Federal Court  Cour fédérale

Date: 20210422

Docket: T-227-17

Citation: 2021 FC 357

Ottawa, Ontario, April 22, 2021

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

DTECHS EPM LTD.

Plaintiff/
Defendant by Counterclaim

and

BRITISH COLUMBIA HYDRO AND POWER AUTHORITY AND AWESENSE WIRELESS INC.

Defendants/
Plaintiffs by Counterclaim

ORDER AND REASONS
(COSTS)

I. Overview

[1] This order concerns the costs and disbursements payable to British Columbia Hydro and Power Authority [BC Hydro] and Awesense Wireless Inc [Awesense] by dTechs epm Ltd

[dTechs] as a result of this Court's judgment in *dTechs epm Ltd v British Columbia Hydro and Power Authority*, 2021 FC 190 [*dTechs*].

[2] This Court held in *dTechs* that Canadian Patent 2,549,087 [087 Patent], titled "Electrical Profile Monitoring System for Detection of Atypical Consumption", is not infringed by BC Hydro or Awesense, individually or together, and is invalid on the grounds of anticipation and obviousness. dTechs' claim of infringement was dismissed, and BC Hydro's and Awesense's counterclaims respecting invalidity were granted.

[3] For the reasons that follow, BC Hydro and Awesense are each awarded costs, including reasonable disbursements, in accordance with the high end of Column IV of Tariff B of the *Federal Courts Rules*, SOR/98-106 [Rules]. The assessment of costs will include a doubling of Tariff values, but not disbursements, after the dates of the Defendants' respective settlement offers. Post-judgment interest will be calculated on a simple basis at a rate of 2.5% *per annum*.

II. Positions of the Parties

A. *BC Hydro*

[4] BC Hydro says that it incurred $1,597,994.75 in legal fees and $232,686.71 in disbursements (both inclusive of taxes) to defend against dTechs' action and to advance its counterclaim. BC Hydro requests a lump sum award in the amount of $881,061.98, calculated as follows:

(a) $325,272.47 in legal fees up to and including October 30, 2020, representing 33.3% recovery of actual fees;

(b) $318,102.80 in legal fees from October 31, 2020 to the end of the final invoice, representing 66.7% recovery of actual fees;

(c) $232,686.71 in disbursements, representing 100% recovery; and

(d) $5,000.00 for post-judgment matters, including judgment review and costs submissions, representing 33.3% recovery.

[5] BC Hydro says that a lump sum award of at least one-third of actual fees is justified by the complexity of the action and BC Hydro's success on all issues. The proceeding involved 10 days of trial, six days of discovery, multiple rounds of expert reports (totalling more than 300 pages from BC Hydro's expert alone), and oral testimony at trial from nine fact witnesses and three expert witnesses.

[6] BC Hydro submits that Tariff B provides inadequate compensation for a litigant's costs in complex patent litigation, and the Court has moved towards a partial indemnification approach that awards a lump sum for a percentage of the actual fees incurred (citing *Dow Chemical Co v Nova Chemicals Corp*, 2016 FC 91; *Sport Maska Inc v Bauer Hockey Ltd*, 2019 FCA 204; *Allergan Inc v Sandoz Canada Inc*, 2021 FC 186 [*Allergan*]; and *Packers Plus Energy Services Inc v Essential Energy Services Ltd*, 2020 FC 68). The Federal Court of Appeal has recently

confirmed that lump sum awards between one quarter and one third of actual fees are “the norm” (citing *Apotex Inc v Shire LLC*, 2021 FCA 54 [*Shire*] at para 22).

[7] On October 30, 2020, 17 days in advance of trial, BC Hydro provided dTechs with an offer to settle the action which remained open for acceptance until one minute after the commencement of the trial. BC Hydro submits that any award for legal fees incurred after the date of its offer to settle should be doubled pursuant to Rule 420.

