintiff then fails to obtain judgment (which is the case here), the defendant is automatically entitled to a doubling of the taxable fees thereafter "unless otherwise ordered by the Court". In this situation there is no need for the defendant to show that the offer was more generous to the plaintiff than the outcome. I am inclined to order otherwise than a doubling, however. The offer of November 26, 1999 was not, in my view, a real offer of a compromise. Apart from a few technical differences, for all practical purposes it was a demand for complete surrender with regard to the enforcement of the plaintiffs' alleged patent rights *vis à vis* these defendants (appellants). As I understand it the Court still has a discretion to exercise in the application or non-application of rule 420 and I so exercise it in favour of increasing the fees after November 26, 1999 by 50%.

[9] It should also be noted that the issue of the offer to settle is already referred to in paragraph 400(3)(e), which gives the Tribunal even more latitude in considering the offer.

ANALYSIS

[10] In the interest of clarity, the Tribunal would like to point out that this decision applies to the costs relating to the application made under section 106 and the costs of the two motions in which the Tribunal had indicated that costs would follow the cause. The fact that RONA consented to pay the costs of the Commissioner in the context of the motion under section 105 and the fact that the Tribunal awarded RONA increased costs for the motion to strike out the application of the Commissioner have no impact on this decision.

(1) Costs in light of the factors listed in Rule 400(3)

[11] The starting point for this analysis is that the Tribunal must, in the words of Décaré J.A. in *Wihksne*, have "valid reasons to derogate from Rule 1407 which states the general principle that costs are to be awarded in accordance with column I11 of the table to Tariff B" (paragraph 11). RONA made various arguments in support of its request for increased costs, which we will now consider.

[12] The first point the Tribunal may consider under paragraph 400(3)(a) of the Rules is the result of the proceeding. RONA was successful. That in itself does not justify an increase but RONA argued that, at the very least, RONA should be awarded costs pursuant to the usual practice. The Commissioner does not contest this fact. The dispute concerning costs turns on the increased assessment.

[13] The second paragraph of subsection 400(3) of the Rules refers to the amounts claimed and the amounts recovered. Although in this case, the application did not involve a sum of money, RONA maintains that the issue in RONA's application must be considered: i.e. that it be released from the obligation to sell a store worth (according to the evidence) approximately 20 million dollars. The Commissioner, on the other hand, is of the view that the argument is absurd because no such sum of money was at stake in the case.

[14] The Tribunal recognizes the importance of the economic issue to RONA, namely whether to keep the store in order to operate it or to sell it at a price below its actual value. Nevertheless,

Competition Tribunal



Tribunal de la Concurrence

Reference: *B-Filer Inc. et al. v. The Bank of Nova Scotia*, 2007 Comp. Trib. 26
File No.: CT-2005-006
Registry Document No.: 0188

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF an application by B-Filer Inc., B-Filer Inc. doing business as GPAY GuaranteedPayment and Npay Inc. for an order pursuant to section 75 of the *Competition Act*.

B E T W E E N :

B-Filer Inc.,
B-Filer Inc. doing business as
GPAY GuaranteedPayment and
Npay Inc.
(applicants)

and

The Bank of Nova Scotia
(respondent)



Decided on the basis of the written record
Before: Dawson J. (presiding), Mr. L. Bolton and Dr. L. Csorgo
Date of Reasons and Order: August 24, 2007
Order and Reasons signed by: Madam Justice E. Dawson, Mr. L. Bolton and Dr. L. Csorgo

PRELIMINARY REASONS FOR ORDER AND ORDER REGARDING COSTS

[12] The first point the Tribunal may consider under paragraph 400(3)(a) of the Rules is the result of the proceeding. Rona was successful. That in itself does not justify an increase but RONA argued that, at the very least, RONA should be awarded costs in accordance with the usual practice. The Commissioner does not contest this fact. The dispute concerning costs turns on the increased assessment.

[11] We reject, however, B-Filer's argument that it would be inconsistent with the “precedent set in *Canada Pipe* for the Tribunal to award Scotiabank costs on a scale that is much higher than the scale applied in *Canada Pipe*, when this case was shorter and simpler”. We reject this submission because the Tribunal in *Canada Pipe* itself applied the discretionary factors set out in Rule 400. Section 8.1 of the *Competition Tribunal Act* requires the Tribunal to consider the exercise of discretion in each case and not to simply perform a comparative analysis based upon the *Canada Pipe* decision. Further, the length of the hearing is simply one matter that may be considered. To illustrate, in *Geza v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1401 (T.D.), affirmed [2006] F.C.J. No. 477 (C.A.), an award of costs based on Column V of the Tariff was awarded in respect of the three-day application for judicial review.

