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.

[2] CCM now seeks costs in the amount of $1,948,372, based on a percentage of its actual legal fees, as well as disbursements in the amount of $1,394,871. CCM divides the proceedings into three periods and suggests different percentages of recovery for each. The initial percentage would be 35%. It would then increase to 50% for the period after Bauer's amendment of its claim, and then to 66% for the period after Bauer refused CCM's offer to settle the matter.

[3] For its part, Bauer denies that costs on a lump sum basis are appropriate. It says that it should only be condemned to pay costs according to the Tariff set out in Schedule B to the *Federal Courts Rules,* SOR/98-106 [the *Rules*]. Furthermore, Bauer submits that CCM's fees are unreasonable and that it should be compensated for only a percentage of certain categories of disbursements. This, in Bauer's view, should result in an award of approximately $1.1 million. Moreover, if this Court grants a higher amount, Bauer requests that the award be made payable in instalments, to help it cope with the financial consequences of the COVID-19 pandemic.

[4] These are my reasons for awarding a lump sum of $2,517,590, inclusive of disbursements. This amount reflects a base percentage of 25% of legal fees, which increases to 50% for fees incurred after Bauer's refusal of CCM's offer. As explained below, I am making certain deductions, mainly because CCM failed to produce accurate financial information on a timely basis and unnecessarily duplicated its technical expert evidence. I am also denying Bauer's request to make the award payable by instalments.

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),

	la Cour peut tenir compte de l'un ou l'autre des facteurs suivants:
[…]	[…]
(i) any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding;	(i) la conduite d'une partie qui a eu pour effet d'abréger ou de prolonger inutilement la durée de l'instance;
(j) the failure by a party to admit anything that should have been admitted or to serve a request to admit;	(j) le défaut de la part d'une partie de signifier une demande visée à la règle 255 ou de reconnaître ce qui aurait dû être admis;
(k) whether any step in the proceeding was:	(k) la question de savoir si une mesure prise au cours de l'instance, selon le cas:
(i) improper, vexatious or unnecessary, or	(i) était inappropriée, vexatoire ou inutile;
(ii) taken through negligence, mistake or excessive caution;	(ii) a été entreprise de manière négligente, par erreur ou avec trop de circonspection;

[17] The manner in which these factors are taken into consideration may vary depending on whether costs are assessed according to the tariff or in a lump sum. Where a lump sum is awarded, the result of many litigation choices is already reflected in the base amount of the calculation: *Seedlings*, at paragraph 25. For example, if a party fails to admit facts that should have been admitted, this presumably results in an increase of the other party's legal fees. This increase is less likely to be captured if costs are assessed according to the tariff.

[18] Moreover, one should always remain conscious of the difficulties associated with judging litigation conduct. After a judgment on the merits is rendered, it is tempting to criticize steps

taken by the parties in the proceedings with the benefit of hindsight. During the trial, however, parties must make decisions in a state of uncertainty. They do not know what amount of evidence will be judged sufficient. They advance alternative arguments to which the other party will want to respond, even though the Court may ultimately not address the issue. Tactical decisions may be made for reasons not disclosed to the judge. In addition, the trial judge may not be in a good position to assess pre-trial proceedings, which are supervised by another judge or a prothonotary.

[19] In this regard, Bauer invited me to impose sanctions on CCM for failing to embrace the "culture shift" mandated by the Supreme Court of Canada in *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 [*Hryniak*]. In that case, the Supreme Court indicated that access to justice is jeopardized if the complexity of the judicial process makes it inaccessible to ordinary Canadians. The Court suggested that the principle of proportionality should guide procedural decisions and that judges should "actively manage the legal process in line with the principle of proportionality:" *Hryniak*, at paragraph 32. Indeed, at the Federal Court, active case management plays a crucial role in achieving proportionality. Moreover, on two or three occasions during this trial, I expressed the view that some matters ought to be resolved by discussions between the parties, or that certain facts should be admitted instead of being the subject of testimony. I even invited the parties to consider *Hryniak*'s culture shift.

