

Federal Court



Cour fédérale

Date: 20170808

Docket: T-2051-10

Citation: 2017 FC 759

Ottawa, Ontario, August 8, 2017

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

**THE DOW CHEMICAL COMPANY, DOW
GLOBAL TECHNOLOGIES INC. AND DOW
CHEMICAL CANADA ULC**

Plaintiffs/Defendants by Counterclaim

and

NOVA CHEMICALS CORPORATION

Defendant/Plaintiff by Counterclaim

ORDER AND REASONS

I. Overview

[1] This order concerns the costs and disbursements payable to Dow Chemical Company, Dow Global Technologies Inc and Dow Chemical Canada ULC [collectively Dow] by Nova Chemicals Corporation [Nova] as a result of this Court's judgment in *Dow Chemical Company v*

Nova Chemicals Corporation, 2017 FC 350 and supplemental judgment in *Dow Chemical Company v Nova Chemicals Corporation*, 2017 FC 637 [collectively remedies phase].

[2] For the reasons that follow, Dow is awarded costs in the lump sum of \$4,355,555.63, comprising legal fees in the amount of \$1,200,000.00 and disbursements in the amount of \$3,155,555.63.

II. Background

[3] On September 5, 2014, Justice O’Keefe found that Dow’s Canadian Patent No. 2,160,705, “Fabricated Products Made From Ethylene Polymer Blends” [the ’705 Patent] was valid and infringed by Nova (*Dow Chemical Company v Nova Chemicals Corporation*, 2014 FC 844). These conclusions were affirmed by the Federal Court of Appeal on September 6, 2016 (*Nova Chemicals Corporation v Dow Chemical Company*, 2016 FCA 216).

[4] Justice O’Keefe awarded Dow \$6.5 million in costs and disbursements, comprising \$2.9 million in legal fees and \$3.6 million in disbursements (*Dow Chemical Company v Nova Chemicals Corporation*, 2016 FC 91 at para 36 [*Dow v Nova Costs Award (FC)*]). This award was affirmed by the Federal Court of Appeal on February 6, 2016 (*Nova Chemicals Corporation v Dow Chemical Company*, 2017 FCA 25 [*Dow v Nova Costs Award (FCA)*]).

[5] Justice O’Keefe heard only the liability phase of the proceeding [liability phase]. As remedies, Dow sought damages in the form of a reasonable royalty and an accounting of Nova’s profits arising from the sale of the infringing products. Dow also requested the inclusion of

certain polyethylene grades that were not explicitly addressed in Justice O’Keefe’s reasons for judgment.

[6] At the conclusion of the remedies phase, this Court awarded Dow the sum of \$644,623,550.00 plus additional interest.

[7] Dow seeks its costs of the remedies phase.

III. Positions of the Parties

[8] Dow requests a lump sum award comprising 30% of the legal fees it actually incurred, together with all reasonable disbursements. Dow has submitted a table of invoices totalling \$7,796,077.00 and a table of disbursements. Dow therefore seeks \$2,338,823.10 in legal fees and \$3,155,555.63 in disbursements, for a total of approximately \$5.5 million.

[9] Dow has also submitted a draft Bill of Costs prepared in accordance with Column V of Tariff B of the *Federal Court Rules*, SOR/98-106 [Tariff] in the amount of \$410,130.00. Dow notes that this amount represents only 5% of the legal fees it actually incurred.

[10] Dow says that an appropriate range for a lump sum award is \$3.5 million to \$5.5 million, with the lower end defined by the maximum amount permitted for legal fees under the Tariff and all disbursements, and the upper end defined by 30% of actual legal fees and all disbursements.

[11] Dow argues that the remedies phase was necessitated by Nova's infringement of the '705 Patent, and it is therefore entitled to full costs. Dow also maintains that it was overwhelmingly successful in the remedies phase. Finally, Dow says that Nova's conduct unnecessarily lengthened the proceedings: Nova's written interrogatories were excessive, it refused to make reasonable concessions and it frequently changed legal positions.

[12] Nova responds that Dow initially sought damages and profits in the amount of approximately \$939 million. This amount was ultimately reduced by almost one third due to Nova's successful justification of a full cost or absorption approach to the calculation of certain profits. Nova therefore argues that Dow's award should be reduced by one third.

[13] In the alternative, Nova says that Dow's legal fees should be no more than three times the maximum available under the Tariff, similar to Justice O'Keefe's award in the liability phase. Discovery, testing and the number of hearing days were more modest in the remedies phase than in the liability phase, and the award should be proportionally lower.

[14] Nova argues that there was a public interest component to this litigation, and the costs award should reflect the commercial importance of determining the issues. Nova also says that Dow unnecessarily delayed its election between damages and profits, increasing work for both parties. Finally, Nova maintains that Dow has provided insufficient particulars to demonstrate the reasonableness of the costs sought.

IV. Analysis

[15] The awarding of costs, including quantum, is a matter falling within the Court's discretion (*Federal Courts Rules*, Rule 400(1); *Canada (AG) v Rapiscan Systems Inc*, 2015 FCA 97 at para 10). In determining an award of costs, the Court is guided by the considerations found in Rule 400(3).