[12] Turning to the principles that govern the exercise of discretion, in *Consortio del Prosciutto di Parma v. Maple Leaf Meats Inc.*, 2002 FCA 417, Mr. Justice Rothstein, then of the Federal Court of Appeal, noted as follows:

[8] An award of party-party costs is not an exercise in exact science. It is only an estimate of the amount the Court considers appropriate as a contribution towards the successful party's solicitor-client costs (or, in unusual circumstances, the unsuccessful party's solicitor-client costs). Under rule 407, where the parties do not seek increased costs, costs will be assessed in accordance with Column III of the table to Tariff B. Even where increased costs are sought, the Court, in its discretion, may find that costs according to Column III provide appropriate party-party compensation.

[9] However, the objective is to award an appropriate contribution towards solicitor-client costs, not rigid adherence to Column III of the table to Tariff B which is, itself, arbitrary. Rule 400(1) makes it clear that the first principle in the adjudication of costs is that the Court has "full discretionary power" as to the amount of costs. In exercising its discretion, the Court may fix the costs by reference to Tariff B or may depart from it. Column III of Tariff B is a default provision. It is only when the Court does not make a specific order otherwise that costs will be assessed in accordance with Column III of Tariff B.

[10] The Court, therefore, does have discretion to depart from the Tariff, especially where it considers an award of costs according to the Tariff to be unsatisfactory. Further, the amount of solicitor-client costs, while not determinative of an appropriate party-party contribution, may be taken into account when the Court considers it appropriate to do so. Discretion should be prudently exercised. However, it must be borne in mind that the award of costs is a matter of judgment as to what is appropriate and not an accounting exercise.

[11] I think this approach is consistent in today's context with the observations of Nadon J. (as he then was) in *Hamilton Marine and Engineering Ltd. v. CSC Group Inc.* (1995), 99 F.T.R. 285 at paragraph 22:

I indicated to counsel during the hearing that there was no doubt that, in most cases, the fees provided in Tariff B were not sufficient to fully compensate a successful party. I also indicated to counsel during the hearing that, in my view, the Tariff necessarily had to remain the rule and that an increase of tariff fee was the exception. By that I mean that the discretion given to the Court to increase the tariff amounts pursuant to rule 344(1) and (6) of the Federal Court Rules was not to be exercised lightly. Put another way, the fact that the successful party's legal costs were far superior to the amounts to which that party was entitled under the Tariff, was not in itself a factor for allowing an increase in those fees.

[13] As for lump sum awards of costs, we endorse the view of Mr. Justice Hugessen in *Barzelex Inc. v. EBN Al Waleed*, [1999] F.C.J. No. 2002, where at paragraph 11 he wrote, “[i]n my view, as a matter of policy the Court should favour lump sum orders. It saves time and trouble for the parties and it is a more efficient method for them to know what their liability is for costs.” In our view, the Tribunal should favour lump sum awards over formal taxation of bills of costs because such practice is in accordance with the direction to the Tribunal found in subsection 9(2) of the *Competition Tribunal Act* that all proceedings before it “shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit”.

[14] Having said that, when setting costs on a lump sum basis, the Tribunal is not to take a “shot in the dark”. Rather, costs must be determined on a principled basis. See: *CCH Canadian Ltd. v. Law Society of Upper Canada*, (2004), 37 C.P.R. (4th) 323 (F.C.). We accept that when “fixing lump sum fees [it is appropriate] to be guided by Tariff B which operates on the principle of allowing a block of time within the range of hours set out in the various columns”. See: *Donaghy v. Scotia Capital Inc.*, 2007 FC 598 at paragraph 7.

[15] Turning to the fixing of a lump sum award, we are satisfied that a number of factors warrant an award of increased costs. In our view, the lump sum should be guided by the top of Column IV of the Tariff for two counsel throughout the preparatory phase of the case and 2 ½ counsel during the actual hearing. The additional one half counsel fee for the hearing reflects the fact that all parties had at least three counsel present throughout the hearing, and we are satisfied that the volume and complexity of the material reasonably required that level of attendance. We deal later with the effect of the Bank's offer to settle.

[16] The factors that in our view warrant a lump sum award based upon the top end of Column IV of the Tariff for two counsel are as follows.

[17] First, the Bank was wholly successful in this application as B-Filer did not establish any of the required elements it needed in order to succeed on its application under section 75 of the *Competition Act*, R.S.C. 1985, c. C-34 ("Act"). Additionally, the evidence of all of the Bank's witnesses was accepted by the Tribunal.

[18] Second, there were numerous important and complex issues raised in the proceeding related to the regulatory regime within which chartered banks operate in Canada and the United States. The issues included determining compliance with the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17 (PCMLTF Act) and its associated Regulations, SOR/2002-184; the Financial Transactions and Reports Analysis Centre interpretive guidelines as they related to the PCMLTF Act; the Office of the Superintendent of Financial Institutions guidelines; and Rule E2 of the Canadian Payments Association. The Tribunal received the evidence of four expert witnesses on these issues. This was also the first case in which the Tribunal was required to consider paragraph 75(1)(e) of the Act.