[20] This does not mean, however, that the assessment of costs must become a detailed autopsy of the trial. Unlike hockey referees, trial judges are not expected to keep a tally of penalties to be reflected in a costs award. As I mentioned above, judging litigation conduct – in

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

disentitles it from claiming a lump sum. I disagree with Bauer. Litigation conduct is taken into account when determining the percentage of recovery. Assuming that it may also disentitle a party from claiming a lump sum, I am not persuaded that CCM acted in a way that makes an award according to the tariff more appropriate, for reasons that I will explain later.

C. *Reasonableness of CCM's Fees*

[24] In most cases, a lump sum is calculated as a percentage of the successful party's reasonable legal fees. Thus, the first step of the analysis is to assess the reasonableness of these costs. As I indicated in *Seedlings*, at paragraphs 13-17, judges must proceed with caution, as they do not know all the factors considered by the parties in making litigation choices and deciding how much they are prepared to spend. There is no rigid rule that both parties must spend roughly equal amounts or that a party's legal fees must stand the comparison with other reported cases.

[25] CCM spent $3,670,208 in legal fees to defend Bauer's claim. This amount includes deductions for work related to motions for which costs were awarded separately or no costs were awarded. I agree that an additional deduction of $30,000 must be made to reflect work on motions that CCM failed to identify in its initial submissions.

[26] I am of the view that CCM's fees are reasonable. Bauer does not explicitly dispute this. Although in the abstract, $3.6 million is a substantial amount, it must be compared to the amount claimed by Bauer, which was a little over $80 million. The fact that Bauer's legal expenses were slightly inferior does not render CCM's fees unreasonable. It may well be that the stakes for

Bauer were lower or that Bauer benefited from economies of scale by reusing materials prepared for a previous case.

[27] The main contentious issue is not CCM's fees, but the percentage of recovery. I now turn to the factors that may justify departing from the starting point of 25%.

D. *Complexity*

[28] CCM argues that the complexity of the case warrants a higher percentage, namely 35%. I disagree. CCM invokes the wide range of products that were accused of infringing and the fact that Bauer sought both a reasonable royalty and an accounting of profits. These factors, however, likely resulted in higher legal and expert fees. This will result in a higher costs award. As I mentioned in *Seedlings*, at paragraph 25, it is not necessary to increase the percentage of recovery to take these factors into account.

E. *Bauer's Litigation Conduct*

[29] CCM argues that it should be entitled to a higher percentage owing to Bauer's litigation conduct. More specifically, CCM complains that Bauer amended its claim to include a large number of additional skate models, only to withdraw many of them a few months later; that Bauer's refusal to bifurcate the proceedings resulted in the waste of the portion of the trial devoted to remedies; and that Bauer engaged in other forms of conduct that unnecessarily delayed the trial.

[30] The difficulty with the first two complaints is that my colleague Prothonotary Mireille Tabib allowed Bauer's motion for amendment and dismissed CCM's request for bifurcation. Her decision was confirmed by my colleague Justice Roger R. Lafrenière. Prothonotary Tabib's reasons belie any claim that the amendment was unreasonable. She also notes that CCM failed to ask for bifurcation in a timely manner.

[31] To the extent that CCM incriminates Bauer's subsequent withdrawal of many skate models from its claim, this is exactly the kind of reasoning based on hindsight that should play little role in costs awards. In any event, any expenses incurred by CCM as a result of the inclusion, and later withdrawal, of certain skate models from Bauer's claim are reflected in the amount of legal fees that provides the base amount for the calculation of the lump sum.

[32] CCM also alleges that Bauer introduced repetitive evidence, called certain witnesses at the last minute and brought an unnecessary rule 153 motion at the very end of the trial. My decision on the merits rendered parts of this evidence irrelevant and this motion moot. My role in awarding costs, however, is not to engage in an autopsy of the trial and criticize retrospectively the parties' tactical decisions. To the extent that they lengthened the trial, Bauer's decisions are reflected in CCM's legal fees. I fail to see anything that rises to the level of vexatious or improper conduct, which would warrant stronger consequences.

F. *CCM's Offer to Settle*

[33] On January 13, 2020, 21 days before the beginning of the trial, CCM made an offer to Bauer to settle the matter for $500,000. Bauer refused and the matter proceeded to trial. Based on

rule 420, CCM argues that the percentage of recovery should be increased to 66% for costs incurred after the offer was made.

