Federal Court Cour fédérale

**Date: 20241025**

**Dockets: T-1790-17**
**T-416-19**

**Citation: 2024 FC 1657**

**Ottawa, Ontario, October 25, 2024**

**PRESENT: The Honourable Madam Justice St-Louis**

**Docket: T-1790-17**

**BETWEEN:**

**VALLEY BLADES LTD**

**Plaintiff/ Defendant by Counterclaim**

**and**

**USINAGE PRO-24 INC C/O/B AS NORDIK BLADES**

**Defendant/ Plaintiff by Counterclaim**

**Docket: T-416-19**

**AND BETWEEN:**

**USINAGE PRO-24 INC C/O/B AS NORDIK BLADES**

**Plaintiff/ Defendant by Counterclaim**

**and**

**VALLEY BLADES LTD**

**Defendant/Plaintiff by Counterclaim**

**PUBLIC SUPPLEMENTARY JUDGMENT AND REASONS**
**(Confidential Supplementary Judgment and Reasons issued October 22, 2024)**

## I. Introduction

[1] This Supplementary Judgment and Reasons addresses the costs and disbursements payable as a result of the Judgment and Reasons rendered on December 22, 2023 (*Valley Blades Ltd v Usinage Pro-24 Inc (Nordik Blades)*, 2023 FC 1749 [Trial Decision]). In that Judgment and Reasons, I awarded costs to Valley Blades Ltd. [Valley Blades], but reserved the issue of the quantum, allowing parties to file written submissions. Both parties filed written submissions.

[2] I must thus determine the amount of costs to be awarded to Valley Blades.

[3] In brief, and for the reasons that follow, I find that (1) elevated costs, i.e., in excess of the Tariff are justified; (2) an amount in the form of a lump sum corresponding to 25% of the adjusted amount of Valley Blades' legal fees is appropriate; (3) Rule 420 of the *Federal Courts Rules*, SOR/98-106 [Rules] does not apply; and (4) Usinage Pro-24 Inc., carrying on business as Nordik Blades [Nordik Blades] makes no comments on the disbursements of $32,438.91, inclusive of applicable taxes, and I am satisfied they were actually incurred and were reasonably required.

## II. Parties' Positions

[4] Valley Blades requests that an award of costs be made as a lump sum in the amount of (1) 630,750.54, representing 37.5% of its legal fees and a portion of its disbursements with the

fees incurred after September 30, 2022 doubled; or, in the alternative (2) $334,362.09, representing the high end of Column V of the Tariff and a portion of Valley Blades' disbursements with the Tariff amounts doubled for services taking place after September 30, 2022.

[5] In support of its request, Valley Blades relies on the affidavit of Ms. Christine Ingham, a law clerk at Norton Rose Fulbright Canada LLP, who has not been cross-examined, introducing some 71 exhibits and hundreds of pages including, *inter alia*:

1) copies of two offers to settle served by Valley Blades on Nordik Blades on November 28, 2017 and September 30, 2022, respectively;

2) three versions of the Bill of Costs, the first prepared under Tariff B at the high end of Column IV, the second prepared under Tariff B at the high end of Column V, and the third prepared on a solicitor-client basis equating to 37.5% of actual legal fees paid (in all three versions of the Bill of Costs, the fees have been apportioned depending on date ranges taking into account offers to settle);

3) the documents relating to Valley Blades' disbursements for an amount of $32,428.91; and

4) the invoices generated by Norton Rose Fulbright and paid by Valley Blades, redacted for privilege and for those fees and disbursements that are not being claimed in the Bill of Costs.

[6] Per the information contained in Ms. Ingham's affidavit, the legal fees paid by Valley Blades to Norton Rose Fulbright amounted to approximately $1.1 million.

[7] As for disbursements, at paragraph 16 of her affidavit, Ms. Ingham affirms that the claimed disbursements are equal to $32,428.91 (including applicable taxes) and introduces Exhibit F-01, which contains a summary of the disbursements billed to Valley Blades for the periods between October 10, 2017 and January 24, 2024.

[8] With respect to the legal fees portion of its request, Valley Blades submits that an elevated costs award in the way of a lump sum award of 37.5% of its actual legal fees is appropriate and that it is entitled to costs at double the rate after September 30, 2022, having served Nordik Blades with a valid Rule 420 of the Rules offer to settle on September 30, 2022 and Nordik Blades having failed to obtain any judgment.

