Federal Court  Cour fédérale

Date: 20121029

Docket: T-299-05

Citation: 2012 FC 1257

Ottawa, Ontario, October 29, 2012

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

CATHERINE LEUTHOLD

Plaintiff

and

CANADIAN BROADCASTING CORPORATION
and
JERRY MCINTOSH

Defendants

REASONS FOR ORDER AND ORDER

I. Introduction

[1] Further to this Court's judgment rendered on June 14th, 2012 (*Leuthold v Canadian Broadcasting Corporation*, 2012 FC 748) [*Leuthold*], the Defendants bring this motion pursuant to Rule 403 of the *Federal Court Rules*, SOR/98-106 [*Rules*], requesting that an order be made containing directions to the assessment officer with respect to costs.

II. Relief Sought

[2] More particularly the motion, in its conclusion, seeks:

[TRANSLATION]

1. An order that the costs be awarded in their favour as of August 9, 2005, at double the tariff set out and in accordance with the upper scale of column IV of Tariff B;

2. That the Court give directions to the assessment officer allowing assessment of costs for:

a) a second attorney for all stages of proceedings, including the hearing;

b) the fees and disbursements of the experts heard at the hearing;

c) all disbursements, including travel expenses for witnesses, photocopy fees, online research fees, transcript fees for examinations for discovery and the hearing, long distance fees, fax fees, postage and courier fees and other administrative fees;

d) interest on fees and disbursements since June 14, 2012;

e) costs for this motion;

f) any other order that this Honourable Court could consider fair and reasonable.

[3] For the following reasons, the Defendants' motion is granted in part.

III. Facts

[4] On February 18th, 2005, the Plaintiff, Catherine Leuthold, began her action for copyright infringement, claiming at that time recovery of her damages on the basis of 3,080.71 CAD (2,500.00 USD) for each unauthorized reproduction of the Stills and each broadcast of the Stills, against the Defendants, the Canadian Broadcasting Corporation [CBC] and Jerry McIntosh (the Defendants).

[5] On August 9th, 2005, the Defendants served an offer to settle (offer) to the Plaintiff for an amount of thirty seven thousand five hundred dollars US (37 500 USD) plus interest. The offer also included the costs of the action up to the date of the offer on a party and party basis.

[6] The Defendants' offer contained no admission of liability for infringements and was rejected by the Plaintiff.

[7] Plaintiff made three offers to settle.

[8] The Defendants conduct led to approximately two additional years of proceedings.

[9] The Plaintiff's taxable income in 2006 was 20,661 USD.

[10] The trial began on February 6th, 2012.

[11] The Plaintiff sought exemplary damages against Defendant CBC, for 25,000 CAD, and against Defendant McIntosh, for 10,000 CAD.

[12] The Plaintiff had also been asking for 15, 000 CAD in punitive damages but abandoned that portion of her claim at the trial.

[13] The Plaintiff also asked for an accounting for profits.

[14] The Defendants admitted infringement for six communications to the public.

[15] The Defendants refused to admit any infringement of the Plaintiff's rights.

[16] The opinion of the Defendants' expert was not adopted by the Court.

[17] The Court refused to order an accounting for profits or an injunction (*Leuthold* at paras 147 and 161).

[18] The Defendant McIntosh was not held personally responsible for infringement because his actions were not the result of a deliberate act or any negligence on his part (*Leuthold* at para 171).

[19] The Court refused to order exemplary damages against the Defendants because the infringements were the result of honest mistakes (*Leuthold* at para 159).

[20] On June 14th, 2012, the Defendant, CBC, was ordered to pay, jointly and severally with each Broadcasting Distribution Undertaking [BDU], 19,200.00 USD in damages to the Plaintiff (cf. *Leuthold*).

[21] The Court ordered a greater amount per infringement than what was claimed.

[22] The CBC was also ordered to pay the Plaintiff an additional 168.74 CAD in generated revenues.

[23] The Court deferred its decision on costs to a special hearing to be set after the parties received the Court's judgment (*Leuthold* at para 174).

[24] On July 13th, 2012, the Defendants filed their notice of motion in accordance with Rule 403 of the *Rules*.

[25] On July19th, 2012, the Court set a date for the hearing of the motion to Thursday, August 23rd, 2012.

[26] On August 7th, 2012, the Defendants filed their written representations.

[27] On August 14th, 2012, the Plaintiff filed her written representations.