[8] BC Hydro therefore asks that its indemnification for legal fees as of October 31, 2020 until the date of judgment comprise 66.7% of actual fees. For the period up to and including October 30, 2020, BC Hydro requests that the award comprise 33.3% of actual fees (adjusted to reflect any amounts addressed in earlier court orders).

[9] BC Hydro says that its actual legal fees and disbursements were justified and commensurate with what was reasonably required to mount a full and thorough defence to the action. BC Hydro also alleges that dTechs unnecessarily increased BC Hydro’s legal expenses.

[10] In the alternative, if costs are to be determined in accordance with Tariff B, then BC Hydro asks that costs be awarded at the high end of Column V, with double costs assessed after the date of the offer to settle. BC Hydro has prepared a draft Bill of Costs with legal fees in the amount of $488,131.48 and disbursements in the amount of $232,686.71. This produces a total award of $720,818.19 inclusive of all fees, disbursements, and taxes.

[11] BC Hydro says it is entitled to 100% reimbursement of disbursements incurred in defending the action. BC Hydro maintains that this is a reasonable sum given the issues raised by the action, and compared to other patent infringement actions (citing *Betser-Zilevitch v Petrochina Canada Ltd*, 2021 FC 151; *Camso Inc v Soucy International Inc*, 2019 FC 816; and *Apotex Inc v Shire LLC*, 2018 FC 1106).

[12] BC Hydro seeks post-judgment interest on all fees and disbursements from March 1, 2021 until payment, and submits that 2.5% is reasonable in light of this Court's recent guidance in *Seedlings Life Science Ventures, LLC v Pfizer Canada ULC*, 2020 FC 505 [*Seedlings*].

B. *Awesense*

[13] Awesense requests an award of $434,103, fixed at the high end of Column V of Tariff B, comprising $392,112 in legal fees, plus $41,991 in disbursements. Awesense's draft Bill of Costs reflects double costs from April 24, 2020, when Awesense made an offer to settle pursuant to Rule 420.

[14] Awesense maintains that the following factors point towards an elevated costs award:

(a) Awesense was entirely successful in its defence and counterclaim, and the Court left no doubt that dTechs' theory of infringement against Awesense was deeply flawed;

(b) Awesense proposed that dTechs and Awesense discontinue their respective claim and counterclaim, without costs, and that Awesense pay dTechs $10,000. Awesense's offer to settle was not withdrawn before the start of the trial, and complied with Rule 420;

(c) the defence of dTechs' action involved complex legal and technical considerations;

(d) despite close cooperation with BC Hydro, Awesense was required to expend significant resources to defend against dTechs' allegations; and

(e) dTechs persisted with its unmeritorious claim against Awesense, and in fact enlarged the claim in December 2019 to allege that Awesense induced BC Hydro to infringe the 087 Patent, and acted in concert with BC Hydro.

[15] To the extent that dTechs invokes its small size and limited means to oppose any material costs award, Awesense notes that it too is a small start-up company with scarce resources.

[16] Awesense argues that its actual legal fees are significantly lower than those typically incurred in patent proceedings of similar complexity and magnitude. Awesense endeavoured to streamline its defences, despite the ensuing litigation risk. Awesense says it should be compensated generously for the efficient conduct of its defence.

C. *dTechs*

[17] dTechs says that the Defendants' requests for costs should be refused entirely. dTechs asks the Court to consider the three-fold objectives of providing compensation, promoting settlement, and deterring abusive behaviour.

[18] dTechs asserts that BC Hydro is not seeking to be compensated, but rather to punish. dTechs notes that it did not object to the bifurcation of the proceedings into separate phases for liability and remedies, thereby reducing the costs of all parties. Given the importance and complexity of the issues, and the imbalance between the parties, dTechs maintains that each party should bear its own costs. In the alternative, dTechs says that any costs should be assessed in accordance with the lowest column of Tariff B.

