Federal Court  Cour fédérale

Date: 20220708

Docket: T-1066-17

Citation: 2022 FC 1007

Ottawa, Ontario, July 8, 2022

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

T-REX PROPERTY AB

Plaintiff/
Defendant by Counterclaim

and

PATTISON OUTDOOR ADVERTISING LIMITED PARTNERSHIP, PATTISON OUTDOOR ADVERTISING LTD, JIM PATTISON INDUSTRIES LTD, and ONESTOP MEDIA GROUP INC

Defendants/
Plaintiffs by Counterclaim

ORDER AND REASONS

[1] While the trial in the matter of an action for infringement by the Plaintiff/Defendant by Counterclaim (hereafter "T-Rex") about its patent number CA 2,252,973 will continue in October 2022, the Defendants/Plaintiffs by Counterclaim (hereafter "Pattison") come to Court to

seek an increase in the security for costs already granted by this Court (Order of April 16, 2021, by Prothonotary Steele, who was the case management judge).

[2] The reason for the motion is that the trial, which was then scheduled for three weeks, is now estimated to require another period of three weeks, with two more days, perhaps three, for final submissions to be presented in February 2023. Pattison argues that the security for costs must be adjusted accordingly.

I. Background

[3] This constitutes as a matter of fact the second motion for additional security for costs. Originally, T-Rex posted $50,000 as a security for the period of up to the end of the examination for discovery. Madam Prothonotary Steele refused an increase of that amount until the end of discovery as Pattison sought an additional amount of $350,000. However, the Prothonotary granted additional security for costs for the period leading up to and including the trial which was scheduled for three weeks.

[4] In order to ascertain if a further amount of security ought to be ordered for that period, and how much should that amount be if an increased security for costs is warranted, it is important to understand the basis on which the order of April 16, 2021 was made.

[5] On top of the amount of $350,000 sought by Pattison for its costs up to the conclusion of the examination for discovery, it asked the Court for $1,150,000 as security for its costs up to and including trial. Pattison argued that 25% of its projected fees should be the proper basis for

the calculation, as opposed to in accordance to column III of the table to Tariff B (Rule 407 of the *Federal Courts Rules*, SOR/98-106). Furthermore, it sought 100% of its disbursements, past and projected.

[6] As indicated earlier, T-Rex was successful in opposing the increase in the security for costs up to the conclusion of the examination for discovery. On the other hand, an additional security was warranted up to and including trial conceded T-Rex, but ought to be reduced in the view of T-Rex as Pattison's claim was unreasonable and designed to exert financial pressure on T-Rex. It was suggested that the high point of column IV of Tariff B be the basis for the calculation, together with reasonable disbursements. The fees and the disbursements should be discounted because of Pattison's counterclaim, for a total of $270,000.

[7] The Court provided extensive reasons. Relying on *Regents of the University of California v I-MED Pharma Inc.*, 2016 FC 975, the Court found that it should consider the following factors in ascertaining the quantum of an additional amount of security in accordance with rule 416(6):

(a) whether there is a significant gap between the security ordered and the actual expenses;

(b) the actual expenses were not reasonably foreseeable;

(c) the original request for security was based on an assessment of the complexity of the case which in hindsight was not realistic.

[8] T-Rex did not challenge the requirement of a security for costs concerning post-discovery steps, in view of rule 416(1)(a):

Where security available	**Cautionnement**
416 (1) Where, on the motion of a defendant, it appears to the Court that	**416 (1)** Lorsque, par suite d'une requête du défendeur, il paraît évident à la Cour que l'une des situations visées aux alinéas a) à h) existe, elle peut ordonner au demandeur de fournir le cautionnement pour les dépens qui pourraient être adjugés au défendeur :
(a) the plaintiff is ordinarily resident outside Canada,	a) le demandeur réside habituellement hors du Canada;
…	[…]

The situation has not changed, other than the length of the trial has more than doubled. Pattison relies again on rule 416(6) for the increase sought.

II. Prothonotary Steele's order

[9] In the order of April 16, 2021, Madam Prothonotary Steele found that a lump sum was not appropriate. Pattison, in its motion now before the Court, is not seeking a lump sum, but rather contends that it replicates the calculation basis used by Prothonotary Steele, using Tariff B.