[9] Valley Blades submits that it would not be adequately compensated by the Tariff and that Rule 400(3) of the Rules support an elevated lump sum award as (1) this was a complex patent proceeding requiring substantial work; (2) the importance of the issues and Nordik Blades' litigation experience; (3) Nordik Blades' conduct; and (4) Valley Blades' success at trial. Valley Blades stresses, in its reply submissions, that lump sums are appropriate in even simple cases, that there is no evidence that Valley Blades' legal fees are unreasonable, and that its offers entitle it to increased costs.

[10] Nordik Blades responds that the high end of Column IV of the Tariff should be used in the assessment of costs, which would amount to $114,580.00, or alternatively, that Column V of the Tariff should be used, which would amount to $145,095.00. Nordik Blades asserts that (1) the Tariff should apply and Column IV of Tariff B is appropriate; (2) the case was not

complex and Nordik Blades is not a sophisticated litigant; (3) the baseline fees calculated by Valley Blades for the lump sum is disproportionate; (4) Valley Blades has indiscriminately included all fees; (5) Nordik Blades' conduct in litigation was normal and reasonable; and (6) the Rule 420 offers were irregular as, in essence, the September 30, 2022 offer does not qualify since it covers only one of the two cases, T-416-19, and only two of the three patents at play.

[11] Nordik Blades relies on the affidavit of Mr. Hugo Michel, president of Nordik Blades, who was not cross-examined. He introduces four exhibits and affirms, *inter alia*, that (1) he is not a sophisticated litigant, as alleged by Valley Blades; (2) his conduct was reasonable in the circumstances; and (3) both parties tried to settle the T-1790-17 and T-416-19 actively and in good faith.

## III. General Principles of Costs Assessment

[12] As the Court outlined in previous decisions, the law of costs is not an exact science. In adjudicating costs, courts attempt to strike an appropriate balance between three main objectives: compensation, providing incentive to settle, and dissuasion of abusive conduct in litigation. In this exercise, Rule 400(1) of the Rules provides that the Court "shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are paid".

[13] Rule 400(3) provides a non-exhaustive list of considerations for a Court to consider in assessing costs. With respect to quantum, Rule 407 of the Rules dictates that within this general rule, costs are to be awarded in accordance with Column III of the table to Tariff B on a default basis (*Consorzio del Prosciutto di Parma v Maple leaf meats Inc*, 2002 FCA 417 at para 9

[*Consorzio del Prosciutto*]). However, the Court's broad discretion includes the power to order an assessment under a different Column of Tariff B or to permit a departure from the Tariff (*Philip Morris Products SA v Marlboro Canada Limited*, 2015 FCA 9 at para 4).

[14] Rule 400(4) allows the Court to fix costs and award a lump sum in lieu of an assessment of costs pursuant to Tariff B.

[15] On the topic of lump sums, the award of a lump sum is increasingly valued by the courts as it saves the parties time and money and further the objective of securing "the just, most expeditious and least expensive determination" of proceedings (Rule 3) (*Nova Chemicals Corporation v Dow Chemical Company,* 2017 FCA 25 at para 11 [*Nova*]). When a court can award costs on a lump sum basis, granular analyses are avoided and the costs hearing does not become an exercise in accounting (*Nova* at para 11). The Federal Court of Appeal in *Nova* adds that:

> [12] Lump sum awards may be appropriate in circumstances ranging from relatively simple matters to particularly complex matters where a precise calculation of costs would be unnecessarily complicated and burdensome: *Mugesera v. Canada (Minister of Citizenship & Immigration)*, 2004 FCA 157, at para. 11.

[16] Hence, a lump sum may be awarded for an amount akin to what would be awarded under the Tariff or it can represent "elevated costs", i.e., costs in excess of the Tariff, often calculated as a percentage of the actual legal fees incurred.

[17] The Court often deviates from the Tariff (1) to sanction reprehensible conduct; and (2) where the default scale would provide inadequate compensation for particularly costly or complex litigation (*Nova* at para 13). Regarding the costly and complex litigation, the Court has to consider if the default Tariff scale would be unjust because it would leave the successful party insufficiently compensated (*Crocs Canada Inc v Holey Soles Holdings Ltd,* 2008 FC 384 at para 2). An award of costs is usually intended to ensure a "reasonable contribution" to the successful party's legal costs (*Nova* at para 13; *Consorzio del Prosciutto* at paras 8-9). The practice of awarding lump sum costs as a percentage of actual costs reasonably incurred is increasingly common in "complex litigation conducted by sophisticated parties" (*Seedlings Life Science Ventures, LLC v Pfizer Canada ULC*, 2020 FC 505 at para 4, aff'd 2021 FCA 154).

