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.

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REASONS FOR JUDGMENT

RENNIE J.A.

I. Introduction

[1] Nova Chemicals Corporation (Nova) appeals from the Judgment of the Federal Court which awarded The Dow Chemical Company, Dow Global Technologies Inc. and Dow Chemical Canada ULC (collectively, Dow) $6.5 million for costs consequent to Dow's success

in an action for patent infringement (2014 FC 844, affirmed 2016 FCA 216). The lump sum award was comprised of $2.9 million for legal fees and $3.6 million for disbursements.

II. Federal Court decision

[2] In the Federal Court, Dow asked for costs above the amounts provided by Tariff B of the *Federal Courts Rules* (S.O.R./98-106). It sought a lump sum award of $6.5 million: $2.9 million in legal fees (which represented 30% of its actual legal fees of $9.6 million) plus $3.6 million in disbursements. In the alternative, Dow asked for a lump sum between $4.7 million and $6.5 million, the former amount including the same disbursements, but with the amount for legal fees based on Column V of Tariff B. Nova opposed, contending that both the record and the evidence Dow had provided were insufficient to substantiate Dow's request for a lump sum. Nova requested that costs be assessed, with specific directions to the assessment officer to address a number of concerns raised by Nova.

[3] In reasons cited as 2016 FC 91, the judge characterized the trial proceeding as "an extremely complex patent case involving much expert testimony." He noted that there were 22 allegations of invalidity, 33 days of discovery and 32 days of trial. The written submissions at the end of the trial exceeded 700 pages in length and the closing argument lasted three days. The judge noted that both parties undertook extensive and scientifically-complex testing of the materials that were at the heart of the patent dispute. The judge found legal fees allowable under Column V of Tariff B, which would have awarded an amount equivalent to 11% of Dow's legal costs, to be "totally inadequate."

[4] Based on these considerations, the judge concluded that an increased award of costs was justified. The judge then considered whether costs should be fixed as a lump sum, as urged by Dow, or assessed by an assessment officer, as urged by Nova. He held that an assessment would "serve no purpose," given the extensive submissions made by both parties and the anticipated additional time and expense of an assessment of costs. He concluded that an amount representing 30% of Dow's actual legal costs and approximately three times what would be available under the Tariff was reasonable.

[5] The judge then considered Nova's submission that Dow's disbursements had not been "proven" as required by subsection 1(4) of Tariff B. In particular, Nova objected to the lack of a supporting affidavit and its inability to cross-examine and test Dow's claim for a disbursement of $1.6 million, said to represent the costs to Dow of testing the infringing product in-house. The judge dismissed Nova's objection, noting that, similar to the practice on assessment, "the solicitor could have established the amount of the disbursements" without an affidavit. The judge was satisfied that the information provided by Dow, specifically the Bill of Costs and the attached schedules, was sufficient to allow him to determine the reasonableness of the amount. He awarded the full $3.6 million in disbursements, holding that Dow had provided "sufficient detail" to allow him to grant the disbursements on the basis that they were reasonable.

III. Analysis

[6] The decision of this Court in *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, confirms that the standard of review on appeal of discretionary decisions of the Federal Court is that articulated by the Supreme Court of Canada in *Housen v.*

Nikolaisen, 2002 SCC 33, [2002] 2 S.C.R. 235, namely of palpable and overriding error in respect of findings of fact and mixed fact and law, and correctness with respect to extricable questions of law. As described below, Nova asserts two errors said to warrant this Court's intervention.

[7] First, Nova submits that costs awards should be guided by the standards established in Tariff B, and that any departures from the Tariff should be limited to exceptional cases. Nova also asserts that, by itself, the fact that a successful party's legal costs exceed the Tariff does not justify departing from the Tariff. It contends that the judge erred in awarding costs based on a percentage of Dow's actual fees, in particular because it alleges that the judge did not analyze whether the amount of time billed by Dow's lawyers was reasonable or warranted, or whether Dow's actual fees (on which the percentage amount was based) included improperly claimed items.

[8] Secondly, Nova takes issue with the sufficiency of evidence before the judge in respect of both the fees and disbursements claimed. It submits that "[i]t is inappropriate for the Court to award a lump sum on the basis of mere assertions of the amounts spent without evidence or explanation," and that the judge was not entitled to conclude that Dow's legal costs were reasonable merely because Nova did not present information on its actual incurred legal fees. Nova also argues that the judge was required to consider whether the services rendered for the fees claimed were "reasonably necessary in the circumstances," and that the judge did not have evidence sufficient to conduct a critical examination of the record in order to come to an informed decision on this requirement. Nova submits that the evidentiary record before a judge

determining costs should be akin to that which would be put before an assessment officer to properly exercise his discretion, and that, because the evidence in this case was insufficient, the judge erred in not referring the matter to an assessment.

[9] Although Nova's submissions point to concerns that could have been better addressed by the judge, I am not persuaded that the judge erred in awarding costs in a lump sum, or in fixing them as a percentage of Dow's actual expenses. Nor am I persuaded that the judge erred in allowing the disbursement for testing without a supporting affidavit. Before explaining why I reach these conclusions, it is important to review first principles.

A. ***Lump sum awards – generally***

[10] Rule 400(1) of the *Federal Courts Rules* gives the Court "full discretionary power over the amount and allocation of costs". This has been described to be the "first principle in the adjudication of costs": *Consorzio del prosciutto di Parma v. Maple Leaf Meats Inc.*, 2002 FCA 417, [2003] 2 F.C.R. 451, at para. 9 [*Consorzio*].