[10] Madam Prothonotary Steele also found that column III was not appropriate either, given its shortcomings in cases of this nature (*Allergan Inc. v Sandoz Canada Inc.*, 2021 FC 186 at

para 25). She concluded that the Tariff should be topped up in this case by doing two things: instead of column III of Tariff B, the default level of costs in the Federal Court, the calculation should be based on the high end of column IV, and there should be an increase of 25% of the amount thus calculated.

[11] In the result, the Court was satisfied with the draft bill of costs offered by T-Rex for the legal fees as per the high end of column IV, that amount ($102,600) being increased by 25%, for a total of $128,250.

[12] On the front of disbursements, Pattison claimed $550,000 for two experts, together with $150,000 for expenses (referred to as “sundry” expenses). The Court did not agree with two experts being justified for the purpose of posting security for costs, thus reducing the ask to $275,000. The various costs of $150,000 were not contested. The total amount reached $425,000 for disbursements.

[13] But that was not all. T-Rex submitted that the total of the fees and the disbursements had to be discounted by 35% to account for these also covering for the counterclaim where Pattison is the Plaintiff. The Court ruled that a discount is appropriate in the calculation of the quantum (*Apotex Inc. v H. Lundbeck A/S*, 2010 FC 807), the said discount being 20% and not 35%.

[14] Accordingly, security for costs for the trial (steps after the conclusion of the examination for discovery) amounted to the following:

Legal fees:	$128,250
Disbursements:	$275,000 (experts) + $150,000 (various costs)
	$553,250

The 20% discount took the total to $442,600. The total amount did not include applicable taxes. Once the taxes were added, the total amount of the security for costs accrued to $500,138.

III. What is being sought

[15] This time round, Pattison seeks an additional amount of $437,000. It asserts that it uses the findings and methodology used by Madam Prothonotary Steele in that the fees are to be calculated for the additional seventeen days (15 hearing days and two days for final submissions) and the full amount of disbursements that is anticipated.

[16] Pattison argued for the need for an increased security because of the unforeseeable doubling of the duration of the trial. It is certainly true that the expected duration of the trial initially came well before (January 2021) the expert reports, covering hundreds of pages, came into existence starting in September 2021. Indeed, new experts have been added by Pattison. Furthermore, Pattison relies on the Court providing in its order of April 16, 2021 that the order was “without prejudice to [Pattison’s] right to apply for further security if the amount proves insufficient” (Order, para 2, p 17).

[17] As for the counsel fees, Pattison claims to apply the formula used by Prothonotary Steele, that is the upper end of Column IV with an increase of 25% on that amount. The draft bill of costs, submitted by Pattison, is made on the basis of 32 hearing days, for a total of $215,550 before taxes. Once taxes are added, the amount reaches $241,469, which, once increased by 25%, adds up to $301,837. However, must be deducted from that amount the legal fees already accounted for 15 hearing days in the order of April 16, 2021.

[18] On the disbursement side, an amount of $425,000 has already been ordered ($275,000 (expert) + $150,000 (various disbursements)).

[19] Surprisingly in my view, Pattison ignores what was already decided by Prothonotary Steele in that it seeks as its disbursements the full amount of the fees it has paid to three experts, for a total of $670,156. It adds to that amount another amount of $145,000, for what it expects will be the contribution of the experts going forward. The order of April 16, 2021 was limited to $275,000.

[20] T-Rex for its part challenges Pattison’s request, noting that an entitlement to further security is not automatic. The additional 17 days do not justify the amount sought. It has not been established, contends T-Rex, that there is a significant gap between what has already been ordered and the actual expenses, that these expenses were not reasonably foreseeable and that the assessment of the complexity of the case originally was not realistic.

[21] Considering differences between the draft bill of costs submitted by T-Rex for the purpose of the decision made on April 16, 2021 which was accepted by Prothonotary Steele, and the draft bill of costs submitted for this motion by Pattison, T-Rex observes that new items account for $6,300 (in footnote 19 of its memorandum of fact and law), and it identifies precisely the following items: second set of Request to Admit Facts and Response ($2,400), Inventor Read-ins and Response ($1,200), additional Case Management and Trial Management Conferences ($2,400), Training for the e-trial Toolkit ($300). T-Rex also observes that an additional amount of $107,100 was identified by Pattison for the additional 17 days of trial. On the disbursement front, it is noted that $145,000 are requested for Pattison's experts, while other disbursements sought are equal to the amount incurred in the first half of the trial at $54,988.26.