IV. Issues

1. ***Are the Defendants entitled to their costs at double the rate they are assessed at?***
2. ***Are the Defendants entitled to have their costs against the Plaintiff assessed at the upper end of column IV of Tariff B?***

V. Relevant legislation

[28] The applicable rules of the *Federal Court Rules*, SOR/98-106, are appended to this decision.

VI. Submissions of the parties on issue 1

1. ***Are the Defendants entitled to their costs at double the rate they are assessed at?***

A. The Defendants' submissions

[29] The Defendants argue they are entitled to double their costs from the date they served their offer. They argue that the two conditions required by Rule 420(2) of the *Rules* are met, namely:

(1) The Plaintiff obtained a judgment less favourable than the offer (the offer was for 37, 500 USD while the Plaintiff obtained a judgment for 19,200 USD plus 168.74 CAD);

(2) The offer was made at least 14 days before the trial began (the offer was served August 9th, 2005 and the trial began on February 6th, 2012), and it was not withdrawn and did not expire before the trial began.

[30] Based on the above, the Defendants argue that they should receive their costs at twice the rate decided upon, from the date they served their offer to the date of judgment. They emphasize that the offer made was nearly double the judgment received by the Plaintiff. The Defendants also refer the Court to the judgment of Justice D. Tremblay-Lamer in *ITV Technologies Inc v WIC Television Ltd*, 2005 CF 744 at para 11.

B. The Plaintiff's submissions

[31] The Plaintiff does not dispute any of the factual claims above. She does not agree, however, that based on those facts, the Defendants should receive double their costs.

[32] The Plaintiff submits that the awarding of double costs does not occur automatically once the conditions of Rule 420(2) are satisfied. Their award is still subject to the absolute discretion of the Court pursuant to Rule 400. In deciding how to exercise that discretion, the Plaintiff submits that the Court should take into account the factors listed in Rule 400(3).

[33] The Plaintiff notes firstly that the Defendants' offer contained no admission of liability or wrongdoing. The Plaintiff then underlines that the Plaintiff had herself made three good-faith offers to settle and that, with regards to the first offer, the Defendants had asked for an extension of the

deadline to accept but then failed to reply by the extended deadline. This, the Plaintiff asserts, made the extension request appear like nothing more than a delaying tactic.

[34] Dealing next with her refusal of the Defendants' offer, the Plaintiff asserts that the Defendants did not provide her with sufficient and reliable information concerning the Defendants' advertising and subscription revenues as well as the number and scope of the infringements. There was also a complete lack of information as to the BDUs' revenues. Finally, when the Plaintiff learned of the hundreds of potential infringements by the BDUs, she claims this justified refusing the Defendants' offer.

[35] The Plaintiff additionally notes that the lack of financial disclosure is what led to her request for an accounting of profits.

[36] The Plaintiff's attorney also underlined certain facts related to the length of time that elapsed before discovery could take place.

[37] She then concluded that the Defendants' conduct led to approximately two additional years of proceedings.

VII. Analysis of the first issue

A. General principles of costs

[38] The basic principle in the awarding of costs is that the Court has "full discretionary power over the amount and allocation of costs" (Rule 400(1) of the *Rules*). The Court may consider the factors listed in Rule 400(3) in exercising that discretion. The case law has added another principle, namely that the Court's goal in awarding costs should be "a compromise between compensating a successful party and not unduly burdening an unsuccessful party" (*Apotex Inc v Wellcome Foundation Ltd*, 84 CPR (3d) 303, 159 FTR 233, at para 7).

1. Are the Defendants entitled to their costs at double the rate they are assessed at?

[39] The Defendants are entitled to their costs at double the rate they are assessed at pursuant to Rule 420(2) of the *Rules* for the following reasons.

[40] Firstly, the Defendants' offer complies with the conditions required by Rule 420 to justify being awarded double costs at the rate assessed by the Court, namely:

(1) The Plaintiff obtained a judgment less favourable than the offer (the offer was for $37, 500 US while the Plaintiff obtained a judgment for $19 200 US plus $168.74 CAN);

(2) The offer was made at least 14 days before the trial began (the offer was served August 9th, 2005 and the trial started on February 6th, 2012), and it was not withdrawn and did not expire before this later date.

[41] The Plaintiff acknowledges that the Defendants' offer met the conditions of Rule 420 of the *Rules*. She does not, however, agree that double costs should necessarily be awarded. The Plaintiff

reminds the Court that it has absolute discretion and is not required to award double costs in the face of an offer that meets all conditions.