[18] Chief Justice Crampton outlined the general principles that must guide the Court in deciding an award of costs in *Allergan Inc v Sandoz Canada Inc*, 2021 FC 186 [*Allergan*]. I adopt these principles and note particularly the following statement of paragraph 27:

> [27] For essentially the same reasons identified immediately above, it is also increasingly common in intellectual property cases to award a significant lump sum amount "well in excess of the Tariff": *Venngo*, above, at paragraph 85; *Bauer Hockey Ltd. v. Sport Maska Inc. (CCM Hockey)*, 2020 FC 862, 176 C.P.R. (4th) 245 (*Bauer*), at paragraph 12. In this regard, a lump sum award in the range of 25–50 percent of actual fees, plus reasonable disbursements, is often made: *Nova v. Dow*, above, at paragraphs 17 and 21; *Seedlings*, above, at paragraph 6; *Bauer*, above, at paragraph 13. See also *Loblaws Inc. v. Columbia Insurance Company*, 2019 FC 1434, 172 C.P.R. (4th) 327, at paragraph 15. In approaching this assessment, it should be kept in mind that determining the level of a lump sum award "is not an exact science": *Nova v. Dow*, above, at paragraph 21.

[19] In regards to the evidentiary considerations of legal fees, the Federal Court of Appeal in *Nova* examined the requirement and mentioned that "[a]n award of costs on a lump sum basis must be justified in relation to the circumstances of the case and the objectives underlying costs. It is not a matter of plucking a number or percentage out of the air" (*Nova* at para 15). The parties should provide both a Bill of Costs and evidence demonstrating the fees actually incurred (*Nova* at para 18). Additionally, the Federal Court of Appeal stated in *Nova* that:

> [18] … What is required is sufficient evidence of the nature and extent of the services provided so that a party can make an informed decision whether to settle the fees or contest and that the Court can be satisfied that the actual fees incurred and the percentage awarded are reasonable in the context of the litigation.

[20] Concerning the disbursements, "[w]here disbursements are outside of the knowledge of the solicitor, they should generally be accompanied by an affidavit such that the Court can be satisfied that they were actually incurred and were reasonably required" (*Nova* at para 20). As set forth in subsection 1(4) of Tariff B, no disbursement shall be assessed or allowed under the Tariff B unless it is reasonable and it is established by affidavit or by the solicitor appearing on the assessment that the disbursement was made or is payable by the party. The Federal Court of Appeal repeated that principle, stating that a party is allowed to recover disbursements when reasonable and necessary for the conduct of the proceeding (*Exeter v Canada (Attorney General)*, 2012 FCA 153 at para 13, citing *Merck & Co Inc v Apotex Inc*, 2006 FC 631).

## IV. Application to the Facts of the Case

### A. *Lump sum*

[21] After consideration of the circumstances of the case, I am satisfied that an award of costs in the form of a lump sum is justified. As the Federal Court of Appeal stated at paragraph 11 of *Nova*, it will allow "the just, most expeditious and least expensive determination" of proceedings (Rule 3 of the Rules) as well as avoid granular analyses and an exercise in accounting.

### B. *Scale of costs*

[22] I am satisfied it is reasonable and appropriate in this case to award elevated costs, i.e., in excess of the Tariff, in the form of a lump sum calculated as a percentage of Valley Blades' actual legal fees.

[23] The subject matter had some level of technical complexity; the parties are sophisticated litigants, being represented by law firms experienced in intellectual property matters; Valley Blades' legal fees were substantially above the amounts contemplated by Column V of Tariff B; and the parties "are in a position to respond to the incentives provided by an elevated award of costs" (*Allergan* at para 38, citing *Bauer Hockey Ltd v Sport Maska Inc (CCM Hockey)*, 2020 FC 862 at para 22 [*Bauer*]).

[24] As the Court has observed in the past, patent matters are inherently complex (*Pollard Banknote Ltd v Babn Technologies Corp*, 2016 FC 1193 at para 13; *Teva Canada Limited v*

*Janssen Inc*, 2018 FC 1175 at para 14). In this case, in particular, obviousness required consideration of a number of sub-issues, including the skilled person, the prior art, the common general knowledge, and claims construction.

[25] Each party vigorously defended the interest of its client and I am mindful that, as Justice Sébastien Grammond recently noted: “[m]y role in awarding costs … is not to engage in an autopsy of the trial and criticize retrospectively the parties’ tactical decisions” (*Bauer* at para 32). That being said, as I stated in the Trial Decision at paragraph 41, I note that it was surprising for Nordik Blades’ expert not to have highlighted earlier that one of the claims was obvious. This weighs against Nordik Blades.