[19] Third, the work required was substantial, both in respect of the preparation for the hearing and the hearing itself. The case was actively case managed with a compressed schedule for all discoveries, the provision of expert reports and the like. To illustrate, 11 months elapsed from the date of the order granting leave to the date of final argument. As in *Fraser River Pile & Dredge Ltd. v. Empire Tug Boats Ltd.*, [1995] F.C.J. No. 740 (T. D.), we find that the extensive preparation required for such an efficient hearing would not be properly compensated by the existing tariff structure. By way of example, the top end of Column III of the Tariff would permit the Bank seven hours for the preparation of its defence at \$120 per hour, for a fee of \$840. Given the complexity of the matter and the compressed timeline to hearing, it was in our view necessary for both of the Bank's two lead counsel, Mr. Morrison and Ms. Constantine, to be actively involved in the preparation of the case. Double counsel fees at the top of Column IV to the Tariff permit 18 hours at \$120 per hour for a fee of \$2,160. This is far less than the 106.2 hours said to have been expended by a number of lawyers on the Bank's behalf, and far less than the sum of \$37,884.33 claimed for the preparation of the defence (\$37,884.33 being 66% of the solicitor client fees of \$57,400.50).

[20] Finally, until its opening statement at the commencement of the hearing, B-Filer did not concede that it was operating a Money Services Business within the definition of the regulations enacted pursuant to the PCMLTF Act. Because of the impact of this admission upon the Bank's record keeping obligations, we accept that this failure to make a timely admission impacted significantly upon the Bank's preparation for hearing. This is a factor that goes to increase the costs.

[21] Conversely, while Mr. Grace was at times an evasive witness, we reject the Bank's submission that his conduct by itself unnecessarily lengthened the duration of the hearing so as to warrant an increase in costs on this ground.

[22] In summary, a lump sum award guided by double counsel fees at the top of Column IV for the preparation of the hearing, and an award of counsel fees for 2 ½ counsel during the hearing itself (again guided by the top of Column IV) strikes the appropriate balance. In our view, it bears a reasonable relationship to the actual cost of litigation (within the strictures of the Tariff) and compensates the successful party without unduly burdening the unsuccessful party. See: *AB Hassle v. Genpharm Inc.*, (2004) 34 C.P.R. (4th) 18 at paragraph 15.

(ii) The effect of the Bank's offer to settle

[23] By letter dated July 31, 2006 the Bank made the following offer of settlement:

Scotiabank offers to settle the Competition matter and the outstanding Alberta Civil action, including the appeal from the Decision of Justice Lefsrud, and all other matters in dispute between the Applicants and Scotiabank on the following basis.

Scotiabank will pay to the Applicants, collectively, the total sum of \$250,000, inclusive of all damages, interest, and costs, in exchange for a full and final release in a form satisfactory to Scotiabank. The Applicants shall pay to Scotiabank the costs as assessed and fixed by Justice Lefsrud in the Alberta Civil Action.

This offer shall remain open until one minute after the commencement of the hearing before the Competition Tribunal scheduled to begin on August 28, 2006 (or such other date that the matter begins, if the schedule is changed), following which it is revoked, unless revoked earlier, by written notice.

Scotiabank considers this to be a formal offer and will rely on it in the event that it is awarded costs of the proceedings before the Competition Tribunal.

Competition Tribunal



Tribunal de la Concurrence

Reference: *B-Filer Inc. et al. v. The Bank of Nova Scotia*, 2007 Comp. Trib. 29
File No.: CT-2005-006
Registry Document No.: 0196

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF an application by B-Filer Inc., B-Filer Inc. doing business as GPAY GuaranteedPayment and Npay Inc. for an order pursuant to section 75 of the *Competition Act*.

B E T W E E N :

B-Filer Inc.,
B-Filer Inc. doing business as
GPAY GuaranteedPayment and
Npay Inc.
(applicants)

and

The Bank of Nova Scotia
(respondent)



Decided on the basis of the written record
Before: Dawson J. (presiding), Mr. L. Bolton and Dr. L. Csorgo
Date of Reasons and Order: November 14, 2007
Reasons and Order signed by: Madam Justice E. Dawson, Mr. L. Bolton and Dr. L. Csorgo

FINAL ORDER AS TO COSTS

[22] From that, we have deducted 98 hours before the making of the offer in respect of affidavits, and 185 hours after the making of the offer in respect of the reply affidavits and travel to attend the hearing. This results in fees of \$99,840.00 before the offer and \$184,260.00 after the offer, for a total of \$284,100.00.

[23] In our view, taking into account the result obtained by the Bank, the importance and complexity of the issues, the amount of work required, and the Bank's solicitor and client fees, an award of \$284,100.00 is reasonable. We repeat the principles set out in our Reasons that the objective of an award of costs is to award an appropriate contribution towards solicitor-client costs. The objective is not rigid adherence to the Tariff. Thus, in the present case, the objective was not to insure the appropriateness of every Tariff item. Rather, we are satisfied that our award, guided by the Tariff, provides an appropriate contribution towards the Bank's solicitor-client costs.

