

Federal Court



Cour fédérale

**Date: 20230424**

**Docket: T-1308-20**

**Citation: 2023 FC 594**

**Ottawa, Ontario, April 24, 2023**

**PRESENT: The Honourable Madam Justice Kane**

**BETWEEN:**

**DERMASPARK PRODUCTS INC  
POLLOGEN LTD.**

**Plaintiffs/  
Defendants by Counterclaim**

**and**

**BINAL PATEL  
BALSAM SPA DBA BALSAM DAY SPA**

**Defendants/  
Plaintiffs by Counterclaim**

**ORDER AND REASONS**

[1] The Defendants, Binal Patel and Balsam Day Spa, brought a motion for summary trial pursuant to Rules 213 and 216 of the *Federal Courts Rules*, SOR/98-106 [the Rules] in the context of the Plaintiffs' action for trademark and copyright infringement. In *Dermaspark Products Inc v Patel*, 2023 FC 388, the Court found that summary trial was appropriate, considered the merits of

the claim, and found in favour of the Plaintiffs. The Court dismissed the counterclaim of the Defendants.

[2] The Court agreed that the parties could make submissions on costs following the issuance of the Court's Judgment. The parties have been unable to reach an agreement on costs and have made written submissions that the Court has considered.

I. The Parties' Submissions on Costs

[3] The Plaintiffs submit that the Defendants' conduct throughout the proceedings, including the Defendants' refusal to settle the claim at an amount much less than the Court ordered, warrants an award to costs to the Plaintiffs at the highest end of Column V of Tariff B.

[4] The Plaintiffs have submitted a draft Bill of Costs and have taken into account the offer to settle, which was made on October 7, 2022 and was available up until the date of the trial. The Plaintiffs provided a copy of the written offer to settle to the Court. The Plaintiffs note that, depending on the Column used in Tariff B, their costs would range from \$18,963.08 to \$33,616.20. Given the history of the litigation as noted by the Plaintiffs, they seek \$25,000.00 in costs from the Defendants.

[5] The Defendants submit that despite the Plaintiffs' success, the costs sought by the Plaintiffs are excessive. The Defendants note that this litigation commenced in 2020 and that there were several delays in advancing the litigation. The Defendants suggest that the formal

motion for summary trial, which both parties supported, wasted additional time. The Defendants also suggest that information provided by the Plaintiffs' witnesses at the hearing of the motion disclosed information not part of the pleadings and "ambushed" them.

[6] The Defendants submit that the Court awarded the Plaintiffs more than expected and the Plaintiffs should not benefit from an additional award of substantial costs. The Defendants submit that no costs should be ordered, noting that time was wasted due to the Plaintiffs' conduct.

II. The Plaintiffs are Entitled to Costs

[7] The Court has considered the history of this litigation, which demonstrates the serious efforts made by the Case Management Judge to assist the parties to resolve this matter and avoid a hearing. The Defendants' suggestion that, because the Plaintiffs agreed with the Defendants that this matter should proceed by way of summary trial, there was no need for the Defendants to bring a formal motion for summary trial is without any merit. The Court advised the Defendants at a Case Management Conference convened on September 16, 2022, following the first request for an adjournment of the hearing, originally scheduled for September 21, 2022, that a motion was required. At a Trial Management Conference convened on January 24, 2023, following a subsequent request for an adjournment and the rescheduling of the hearing, the Court again advised the Defendants that a motion for summary judgement or summary trial in the required form was required. At that time, the Court had little before it to determine the issues in a summary trial.

[8] The Defendants allegation that the Plaintiff raised issues at the hearing that “ambushed” them is also without merit. The reference by the Plaintiffs’ witnesses to broader measures taken to address infringement of trademark and copyright had no bearing on the issues before the Court regarding whether the Defendants had breached the intellectual property rights of the Plaintiffs.

A. *The Relevant Principles*

[9] Rule 400 of the Rules provides that the Court has discretion to determine whether costs should be awarded and in what amount.

[10] The Plaintiffs are entitled to costs. The issue is the appropriate amount of costs to be awarded in the circumstances.

[11] The non-exhaustive factors set out in Rule 400(3) provide guidance to the Court in making this determination (*Francosteel Canada Inc v African Cape (The)*), 2003 FCA 119. The factors do not relate exclusively to costs pursuant to the Tariff or lump sum awards, but to all cost awards.