[19] dTechs says that there were no genuine offers of compromise that objectively reflected the evidentiary record. Before trial, there could be no assessment of the evidence in chief, with the exception of the limited evidence led on discovery. Before trial, it was not possible to predict how the legal issues would ultimately be determined.

[20] dTechs maintains that it prosecuted its infringement claim as efficiently as possible. By contrast, the Defendants advanced every conceivable defence and counterclaim, whether or not this was necessary or helpful, and took every possible step to increase dTechs' work.

[21] dTechs cautions that the public interest is an important factor to be considered, and costs awards should not preclude access to justice.

[22] dTechs also notes that the defences and counterclaims of both Defendants did not diverge except in minor respects to reflect their respective systems. Insofar as Awesense may be entitled to costs, dTechs says it should be awarded costs only with the respect to the unique aspects of its defence.

[23] If costs are to be awarded in favour of the Defendants, then dTechs asks that the matter be referred by an assessment officer to give it a full opportunity to respond.

III. Analysis

[24] The awarding of costs, including quantum, is a matter falling within the Court's discretion (Rule 400(1); *Canada (AG) v Rapiscan Systems Inc*, 2015 FCA 97 at para 10).

A. *Should lump sum costs be awarded?*

[25] A lump sum award is specifically contemplated in Rule 400(4), and may serve to promote the objective of the Rules of securing "the just, most expeditious and least expensive determination" of proceedings (Rule 3; *Nova Chemicals Corporation v Dow Chemical Company*, 2017 FCA 25 [*Nova*] at para 11). A lump sum award may be particularly appropriate in complex matters where a precise calculation of costs would be unnecessarily complicated and

burdensome. Nevertheless, the burden is on the party seeking increased costs to demonstrate why its particular circumstances warrant an increased award (*Nova* at paras 12-13).

[26] The parties to this dispute are not sophisticated commercial entities comparable to the parties in *Nova*. Both dTechs and Awesense are small start-up companies with limited resources. BC Hydro is a publicly-funded utility that does not engage in patent litigation in the normal course of business.

[27] dTechs' complaint that the Defendants, particularly BC Hydro, advanced every conceivable defence and counterclaim, whether or not this was necessary or helpful, has some foundation. In addition to defending against dTechs' allegation of infringement, BC Hydro's counterclaim asserted that the 087 Patent was invalid on the grounds of (i) anticipation; (ii) obviousness; (iii) insufficiency; (iv) inutility, (v) overbreadth; and (vi) non-patentable subject-matter.

[28] BC Hydro also argued that dTechs lacked standing to allege infringement or defend the validity of the 087 Patent, because the inventor, Roger Morrison, conceived of his method in the course of his employment with the Calgary Police Service. Awesense supported the challenge to dTechs' lawful ownership of the 087 Patent.

[29] In addition, BC Hydro raised a "prior user" defence pursuant to s 56 of the *Patent Act*, notwithstanding that the amended version of this provision did not come into force until October 2018, several months after the action was commenced in February 2017. BC Hydro also raised a

defence of statutory authority, asserting that it could not infringe the 087 Patent because the establishment, procurement, and use of its distribution system metering devices were authorized by British Columbia legislation.

[30] Taking all of these considerations into account, this is not an appropriate case for a lump sum costs award comprising a percentage of the Defendants' actual legal fees. I note that only BC Hydro has requested a lump sum award. Awesense asks for costs to be assessed in accordance with the Tariff.

B. *Should costs be awarded under the Tariff*

[31] A successful party that has had to incur the costs of proceeding to trial has the right to be compensated within the limits prescribed by the Rules. A party's impecuniosity is not a relevant factor in the assessment of costs (*Leuthold v Canadian Broadcasting Corp*, 2014 FCA 174 at para 12).

[32] In determining an award of costs, the Court is guided by the considerations found in Rule 400(3). The principal considerations that inform the assessment of costs in this proceeding are:

(a) the result of the proceeding;

(b) the importance and complexity of the issues;

(c) any written offer to settle;

(d) the amount of work; and

(e) any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding.