[24] To this must be added the 150% multiplier for services performed after the Bank's offer to settle. This increases the post-offer fees to \$276,390.00 for a total allowance of \$376,230.00. From that, the applicants are entitled to set-off their fees that we have fixed in the amount of \$4,000.00, thus reducing the total fees to \$372,230.00.

[25] The Bank's total entitlement is as follows:

| | |
|-------------------------------|--------------|
| Fees: | \$372,230.00 |
| Taxable Disbursements: | \$441,847.16 |
| Non-Taxable Disbursements: | \$ 21,616.72 |
| GST on Fees (6%): | \$ 22,333.80 |
| GST on Disbursements (6%): | \$ 26,510.83 |
| Total: | \$884,538.51 |
| Plus Ryan Woodrow's Expenses: | \$ 2,511.11 |
| Grand Total: | \$887,049.62 |

[26] The Bank asks that the costs be payable forthwith. This is a final order of the Tribunal which is enforceable in the ordinary course. We see no need to provide that the costs be payable forthwith.

Federal Court



Cour fédérale

Date: 20160122**Docket: T-2051-10****Citation: 2016 FC 91****Ottawa, Ontario, January 22, 2016****PRESENT: The Honourable Mr. Justice O'Keefe****BETWEEN:**

**THE DOW CHEMICAL COMPANY,
DOW GLOBAL TECHNOLOGIES INC. and
DOW CHEMICAL CANADA ULC**

Plaintiffs**and**

NOVA CHEMICAL CORPORATION

Defendant

REASONS FOR JUDGMENT AND JUDGMENT

[1] When the decision was released in this matter, the plaintiffs, The Dow Chemical Company, Dow Global Technologies Inc. and Dow Chemical Canada ULC were awarded their costs of the proceeding. The plaintiffs were granted a declaration that the defendant [NOVA] had infringed Canadian Patent No. 2,160,705 by manufacturing in Canada and distributing, offering for sale, selling or otherwise making available film-grade polymers under the name SURPASS.

[22] After considering the submissions of both parties and the jurisprudence of this Court, I am of the opinion that a lump sum award for costs is appropriate in this case.

[23] The submissions show that Dow's actual total legal costs were \$9.6 million. Details of these fees are shown in Schedule C of the plaintiffs' details of fees.

[24] As well, the plaintiffs' submissions state that should their fees be assessed under Column V of Tariff B, their costs would only amount to \$1,099,725, which is 11% of the plaintiffs' total legal costs.

[25] In its submissions, the defendant did not present any data with respect to its actual total legal costs for this action.

[26] I am of the view that costs in the amount of \$1,099,725 pursuant to Column V of Tariff B, would be totally inadequate as an amount of costs for the plaintiffs in this case. To only recoup 11% of your costs in such a complex case is not acceptable.

[27] I am also of the opinion that to order an assessment of costs in this case is not a proper approach. The costs to the parties and the time to complete this assessment would be very great. In fact, the submissions on costs before me were extensive and the record on an assessment would be much larger.

Federal Court of Appeal



Cour d'appel fédérale

Date: 20170206

Docket: A-43-16

Citation: 2017 FCA 25

**CORAM: DAWSON J.A.
RENNIE J.A.
WOODS J.A.**

BETWEEN:

NOVA CHEMICALS CORPORATION

Appellant

and

**THE DOW CHEMICAL COMPANY, DOW
GLOBAL TECHNOLOGIES INC. and
DOW CHEMICAL CANADA ULC**

Respondents

Heard at Toronto, Ontario, on October 24, 2016.

Judgment delivered at Ottawa, Ontario, on February 6, 2017.

REASONS FOR JUDGMENT BY:

RENNIE J.A.

CONCURRED IN BY:

DAWSON J.A.
WOODS J.A.

Rules of securing “the just, most expeditious and least expensive determination” of proceedings (Rule 3). When a court can award costs on a lump sum basis, granular analyses are avoided and the costs hearing does not become an exercise in accounting.

[12] Lump sum awards may be appropriate in circumstances ranging from relatively simple matters to particularly complex matters where a precise calculation of costs would be unnecessarily complicated and burdensome: *Mugesera v. Canada (Minister of Citizenship & Immigration)*, 2004 FCA 157, at para. 11.

[13] As demonstrated by the facts of this case, there are circumstances in which costs generated even at the high end of Column V of Tariff B bear little relationship to the objective of making a reasonable contribution to the costs of litigation. The Tariff amounts have been described as inadequate in this respect, although this may be a significant understatement in complex litigation conducted by sophisticated parties in the Federal Courts. Nevertheless, an increased costs award cannot be justified solely on the basis that a successful party’s actual fees are significantly higher than the Tariff amounts: *Wihksne v. Canada (Attorney General)*, 2002 FCA 356, at para. 11. The burden is on the party seeking increased costs to demonstrate why their particular circumstances warrant an increased award.