[26] I further note both parties have made efforts to discuss and settle. This is thus a neutral factor.

[27] As for the reasonableness of Valley Blades’ legal fees, I find again some of the points raised by Nordik Blades in its written submissions are convincing in showing that some legal fees are non-compensable and are excessive in the circumstances of this case. I am satisfied Valley Blades’ legal fees should be reduced by some $60,000.00 and be thus more reasonably considered to be $1,040,000.00.

[28] Finally, in my view, in the particular circumstances of this case, 25% of reasonable legal fees amounts to an appropriate and adequate amount for costs.

## C. *Rule 420*

[29] Under Rule 420(2)(b), where a defendant makes a written offer to settle, if a 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 from the date of the offer to the date of judgment.

[30] To trigger double costs, a Rule 420 offer must:

(a) satisfy the timing requirements of Rule 420(3), i.e., the offer must be made at least 14 days before the start of trial, and not have been withdrawn before the start of trial;

(b) be clear and unequivocal;

(c) contain an "element of compromise"; and

(d) bring the litigation to an end (*Venngo Inc v Concierge Connection Inc*, 2017 FCA 96 at para 87).

[31] When the Court makes a costs award based on a percentage of actual legal fees, the Court may double the percentage applied to the legal fees incurred in the period following the refusal of the offer (*Bauer* at para 38). For example, in *Bauer*, the Court awarded a lump sum award based on 25% of actual fees and an award based on 50% of actual fees after the date the offer was refused (*Bauer* at para 43).

[32] In the T-416-19 file, Valley Blades was the Defendant and Plaintiff by Counterclaim. On September 30, 2022, Valley Blades sent an offer to Nordik Blades specifically for the T-416-19 file and offered that:

A. The Plaintiff [Nordik] will discontinue the entirety of its action in Court File No. T-416-19, on a without costs basis.

B. The Defendant [Valley Blades] will discontinue the entirety of its counterclaim in Court File No. T-416-19, on a without costs basis.

C. This offer remains open until one minute after the commencement of trial for acceptance on a without costs basis.

[33] Valley Blades argues that its September 2022 offer meets all of the requirements of Rule 420(2)(b):

(a) **Timing conditions**: The offer was made more than 14 days before the commencement of trial, i.e., October 17, 2022, and remained open for one minute after the commencement of trial;

(b) **Clear and unequivocal**: The terms of the offer were clear. Nordik Blades needed only to decide whether to accept this offer (*H-D USA, LLC v Berrada*, 2015 FC 189 at para 32);

(c) **Element of compromise**: Valley Blades' offer would have removed the counterclaim and waived costs. The Court has recognized that these are both compromises. For example, in *Camso Inc v Soucy International Inc*, 2019 FC 816 [*Camso*], Justice Locke accepted that when a Rule 420 offer removes a counterclaim and contains a waiver of costs, it triggers double costs (*Camso* at para 38). Similarly, in *Bodum USA, Inc v Trudeau Corporation (1889) Inc*, 2012

FC 240 [*Bodum*], the defendant offered that: (i) the plaintiff would discontinue its claim; (ii) the defendant would discontinue its counterclaim; and (iii) each party would bear their own costs (*Bodum* at para 7). This is the exact same offer that Valley Blades made here. As recognized by Justice Montigny in that case, "it cannot seriously be disputed that the defendant's written offer to settle fulfils all the conditions of Rule 420" (*Bodum* at para 22); and

(d) **Brings litigation to an end**: If Nordik Blades accepted this offer, the entirety of T-416-19 would end. No trial would have been required to determine the validity of two out of three of Nordik Blades' patents and 63 out of the 75 disputed claims. It adds that while the September 2022 offer did not directly apply to T-1790-17, the costs to invalidate all three of the Nordik Patents ought to be doubled. As the work done on all three patents was intertwined given that the Nordik Patents "relate to each other and cover the same subject matter" (Trial Decision at para 8).

[34] At last, Valley Blades submits that at minimum, both the November 2017 offer and September 2022 offer ought to favour increased costs given that "settlement proposals or offers that do not meet the conditions of Rule 420 may be considered under Rule 400 in making a costs award." (*Pharmascience Inc v Teva Canada Innovation*, 2022 FCA 207 at para 18 [*Pharmascience*]).