[42] To support this assertion, the Plaintiff relies on *Canwell Enviro-Industries Ltd v Baker Petrolite Corp*, 2002 FCA 482 [*Baker*], which at paragraph 4(b) states:

> "As I understand Rule 420(2)(b), where a defendant makes an offer to a plaintiff which is rejected and the plaintiff then fails to obtain judgment (which is the case here), the defendant is automatically entitled to a doubling of the taxable fees thereafter "unless otherwise ordered by the Court". In this situation there is no need for the defendant to show that the offer was more generous to the plaintiff than the outcome. I am inclined to order otherwise than a doubling, however…"

In that instance the Court of Appeal then went on to increase the Defendants' costs by 50% (rather than 100%) because it believed the offer was not a true compromise (the notion of "compromise (or incentive to accept)" has since been analyzed as an essential element of an offer satisfying the conditions of Rule 420(2) (cf. *M.K. Plastics Corp. v Plasticair Inc*, 2007 FC 1029 at para 39).

[43] The Plaintiff's argument for refusing double costs can be distinguished from *Baker,* however, in that the Plaintiff never argued before us that the Defendants' offer was not a compromise. When treating the Defendants offer in the context of Rule 400(3)(*e*) ("any written offer to settle"), the Plaintiff focuses more on the fact that she did not have sufficient information to make a reasoned decision on the offer. This lack of sufficient information, the Plaintiff argues, was mostly due to the Defendants' uncooperativeness in providing information to evaluate her claim. She also underlines the fact that she made three good-faith offers to the Defendants.

[44] It is the Plaintiff's position that the Court should consider all the Rule 400(3) factors in exercising its discretion in awarding double costs. The only case where a Court recognized factors other than those related to the quality of offer was *Monsanto Canada Inc v Schmeiser*, 2002 FCT 439 at paras 14-15.

[45] It is the Court's view that it must look primarily at the factors that existed at the time of the offer when deciding whether to double costs. In *Sun Construction Co. Ltd v Canada*, 2001 FCT 447 at para 39, the Court cites Mr. Justice Orsborn in *Burton v Global Benefit Plan Consultants Inc*, (1999) 183 Nfld. & P.E.I. 86 at paras 10 and 11 [*Burton*], on the notion of offers to settle:

> [10] After reviewing decisions from other jurisdictions I noted, at paras. 21-22:
>
> "It is clear that, across Canada, the imposition of severe and adverse cost consequences is seen as necessary in order to encourage the making and acceptance of reasonable settlement offers prior to trial. . . . "
>
> [11] . . .
>
> "Faced with an offer to settle, a party must objectively assess the economics of proceeding further. As Pattison phrased it, this "... is where the substantive and economic analyses of the value and risk of seeing a lawsuit through to judgment converge". A party may decide to accept the offer or to itself make an offer. If, having assessed the offer, it chooses to do nothing, that choice carries with it the implicit determination that the party is satisfied that it will achieve a better result at trial. This is the party's own determination to make - it knows the strengths and weaknesses of its case. But such a determination also indicates that the party is willing to accept the risk of proceeding further. There is a willingness to accept the consequences of being wrong. A party who has offered to settle should not bear the expense of proceeding to trial because of the other party's over-optimistic assessment of its case . . . "

[46] The facts in the case at bar show that the Defendants' offer was for 37,500 USD plus interest and costs. The Plaintiff had consented to the use of five of her photographs for 2,500 USD (*Leuthold* at para 21). Furthermore, Ms. Leuthold, was not a wealthy person at the time of the offer. The Defendants argue that the Plaintiff held an "over-optimistic" assessment of her claim and unwisely refused their reasonable offer.

[47] The Plaintiff counters by arguing that "it is not in the public interest to deter litigants from pursuing a reasonable claim owing principally to a fear of an award of costs". The Plaintiff insists the award sought (i.e. 21, 554, 954.25 CAD), while on its face enormous, was based on a reasonable evaluation of damages per infringement. The amount was large because of the number of potential infringements, particularly by the BDUs. The issue of the "number of infringements that result from a transmission by a programming undertaking to [numerous] BDUs" was important (Plaintiff's Written Representations [PWR] at para 27). The resolution of the question required a careful analysis of sections of the *Copyright Act*, RSC 1985, c C-42 [*Copyright Act*] and the *Broadcasting Act*, SC 1991, c 11 [*Broadcasting Act*], as well as the testimonies of two expert witnesses. A claim that required such extensive analysis cannot be easily dismissed as unreasonable. Finally, the Plaintiff adds that "[t]he importance of the issues in dispute justifies relieving the Plaintiff of the burden of paying substantial [...] costs" (PWR at para 29).