B. Evidentiary considerations

[14] As a matter of good practice, requests for lump sum awards should generally be accompanied by a Bill of Costs and an affidavit in respect of disbursements that are outside the

knowledge of the solicitor. In most cases this will provide a proper starting point for the exercise of discretion.

[15] An award of costs on a lump sum basis must be justified in relation to the circumstances of the case and the objectives underlying costs. It is not a matter of plucking a number or percentage out of the air. However, I do not agree with Nova's submission that the evidentiary record before a trial judge asked to award a lump sum must provide a level of detail akin to that which would be required in an assessment conducted by an assessment officer unfamiliar with the proceeding. To my mind, that would defeat the purpose of a lump sum, to save time and costs to the parties that would have otherwise resulted from the assessment process.

(1) Legal fees

[16] The practice of awarding lump sum costs as a percentage of actual costs reasonably incurred is well established in the jurisprudence. In *Philip Morris Products SA v. Marlboro Canada Ltd*, 2015 FCA 9, at para. 4, this Court observed that “when dealing with sophisticated commercial parties, it is not uncommon for such lump sums to be awarded based on a percentage of actual costs incurred.” As noted by the Federal Court in *H-D U.S.A., LLC v. Berrada*, 2015 FC 189, there appears to be a “[t]rend in recent case law favouring the award of a lump sum based on a percentage of the actual costs to the party when dealing with sophisticated commercial litigants that clearly have the means to pay for the legal choices they make”: at paragraph 22, quoting *Eli Lilly & Co. v. Apotex Inc.*, 2011 FC 1143, at para. 36.

[25] In the ordinary course, disbursements of this magnitude should be supported by affidavit evidence. In the unique circumstances of this case, however, the judge had a sufficient basis on which to conclude that the disbursement claimed by Dow for its testing was reasonable. The judge was well positioned to assess the utility of the in-house testing in the course of the trial. The question of testing, how and when it was to be done, the measures necessary to protect intellectual property interests, the operational aspects including supervision, costs and disclosure of results, were all the subject of a contested motion, on which affidavit evidence was led. The judge also heard testimony during the trial about the testing process and results, and observed some aspects of the testing by video. Nova and Dow's solicitors both attended the testing, and were in a position to speak to the reasonableness, or not, of the amount claimed on the costs motion. The judge was also aware that some of the in-house testing was unnecessary and flowed from Nova's initial position that it could not reproduce one of the relevant polymers. Nova resiled from this position at trial. In these circumstances, the judge was able to assess the assertion that the testing costs were limited to the expenses incurred for presentation at trial alone and were reasonable in the circumstances. The judge also had one other point of reference by which he could gauge the reasonableness of the disbursement: a cost estimate from an independent third party.

[26] I agree with Nova that, as a general proposition, an in-house disbursement cannot be justified on the sole basis that it would be more expensive to obtain the same service elsewhere. The costs must still be both "reasonable" in the language of the Tariff, and justified in relation to the issues at trial. The successful party must not be over-compensated. Generally, ongoing overhead costs of a party related to in-house testing should not be shifted to the other party.

Federal Court of Appeal



Cour d'appel fédérale

Date: 20190716

Docket: A-259-18

Citation: 2019 FCA 204

**CORAM: BOIVIN J.A.
DE MONTIGNY J.A.
GLEASON J.A.**

BETWEEN:

SPORT MASKA INC. d.b.a. CCM HOCKEY

Appellant

and

BAUER HOCKEY LTD.

Respondent

Heard at Ottawa, Ontario, on May 1, 2019.

Judgment delivered at Ottawa, Ontario, on July 16, 2019.

REASONS FOR JUDGMENT BY:

GLEASON J.A.

CONCURRED IN BY:

BOIVIN J.A.
DE MONTIGNY J.A.

[49] I agree.

[50] As this Court explained in *Nova Chemicals Corporation v. Dow Chemical Company*, 2017 FCA 25 at para. 16 (*Nova*), “[t]he practice of awarding lump sum costs as a percentage of actual costs reasonably incurred is well established”, particularly when “dealing with sophisticated commercial parties”, citing *Philip Morris Products S.A. v. Marlboro Canada Limited*, 2015 FCA 9 at para. 4, 131 C.P.R. (4th) 1. Such costs awards “tend to range between 25% and 50% of actual [legal] fees”: *Nova* at para. 17.

[51] The parties in this appeal are undoubtedly sophisticated, commercial parties and the award sought by the respondent falls squarely within the range identified by this Court in *Nova*.

[52] For this reason as well as the entire lack of merit in the appellant’s positions, I would grant the respondent the costs it seeks.

V. Proposed Disposition

[53] In light of the foregoing, I would dismiss this appeal, with costs fixed in the all-inclusive amount of \$25,000.00.

“Mary J.L. Gleason”

J.A.

“I agree.
Richard Boivin J.A.”

“I agree.
Yves de Montigny J.A.”