[34] In response, Bauer argues that rule 420 applies only where costs are assessed according to the tariff and that a lump sum award already incorporates an elevation of costs associated with the refusal of an offer that proved to be more advantageous than the judgment. It also contends that CCM's offer should be given very little weight, because it had every reason to believe that it would obtain a judgment substantially more favourable than the offer.

(1) Rule 420 and Lump Sum Awards

[35] In its relevant part, rule 420 reads as follows:

(2) Unless otherwise ordered by the Court and subject to subsection (3), where a defendant makes a written offer to settle,	(2) Sauf ordonnance contraire de la Cour et sous réserve du paragraphe (3), si le défendeur fait au demandeur une offre écrite de règlement, les dépens sont alloués de la façon suivante:
[…]	[…]
(b) if the plaintiff fails to obtain judgment, the defendant is entitled to party-and-party costs to the date of the service of the offer and to costs calculated at double that rate, but not double disbursements, from that date to the date of the judgment.	(b) si le demandeur n'a pas gain de cause lors du jugement, le défendeur a droit aux dépens partie-partie jusqu'à la date de signification de l'offre et, par la suite et jusqu'à la date du jugement, au double de ces dépens mais non au double des débours.

[36] This provision does not set aside the Court's discretion regarding costs – it applies "unless otherwise ordered." Nevertheless, the language of "entitlement" suggests that it is a rule that should ordinarily be followed. There is good reason for this. The purpose of rule 420 is to provide an incentive to settlement. This incentive will be ineffective if the doubling of costs is subject to unstructured discretion. Rather, the consequence must be visible and reasonably certain.

[37] Bauer points to certain cases where the refusal of a better offer would have been merely one factor among many that led to the awarding of a lump sump. In *Teva*, at paragraphs 16-18 and 39, Justice George R. Locke, then a member of this Court, awarded a lump sum determined by comparison with costs assessed according to the top of column V of the tariff. Nevertheless, in performing this exercise, he applied rule 420 and explicitly doubled the costs in respect of expenses incurred after the offer was refused. However, this did not result in a percentage of recovery higher than 25%. Likewise, in *Safe Gaming System Inc v Atlantic Lottery Corporation*, 2018 FC 871, the award was for a round figure approximating 25% of actual legal fees, but the methodology employed does not clearly reveal how the refusal of an offer was factored in.

[38] With respect, I prefer to adopt an approach that makes the consequences of refusing an offer visible and predictable. Thus, in my view, when rule 420 applies, the percentage of recovery should be doubled for the period after the refusal of an offer, save in exceptional circumstances.

(2) Did the Offer Contain an Element of Compromise?

[39] Rule 420 requires that the offer be made in writing, at least 14 days before the beginning of the trial and that it remain open for acceptance until that moment. In addition, case law adds that the offer must be genuine – it must include an element of compromise – and bring litigation to an end: *Venngo Inc v Concierge Connection Inc (Perkopolis)*, 2017 FCA 96 at paragraph 87.

[40] Bauer does not deny that CCM's offer complies with rule 420. Indeed, it puts forward an assessment pursuant to the tariff that includes a doubling of costs. Rather, Bauer submits that its refusal of CCM's offer should have very little weight in the determination of a lump sum, essentially because it genuinely believed that it would win the case and the amount offered was substantially less than what had already been invested in legal fees on the eve of the trial.

[41] I have no doubt that CCM's offer included an element of compromise and complied with rule 420. While Bauer claimed approximately $80 million, CCM's offer of $500,000 was explicitly based on a defensible line of reasoning. The main hypothesis behind CCM's offer is that only "Category C" skates infringe Bauer's patent, if that patent is valid. This is indeed the conclusion I reached in my judgment on the merits. The issue then becomes one of compensation. In terms of sales revenue, "Category C" skates amount to less than 5% of the skates at issue. Assuming the opinions of Bauer's experts are accepted in their integrality, the accounting of profits for those skates would amount to approximately $4 million. CCM's financial experts opined that a reasonable royalty would be at most $0.50 for each pair of skates – approximately $130,000 in total. CCM offered approximately $2 per pair of skates. Moreover,

CCM's offer assumed that its arguments in respect of the invalidity of the patent and Bauer's entitlement to compensation would fail.