[48] The Court disagrees with the Plaintiff's argument that the importance of the issue meant that her decision to litigate the issue was reasonable. Given the offer from the Defendants, the Plaintiff's decision to forego the offer and risk spending large amounts of money litigating a claim is not necessarily reasonable. As mentioned in the passage taken from *Burton*, cited above, a party that

refuses a reasonable offer to settle is considered to be confident that it will be awarded more at trial. If you are not confident, then you should accept a reasonable offer or be willing to accept the risk of proceeding further.

VIII. Submissions of the parties on issue 2

2. Are the Defendants entitled to have their costs against the Plaintiff assessed at the upper end of column IV of Tariff B?

A. The Defendants' position

[49] The Defendants referred the Court to Rule 407 of the *Rules* that allows the Court to assess costs at a rate other than column III of the table of Tariff B. They also underline the Court's ability to award costs according to a higher column and its "full discretionary power" as to the amount of costs referred to in Rule 400(1) of *Rules*. They cite *Novopharm Limited v Sanofi-Aventis Inc*, 2007 FCA 384 at paras 8-10, by way of confirmation.

[50] The Defendants then turned to Rule 400(3) of the *Rules* that provides a list of factors to consider. The Defendants point to the following factors as favouring both the award of costs according to the upper end of column IV and costs for having a second senior attorney participate in the proceedings:

400. (3) In exercising its discretion under subsection (1), the Court may consider	400. (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 :
(*a*) the result of the proceeding;	*a*) le résultat de l'instance;
(*b*) the amounts claimed and the amounts recovered;	*b*) les sommes réclamées et les sommes recouvrées;
(*c*) the importance and complexity of the issues	*c*) l'importance et la complexité des questions en litige

[51] The Defendants concede that the Plaintiff succeeded in her claim for copyright infringement for six unauthorized transmissions of her work but remind the Court that these infringements were admitted in the joint book of documents before the trial started.

[52] Furthermore, they submit, the Plaintiff was unsuccessful in the majority of her other claims, notably, accounting for profits, exemplary damages and an injunction. The Defendants therefore conclude that the results of the proceedings were largely in their favour.

B. The Plaintiff's position

[53] The Plaintiff responds with her own list of claims on which, in addition to the copyright infringement claim, she was successful, namely a claim for delivery up, profits of the Defendant CBC, and the destruction of electronic copies of infringing works. Thus, according to the Plaintiff, she was the more successful of the two parties.

[54] The Plaintiff also insists that the Defendants never admitted to the infringement. She cites the Defendants' Re-Amended Defence dated April 3, 2009, as containing, rather, a number of defences designed to avoid liability for the infringements.

C. Parties' respective positions on Rule 400(3)(*b*) and Rule 400(3)(*c*)

(1) The amounts claimed and the amounts recovered

(a) Defendants' position

[55] The Plaintiff's total claim in damages for copyright infringement against the Defendants totalled 21, 554,954.25 CAD. The Defendants submit that the claim was grossly exaggerated as evidenced by the award granted on June 14th, 2012, which was only equivalent to 0.1% of the claim.

[56] As a result of the amount at stake, further to the amendments introduced by Plaintiff in 2007, the Defendants submit that the matter became more lengthy and complex. For example, more than one pre-trial conference was required.

[57] The Defendants also argue that the CBC is a public organization and, therefore, a large amount of taxpayer money was expended due to the outlandish amount of the claim.

[58] Lastly, the Defendants note that had the Plaintiff valued her damages around the amount that she was awarded (i.e. around 20,000 USD), her action would have been governed by Rules 292 to

299 of the *Rules*. Her action would have been far less costly. This is another factor to be considered under Rule 400(3)(*n*) of the *Rules*.

[59] For all these reasons, the Defendants argue that the exaggerated amount of the Plaintiff's claim favours an assessment for costs at the upper end of column IV of Tariff B, as well as for the costs for two attorneys at each step of the litigation from the date the offer was served.

(b) Plaintiff's position

[60] The Plaintiff responds that the difference between the amount claimed in damages from that awarded is the result of the Court's interpretation of both the license agreement of October, 2002 and the number of infringements the Plaintiff alleged.

[61] Had the Court ruled in favour of the Plaintiff on those important, non-trivial issues and awarded the same amount (3,200 USD) that it did for the six infringements, the total would have been close to the total amount claimed by the Plaintiff.

[62] For these reasons, the Plaintiff argues that her claim cannot be considered frivolous, unreasonable or exaggerated.

[63] Additionally, the Plaintiff reminds the Court that it awarded a higher amount per infringement than she claimed and rejected the position of the Defendants' expert as to the value of the photographs or a license of same.