[Dableh v. Ontario Hydro](#)

Federal Court Judgments

Federal Court of Canada - Trial Division

Toronto, Ontario

Stinson, Taxing Officer

Heard: August 3, 1994

Judgment: November 2, 1994

Action No. T-1422-90

[1994] F.C.J. No. 1810 | [\[1994\] A.C.F. no 1810](#)

Between Youssef Hanna Dableh, plaintiff, and Ontario Hydro, defendant

(16 pp.)

Case Summary

Practice — Costs — Party and party — Counsel fees — Entitlement — Inhouse counsel — Apportionment of, circumstances when justified — Witness fees and costs of preparation — Expert witness fees — Time charges, relevant considerations applicable to foreign experts — Disbursements — Travelling and living expenses of counsel.

This was the taxation of the costs of a successful defendant on a party and party basis. In the action, the plaintiff had claimed substantial damages for alleged infringement of his patent rights by the defendant who was his former employer. The latter presented its bill of costs at \$99,600. The legal and factual issues were so complicated that the trial required 25 days and resulted in lengthy reasons confirming both volume and complexity. The plaintiff's objections mainly related to the fees of defendant's counsel, the amounts claimed for fees paid to two expert witnesses and the amounts paid for counsel's transportation and living expenses.

HELD: Defendant's bill of costs was taxed and allowed at \$78,000.

With respect to the appropriate allowance for fees of counsel, the infringement action belonged in the upper portion of the applicable Tariff items, not at the maximum. The plaintiff was not entitled to a lowering of the rates charged by the defendant's expert witnesses as those disbursements were incurred by counsel in the course of providing what was a prudent and reasonable representation to her client. However, in fixing the amount chargeable by a foreign expert witness, it was not appropriate to consider jet lag or the loss of part of a weekend resulting from the required air travel.

Statutes, Regulations and Rules Cited:

Federal Court Rules, Rules 344(1), 346(1.1), 482(5). Solicitors Act, [R.S.O. 1990, c. S15, s. 36](#).

Donald M. Cameron, for the plaintiff. Lesley M. Cameron, for the defendant.

Dableh v. Ontario Hydro

15 It may seem anomalous that one professional in the process i.e. the solicitor; qualifies only for partial indemnification and another professional in the process i.e. the engineer; qualifies for full indemnification but that is the scheme of costs relative to the principle of partial indemnity set up in the Rules and Tariff subject to the authority of Rule 344(1) or other overriding legislation. The test, particularly in the face of a disinterested business relationship without collusion between an expert selling his or her services and a litigant purchasing said services to fill a void in the expertise requisite to success in the litigation, is not to cut experts' accounts down to some lowest common denominator. I have evidence here of real invoices apparently received and paid. **The test or threshold, for indemnification of disbursements such as these, is not a function of hindsight but whether, in the circumstances existing at the time a litigant's solicitor made the decision to incur the expenditure, it represented prudent and reasonable representation of the client both in terms of leading and responding to Rule 482 expert evidence and of filling the void of technical expertise requisite to the solicitor's preparation and conduct.** Austerity must be a factor in costs: I am not suggesting that experts should always be indemnified for the entire period of a trial. Here, Dr. Laithwaite left on the last day of his testimony but was subsequently consulted briefly via long distance telephone. At taxation, Defendant's counsel supplemented the evidence with oral explanation and invited me to infer, from the record, the importance of Dr. Laithwaite and Dr. Lavers both as experts and consultants. The Mills affidavit supporting the Bill of Costs did not address this. My Reasons supra indicate that the uses of experts encompass both Tariff B1(2)(a) and (b) and further that the taxing party faces variable results depending on the proof led. Further, they indicate that, in the absence of sufficiently detailed proof, the result may be necessarily conservative so as to embrace the interests of the respondent at taxation but coincidentally not provide an absurd result for the taxing party.

16 I reject Plaintiff's suggestion to lower the rates. Experts charge different rates as a function of their particular discipline, market and location. Defendant's proof of Dr. Laithwaite's account at least breaks out preparation from attendance but gives no additional detail: I have seen better and poorer examples of proof (Dr. Lavers' account epitomizes the latter). I read his Curriculum Vitae. He is a man of considerable years with professional activities in multiple areas including teaching. It may be that he values the distinction between days of leisure and of work and charges for the former as a matter of course: there was no evidence before me. I am not inclined to consider jet lag. Weekend classes do occur at academic institutions and the role of professors are generally conceded to have a duality of function: teaching and research both of which may not keep ordinary workdays. It was reasonable for counsel to want to consult with him just prior to his testimony but I am unwilling, in the circumstances of this case and on the record before me, to approve a full day's fee for weekend travel. Paragraph no. 10 of the Mills affidavit indicates that Defendant's solicitor travelled to the U.K. to interview witnesses (or a witness) but does not identify the name. The Abstract of Hearing discloses only one witness from England, Dr. Laithwaite. The interview could have been with a potential witness never called: there was no evidence before me. The Bill of Costs claims \$3,411.42 for interviewing an expert witness in England. The point is simply that I took into consideration the necessity for contacts between solicitor and expert prior to testimony. At the other end of his trip, I note that he did minimize costs by leaving immediately and that, given time zone factors, his travel interfered with his weekend. However, there was no proof that said interference compromised some other professional obligation scheduled for Saturday, May 23rd and unrelated to this litigation. Dr. Laithwaite represents a business in this process: losing a weekend was a cost of doing business at least so far as Plaintiff's obligation for indemnification in this particular lawsuit is concerned. Therefore, I tax off the 1st and 8th days at \$1,555.00 per day = \$3,110.00 leaving his account allowed at \$24,797.96. As for the proof of the disbursements within his account, I allow them notwithstanding my comments below on Dr. Lavers' account.