[22] T-Rex argues that Pattison is taking "a second kick at the can". It does not contest the gap between the security ordered and the actual expense, or that the expenses were not foreseeable. However, it argues that the complexity of the case has not changed between April 2021 and now. That would justify that the security for costs not be adjusted.

[23] Alternatively, if an adjustment is warranted, the Court should consider that costs might be reduced on taxation, which should be reflected in the amount granted as security for costs. One such possibility is if Pattison is unable to prove that the patent-in-suit is null and void pursuant to section 53 of the *Patent Act*, RSC, 1985, c P-4: T-Rex asserts that not being able to prove such allegation, that implies the notion of fraud subsumed in the allegation under section 53, could have serious cost consequences, thus justifying a lower security. Furthermore, T-Rex asserts that the amount of security for costs in this case would be higher than in other patent infringement

cases. Hence, if an increase from the security for costs ordered on April 16, 2021 is deemed appropriate, only the additional 17 days for the completion of the trial should be considered.

[24] Concerning disbursements, T-Rex stresses that only reasonable disbursements are recoverable. The reasonableness of the expert disbursements cannot be assessed on the basis of the evidence proffered on this motion: there is not evidence concerning the number of hours, hourly rate or even description of the tasks performed. Not only is the record devoid of any detail, or even invoices, but some of the work done by Pattison's main expert is moot in view of the concession made by Pattison that it is now withdrawing its "1996 Daktronics reference", which took up a portion of that expert's original report of September 17, 2021.

[25] Moreover, T-Rex challenges the experts' fees on the basis that our Court has shown concerns about the costs of experts. Recent cases in this Court were critical of fees for which the successful party wished to be compensated. T-Rex stresses that its expert has charged less than 50% of the amount charged by Pattison's main expert. It must of course be noted that T-Rex's expert acted in the litigation in the United States, which allows for some efficiencies. T-Rex contends that no further amount ought to be considered on account of disbursements for expert fees.

[26] As for "sundry expenses", T-Rex observes that, out of the $120,000 (once the 20% discount has been applied) in "other expenses" granted in the order of April 16, 2021, only $54,988.26 have been incurred. T-Rex complains that more than $5,000 are claimed as travel expenses, yet the trial has been held by videoconference: no information was supplied. Similarly,

there is a claim of $12,278.14 in “documentation expenses” in a case conducted virtually; there is no way of establishing how costs of over $12,000 could have accumulated post-discovery. T-Rex argues that some costs are part of the “normal overhead costs of litigation” which require justification ($13,133 for E-Discovery and $4,373 for research expenses). Without justification offered by Pattison, it is not possible to do any assessment. With $65,000 still unaccounted for with respect to “other expenses” granted in the April 16, 2021 order, and some cost items lacking details, the additional $54,988 sought by Pattison ought to be denied, according to T-Rex.

IV. Analysis

[27] I take it that the starting point in the analysis is rule 416(6) which provides that it is possible to order an additional amount as security for costs. As already stated at paragraph 7 of these Reasons, the considerations in making such decisions are (1) the gap between the security ordered and the actual expenses, (2) the actual expenses were not reasonably foreseeable, and (3) the complexity of the case was not well assessed. Madam Prothonotary Steele awarded an amount of $500,138, which came on top of $50,000 which had been agreed to by the parties.

[28] Given that it is an additional amount which is asked for, the Court insisted on a marginal analysis to be supplied by Pattison. It needs to be remembered that Pattison claimed in its memorandum of fact and law that it was “using the rulings and calculation methodology retained by Madam Prothonotary Steele in April 2021” (memorandum of fact and law, footnote 5). Unfortunately, the marginal analysis never came. Although perhaps somewhat exaggerated, there is some truth in the T-Rex suggestion that there may have been a measure of “a second kick at the can” instead of an additional amount.