(2) The importance and complexity of the issues

(a) Defendants' position

[64] The Defendants note firstly that intellectual property cases are generally more complex than other types of litigation and that it is not unusual for costs to be assessed at the upper end of column IV of Tariff B. They cite *Novopharm Limited v Eli Lilly and Company*, 2010 FC 1154 at paras 5 and 7 [*Novopharm Limited*] and *Bonds v Suzuki Canada Inc*, 2003 FCT 611 at para 33, in support of those claims.

[65] They argue that the case raised a number of difficult questions that required a close analysis of the *Copyright Act* and the *Broadcasting Act*.

[66] The Defendants also submit that the case was long, expensive and required two experts and five ordinary witnesses. The numerous proceedings that took place before the trial required, according to them, the presence of two attorneys.

[67] Finally, the Defendants point out that the amount of work due to the complexity of the matter is a factor that justifies costs being assessed at the upper end of column IV of Tariff B. It also justifies that the costs for two attorneys at each step of the litigation be awarded.

(b) Plaintiff's position

[68] Due to its nature and the number of issues and parameters that were dealt with, the Plaintiff takes the position that the case was important but not very complex.

[69] The Plaintiff emphasizes the importance of the issues treated. The case involved, according to Plaintiff's counsel, some very important issues of copyright and broadcasting law, including the interpretation of paragraphs 2.4(1)(*c*) and 3(1)(*f*) of the *Copyright Act*, as well as the issue of quantum to be awarded in the context of negotiated licenses.

D. Plaintiff's additional Rule 400(3) arguments

[70] The Plaintiff also argues that applying a number of other factors in Rule 400(3) of the *Rules* to the facts should deter the Court from awarding double costs at the upper end of column IV of Tariff B.

[71] The additional factors to be considered are:

400. (3) In exercising its discretion under subsection (1), the Court may consider	400. (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 :
. . .	[…]
(*d*) the apportionment of liability;	*d*) le partage de la responsabilité;

. . .	[…]
(*h*) whether the public interest in having the proceeding litigated justifies a particular award of costs;	*h*) le fait que l'intérêt public dans la résolution judiciaire de l'instance justifie une adjudication particulière des dépens;
(*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;
. . .	[…]
(*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;
. . .	[…]
(*o*) any other matter that it considers relevant	*o*) toute autre question qu'elle juge pertinente.

(1) The apportionment of liability

[72] On this factor, the Plaintiff points out that solely the Defendants were found liable for both the infringements and the ambiguity in the license.

(2) Whether the public interest in having the proceeding litigated justifies a particular award of costs

[73] The Plaintiff argues that the issues debated and decided upon in this matter are of great importance for copyright law, both in Canada and generally in other Countries. Specifically, the Plaintiff points to 1) the question of the number of infringements that result from a transmission by a programming undertaking to multiple BDUs; and 2) the interpretation and use of copyright licenses in determining the amount awarded for infringement.

[74] The Plaintiff argues that had she been deterred by the rules governing costs, these important issues would never have been litigated. It is in the public interest not to deter a reasonable and important claim from coming before the courts due to a fear of costs awards.

(3) Any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding

[75] The Plaintiff's attorney also underlined the following facts:

(1) He had to send seven letters in order to finally set a date for the examination for discovery;

(2) Mr. McIntosh was not in a position to answer the Plaintiff's questions concerning the CBC's intentions regarding the License;

(3) Mr. McIntosh was unable to answer questions of a technical nature;

(4) Mr. McIntosh was unable to identify for the Plaintiff an individual who could answer her questions;

(5) Defendants refused to provide another witness for discovery;

(6) The Defendants made 39 undertakings during the examination of Mr. McIntosh, on December 7, 2005, and took 10 months to fulfill them;

(7) In the fall of 2007, the Plaintiff, through independent research, discovered the approximate number of BDUs that carried *Newsworld* programming and the fact that the scope of alleged infringements included hundreds of BDUs.

[76] He then concluded that the Defendants' conduct led to approximately two additional years of proceedings.

[77] All in all, the Plaintiff submits that the Defendants' uncooperative conduct in the context of examination for discovery led to approximately two additional years of proceedings. The Plaintiff highlights the independently discovered information regarding the number of BDUs that carried *Newsworld* (information she had requested from the Defendants), which necessitated further examination, additional proceedings and a Re-Amended Statement of Claim.

(4) Whether any step in the proceeding was improper, vexatious or unnecessary, or taken through negligence, mistake or excessive caution

[78] The Plaintiff submits that the Defendants' actions in delaying and being unprepared for examination for discovery mentioned above is as an example of improper, if not, vexatious conduct.

