Federal Court Cour fédérale

Date: 20220322

Docket: T-1359-07

Citation: 2022 FC 392

Toronto, Ontario, March 22, 2022

PRESENT: Mr. Justice Diner

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

<u>ORDER AS TO COSTS AND REASONS</u>

I. <u>Introduction</u>

[1] I rendered judgment after the trial of this case on November 16, 2021 (*Canadian Pacific Railway Company v. Canada*, 2021 FC 1014, the "Decision"). The parties requested time to attempt to reach an agreement on costs. Having been unable to do so, they now request an Order from the Court, which is the subject of these Reasons. After considering both parties' written

materials and oral arguments, I have decided to grant costs to the Defendant in a lump sum of 20% of their legal fees, along with reasonable disbursements, for the rationale set out below.

II. Background

[2] This trial took place over approximately two weeks in the Fall of 2020 (the evidence phase) and a further two weeks in the Winter of 2021 (the legal arguments phase), with those two components constituting the liability portion of the action. The case had previously been bifurcated into liability and damages portions. Given the Decision, the latter never occurred.

[3] In its action, the Canadian Pacific Railway Company ("CPRC") had sought both restitution and declaratory relief, premised on their interpretation of three historic instruments, the (i) 1880 Contract (which contains Clause 16, the disputed provision in this action), (ii) *Act respecting the Canadian Pacific Railway (1881)*, 44 Vict, c 1 ("1881 Act"), and 1881 Letters Patent (the "Charter" and, all together, the "CPRC Instruments"). For further details, see the Decision at paragraphs 1-8 and 37-55.

[4] CPRC claimed that, based on the content of the CPRC Instruments, and in particular, the operation of Clause 16 of the 1880 Contract, the Crown had no right to levy the three taxes in question (income, fuel and large corporations tax ("LCT")) dating back as far as 2000, on the basis of the restitutionary remedy established in *Kingstreet Investments Ltd v New Brunswick (Finance)*, 2007 SCC 1 [*Kingstreet*], which allows taxpayers to recover funds if they had been collected through an *ultra vires* levy. Currently, other trials focusing on provincial taxation

implications of the CPRC Instruments are in their hearing or pre-hearing stages in Alberta, Saskatchewan and Manitoba.

[5] The proceedings had steady, sophisticated, senior hands guiding the action through to its conclusion. The Plaintiff's current law firm took over the file in 2015. CPRC's lead counsel had carriage of the case when it was filed in 2007. The same is true of the Crown's two lead lawyers.

[6] In the 14 years the case was before this court, copious amounts of evidence and legal submissions were filed. As counsel to both parties are aware through the comments I have made throughout the proceedings, including in reported decisions, they have conducted themselves adeptly and cooperatively, displaying civility through the long lead-up to and during trial. This can hardly be described as a simple action. The Decision's introduction illustrates how this was, by any standard, a complex action, given the time required before the Court, the breadth of issues raised, the expansive historical context canvassed, the extensive documentary record tendered, and the significant expert testimony introduced.

[7] Ultimately, while CPRC succeeded on certain arguments, the Crown's positions carried the day on the key issues regarding *Kingstreet* and other remedies sought. As a result, the claims for the restitution of taxes paid, and forward-looking declaratory relief were both denied in the judgment and the trial did not proceed to the damages portion. The Decision is currently on appeal, for which a hearing date has not yet been set.

[8] The issue of costs remains unresolved before this Court. The last paragraph of the Decision reads:

> [754] Finally, the Parties have requested a period of up to 60 days from the release of this decision to reach an agreement on costs, or failing such agreement, to make submissions on costs to this Court. I have accepted that request.

No agreement materialized. On November 23, 2021, the parties wrote jointly to the Court to request additional time to make submissions on costs and propose a calendar for their submissions. A hearing on costs took place on February 14, 2022.

[9] The parties remain diametrically opposed in their views on the appropriate costs order to apply to this case. Their divergent views and my analysis are set out below.

III. <u>The Parties' Positions</u>

A. *Canada (The Defendant)*

[10] The Crown, which views its result at trial as "wholly successful" contends this is an example of a complex matter for which Tariff B [the *Tariff*] of the *Federal Courts Rules* SOR/98-106 [the *Rules*] does not provide a reasonable contribution to the costs of litigation, relying on *Nova Chemicals Corporation v. Dow Chemical Company*, 2017 FCA 25 at paragraph 13 [*Nova Chemicals*]. Rather, in accordance with their interpretation of the prevailing case law for complex matters, they advocate for increased, lump sum costs, to the tune of 60% of their legal fees (the claimed amount incurred is $6,318,115.66) plus full disbursements, representing $3,790,869.40 and $471,464.03, respectively.

[11] Canada submits that increased costs are merited due to the importance and complexity of the issues, and the amount of work that was required to get the case to trial over the course of 14 years. The case involved interpretation of historical contracts, legislation and constitutional instruments. Preparing it for trial involved retrieving documents and information dating back to the 1870s, several rounds of oral and written discoveries, and the joint preparation of an agreed statement of facts and book of documents that were relied upon by the Court.

[12] According to the Affidavit of Tianna Brown and the exhibits provided in support, 18 Department of Justice (DOJ) lawyers and paralegals worked on the file and the costs claimed by the Crown excludes the work of support staff, articling students and paralegals who worked less than 30 hours on the file, as well as time charged for duplicative work, travel and work related to motions settlement and costs. The Crown's lead lawyers, Mr. Ezri and Ms. Hill, have both been heavily involved since the file's commencement in 2007.

