

Federal Court



Cour fédérale

Date: 20220921

Docket: T-1050-20

Citation: 2022 FC 1315

Toronto, Ontario, September 21, 2022

PRESENT: Madam Justice Go

BETWEEN:

**SUREWERX USA INC. and
JET EQUIPMENT & TOOLS LTD.**

**Plaintiffs/
Defendants by Counterclaim**

and

DENTEC SAFETY SPECIALISTS INC.

**Defendant/
Plaintiff by Counterclaim**

COSTS ORDER AND REASONS

I. Overview

[1] By an order dated August 12, 2022, I dismissed the Defendant’s appeal [Appeal] from an order of Case Management Judge [CMJ] Tabib which granted a motion brought by the Plaintiffs Surewerx USA Inc. and Jet Equipment & Tools Ltd. [Surewerx] to challenge the designation of the identity of the manufacturer of Dentec Safety Specialists Inc. [Dentec] as “Solicitor’s Eyes

Only” [SEO] information. The designation was made pursuant to a Protective Order previously issued, on consent, by the same CMJ.

[1] The issue in the Appeal involved the interpretation of certain key terms of the Federal Court’s Model Protective Order [Model Protective Order] which formed the basis of the Protective Order made in this case.

[2] As per my order dated August 12, 2022, both Dentec and Surewerx filed their written submissions on costs on September 9, 2022. After reviewing Dentec’s submissions, Surewerx sought and received leave of the Court to deliver and file a reply to the submissions filed by Dentec. Dentec then filed a letter dated September 13, 2022 in response to Surewerx’s reply. I have reviewed and considered all of the written submissions from the parties.

[3] The reasons for my costs order are set out below.

II. Summary of the Guiding Principles for Costs Orders

[4] This Court has full discretionary power over the amount and allocation of costs: Rule 400(1) of the *Federal Courts Rules*, SOR/98-106 [the *Rules*].

[5] While the Court has broad discretion over costs, the exercise of such discretion is not made arbitrarily: *Pembina County Water Resource District v Manitoba*, 2019 FC 82 [*Pembina*], at para 20. The Court may consider the list of factors set out under Rule 400(3) and, in

accordance with Rule 400(3)(h) of the *Rules*, the Court may take into account any other matter that it considers relevant: *Pembina*, at para 19.

[6] In *Allergan Inc v Sandoz Canada Inc*, 2021 FC 186 [*Allergan*], Chief Justice Crampton summarized the principal objectives underlying an award of costs as follows: “(i) provide indemnification for costs associated with successfully pursuing a valid legal right or defending an unfounded claim, (ii) penalize a party who has refused a reasonable settlement offer, and (iii) sanction behaviour that increases the duration and expense of litigation, or is otherwise unreasonable or vexatious”: *Allergan*, at para 19.

[7] As the Chief Justice further explained in *Allergan* at paragraph 25, “[t]he ‘default’ level of costs in this Court is the mid-point of Column III in Tariff B” and “Column III is intended to provide partial indemnification (as opposed to substantial or full indemnification)” for cases of average or usual complexity.

[8] Also, as Justice Diner explained in *Canadian Pacific Railway Company v Canada*, 2022 FC 392 at paragraph 23:

Costs customarily provide partial compensation, rather than reimbursing all expenses and disbursements incurred by a party, representing a compromise between compensating the successful party and burdening the unsuccessful party (*Sherman v Canada (MNR)*, 2004 FCA 29 at para 8 [*Sherman*], citing *Apotex Inc. v. Wellcome Foundation Ltd.* (1998), 1998 CanLII 8792 (FC), 159 F.T.R. 233)....

III. Analysis

[9] The parties' positions on costs differ significantly. Although their Appeal was dismissed, Dentec submits no costs should be awarded to either party. In the alternative, Dentec submits that costs should be awarded in accordance with the mid-point of default Column III of Tariff B in the amount of \$1,500.00.

[10] Surewerx, on the other hand, seeks a lump sum cost award of \$6,500.00 representing approximately 25% of Surewerx's legal fees and taxes incurred in defending Dentec's Appeal. In the alternative, Surewerx asks for \$3,680.00 reflecting the high end of Column IV of the Tariff.

[11] In support of their positions, the parties put forward various arguments, of which the key ones can be summarized as follows.

[12] Dentec argues:

- a) Surewerx rejected Dentec's reasonable offer to resolve the issue raised by Surewerx prior to the filing of the underlying motion;
- b) Surewerx has already been compensated with a \$7,000 costs award on the underlying motion; a further award of costs to Surewerx would ignore one of the principal objectives of penalizing a party that has refused a reasonable settlement offer;
- c) The Appeal was relatively straightforward and there is no reason to depart from a typical mid-Column III award; and
- d) If the Court awards costs, they should not be ordered forthwith on the basis that the motion should not have been brought.

[13] Surewerx's counter-submissions are:

- a) The Appeal was of greater than average complexity and the subject matter was important not only to the parties, but to the legal profession more generally;
- b) Even if calculated at the higher end of Column IV, Surewerx's costs in accordance with Tariff B are roughly 12% of its actual legal fees;
- c) Dentec's pursuing a range of arguments in the face of unsupportive law and the CMJ's clear, correct and comprehensive reasons warrants a greater award of costs; and
- d) Surewerx did not engage in any inappropriate behaviour but instead diligently defended the Protective Order regime; the additional burden should not be borne solely by Surewerx but shared by Dentec in the form of an increased costs award.

[14] My analysis of the parties' positions is set out below.