[11] Rule 400(4) expressly contemplates an award of costs in a lump sum in lieu of an assessment of costs pursuant to Tariff B:

400 (4) The Court may fix all or part of any costs by reference to Tariff B and may award a lump sum in lieu of, or in addition to, any assessed costs.	400 (4) La Cour peut fixer tout ou partie des dépens en se reportant au tarif B et adjuger une somme globale au lieu ou en sus des dépens taxés.

Lump sum awards have found increasing favour with courts, and for good reason. They save the parties time and money. Lump sum costs awards further the objective of the *Federal Courts*

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.

[17] A review of the case law indicates that increased costs in the form of lump sum awards tend to range between 25% and 50% of actual fees. However, there may be cases where a higher or lower percentage is warranted.

[18] When a party seeks a lump sum award based on a percentage of actual legal fees above the amounts provided for in the Tariff, as a matter of good practice the party should provide both a Bill of Costs and evidence demonstrating the fees actually incurred. As well, a sufficient description of the services provided in exchange for the fees should be given to establish that it is appropriate that the party be compensated for those services. What is required is sufficient evidence of the nature and extent of the services provided so that a party can make an informed decision whether to settle the fees or contest and that the Court can be satisfied that the actual fees incurred and the percentage awarded are reasonable in the context of the litigation.

[19] While, as noted above, a judge fixing costs on a lump sum basis has a wide discretion, the discretion is not unfettered. As noted, it is not a matter of plucking a number out of the air. The discretion must be exercised prudently. The criteria set forth in Rule 400(3), the case law and the objectives that underlie awards of costs are all relevant considerations. Efficiency in the administration of justice is one value that underlies lump sum awards, but costs must also be predictable and consistent so that counsel can properly advise and clients can make informed decisions about litigation risks. The ability to forecast cost consequences also bears both on the ability of parties to settle and on the question of access to the courts.

(2) Disbursements

[20] Disbursements must be, in the language of the Tariff, “reasonable”. This requires that they be justified expenditures in relation to the issues at trial. Where disbursements are outside of the knowledge of the solicitor, they should generally be accompanied by an affidavit such that the Court can be satisfied that they were actually incurred and were reasonably required.

C. *Application*

(1) Legal fees

[21] Nova submits that there was insufficient evidence on the record to establish that the services for which Dow’s actual legal fees were incurred were reasonable. However, the parties to this litigation are sophisticated corporations which chose to engage in complex, lengthy, contentious litigation. The judge considered that the award of a lump sum award would avoid the parties incurring additional costs and time spent were an assessment undertaken. I see no error of law or palpable and overriding error of fact on the part of the judge in deciding to depart from the Tariff amounts and to fix the increased award as a lump sum based on 30% of Dow’s actual legal fees. The selection of the appropriate percentage of an increased costs award is a matter for the judge, who, as here, is in a good position to assess the evidentiary and legal complexity of the trial, the result of the action, the conduct of the parties and other considerations relevant to the assessment of costs. The judge turned his mind to the criteria under Rule 400(3), which remain useful beacons in the selection of a lump sum award. The determination of a lump sum is not an exact science, but reflects the amount the Court considers to be a reasonable contribution to the successful party’s actual legal fees: *Consorzio*, at para. 8.

[22] Further, the record before a trial judge hearing a costs motion is not confined to the motion materials, but includes all of the trial and pre-trial matters over which he or she presided. Here, the judge had an intimate knowledge of the case. The judge was provided with both a Bill of Costs, as well as a summary of Dow's actual solicitor-client fees. The award of 30% of the fees incurred by Dow took into account Nova's complaints that certain steps ought not to have been part of the costs award, and avoided the need for the parties to undertake the costly exercise of parsing out such steps. The judge was satisfied that the percentage of fees requested as a lump sum were actually incurred and reasonable in the circumstances.

(2) Disbursements

[23] Nova submits that affidavit evidence was necessary to substantiate the in-house testing costs as such evidence was not adduced at trial and was outside of the judge's knowledge. More particularly, Nova contends that the judge erred in finding that Dow's solicitors would have been able to substantiate the impugned disbursements as required under Tariff B subsection 1(4), as the associated costs of in-house testing would be outside of their knowledge.

[24] Nova also submits that Dow should not have been allowed to recover for overhead costs that may have been embedded in the disbursement, and that the evidence lacked sufficient detail to determine whether costs for those items were being claimed or were reasonable. It argues that the judge erred in determining reasonableness of the disbursements based on the irrelevant consideration of whether testing by a for-profit facility would have been more costly.

[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.

However, the judge heard these concerns and was not satisfied that they altered the reasonableness of the disbursement. In the particular circumstances of this case, I see no error of law or palpable and overriding error on the part of the judge.

IV. Conclusion

[27] I would dismiss the appeal with costs.

"Donald J. Rennie"
J.A.

"I agree
Eleanor R. Dawson J.A."

"I agree
J. Woods J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE FEDERAL COURT FOR REASONS DATED January 14, 2016 (confidential) and January 22, 2016 (public) No. T-2051-10 (2016 FC 91)

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STYLE OF CAUSE:	NOVA CHEMICALS CORPORATION V. THE DOW CHEMICAL COMPANY ET AL
PLACE OF HEARING:	TORONTO, ONTARIO
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REASONS FOR JUDGMENT BY:	RENNIE J.A.
CONCURRED IN BY:	DAWSON J.A. WOODS J.A.
DATED:	FEBRUARY 6, 2017

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