[33] Both BC Hydro and Awesense were wholly successful in their defences of the actions and the prosecutions of their counterclaims. Both Defendants are entitled to costs.

[34] While being of limited public importance, the issues and their complexity justified both Defendants in expending commensurate resources to defend their respective interests.

[35] BC Hydro cites a number of cases where this Court awarded costs at the high end of Column V in complex patent litigation. However, at its essence this case was less complex than many intellectual property disputes. Much of the complexity of this proceeding resulted from the myriad issues raised by BC Hydro in its defence and counterclaim. Awesense benefited from BC Hydro's comprehensive approach to the litigation, adopting BC Hydro's positions or proffering its own, depending on what it considered to be most advantageous.

[36] Two authorities relied upon by BC Hydro in support of its request for a lump sum costs award are the Federal Court of Appeal's recent decision in *Shire* and this Court's recent decision in *Allergan*. While both of those cases resulted in a lump sum costs award, Justice Donald Rennie acknowledged in *Shire* that the upper range of Column IV of the Tariff is "routinely chosen in intellectual property litigation" (at para 11, citing *Leuthold v Canadian Broadcasting Corporation*, 2012 FC 1257 at para 92 and *Eurocopter v Bell HelicopterTextron Canada*

Limitée, 2012 FC 842 at para 22). In *Allergan*, Chief Justice Paul Crampton recognized that in cases involving patent disputes (particularly in the pharmaceutical context), "the high end of Column IV is often considered to be reasonable and appropriate" (at para 26, citing *Sanofi-Aventis Canada Inc v Novopharm Limited*, 2009 FC 1139, aff'd 2012 FCA 265; *Novopharm Limited v Eli Lilly and Company*, 2010 FC 1154; *Apotex Inc v Sanofi-Aventis*, 2012 FC 318; and Federal Court of Appeal and Federal Court Rules Committee, *Review of the Rules on Costs: Discussion Paper*, October 5, 2015 at page 8).

[37] For the reasons explained above, I consider the high end of Column IV to be the appropriate benchmark for costs in this case.

[38] The offers to settle delivered to dTechs by BC Hydro on October 30, 2020, and by Awesense on April 24, 2020, both complied with Rule 420. Pursuant to Rule 420(2)(b), each of the Defendants 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 judgment.

[39] dTechs has not challenged the draft Bills of Costs submitted by BC Hydro and Awesense, except with respect to the applicable column of Tariff B. dTechs also asks that Awesense's costs award be restricted to the unique points of its defence.

[40] BC Hydro's and Awesense's positions aligned in many respects, but there was a clear potential for conflict of interest. I do not fault Awesense for pursuing its defence and

counterclaim independently. Furthermore, dTechs' claim against Awesense was always dubious (see *dTechs* at paras 177-179). dTechs did not abandon its allegation of direct infringement by Awesense until trial.

[41] Each of the Defendants is therefore entitled to its own set of costs, including disbursements.

C. *What should the rate be for post-judgment interest?*

[42] dTechs has not addressed BC Hydro's request for post-judgment interest at 2.5%. In his recent decision in *Seedlings*, Justice Sébastien Grammond set post-judgment interest at 2.5% having regard to the compensatory nature of interest, prevailing commercial rates, the rate that would have resulted from the application of provincial interest law, the post-judgment interest rate in Ontario, and the downward trend of interest rates (at paras 39-40).

[43] dTechs' cause of action arose in British Columbia, and the action was commenced in that registry. The post-judgment interest rate in British Columbia is currently 2.45%. I therefore agree with BC Hydro that 2.5% is a reasonable rate for post-judgment interest in this case.