[29] Indeed, there were differences, for instance, between the bill of costs used by Prothonotary Steele and the one submitted by Pattison which came to light. The most prominent difference was perhaps the one about the number of hours per hearing day, where the first bill of costs accepted by Prothonotary Steele, allowed 5.5 hours/day, for both the first and second chairs. Pattison changed the number of hours per day for the duration of the trial including the first 15 days to 6 hours, thus in effect changing the ruling made by the Court. As I stressed during the hearing of this motion, the starting point must be the unchallenged order of Prothonotary Steele with Pattison seeking to justify adjustments in view of some changing circumstances.

[30] There are three broad categories of expenses to be considered here: (1) the fees to be paid as per the top of column IV of Tariff B, (2) the disbursements for experts, and (3) the sundry, or various expenses.

[31] These are to be considered further only if there is to be an additional amount as security. I believe that such is the case. In my view, there is a gap between the actual expenses and the security ordered, the actual expenses not being reasonably foreseeable at the time the April 2021 order was made. It must be remembered that the trial duration was set in January 2021, but the expert reports started being made available only in September 2021. The expert reports proved to be extremely complex, which arguably changed to some extent the complexion of the case. As the saying goes, the proof of the pudding is in the tasting of the pudding: here, the examination of the first two witnesses, one the alleged inventor and the other the expert retained by T-Rex,

took much more time than was originally expected. The length and complexity of the expert reports are not foreign to that reality.

[32] That said, no case has been made that various disbursements should be adjusted. An amount of $150,000 (20% of that amount was discounted, for a net of $120,000) was granted in April 2021. Pattison reports that it has expended less than 50% of the amount granted. T-Rex suggests that some of the amounts may actually be suspect if they are not fully justified. I cannot see any reason why the amount granted on account of sundry disbursements should be adjusted.

[33] Not only does Pattison ask that the security for costs be adjusted to compensate fully the choice it made to hire more experts, but it requests an amount of $145,000 in disbursements for future expenses related to its experts. It will be remembered that the order of April 16, 2021, allowed $275,000 on account of experts, based on Prothonotary Steele's view that one expert was appropriate instead of the two sought by Pattison. The requested $550,000 amount was split in two. The amount now sought is well beyond what has been granted by Prothonotary Steele. Furthermore, that amount must have included the expertise needed by Pattison to try to make its case that section 53 of the *Patent Act* has been infringed. During the hearing of this motion, Pattison confirmed that the section 53 issue is not new and was known at the time of the order of April 2021, such that the amount of $275,000 must have included expert fees in order to make that case. In other words, the reduction from the amount asked for, $550,000, and the amount granted, $275,000, cannot be said to have been done *per incuriam*, without knowing the full scope of the expertise required. The fact that Pattison retained two new experts to address

specifically its section 53 argument, beside its main expert, appears to have been by choice. It now seeks to recoup these amounts.

[34] I note that Pattison insisted on the amount already paid to its main expert in fees up to now. T-Rex is right in my view to point out that the amount is more than twice that paid to its expert; furthermore, there is no way to make any assessment of those fees. No detail is available, as already pointed out, but at least one matter was addressed by this expert, only to be abandoned after his opinion was given. That relates to potential pieces of prior art. Pattison chose to seek to rely on either the Daktronics Manual 1996 or the Daktronics Venus 4000 Actual System (as prior art), only to abandon that chase on March 5, 2022 (exhibit C of Anna Antonetti of May 4, 2022). As a matter of fact, the expert's first report (September 17, 2021) as well as the so-called "Supplemental Expert Report" of December 17, 2021, dealt with the now withdrawn Daktronics Manual 1996 and the Daktronics Venus 4600 Actual System. However, it appears that other "Daktronics documents" may now be relied on.

[35] Pattison also seeks a not insignificant amount of money for the preparation of their two other expert witnesses, Messrs. Morin and Richey. They are the two new experts added by Pattison to address their section 53 issue.

[36] Our Court has shown some concerns around costs associated with expert fees. Furthermore, the Court is not inclined to accept Pattison's argument that the order of April 16, 2021 should be replaced by altogether new calculations. Rule 416(6) speaks of additional amount as security. The order of April 16, 2021 was never challenged and it therefore stands.