17 In the scheme of costs, the taxing party has more of an obligation than simply to accept and pay bills without some sort of preliminary filtering process i.e. breakdown of charges by purpose, rates, hours etcetera. For \$28,890.00 in the scheme of costs, I expect to see more than exhibit B to the Mills affidavit. It may be that said exhibit was a cover page for a detailed summary: there was no evidence before me. Defendant may not have wanted to come to Court but that did not divest it or its solicitor of certain responsibilities for proof. My Reasons supra indicate that I consider zero dollars at taxation an absurd result when it was obvious that at least some dollars were necessarily spent. They do not suggest that a one line invoice, as presented here, necessarily establishes an absolute right to indemnification of the amount presented. Assessing reasonableness becomes difficult when faced

Competition Tribunal



Tribunal de la Concurrence

Reference: *The Commissioner of Competition v The Toronto Real Estate Board*, 2016 Comp. Trib. 8

File No.: CT-2011-003

Registry Document No.: 409

IN THE MATTER OF an application by the Commissioner of Competition pursuant to section 79 of the *Competition Act*;

B E T W E E N:

The Commissioner of Competition
(applicant)

and

The Toronto Real Estate Board
(respondent)

and

Canadian Real Estate Association
(intervenor)



Dates of hearing: 20120910 to 20120914, 20120918 to 20120919, 20120924 to 20120925, 20120927 to 20120928, 20121002 to 20121003, 20121009 to 20121010, and 20121017 to 20121018 (Initial hearing); 20150921 to 20150924, 20151005 to 20151007, and 20151102 (Redetermination hearing); 20160602 (Remedy hearing)

Before: P. Crampton C.J., D. Gascon J. (Chairperson) and Dr. W. Askanas

Date of order: June 3rd, 2016

ORDER FURTHER TO THE REASONS ISSUED ON APRIL 27, 2016

- (h) TREB shall implement paragraphs (b) to (g) of this Order no later than sixty (60) days from the date of this Order.
- (i) TREB shall provide the Commissioner sixty (60) days' written notice of any proposed change to its VOW Policy and Rules, agreements, or practices concerning VOWs.
- (j) Should TREB decide to pass along to its Members the costs to be incurred to comply with the terms of this Order, such costs shall be shared equally by all TREB Members.
- (k) Within thirty (30) days from the date of this Order, TREB shall pay to the Commissioner \$215,000 in respect of Tariff B legal costs, \$113,000 in respect of disbursements other than those relating to expert witnesses, and \$1,500,000 in respect of disbursements relating to expert witnesses.

DATED at Ottawa, this 3rd day of June, 2016.

SIGNED on behalf of the Tribunal by the Panel Members.

- (s) Paul Crampton C.J.
- (s) Denis Gascon J. (Chairperson)
- (s) Dr. Wiktor Askanas

Federal Court



Cour fédérale

Date: 20131126

Docket: T-1407-09

Citation: 2013 FC 1188

Vancouver, British Columbia, November 26, 2013

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

APOTEX INC.

Plaintiff

and

H. LUNDBECK A/S

Defendant

AND BETWEEN:

H. LUNDBECK A/S

Plaintiff by Counterclaim

and

**APOTEX INC. AND
APOTEX PHARMACHEM INC.**

Defendants by Counterclaim

**REASONS FOR JUDGMENT AND JUDGMENT
(ON DIRECTIONS WITH RESPECT TO COSTS)**

[1] Following a hard fought 26-day trial, I dismissed Apotex's action for the impeachment of Lundbeck's Canadian Patent No. 1,339,452 in respect of Escitalopram and maintained Lundbeck's

allegation at the opening of trial, there have been many cases where points have been dropped in mid-trial and no costs have been awarded for witnesses who were no longer required to testify.

X. Item M – Stenography

[35] Apotex says that the recent jurisprudence indicates that stenography is no longer taxed. Reference was made to *Novopharm Ltd v Jansen-Ortho Inc*, 2012 FCA 29, [2012] FCJ No 126 (QL) where there was an assessment of costs by an assessment officer. However, the assessment officer, Mr. Preston, was dealing with court reporting services on the appeal which he allowed as being reasonable and justified. His reasons do not indicate that taxation of stenography at discovery or at trial was ever in issue.