[35] Nordik Blades responds that the offer of September 30, 2022 does not qualify under Rule 420 as it only covers one of the two cases, T-416-19, and just two of the three patents. Nordik Blades adds that it also results in a royalty-free licence, invalidation *inter partes* and is not made with prejudice. In response to Valley Blades' submission that the work on all three was

intertwined, Nordik Blades states there is no reason to settle two patents that are intertwined with a patent that is not settled or settle one patent and not the other two. It concludes by arguing, in essence, that the consequences of Rule 420 can be very serious and onerous, and that doubt should be resolved against the party that did not formulate its Rule 420 offer to cover and settle the whole litigation.

[36] I am satisfied the September 2022 offer fails to meet two of the aforementioned requirements to trigger Rule 420, as the offer was not clear and unequivocal; and would thus not have brought the litigation to an end. Both factors rely on the same issue, which is that this offer does not clearly state what would happen with the T-1790-17 file.

[37] Further, the Federal Court of Appeal has stated that a valid offer to settle under Rule 420 of the Rules must be in writing and it "must be clear and unequivocal in the sense it leaves the opposite party to decide only whether to accept it or reject it" (*Syntex Pharmaceuticals International Ltd v Apotex Inc*, 2001 FCA 137 at paras 9-10).

[38] In this case, I do not believe that a settlement offer that pertains to the file relating to only two of three patents (T-416-19) clearly and unequivocally pertains to the other file that concerns the third patent (T-1790-17) and should therefore inform the award of costs in both files.

[39] Even more so, the T-1790-17 file included the issue of Nordik Blades' alleged liability under subsection 7(a) of the *Trademark Act*, RSC 1985, c T-13, an issue unrelated to the T-416-19 file that was identified in the agreed statement of issues. As such, if Nordik Blades had accepted the September 2022 offer, this issue as well as the validity of the 940 Patent and each of

the claims thereof would not have been resolved and Valley Blades could have maintained its action in the T-1790-17 file.

[40] Lastly, in response to Valley Blades' argument that at minimum, both the November 2017 offer and September 2022 offer ought to favour increased costs, I note that the Federal Court of Appeal stated that not all settlement offers or proposals will be a factor in costs awards (*Pharmascience* at para 20). As outlined above, and according to the evidence before me, both parties have made efforts to settle and this is a neutral factor.

### D. *Disbursements*

[41] Valley Blades seeks disbursements of $32,438.91 inclusive of tax. The charges claimed appear reasonable, Ms. Ingham's affidavit states that the disbursements claimed were incurred, the affiant was not cross-examined and Nordik Blades confirmed it had no comments to formulate in this regard. Based on the foregoing, I find that Valley Blades has established the reasonableness and the necessity of the disbursements they seek and I will thus award Valley Blades their disbursements.

## V. Conclusion

[42] I am mindful that "[f]airness and reasonableness are overarching considerations in making a costs award; it involves striking a balance between compensating the successful party and not burdening the unsuccessful party unduly" (*Energizer Brands, LLC v Gillette Company*, 2024 FC 717 at para 9, citing *Janssen Inc v Teva Canada Ltd*, 2022 FC 269 at para 8).

[43] For the aforementioned reasons, I think this award respects those principles.

[44] Accordingly, I will award Valley Blades total costs rounded to $293,000 inclusive of all fees, disbursements and taxes.

**JUDGMENT IN T-1790-17 & T-416-19**

**THIS COURT'S JUDGMENT is that:**

1. Valley Blades is awarded total costs of $293,000.00 inclusive of all fees, disbursements and taxes.

2. No costs are awarded on this Judgment for costs.

"Martine St-Louis"

Judge

## FEDERAL COURT

## SOLICITORS OF RECORD

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| **DOCKET:** | T-1790-17 |
| **STYLE OF CAUSE:** | VALLEY BLADES LTD. v USINAGE PRO-24 INC., C/O/B AS NORDIK BLADES |
| **AND DOCKET:** | T-416-19 |
| **STYLE OF CAUSE:** | USINAGE PRO-24 INC., C/O/B AS NORDIK BLADES v VALLEY BLADES LTD. |

**SUBMISSIONS ON COSTS CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO THIS COURT'S JUDGMENT IN 2023 FC 1749**

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| **SUPPLEMENTARY JUDGMENT AND REASONS** | ST-LOUIS J. |
| **CONFIDENTIAL SUPPLEMENTARY JUDGEENT AND REASONS ISSUED:** | OCTOBER 22, 2024 |
| **PUBLIC SUPPLEMENTARY JUDGMENT AND REASONS ISSUED:** | OCTOBER 25, 2024 |

**APPEARANCES:**

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