

Federal Court



Cour fédérale

Date: 20220517

Docket: T-374-21

Citation: 2022 FC 733

[ENGLISH TRANSLATION REVISED BY THE AUTHOR]

Ottawa, Ontario, May 17, 2022

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

**VIDÉOTRON LTD
GROUPE TVA INC.**

**Plaintiffs
Defendants to counterclaim**

and

**TECHNOLOGIES KONEK INC.
COOPÉRATIVE DE
CÂBLODISTRIBUTION HILL VALLEY
LIBÉO INC.
LOUIS MICHAUD
JOÉ BUSSIÈRE
JEAN-FRANÇOIS ROUSSEAU
MANON GAUVREAU**

**Defendants
Plaintiffs by counterclaim**

ORDER AND REASONS

[1] On February 24, 2022, I granted the plaintiffs' motion for summary trial: 2022 FC 256. I awarded costs to the plaintiffs. The plaintiffs now bring a motion to fix the amount of costs. They seek a total of \$120,000, which represents approximately 30 percent of their legal fees, and \$23,332 in disbursements, primarily for their expert's report and testimony, as well as \$5,000 for the preparation of this motion. The defendants argue that costs should instead be calculated according to the tariff.

[2] Here are my reasons for awarding costs in the amount of \$54,593.33, pursuant to the tariff, rather than awarding a larger lump sum.

[3] Lump sum cost awards are now a well-accepted practice in complex litigation, including intellectual property litigation: *Nova Chemicals Corporation v Dow Chemical Company*, 2017 FCA 25 [*Nova*]; *Apotex Inc v Shire LLC*, 2021 FCA 54 [*Apotex*]; *Seedlings Life Science Ventures, LLC v Pfizer Canada ULC*, 2020 FC 505 [*Seedlings*]; *Bauer Hockey Ltd v Sport Maska Inc (CCM Hockey)*, 2020 FC 862.

[4] However, the award of a lump sum is not automatic, even in the context of intellectual property disputes. The mere fact that applying the tariff would result in an amount that represents a small proportion of the fees actually incurred is not, in itself, sufficient grounds to justify a higher lump sum award: *Nova*, at paragraph 13; *Apotex*, at paragraph 18. In recent decisions, this Court has refused to award a lump sum against an individual inventor, a start-up company or a party who cannot be characterized as a "sophisticated commercial party": *Betsler-Zilevitch v Petrochina Canada Ltd*, 2021 FC 151; *Swist v MEG Energy Corp*, 2021 FC 198 at paragraph 22;

dTechs epm Ltd v British Columbia Hydro and Power Authority, 2021 FC 357. Of course, in each case, this Court considered all the relevant factors before concluding that a lump sum award was not warranted.

[5] In this case, I cannot help but note that there is a significant imbalance between the size and resources available to the parties. The plaintiffs are among the largest media and telecommunications companies in Quebec. In contrast, the defendants against whom the action was allowed are small start-up companies. Although no financial information was put in evidence, the imbalance between the parties is obvious. In this context, it should be remembered that one of the functions of the tariff is to “ensure that the amount awarded does not depend on whether a party has retained expensive or inexpensive counsel”: *Seedlings*, at paragraph 3.

[6] Moreover, although the case involves the interpretation of a statutory provision that has rarely been considered by the courts and both parties have presented expert evidence, it does not rise to the level of complexity of the above cases in which a lump sum was awarded.

[7] The conduct of the parties during the proceeding is also not a factor that justifies deviating from the tariff. The proceeding gave rise to disagreements between the parties as to the scope of the issues in dispute. Both parties made some late concessions. There is, however, no

conduct that warrants an elevated costs award. In sum, both parties have worked together towards a quick resolution of the main issues in dispute by way of a motion for summary trial.

[8] Taking a holistic look at the matter, I do not believe that an increased lump sum is appropriate.