[37] The submissions made on behalf of Pattison operate on a completely different basis than the order of April 16, 2021. It seeks to recoup the costs incurred for the experts it chose to use. The amount largely exceeds that which was ordered as a security by Prothonotary Steele, without any form of explanation being forthcoming. Pattison did not provide either a marginal analysis, where one would find an explanation for the increase in costs and expenses on account of more days being needed for the completion of the trial. Instead, it appears to have largely ignored the judicial order of April 16, 2021 and created tables which attempt to include in a new bill of costs of more than $615,000 of expert fees and new expert fees of $145,000 for the further involvement of three experts, not the one accounted for.

[38] As for the $145,000 new amount, very little is offered to support with any precision the necessity of such an amount. It is said that $115,000 are needed for Pattison's main expert because he will need to prepare again for his testimony and he is expected to attend the testimony of witnesses relevant to his expertise. There is no indication whatsoever as to why these amounts are needed to prepare again and to witness the testimony of others during their full duration.

[39] Concerns relative to expenses relative to experts are not new. Twenty-five years ago, one could read in *AlliedSignal Inc. c Dupont Canada Inc.*, (1998) 81 CPR (3d) 129:

> [77] Of course, a party has the right to hire the expert or experts of its choice to advance the merits of its case, but that does not mean a losing side must, invariably, foot the bill of the expert or experts chosen by the winning side without questioning the fees and disbursements claimed. The jurisprudence is replete with cases that attack such bills essentially on two fronts; the first, on whether or not the fees being exacted are reasonable and, second on whether or not the disbursements claimed, as otherwise perfectly

> legitimate items to be included in such a bill, denote a lavish style of living. In other words, the level of expertise required in a particular case may justify the hiring of the "cadillac" of expert witnesses, but that does not mean the unsuccessful party will necessarily have to pay for a "cadillac" when other expert witnesses were available and charged lower fees. I glean this cautious approach from the statement of Mr. Justice Sirois of the Saskatchewan Court of Queen"s Bench who said in *Angelstad v. Frederick Estate*[24] that:
>
> > Some expert witnesses seem to charge whatever the traffic will bear while others are very reasonable about the remuneration they receive to give testimony before the court. This places the lawyer in an unenviable position if he feels the expert's testimony is important to his client's case because he may feel it is necessary to call the witness whatever the cost. While this is an acceptable and legitimate decision on counsel's part, it follows that the court will not necessarily approve the expert's fees an item which is all chargeable to the losing litigant. A practice seems to have developed among counsel to simply pay the expert's bill and seek to charge it off as a disbursement. There is an onus on counsel seeking payment of the expert witness's charges to justify the expense in the sense that the losing side should not be required to pay costs which are not reasonable having regard to the importance of the witness's evidence to the outcome of the trial and the complexity of the expertise.

[40] More recently, Justice Locke, then of this Court, spoke of the excessive amounts charged by experts and asserted the willingness of the Court to limit the amount to be paid at the end of a trial. Here is paragraph 46 of his ruling in *Camso Inc. v Soucy International Inc.*, 2019 FC 816 [*Camso*]:

> [46] Moreover, I find that the amount he charged (approximately $388,000) is excessive, even in a case involving 246 claims of infringement in three patents, dozens of relevant pieces of prior art (a few of which were not easy to find) and a number of products that were allegedly infringing.

In the case at bar, we have a fraction of the claims considered in *Camso*, in only one patent. The subject-matter may prove to be complex and esoteric, but the disbursements on account of experts have not yet been shown to be reasonable. At this stage in the proceedings, the explanations are dearly lacking.

[41] Scrutiny is the norm. My colleague Justice Manson, with his acknowledged expertise in IP law, had this to say recently in *Betser-Zilevitch v Petrochina Canada Ltd*, 2021 FC 151:

> [21] The expert fees engaged in the underlying litigation warrant greater scrutiny. Expert fees should not always be automatically compensable. While a party is free to engage any expert it desires, this Court should be concerned with the mounting and often extravagant expert fees charged by these witnesses (*Janssen-Ortho Inc v Novopharm Ltd*, 2006 FC 1333 at para 43). Mr. Brindle's expert fees alone were more than double the combined total of the Plaintiff's expert fees. These circumstances warrant that Mr. Brindle's fees be capped at $104,440.00 (which is two-thirds the billed amount).