[79] The Plaintiff also labels the fact that Defendants raised many defences throughout the seven years of proceedings, only to drop them at trial, as another example of improper, if not vexatious conduct.

(5) Any other matter that the Court considers relevant

[80] The Plaintiff submits that the Court should consider the relative strength and resources of the parties under this factor. The Plaintiff had very limited resources with which to pursue her claim (20,661 USD in 2006) compared to the Defendants' resources.

[81] The Plaintiff also underlines the fact that the Defendants' expert's opinion was not adopted by the Court as relevant to the awarding of costs for said expertise.

IX. Analysis of the second issue

2. Are the defendants entitled to have their costs assessed at the upper end of column IV of Tariff B?

[82] The Defendants are not entitled to have their costs assessed at the upper end of column IV of Tariff B.

[83] Rule 407 of the *Rules* specifies that party-and-party costs are assessed according to column III of the table of Tariff B, unless the Court orders otherwise. As both parties submit, the factors the Court may consider when assessing the scale of costs are those found in Rule 400(3).

[84] The Defendants highlighted three factors that they believe justify having their costs assessed at the upper end of column IV of Tariff B, namely, the result of the proceedings, the amounts claimed and amounts recovered, and the importance and complexity of the issues.

[85] With respect to the complexity factor, the Defendants correctly point out that intellectual property cases are generally more complex and are often assessed at the upper end of column IV of Tariff B (the default scale, column III, usually applying to cases of average complexity). The Defendants cite *Novopharm Limited*, cited above, at paras 5 and 7. In *Sanofi-Aventis Canada Inc v Novopharm Ltd*, 2009 FC 1139 at para 13, Justice Snider notes:

> [13] In my view, the upper end of Column IV is appropriate, and not simply because this award "splits the difference". A review of recent jurisprudence on the issue of awards in intellectual property trials indicates that this scale recognizes the significance and complexity of the various issues in such a trial (see, for example, *Johnson & Johnson Inc. v. Boston Scientific Ltd.*, 2008 FC 817, 2008 FC 817, [2008] F.C.J. No. 1022, at para. 15; *Adir Costs*, above, at para. 9-11; *Kirkbi AG v. Ritvik Holdings Inc.*, 2002 FCT 1109, 2002 FCT 1109, [2002] F.C.J. No. 1474, at para. 10)…

[86] The Defendants also cite a copyright case where column IV of Tariff B was applied on account of "volume and nature of the work involved" (cf. *Bonds v Suzuki Canada Inc*, 2003 FCT 611 at para 33).

[87] Both parties have submitted, in their representations, that this case involved a large amount of work and legal analysis.

[88] The Defendants also argue that the Plaintiff failed on a number of claims that she brought, notably, claims for an accounting for profits, exemplary damages and an injunction. The Plaintiff was nonetheless successful in her central claim for infringement which, at any rate, was subject to an admission on the part of the Defendants. The Defendants were thus required to expend time and resources on a number of claims that were ultimately not accepted by the Court.

[89] The Plaintiff rightly asserts that she was not only successful on her infringement claim but also on her claims for delivery up, profits of the CBC and the destruction of electronic copies of infringing works. The Plaintiff also underlines that the Defendants never did admit liability for infringement. In the Court's view this last issue is divided.

[90] The last factor the Defendants raise is the amounts claimed and amounts recovered (Rule 400(3)(*b*)). The Defendants submit that the amount claimed was completely exaggerated (around 100 times more than what was awarded). It increased the complexity of the case and required them to devote more time to litigating it. The Plaintiff, as mentioned above, submits that the award sought was based on a reasonable evaluation of damages per infringement.

[91] The Plaintiff, in turn, lists the following additional factors which the Court should take into consideration:

(1) the public interest in having the proceeding litigated (400(3)(*h*)).

(2) the Defendants' unwillingness to cooperate throughout the examination for discovery (discussed above in section V) (400(3)(*i*) and (*k*));

(3) the relative strength of the parties in terms of resources (400(3)(*o*));

(4) the fact that the opinion of Defendants' expert was not adopted by the Court (400(3)(*o*)).