[9] It may be that this Court's tendency to award costs in a lump sum in intellectual property matters reflects the tacit consent of the large companies involved in such proceedings that a larger sum will more effectively accomplish the objectives of costs awards. In some cases, this consent is given explicitly, before the outcome of the case is known: *Corey Bessner Consulting Inc v Core Consulting Realty Inc*, 2020 FC 224; *Amgen Inc v Pfizer Canada ULC*, 2020 FC 522 at paragraphs 482–84; *Bank of Montreal v Canada (Attorney General)*, 2020 FC 1014 at paragraph 164. In the future, parties should be encouraged to make submissions on costs at the end of the hearing, as suggested in the Chief Justice's guidelines of April 30, 2010 (<https://www.fct-cf.gc.ca/content/assets/pdf/base/notice-avis-30apr2010.pdf>), or at least before the outcome of the case is known. Such a practice would make it easier for this Court to identify cases that warrant a lump sum award and has the potential to simplify costs proceedings.

[10] Since I am not awarding costs as a lump sum, costs should normally be calculated according to Column III of the tariff, pursuant to rule 407 of the *Federal Courts Rules*, SOR/98-106. The plaintiffs have prepared a bill of costs calculated according to the middle of Column III, in the amount of \$54,593.33, including fees, disbursements and taxes. The defendants accept this amount. In the event that their request for a lump sum is denied, the plaintiffs have not submitted

an alternative position other than this bill of costs. In order to avoid prolonging the case, I will therefore award costs in this amount.

[11] However, the defendants argue that this amount should be reduced by 15 percent since one of them, Libéo Inc, has won its case in its entirety. The consequence of this exoneration is that Libéo Inc will not be ordered to pay costs. It does not follow that the amount of costs to which the plaintiffs are entitled should be reduced. In fact, where a plaintiff is partially successful, the costs to which it is entitled are not usually reduced: *Philip Morris Products SA v Marlboro Canada Ltd*, 2014 FC 2 at paragraphs 7–9 [*Philip Morris*]; *Fluid Energy Group Ltd v Exaltexx Inc*, 2020 FC 299 at paragraphs 6–11 [*Fluid Energy*]; *Bertrand v Acho Dene Koe First Nation*, 2021 FC 525 at paragraphs 10–15; *Canadian Pacific Railway Company v Canada*, 2022 FC 392 at paragraphs 29–36. Similarly, where a plaintiff sues more than one defendant, but is successful only in respect of a subset of them, the plaintiff is normally entitled to full costs against the defendants who lost.

[12] The plaintiffs argue that costs should be payable immediately, since the motion for summary trial resolved many of the issues in dispute. They draw an analogy with cases where the proceedings are split between liability and damages. In such cases, costs can be ordered without delay when the Court renders judgment on liability: *Philip Morris*, at paragraphs 11, 12 and 21. I find this analogy compelling, although I am mindful that an award of costs payable

immediately on a motion is the exception rather than the rule: *Fluid Energy*, at paragraphs 27–29.

[13] I will therefore order the two unsuccessful defendants, Technologies Konek Inc and Coopérative de câblodistribution Hill Valley, to pay the plaintiffs the sum of \$54,593.33 as costs, without delay.

ORDER in T-374-21

THIS COURT ORDERS as follows:

1. The defendants Technologies Konek Inc and Coopérative de câblodistribution Hill Valley are ordered to pay the plaintiffs the sum of \$54,593.33 as costs, including disbursements and taxes, regarding the judgment on the motion for summary trial.
2. The amount referred to in the preceding paragraph is immediately due and payable.

“Sébastien Grammond”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-374-21

STYLE OF CAUSE: VIDÉOTRON LTD, GROUPE TVA INC. v
TECHNOLOGIES KONEK INC., COOPÉRATIVE
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INC., LOUIS MICHAUD, JOÉ BUSSIÈRE, JEAN-
FRANÇOIS ROUSSEAU, MANON GAUVREAU

**MOTION IN WRITING CONSIDERED AT MONTRÉAL, QUEBEC, PURSUANT TO
RULE 369 OF THE *FEDERAL COURTS RULES***

JUDGMENT AND REASONS: GRAMMOND J.

DATED: MAY 17, 2022

APPEARANCES:

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Jean-Sébastien Dupont
Olivier Jean-Lévesque

FOR THE PLAINTIFFS

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