[42] The fact that the offer is for a small fraction of the claimed amount is not, in itself, grounds for finding that it does not contain an element of compromise: *Leuthold*. It may well be that an offer for a small amount will be less attractive to the other party, especially where a large investment in the case has already been made, but it is also less likely to trigger the doubling of costs contemplated by rule 420. Ultimately, these are tactical considerations for the parties when making offers and deciding whether to accept them or not. The parties' decisions are based on their assessment of their chances of winning and the value of the claim. By nature, this assessment is probabilistic. By raising the stakes, however, rule 420 prompts the parties to be as objective as possible, although some uncertainty inevitably remains. Quite simply, the doubling of costs provided by rule 420 does not depend on an after-the-fact evaluation of the reasonableness of the parties' positions. All that matters is that the offer be genuine and contain an element of compromise. In this case, it did.

[43] As a result, the percentage of recovery for fees incurred after January 13, 2020, will be increased from 25% to 50%.

G. *CCM's Litigation Conduct*

[44] Bauer argues that CCM's percentage of recovery should be lowered because of its conduct before and during the trial. In particular, Bauer criticizes CCM's unsuccessful motion and appeals regarding Bauer's entitlement to compensation in relation to events before Bauer's

corporate restructuration in 2017, as well as CCM's unsuccessful opposition to Bauer's motion for amendment and insistence on bifurcation. Bauer also alleges that CCM failed to provide information it had in its possession during the discovery process and took a number of rigid or unreasonable stances on a variety of procedural or evidentiary issues over the course of the trial.

[45] I note that my colleagues who heard the pre-trial motions and appeals expressed the view, sometimes using strong language, that CCM's position was entirely devoid of merit. Costs were awarded against CCM in most, if not all of those decisions. Beyond the time necessary to deal with these motions and appeals, however, CCM's position did not result in the lengthening of the trial or increased costs. If Bauer was of the view that CCM's conduct warranted elevated costs, it had to make the argument before my colleagues who decided these motions and appeals.

[46] Bauer put significant emphasis on CCM's alleged failure to produce accurate financial information on a timely basis during the discovery stage. For example, in 2019, CCM replaced the sales information it had already disclosed with an entirely new data set; it produced existing license agreements at a very late stage; and some model codes were not included in the financial disclosure. Bauer asserts that in doing so, CCM purposely concealed relevant information.

[47] On the record before me, I am not prepared to ascribe improper motive to CCM. Nonetheless, taking a global perspective of the case, I am of the view that CCM should have taken more care to ensure that the information disclosed was accurate. On that account, I will deduct $50,000 from the costs award.

[48] Beyond that, Bauer also alleges that, on a number of occasions, CCM acted unreasonably or in a manner that unnecessarily lengthened the proceedings. This includes instances where CCM failed to cooperate to reach agreement on facts or the joint book of documents or failed to have witnesses ready when the trial schedule was slightly modified. Earlier in these reasons, I examined similar accusations levelled by CCM against Bauer. I expressed the view that I did not have to perform a detailed autopsy of the trial and that the impugned conduct did not rise to a level warranting cost consequences. The same thing applies here.

II. Disbursements

[49] CCM claims for its disbursements in the amount of $1,394,871. This includes mainly CCM's experts' fees, as well as fact witnesses' fees and disbursements, transcripts, costs of physical skates, office expenses, travel expenses and translation. Bauer challenges certain aspects of this claim, in particular the reasonableness of CCM's experts' fees and certain other disbursements. I will review Bauer's objections in turn.

A. *Technical Experts*

[50] CCM called three expert witnesses on issues of validity and infringement. Bauer argues that their evidence was unnecessarily duplicative. I agree. As a result, I will reduce their recoverable fees by $50,000.

B. *Financial Experts*

[51] Bauer challenges the amounts claimed by CCM in respect of its financial experts for a number of reasons: their fees are higher than those of Bauer's experts; the hourly rate of one of them was higher than that of CCM's lead counsel; and they made "errors" in their reports.