[92] With regards to the Defendants' uncooperative behaviour (Rule 400(3)(*i*)), the Court finds that the Defendants' comportment with respect to the discovery of Jerry McIntosh bordered on vexatious (cf. *Apotex Inc v Sanofi-Aventis*, 2012 FC 318 at para 15). On the applicable column of the tariff, the Court concludes that the appropriate column is column III of tariff B, for the following reasons. The case did raise some important issues, yet these were not as complex as the Defendants assert. Firstly, the expert opinions filed dealt with the scope of the license on the one hand and the value of the photographs on the other. The opinions had no link to the issue of the number of infringements and the consequent entitlement to the very significant amount of damages claimed. Secondly, while it is true that costs in intellectual property cases are often awarded on column IV, in the majority of such instances, the Court is faced with patent litigation involving pharmaceuticals where the amounts at stake and the duration of the cases, discoveries and procedural incidents far eclipse the five witnesses and two experts heard in the present case.

[93] A final sub-issue on which the parties disagree is whether the Defendants should receive costs for a second attorney. The Defendants cite *Novopharm Limited*, cited above, at para 8, where costs for second counsel were allowed due to the large amount of work and complex issues litigated. Another guiding principle behind this practice is "that party and party costs should bear a

reasonable relationship to the actual costs of litigation" (*Porto Seguro Companhia de Seguros Gerais v Belcan SA*, 2001 FCT 1286 at para 24),.

[94] The Plaintiff opposes the awarding of costs for a second attorney. Having concluded that the case was not of such complexity as to warrant the allowing of costs under column IV of Tariff B, the Court fails to see how such a case can warrant granting costs for a second attorney. For one, the Plaintiff was able to conduct her case with just one attorney. Additionally, the second attorney's involvement at trial was limited to the cross-examination of the Plaintiff's expert witness. Consequently, the Court rejects the claim for costs for a second attorney.

ORDER

In light of the reasons above **THIS COURT ORDERS that**

(1) the costs be awarded in their favour as of August 9, 2005, at double the tariff set out and in accordance with column III of Tariff B;

(2) the assessment officer allows assessment of costs for:

(a) the fees and disbursements of the experts heard at the hearing;

(b) all disbursements, including travel expenses for witnesses, photocopy fees, online research fees, transcript fees for examinations for discovery and the hearing, long distance fees, fax fees, postage and courier fees and other administrative fees;

(c) interest on fees and disbursements since June 14, 2012;

less a 25% deduction given the vexatious conduct of the defendants during the discovery of defendant Jerry McIntosh.

"André F.J. Scott"

Judge

ANNEX

Rules 400(1), 400(3), 403(1), 403(2), 403(3), 407, 420(2) and 420(3) of the *Federal Court Rules*, SOR/98-106, provide as follows:

400. (1) The Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.	400. (1) La Cour a le pouvoir discrétionnaire de déterminer le montant des dépens, de les répartir et de désigner les personnes qui doivent les payer.
400. (3) In exercising its discretion under subsection (1), the Court may consider	400. (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 :
(*a*) the result of the proceeding;	*a*) le résultat de l'instance;
(*b*) the amounts claimed and the amounts recovered;	*b*) les sommes réclamées et les sommes recouvrées;
(*c*) the importance and complexity of the issues;	*c*) l'importance et la complexité des questions en litige;
(*d*) the apportionment of liability;	*d*) le partage de la responsabilité;
(*e*) any written offer to settle;	*e*) toute offre écrite de règlement;
(*f*) any offer to contribute made under rule 421;	*f*) toute offre de contribution faite en vertu de la règle 421;
(*g*) the amount of work;	*g*) la charge de travail;
(*h*) whether the public interest in having the proceeding litigated justifies a particular award of costs;	*h*) le fait que l'intérêt public dans la résolution judiciaire de l'instance justifie une adjudication particulière des dépens;
(*i*) any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding;	*i*) la de la part d'une partie de 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 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

(i) improper, vexatious or unnecessary, or

(ii) taken through negligence, mistake or excessive caution;

k) la question de savoir si une mesure prise au cours de l'instance, selon le cas :

(i) était inappropriée, vexatoire ou inutile,

(ii) a été entreprise de manière négligente, par erreur ou avec trop de circonspection;

(*l*) whether more than one set of costs should be allowed, where two or more parties were represented by different solicitors or were represented by the same solicitor but separated their defence unnecessarily;

l) la question de savoir si plus d'un mémoire de dépens devrait être accordé lorsque deux ou plusieurs parties sont représentées par différents avocats ou lorsque, étant représentées par le même avocat, elles ont scindé inutilement leur défense;

(*m*) whether two or more parties, represented by the same solicitor, initiated separate proceedings unnecessarily;

m) la question de savoir si deux ou plusieurs parties représentées par le même avocat ont engagé inutilement des instances distinctes;