D. *Should Broy Engineering be jointly and severally liable for costs?*

[44] BC Hydro says that Broy Engineering [Broy] provided funding for dTechs' action, at a minimum with respect to posting security for costs, and stood to benefit from any proceeds of the

litigation. According to BC Hydro, this puts Broy in the shoes of litigation funder. Awesense endorses BC Hydro's position.

[45] BC Hydro submits that this Court has jurisdiction to order costs against non-parties in appropriate circumstances under Rule 400(1). In *Bellegarde v Poitras*, 2009 FC 1212 [*Bellegarde*] at paragraph 10, Justice Russel Zinn found that a third party was paying the Respondents' legal costs and would presumably benefit from any costs awarded in favour of the respondents. The third party was therefore held to be liable for the costs awarded to the applicant.

[46] Peter Roy, president and owner of Broy, was asked about his company's involvement in dTechs and in this litigation. Mr. Roy acknowledged that Broy posted security for costs pursuant to the Order of Prothonotary Mandy Aylen dated May 1, 2020, and that he authorized the letters of credit on behalf of Broy. He also acknowledged that there is a written agreement between Broy and dTechs for a "return on investment", but only with respect to the security for costs. Mr. Roy was asked whether this was "a return on the investment in the litigation itself", and he said "yes". He was asked no further questions regarding the nature of the arrangement, whether Broy had funded the litigation in any manner beyond posting security for costs, or what the "return on investment" might be.

[47] BC Hydro's request that Broy be made jointly and severally liable for any costs award against dTechs lacks an adequate evidentiary foundation. Furthermore, as a matter of procedural fairness, non-parties must be given notice of a litigant's intention to seek a costs award against

them (*1318847 Ontario Limited v Laval Tool & Mould Ltd*, 2017 ONCA 184 at para 79, citing *St James' Preservation Society v Toronto (City)*, 2007 ONCA 601 at paras 48-55). Given the inadequate evidentiary record and lack of notice, BC Hydro's and Awesense's request that Broy be made jointly and severally liable for costs must be denied.

IV. Conclusion

[48] BC Hydro and Awesense are each entitled costs, including reasonable disbursements, in accordance with the high end of Column IV of Tariff B of the Rules. The assessment of costs will include a doubling of Tariff values, but not disbursements, after the dates of the Defendants' respective settlement offers. Post-judgment interest will be calculated on a simple basis at a rate of 2.5% *per annum*.

[49] If the parties are unable to agree upon the costs, including disbursements, payable pursuant to this Order and Reasons, then the matter will be referred to an assessment officer for determination.

ORDER

THIS COURT ORDERS that:

1. The costs, including disbursements, payable to the Defendant British Columbia Hydro and Power Authority by the Plaintiff dTechs epm Ltd shall be assessed in accordance with the high end of Column IV of Tariff B of the *Federal Courts Rules*, SOR/98-106 [Rules]. Costs shall be calculated at double the Tariff rate (but not double disbursements) from October 30, 2020 to March 1, 2021.

2. The costs, including disbursements, payable to the Defendant Awesense Wireless Inc by the Plaintiff dTechs epm Ltd shall be assessed in accordance with the high end of Column IV of Tariff B of the Rules. Costs shall be calculated at double the Tariff rate (but not double disbursements) from April 24, 2020 to March 1, 2021.

3. If the parties are unable to agree upon the costs, including disbursements, payable pursuant to this Order, then the matter will be referred to an assessment officer for determination.

4. Post-judgment interest shall be calculated on a simple basis at a rate of 2.5% *per annum* from the date of this Order.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-227-17
STYLE OF CAUSE:	DTECHS EPM LTD. v BRITISH COLUMBIA HYDRO AND POWER AUTHORITY AND AWESENSE WIRELESS INC.

SUBMISSIONS ON COSTS CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO THIS COURT'S JUDGMENT IN 2021 FC 190.

ORDER AND REASONS:	FOTHERGILL J.
DATED:	APRIL 22, 2021

WRITTEN SUBMISSIONS BY:

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