[52] It is difficult to assess the reasonableness of the fees charged by a party's expert witnesses. In some instances, such as the one I mentioned above, it is obvious to the trial judge that certain expenses were unnecessary. In other cases, we seek objective benchmarks, such as a comparison to the other party's fees or to the lead counsel's hourly rate. However, these comparisons are only guidelines. As the comparators are themselves the product of many factors, the comparisons are bound to be imperfect. This illustrates the general observation that the assessment of costs and disbursements is "often likely to do no more than rough justice between the parties:" *Apotex Inc v Merck & Co Inc*, 2008 FCA 371 at paragraph 14.

[53] Thus, the mere fact that Bauer's financial experts charged approximately 20% less than CCM's does not indicate that their fees were unreasonable.

[54] One of CCM's experts charged an hourly rate of $925 (in 2019) or $950 (in 2020). This exceeds the hourly rate of CCM's lead counsel. In other cases, the lead counsel's hourly rate has been used as a cap on the financial expert's hourly rate: *Seedlings*, at paragraph 28, and the cases cited therein. However, CCM's lead counsel hourly rate is significantly lower than the one that served as a benchmark in *Seedlings*. Moreover, the hourly rate charged by Bauer's lead counsel

exceeds $950. CCM should not be penalized for retaining a lawyer charging a lower rate. In these circumstances, I do not think that a reduction is warranted.

[55] Bauer also contends that CCM's experts' fees should be reduced on account of "errors" contained in their reports. A distinction should be drawn, however, between disagreement and error. The purpose of a costs award is not to dissect the positions advanced by the parties at trial and assess their correctness. In *Seedlings*, at paragraph 31, I suggested that expert fees should be discounted only when it was unreasonable or excessive for a party to rely on the testimony of an expert. The rejection of an aspect of an expert's testimony, in the judgment on the merits, does not rise to this high threshold. In this case, the financial experts disagreed on a wide range of subjects. Given the view I took of the case, I did not find it necessary nor useful to make findings regarding their evidence in my judgment on the merits. At this stage of the proceedings, I will confine myself to saying that the financial experts legitimately disagreed with each other, but there was nothing in the substance of their evidence that warrants a reduction in their fees.

[56] I agree with Bauer, however, that the portion of an expert's fees related to attendance to portions of the trial unrelated to his evidence and attendance of a colleague at trial should be disallowed. Accordingly, I am deducting $15,000.

C. *Translation Fees*

[57] CCM claims $12,139 in respect of translation costs. It says that it needed to translate from French to English some of Bauer's expert reports and the transcript of Mr. Chênevert's discovery, to enable its unilingual experts to review them. Bauer objects, arguing that "A party

cannot be penalized (including by being ordered to pay translation costs) for their use of one of the official languages."

[58] Some decisions of this Court have disallowed similar expenses: *Canadian Olympic Association v Olympic Denture Cleaner Inc*, 1997 CanLII 5114 (FC); *Maison des Pâtes Pasta Bella Inc v Olivieri Foods Ltd*, 1999 CanLII 7495 (FC); *Kraft Canada Inc v Euro Excellence Inc*, 2006 FC 452. Other decisions reached the opposite result, apparently without considering the foregoing decisions: *Eli Lilly Canada Inc v Apotex Inc*, 2015 FC 1165 at paragraph 22; *Eli Lilly Canada Inc v Teva Canada Ltd* (T-1048-07), 12 June 2017.

[59] I am of the view that this expense should be disallowed. The situation cannot be compared to the cost of translation from foreign languages, which is easily recognized as a necessary disbursement. English and French, however, are the official languages of Canada. Translation will often be required, as many Canadians speak only one official language. Nevertheless, every Canadian may choose to use English or French in proceedings before this Court: *Canadian Charter of Rights and Freedoms*, s 19(1); *Official Languages Act*, RSC 1985, c 31 (4th suppl), s 14. A person exercising that right should not bear the burden of translating his or her statements in the other language, whether directly or by way of a costs award. Were it otherwise, it is obvious that such a shifting of translation costs would not operate in a symmetrical fashion and would amount, in most cases, to a tax on the use of French.