Dentec's Settlement Offer to Surewerx

[15] Dentec asks the Court to consider Surewerx's rejection of Dentec's offer on April 7, 2022, one day prior to Surewerx's filing of their moving materials for the underlying motion to the CMJ, to resolve the issue raised by Surewerx. Dentec offered to provide the relief sought by Surewerx three months after the offer date. Surewerx rejected Dentec's offer, stating that Dentec's proposal would cause unnecessary delay in the proceeding and mediation, and that Surewerx preferred to just have this issue determined in order to move things forward.

[16] After Surewerx filed their materials, the hearing of the underlying motion was delayed from April 21, 2022 until May 13, 2022, at Dentec's request, due to counsel's illness. The CMJ granted Surewerx's motion on June 17, 2022. Surewerx ultimately obtained the relief it sought

on August 22, 2022 (the expiration of the time to appeal the August 12 order), which I note is more than the three-month timeframe proposed by Dentec.

[17] Having said that, however, I would not characterize Surewerx's initial refusal to accept Dentec's offer as unreasonable. Dentec's offer required Surewerx to wait three months before getting the information they sought on a confidential basis. If the motion had proceeded on its initially scheduled day, Surewerx would have obtained the information much sooner than the three month time period offered by Dentec. While the motion was delayed for reasons beyond the party's control, by appealing the CMJ's order, Dentec was able to achieve what it had initially offered, namely, to provide the information regarding its manufacturer's identity on a confidential basis, but at a later date than initially sought by Surewerx.

[18] I therefore do not find Surewerx's non-acceptance of Dentec's offer to be "legally significant": *Coca-Cola Ltd v Pardhan* (2000), 5 CPR (4th) 333 [*Coca Cola*] at para 32. Nor do I find Surewerx's refusal to have unduly extended the underlying litigation: *Coca Cola*, at para 32. As such, I need not consider the refusal as a factor in the determination of the reasonable costs to be paid.

Complexity and Legal Significance of the Case

[19] Dentec submits that the Appeal was relatively straightforward; the issues were crystallized and narrow, with no cross-examinations of any affiants on the Appeal.

[20] Surewerx counters that the subject matter of the Appeal was important to the legal profession more generally in that Dentec put into issue the interpretation of key terms of the Model Protective Order. While arguing that the existing jurisprudence was “always clearly” in support of their arguments, Surewerx acknowledges that the Federal Court’s prior commentary on challenging a SEO designation lacked some clarity. As such, litigants more generally benefit from the Court’s clarification of the appropriate test to be used in challenging a designation under a Protective Order.

[21] Surewerx further argues that the Appeal was of greater than average complexity as each party made extensive submissions regarding the facts and jurisprudence informing the Appeal and the underlying decision; and that the depth of legal argument supporting these grounds was relatively substantial. Surewerx further argues that the case was factually complex with a substantial factual background and corresponding evidence at issue in the Appeal.

[22] To start off, I do not agree with Surewerx that the factual background dealt with under the Appeal was complex. I acknowledge that Dentec has filed a four-volume motion record, but the only legally relevant facts were not extensive. I also agree with Dentec that the issues in the Appeal were quite narrow.

[23] However, both parties have stressed before me that the issue in the Appeal has general significance for the profession, as it offered an opportunity for the Court to clarify the appropriate test to be used in challenging a SEO designation under a Protective Order. This factor may have accounted for the relatively substantial arguments advanced by both parties in

the underlying motion and in the Appeal. It bolsters Surewerx's view that they alone should not bear the burden of protecting the Model Protective Order as created by the Federal Court in consultation with the legal profession.

[24] However, Surewerx's acknowledgement that clarity is needed from the Federal Court on the appropriate test regarding a SEO designation, in my view, undermines its position that Dentec unreasonably pursued a wide range of arguments "despite the existence of recent, unsupportive case law." Moreover, even if the parties did agree on the appropriate test to be applied, the Model Protective Order still anticipates disagreement over designation of specific information, which may require intervention from the CMJ and from the Court, if necessary, to resolve such disagreement. As such, I do not adopt Surewerx's arguments that Dentec was pursuing arguments "in the face of unsupportive law."

Conclusion

[25] As noted above in *Allergan*, "the 'default' level of costs is the mid-point of Column III in Tariff B." Having considered the parties submissions, the only factor that may justify deviation from this default position, in my view, is that this matter raises an issue that the parties agreed requires further clarification from this Court, and thereby adding to its complexity.

[26] In so concluding, I do not in any way purport to have provided the clarity that the profession is seeking, nor do I doubt that more opportunities will present themselves for my esteemed colleagues, especially those steeped in the study of Intellectual Property Law, to make further pronouncements on the appropriate interpretation and application of the Model Protective

Order. The fact remains that the core issue of the underlying motion has implications for other litigants beyond the immediate parties. As such, I agree that some increased cost award over and above the mid-Column III amount is called for to reflect that Surewerx alone should not bear the burden of testing the terms within the Model Protective Order.

[27] Having considered that Dentec has previously not had the opportunity to make full submissions on costs, and that Surewerx had already received a \$7000 costs award on the underlying motion, I find the appropriate cost award in this case is a lump sum amount of \$3,680.00.

ORDER in T-1050-20

THIS COURT'S ORDER is that:

1. Costs are payable by the Defendant to the Plaintiffs in the lump sum amount of \$3,680.

"Avvy Yao-Yao Go"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1050-20

STYLE OF CAUSE: SUREWERX USA INC. AND JET EQUIPMENT &
TOOLS LTD. v DENTEC SAFETY SPECIALISTS INC.

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

**COSTS ORDER AND
REASONS:** GO J.

DATED: SEPTEMBER 21, 2022

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