[16] A lump sum award is specifically contemplated in Rule 400(4), and may serve to promote the objective of the *Federal Courts Rules* of securing "the just, most expeditious and least expensive determination" of proceedings (Rule 3; *Dow v Nova Costs Award (FCA)* at para 11). A lump sum award may be particularly appropriate in complex matters where a precise calculation of costs would be unnecessarily complicated and burdensome (*Dow v Nova Costs Award (FCA)* at para 12, citing *Mugesera v Canada (Citizenship and Immigration)*, 2004 FCA 157 at para 11).

[17] In *Dow v Nova Costs Award (FCA)*, Justice Donald Rennie said the following at paragraph 13:

[...] there are circumstances in which costs generated even at the high end of Column V of Tariff B bear little relationship to the objective of making a reasonable contribution to the costs of litigation. The Tariff amounts have been described as inadequate in this respect, although this may be a significant understatement in complex litigation conducted by sophisticated parties in the Federal Courts. Nevertheless, an increased costs award cannot be justified solely on the basis that a successful party's actual fees are significantly higher than the Tariff amounts: *Wihksne v. Canada (Attorney General)*, 2002 FCA 356 (Fed. C.A.), at para. 11. The burden is on the party seeking increased costs to demonstrate why their particular circumstances warrant an increased award.

[18] As a matter of good practice, a party seeking a lump sum award based on a percentage of actual legal fees above the amounts provided for in the Tariff should provide a sufficient description of the services rendered to satisfy an opposing party and the Court that the fees actually incurred are reasonable (*Dow v Nova Costs Award (FCA)* at para 18).

[19] The length and complexity of the remedies phase clearly justify an award of legal fees in excess of the amount prescribed by the Tariff. However, Dow has provided only the total amounts of the invoices submitted by counsel. Dow has not provided itemized invoices or any other information that would enable Nova or the Court to assess the reasonableness of the legal fees incurred.

[20] Dow claims to have incurred legal fees of approximately \$7.8 million in the remedies phase. This may be compared to the legal fees of approximately \$9.6 million incurred by Dow in the liability phase. The liability phase comprised 33 days of discovery, 32 days of trial and 180 days of testing. The remedies phase comprised 11 days of discovery and 17 days of hearing. I agree with Nova that the legal fees incurred by Dow in the remedies phase are not supported by evidence, and do not on their face appear reasonable.

[21] Justice O'Keefe awarded 30% of the legal fees incurred by Dow in the liability phase (*Dow v Nova Costs Award (FC)* at para 29). This sum was roughly equivalent to three times the maximum available under the Tariff. Given that the liability phase and the remedies phase were of comparable complexity, I am satisfied that a similar multiplier should be applied here.

[22] I therefore conclude that an appropriate award for legal fees is three times the maximum claimed by Dow under the Tariff (approximately \$400,000.00), for a total of \$1.2 million.

[23] I am not persuaded that this amount should be reduced by one third, as proposed by Nova. While a costs award may reflect successful defences to important parts of a proceeding (*Eurocopter v Bell Helicopter Textron Canada Ltée*, 2013 FCA 220 at para 5; *Merck & Co v Apotex Inc*, 2013 FC 751 at paras 272, 275-277), the calculation of lump sum awards is “not an exact science, but reflects the amount the Court considers to be a reasonable contribution to the successful party’s actual legal fees” (*Dow v Nova Costs Award (FCA)* at para 21, citing *Consorzio del prosciutto di Parma v Maple Leaf Meats Inc*, 2002 FCA 417 at para 8).

[24] Applying a multiplier to the Tariff is a conservative approach to calculating Dow’s award for legal fees, and represents a significant reduction in the amount sought by Dow. Furthermore, there are aspects of Nova’s conduct that unreasonably increased the cost and complexity of the remedies phase. While Dow’s conduct may not have been entirely blameless – the parties fairly characterize the litigation as hard-fought – Dow was largely successful in the remedies phase and I see no reason to further discount the award.

[25] Nova does not dispute the reasonableness of the disbursements claimed by Dow. I therefore award Dow legal costs in the amount of \$1,200,000.00 and disbursements in the amount of \$3,155,555.63 for a total award of \$4,355,555.63. This amount accords with one of the methods of calculation advocated by Nova, and falls in the middle of the range advocated by Dow.

ORDER

THIS COURT ORDERS that Nova shall pay to Dow costs in the lump sum of \$4,355,555.63, comprising legal fees in the amount of \$1,200,000.00 and disbursements in the amount of \$3,155,555.63.

“Simon Fothergill”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-2051-10

STYLE OF CAUSE: THE DOW CHEMICAL COMPANY, DOW GLOBAL
TECHNOLOGIES INC. AND DOW CHEMICAL
CANADA ULC v NOVA CHEMICALS CORPORATION

**SUBMISSIONS ON COSTS CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO
THIS COURT'S JUDGMENT IN 2017 FC 350 AND SUPPLEMENTAL JUDGMENT IN
2017 FC 637**

ORDER AND REASONS FOTHERGILL J.

DATED: AUGUST 8, 2017

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