III. Payment by Instalments

[60] Bauer also makes a particular request. In the event that a lump sum is awarded, it asks that the obligation to pay it be spread evenly over a period of twelve months. In support of this request, Bauer provides the affidavit of its General Counsel and Corporate Secretary. She states that the sporting goods industry has been severely impacted by measures taken to fight the COVID-19 pandemic. In particular, the hockey industry has come to an almost complete halt and most arenas in North America are closed for an indeterminate period. This was foreshadowed by the National Hockey League's suspension of its regular season, announced on the last day of the trial.

[61] However, in response to questions asked by CCM, Bauer recognized that it currently has sufficient assets to pay $3.3 million to CCM and the ability to borrow the same sum at a rate of interest of LIBOR plus 1.75%.

[62] The basic principle is that judgment debts are payable forthwith. This also applies to costs awards. Indeed, Bauer is unable to cite any precedent where a costs award was made payable by instalments. Rather, in *Leuthold*, at paragraph 12, the Federal Court of Appeal suggested that "a party's impecuniosity is not a relevant factor in the assessment of costs […] Issues of enforceability are distinct from issues of entitlement."

[63] CCM argues that Bauer's request amounts to a motion for a stay of this costs award. Assuming that this is the correct way of analyzing it, Bauer's request fails on the facts. I have

much sympathy for businesses affected by the COVID-19 pandemic. However, a stay could only be requested on the basis of much more precise evidence regarding the debtor's financial situation. Yet, Bauer provides no evidence whatsoever as to its financial situation. What we know is that it has the ability to satisfy this costs award, either out of its own assets or by borrowing. That admission undercuts any argument that the obligation to pay should be spread over a period of time.

[64] Considerations of principle also lead me to deny Bauer's request. It must be assumed that the situation described by Bauer affects all players in the sporting goods industry, including CCM. One fails to see why the financial burden of the costs award should be borne, for the next year, by the party who won the case, even though it must be equally affected by the COVID-19 pandemic. In litigation involving two large businesses competing against each other, the successful party should not be compelled to compromise recovery of money owed to it to help the other party improve its financial situation.

[65] Thus, Bauer's request that this award be made payable by instalments is denied.

IV. Summary

[66] My award of costs in this case can be summarized in the following table.

Costs

CCM's legal fees before January 13, 2020 (less $30,000 in respect of motions)	$2,236,985	
Percentage of recovery	25%	$559,246

CCM's legal fees after January 13, 2020	$1,403,223	
Percentage of recovery	50%	$701,612
Deduction for failure to provide accurate financial information		($50,000)
Disbursements		
CCM's total disbursements		$1,394,871
Deduction for unnecessary duplication of technical expertise		($50,000)
Deduction regarding financial expertise		($15,000)
Deduction regarding translation costs		($12,139)
Outstanding costs awards in favour of Bauer		($11,000)
Total amount		**$2,517,590**

[67] With respect to post-judgment interest, I recently concluded that under present circumstances, a rate of 2.5% per year was reasonable: *Seedlings*, at paragraphs 35-40. I am not aware of any subsequent change of circumstances that would affect my conclusion.

ORDER in T-546-12

THIS COURT'S JUDGMENT is that:

1. The plaintiff is condemned to pay costs in the amount of $2,517,590 to the defendant, inclusive of taxes and disbursements.

2. The plaintiff is condemned to pay post-judgment interest calculated on a simple basis at a rate of 2.5% *per annum* from the date of this order.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-546-12
STYLE OF CAUSE:	BAUER HOCKEY LTD. v SPORT MASKA INC. DOING BUSINESS AS CCM HOCKEY
ORDER AS TO COSTS AND REASONS:	GRAMMOND J.
DATED:	AUGUST 28, 2020

APPEARANCES:

François Guay Jeremy Want Jean-Sébastien Dupont Matthew Burt Élodie Dion	FOR THE PLAINTIFF
Jay Zakaïb Frédéric Lussier Erin Creber Alexander Camenzind Cole Meagher	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Smart & Biggar Barristers and Solicitors Montréal, Quebec	FOR THE PLAINTIFF
Gowling WLG (Canada) LLP Barristers and Solicitors Ottawa, Ontario	FOR THE DEFENDANT