I wholeheartedly agree. I note that our colleague Justice Fothergill endorsed the same passage in *Swist v MEG Energy Corp.*, 2021 FC 198.

[42] The point of the matter is not to conclude that, ultimately, disbursements on account of expert fees in this case ought to be capped, and capped at a particular level. That would be premature. It is rather that the security for costs had been specifically addressed in a judicial decision. Pattison has deliberately retained more experts at a cost significantly higher than the security ordered by the Court. There is no marginal analysis that could explain the substantial

premium. Without an analysis or information about how such amounts are arrived at, the Court is left with no basis to gauge the security amount already granted.

[43] That leaves us with Pattison's contention that an additional amount as security ought to be granted because there will be 17 more hearing days before this trial is completed. I believe that the bill of costs for legal fees for 17 hearing days and an amount in consideration of experts having to support counsel for Pattison in the last 15 days are appropriate.

[44] The amount for counsel fees, using the high end of column IV of Tariff B and considering 5.5 hours/day for two counsel, accords with the methodology followed by Madam Prothonotary Steele in this Court's order of April 16, 2021. The "probable" legal fees were accepted to be $102,600 for a trial to last 15 days. The extra 17 days would be reflected with an award of $115,000, with an increase of 25% to the Tariff. However, a reduction of 20% to account for the counterclaim of Pattison will take the award back to $115,000. As Prothonotary Steele did, I leave to the parties to calculate appropriate taxes and add them to the total of $115,000 (order of April 16, 2021, para 36).

[45] The adjustment for counsel fees could well apply to the need for the Pattison expert to support the counsel team for more days than were originally considered. I have no doubt that such support is useful in view of the complexity of the evidence. The difficulty rests on determining a reasonable amount. Pattison was speaking in terms of $145,000 until the end of the trial. For 15 days of hearings, that amounts to close to $10,000/day, or around $1,800/hour

for 5.5 hours per day. Without any information about the expert fees, and even assuming some preparation time, that is clearly excessive.

[46] Out of the $145,000 asked for, Pattison sought $30,000 for two experts retained to address the section 53 issue. No amount as security should be allocated. I would be inclined to allocate $30,000 as security for the assistance that may be needed from the main expert for Pattison. That amount is inclusive of applicable taxes.

[47] T-Rex asked that, if an additional amount as security is to be ordered, it be posted pursuant to rule 418 no sooner than 30 days before the trial resumes. Given that it has been decided that the trial will resume on October 24, 2022, the date on which the required amount is to be paid into Court (or an irrevocable letter of credit in the full amount of $115,000, plus applicable taxes, and $30,000 is filed) is no later than September 23, 2022.

[48] In view of the circumstances, including divided success on the motion, there will not be costs awarded on this motion.

ORDER in T-1066-17

THIS COURT ORDERS:

1. The Defendants\Plaintiffs by Counterclaim's motion to increase the security for costs is granted in part.
2. The Plaintiff/Defendant by Counterclaim shall pay into Court an additional amount as security for costs of the Defendants\Plaintiffs by Counterclaim in the total amount of $115,000, plus applicable taxes, for counsel fees and $30,000 on account of disbursements for experts.
3. The Plaintiff/Defendant by Counterclaim may satisfy its obligation to give an additional amount as security by paying the amount into Court, or by filing an irrevocable letter of credit in the full amount of $115,000, plus applicable taxes, and $30,000 from a reputable financial institution, or in a form satisfactory to the Defendants/Plaintiffs by Counterclaim. The date on which the amount is due into Court is no later than September 23, 2022.
4. If the Plaintiff/Defendant by Counterclaim fails to post security for the Defendants/Plaintiffs by Counterclaim's costs in accordance with this order, this action may be dismissed on motion of the Defendants/Plaintiffs by Counterclaim.
5. There will not be any costs awarded on this motion.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1066-17
STYLE OF CAUSE:	T-REX PROPERTY AB v PATTISON OUTDOOR ADVERTISING LIMITED PARTNERSHIP, PATTISON OUTDOOR ADVERTISING LTD, JIM PATTISON INDUSTRIES LTD, and ONESTOP MEDIA GROUP INC
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