(*n*) whether a party who was successful in an action exaggerated a claim, including a counterclaim or third party claim, to avoid the operation of rules 292 to 299;

n) la question de savoir si la partie qui a eu gain de cause dans une action a exagéré le montant de sa réclamation, notamment celle indiquée dans la demande reconventionnelle ou la mise en cause, pour éviter l'application des règles 292 à 299;

(*n.1*) whether the expense required to have an expert witness give evidence was justified given

(i) the nature of the litigation, its public significance and any need to clarify the law,

(ii) the number, complexity or technical nature of the issues in dispute, or

n.1) la question de savoir si les dépenses engagées pour la déposition d'un témoin expert étaient justifiées compte tenu de l'un ou l'autre des facteurs suivants :

(i) la nature du litige, son importance pour le public et la nécessité de clarifier le droit,

(ii) le nombre, la complexité ou la nature technique des questions en litige,

(iii) the amount in dispute in the proceeding; and

(*o*) any other matter that it considers relevant.

Motion for directions

403. (1) A party may request that directions be given to the assessment officer respecting any matter referred to in rule 400,

(*a*) by serving and filing a notice of motion within 30 days after judgment has been pronounced; or

(*b*) in a motion for judgment under subsection 394(2).

Motion after judgment

(2) A motion may be brought under paragraph (1)(*a*) whether or not the judgment included an order concerning costs.

Same judge or prothonotary

(3) A motion under paragraph (1)(*a*) shall be brought before the judge or prothonotary who signed the judgment.

Assessment according to Tariff B

407. Unless the Court orders otherwise, party-and-party costs shall be assessed in accordance with column III of the table to Tariff B.

Consequences of failure to accept defendant's offer

420. (2) Unless otherwise ordered by the

(iii) la somme en litige;

o) toute autre question qu'elle juge pertinente.

Requête pour directives

403. (1) Une partie peut demander que des directives soient données à l'officier taxateur au sujet des questions visées à la règle 400 :

a) soit en signifiant et en déposant un avis de requête dans les 30 jours suivant le prononcé du jugement;

b) soit par voie de requête au moment de la présentation de la requête pour jugement selon le paragraphe 394(2).

Précisions

(2) La requête visée à l'alinéa (1)*a*) peut être présentée que le jugement comporte ou non une ordonnance sur les dépens.

Présentation de la requête

(3) La requête visée à l'alinéa (1)*a*) est présentée au juge ou au protonotaire qui a signé le jugement.

Tarif B

407. Sauf ordonnance contraire de la Cour, les dépens partie-partie sont taxés en conformité avec la colonne III du tableau du tarif B.

Conséquences de la non-acceptation de l'offre du défendeur

420. (2) Sauf ordonnance contraire de la

Court and subject to subsection (3), where a defendant makes a written offer to settle,

(*a*) if the plaintiff obtains a judgment less favourable than the terms of the offer to settle, the plaintiff is entitled to party-and-party costs to the date of service of the offer and the defendant shall be entitled to costs calculated at double that rate, but not double disbursements, from that date to the date of judgment; or

(*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 judgment.

Conditions

(3) Subsections (1) and (2) do not apply unless the offer to settle

(*a*) is made at least 14 days before the commencement of the hearing or trial; and

(*b*) is not withdrawn and does not expire before the commencement of the hearing or trial.

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 :

a) si le demandeur obtient un jugement moins avantageux que les conditions de l'offre, il a droit aux dépens partie-partie jusqu'à la date de signification de l'offre et le défendeur a droit, par la suite et jusqu'à la date du jugement au double de ces dépens mais non au double des débours;

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.

Conditions

(3) Les paragraphes (1) et (2) ne s'appliquent qu'à l'offre de règlement qui répond aux conditions suivantes :

a) elle est faite au moins 14 jours avant le début de l'audience ou de l'instruction;

b) elle n'est pas révoquée et n'expire pas avant le début de l'audience ou de l'instruction.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-299-05
STYLE OF CAUSE:	CATHERINE LEUTHOLD v CANADIAN BROADCASTING CORPORATION and JERRY MCINSOTH

MOTION HELD VIA VIDEOCONFERENCE ON AUGUST 23, 2012 FROM OTTAWA, ONTARIO AND MONTRÉAL, QUÉBEC

REASONS FOR ORDER AND ORDER:	SCOTT J.
DATED:	October 29, 2012

ORAL AND WRITTEN REPRESENTATIONS BY:

Me Daniel O'Connor	FOR THE PLAINTIFF
Me Christian Leblanc Me Alain Dussault	FOR THE DEFENDANTS

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