[36] As every trial lawyer knows, an accurate transcript prepared by an independent reporter is crucial. Examinations for discovery are transcribed in order to adequately and properly deal with undertakings and objections. The transcript may be used at trial as read-ins or to bring an inconsistent testimony to a witness' attention.

[37] In this case, daily transcripts of the trial were agreed. They were extensively used by counsel, and by the Court. Furthermore, one could not have a proper record on appeal without them.

[38] If any one disbursement is recoverable, this is it.

Federal Court



Cour fédérale

Date: 20201022

Docket: T-1615-18

Citation: 2020 FC 997

Ottawa, Ontario, October 22, 2020

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

FLATWORK TECHNOLOGIES, LLC
(DOING BUSINESS AS POWERBLANKET)

Plaintiff

and

SUSAN BRIERLEY

Defendant

ORDER AND REASONS

I. Introduction

[1] The Plaintiff has brought a motion for summary judgment in respect of its patent impeachment action under section 60(1) of the *Patent Act*, RSC 1985, c P-4 [the “*Act*” or “*Patent Act*”]. The Plaintiff’s position is that Canadian Patent No. 2,383,341 [the ‘341 Patent] which describes an electric heating wrap for use on articulated hydraulic booms should be declared invalid pursuant to section 62 of the *Act*.

[2] The grounds the Plaintiff relies on is that their expert evidence proves that the '341 Patent does not disclose a patentable invention. The evidence they say is that it was obvious as of the claim date so the patent is invalid pursuant to section 28(3) of the *Patent Act*. As well, the Plaintiff argues that the '341 Patent was anticipated by prior art therefore invalid pursuant to section 28(2) of the *Patent Act* and section 28.2 of the *Patent Act* due to previous disclosure of the subject-matter of the claim. The final ground the Plaintiff argued was that claim 5 of the '341 Patent was invalid because of lack of utility under section 2 of the *Patent Act*. Alternatively, the Plaintiff argues that '341 Patent's validity should be determined by way of a summary trial.

[3] This matter proceeded over the course of two days by a virtual hearing.

II. Background

A. *The parties*

[4] The Plaintiff Flatwork Technologies, LLC [Flatwork] is a corporation registered in Nevada with a primary office in Utah. Flatwork carries out business manufacturing heating blankets as well as other heating and cooling solutions.

[5] The Defendant Susan Brierley [Ms. Brierley] is a businessperson living in Wetaskiwin, Alberta. She explained at the hearing that she worked operating heavy equipment in northern British Columbia including at very cold job sites and developed the '341 Patent to keep articulated hydraulic booms operating in cold temperatures. Ms. Brierley is self-represented and very ably represented herself.

[127] I do not accept that Ms. Brierley's contrary positions in the Federal Court and Alberta actions were malicious, and at the hearing Ms. Brierley acknowledged the articulated hydraulic boom is an essential element of her patent. Some of the issues about unnecessary litigation steps are a result of Ms. Brierley being self-represented. The patent itself and the litigation was not complex and it was determined on a summary basis. However, other steps such as assigning the patent to the Belize corporation then assigning it back to herself and bringing motions that she later abandoned did add unnecessary costs. Ms. Brierley in her submissions provided a letter dated January 16, 2019 where the Flatwork agreed not to pursue her for costs of a Motion to Strike if she abandoned it, which she did, and Flatwork did not seek costs of defending this abandoned motion. It should be remembered that Ms. Brierley began the dispute between the parties by suing Flatwork in Alberta for infringing her patent and certainly represented herself in a forceful competent manner. I find \$40,000.00 inclusive of taxes to be an appropriate lump sum for fees for these reasons. This does not include disbursements which are dealt with below.

[128] I have also reviewed the Plaintiff's disbursements including for expert fees and photocopying and I find the disbursements of \$13,996.72 put forward by the Plaintiff are reasonable. Adding these total disbursements to the costs discussed above, I will be awarding a lump sum costs award of \$53,996.72 inclusive of taxes and disbursements.

X. Conclusion

[129] I therefore grant Flatwork's motion for summary judgment because the '341 Patent is obvious and there is no genuine issue for trial. The '341 Patent is of no force and effect, and CIPO is to void the '341 Patent pursuant to sections 60(1) and 62 of the *Patent Act*.

CT-2019-005

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF the acquisition by Parrish & Heimbecker, Limited of certain grain elevators and related assets from Louis Dreyfus Company Canada ULC;

AND IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the *Competition Act*.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- **AND** -

PARRISH & HEIMBECKER, LIMITED

Respondent

BOOK OF AUTHORITIES

BORDEN LADNER GERVAIS LLP

Bay Adelaide Centre, East Tower
22 Adelaide Street West, 34th Floor
Toronto, ON M5H 4E3

Robert S. Russell
Davit Akman

Lawyers for the Respondent, Parrish & Heimbecker, Limited