[12] The non-exhaustive list of factors includes the result of the proceeding, the importance and complexity of the issues, any written offer to settle, the amount of work, the conduct of a party that tended to shorten or lengthen the proceeding, whether any step in the proceeding was improper, vexatious or unnecessary, and any other matter that the Court considers relevant.

[13] The result of the proceeding usually carries significant weight because, as a general rule, costs should follow the event (*Merck & Co, Inc v Novopharm Ltd, 1998 CanLII 8260 (FC)* at para 24, 152 FTR 74).

[14] In *Consorzio del Prosciutto di Parma v Maple Leaf Meats Inc* (CA), 2002 FCA 417, Justice Rothstein provided guidance regarding the exercise of the Court's discretion in awarding costs, noting at para 8:

[8] An award of party-and-party costs is not an exercise in exact science. It is only an estimate of the amount the Court considers appropriate as a contribution towards the successful party's solicitor-client costs (or, in unusual circumstances, the unsuccessful party's solicitor-and-client costs). Under rule 407, where the parties do not seek increased costs, costs will be assessed in accordance with column III of the table to Tariff B. Even where increased costs are sought, the Court, in its discretion, may find that costs according to column III provide appropriate party-and-party compensation.

[15] In *Philip Morris Products SA v Marlboro Canada Limited*, 2015 FCA 9, Justice Gauthier noted, at para 4, the "judicial trend to grant costs on a lump sum basis whenever possible," calculated based on a percentage of legal fees, particularly in sophisticated commercial matters.

[16] In *Nova Chemicals Corp v Dow Chemical Co*, 2017 FCA 25, Justice Rennie reiterated that the Court has full discretion to award costs and determine the amount, although this discretion is not unfettered. Justice Rennie also noted the trend to award lump sum costs in lieu of an assessment pursuant to the Tariff, adding that lump sum awards may be appropriate in a range of circumstances "where a precise calculation of costs would be unnecessarily complicated

and burdensome” (at paras 11-12). Justice Rennie added, at para 15, that a lump sum cost award must be justified in relation to the circumstances of the case and the objectives underlying costs.

[17] With respect to awarding lump sum costs as a percentage of the actual costs “reasonably incurred,” Justice Rennie noted, at para 17, that lump sum awards range between 25% and 50%, but that there may be cases that warrant a lower or higher percentage.

B. *Lump sum costs are appropriate*

[18] I have considered all the relevant factors, and in particular, that the Plaintiffs were successful, the Plaintiffs had made a formal written offer to settle that was far less than the amount awarded by the Court, the litigation was not complex and could have been resolved much earlier, and that both parties contributed to some extent to prolonging the litigation. Engaging in an assessment for costs would entail further time and costs for both parties. A lump sum award of costs is the preferable approach in these circumstances.

[19] As noted in the jurisprudence, lump sum costs range from 25–50% of the reasonable costs incurred, but many factors guide the determination of the appropriate amount. The Plaintiffs propose an amount of \$25,000, which the Court regards as their assessment of the reasonable costs incurred. In addition to the factors noted above, the Court has considered that this amount would be a significant burden on the Plaintiffs’ small business in addition to their obligation to pay the damages awarded by the Court. The Court finds that a lump sum award of costs of \$7,500 is appropriate, which reflects 30% of the reasonable costs incurred by the Plaintiffs



**ORDER in file T-1308-20**

**THIS COURT ORDERS that:**

The Defendants shall pay to the Plaintiffs the amount of \$7,500 in costs.

"Catherine M. Kane"

---

Judge



**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1308-20

**STYLE OF CAUSE:** DERMASPARK PRODUCTS INC, POLLOGEN LTD. v  
BINAL PATEL, BALSAM SPA DBA BALSAM DAY  
SPA

**SUBMISSIONS ON COSTS CONSIDERED AT OTTAWA, ONTARIO PURSUANT  
TO THIS COURT'S JUDGMENT IN 2023 FC 388**

**JUDGMENT AND REASONS:** KANE J.

**DATED:** APRIL 24, 2023

**WRITTEN SUBMISSIONS BY:**

Mr. Michael Chevalier FOR THE PLAINTIFFS

Mr. Alnaz I. Jiwa FOR THE DEFENDANTS

**SOLICITORS OF RECORD:**

PINTO LEGAL FOR THE PLAINTIFFS  
Montreal, Quebec

JIWA LAW OFFICE FOR THE DEFENDANTS  
Scarborough, Ontario