[13] In terms of the percentage of fees, and resulting quantum sought, Canada concedes that 60% is a significant percentage, above what is customarily ordered by this Court, but notes that proceedings of analogous complexity have resulted in even higher lump-sum fee percentages ordered by the Tax Court (*Grenon v. The Queen*, 2021 TCC 89 at para 15). The Crown notes the similarity in subject matter, and argues that this case shares more in common with tax matters than, for instance, intellectual property (IP) litigation before this Court.

[14] As for disbursements, Canada states that they include amounts paid for archival research, document processing, expert witnesses, and court reporting services. The Crown argues that in light of these factors, and the stakes involved, the disbursements are reasonable.

[15] Finally, responding to CPRC's allegation that the fees and disbursements claimed are unreasonable, the Crown notes that the Plaintiff has not disclosed details of their own docket entries for the periods where they *have* accounted for their hours (from 2015 on), nor have they provided any details of their hours from the filing of the action in 2007 until 2015. Neither would those cumulative hours account for the preparation the Plaintiff did between the years they became aware of the issue (according to its witness Mr. Wong, around the year 2002) and the launch of proceedings in 2007. Furthermore, Canada notes that CPRC provided no evidence of disbursements at all, depriving the Court of any basis of comparison against which to assess the reasonableness of the Crown's disbursements under the circumstances.

B. *CPRC (The Plaintiff)*

[16] CPRC begins at the other end of the costs spectrum, strongly arguing that none should be awarded, for two primary reasons. First and foremost, the Plaintiff argues that this was a textbook case of divided success, having prevailed on most of the legal issues raised, including that the 1880 Contract, and thus the Clause 16 exemption, have statutory and contractual force and remain binding. They also note that by raising equitable defenses, which were ultimately unnecessary to resolve the claim, the Crown unduly expanded the case, which required expert evidence and voluminous submissions, lengthening the trial. CPRC does not deny the Crown's right to mount a robust defense, but submits they should not have to pay it.

[17] Second, the Plaintiff contends that the novelty of the issues raised weighs against the awarding of costs, where the interpretation of novel provisions affects interests beyond the parties. CPRC notes that the novelty of the interpretation of the Clause 16 exemption was confirmed even at the early stages of the litigation, when in 2012, Prothonotary Aalto rejected the Crown's motion to strike the action (*Canadian Pacific Railway v Canada*, 2012 FC 1030 at paras 36 and 40, aff'd 2013 FC 161, 2013 CarswellNat 4190). They also submit that the scope of application of the *Kingstreet* remedy is of potential relevance to all taxpayers and that given both the novelty of the issues and their divided results, it would be wrong to impose any costs in this case, lest parties be discouraged from bringing these important cases to court.

[18] CPRC goes on to argue, in the alternative, that should this Court nonetheless decide to issue a costs order, the *Tariff* rate should apply, to which no exception is warranted. CPRC argues that the majority of cases which give rise to lump sum awards relied on by the Crown are IP cases, which are distinguishable by their technical subject matter, inherent complexity, and the number of expert witnesses. They further point out that in this case, according to the Crown's calculation, *Tariff* costs, even under the highest scale (Column V), would amount to $152,700, a figure nearly twenty five times lower than the amount that the Crown claims.

[19] In the further alternative, CPRC argues that should the Court decide to award a lump sum, it should be heavily discounted to exclude unreasonable fees and then assessed at the very low end of the 10-50% range cited by some of the Federal Courts' decisions (see, for example *Apotex Inc. v. Shire LLC*, 2021 FCA 54 at para 22 [*Shire*]; *Bauer Hockey Ltd. v. Sport Maska Inc. (CCM Hockey)*, 2020 FC 862 at para 14 [*Bauer*]). CPRC submits there is no reliable basis to

apply a percentage in this case because of what they claim are excessive costs claimed of $6.32M and that the Court should have little confidence that even a low percentage award would achieve the stated goals of costs awards.

[20] CPRC further asserts that in contrast to the tight construction of their case, focusing on discreet points of law and tendering a limited amount of evidence, the Crown introduced unnecessary evidence and read-ins, including expert reports that did not feature substantively in the decision. CPRC supports their allegation with an analysis conducted by their affiant Ms. Beard, which compared the amount of hours CPRC's lawyers billed on the file between April 2015 and April 2021, with those of the Crown, which billed twice as many hours to the file, assigning a larger number of lawyers during that period. The Plaintiff also argues that Canada has not provided sufficiently detailed docket descriptions to justify a lump sum award.

[21] In short, CPRC contends the Crown's approach complicated and prolonged the trial by expanding the issues and going down "rabbit holes" that were neither crucial to the outcome, nor successfully argued. They argue the number of billers involved (18 lawyers and paralegals over the 14-year litigation period), and the "kitchen sink" approach employed to defend the action, were excessive and unnecessary.

[22] Finally, CPRC argues that the disbursement figure should be significantly discounted to include only those that are reasonable and justified, citing *Nova Chemicals* at paragraph 20. Many of the disbursements, they submit, do not meet this standard and should be disallowed,

such as fees for archival services, non-relevant experts, and inappropriate hourly fee levels and travel-related expenses.

IV. Summary of the guiding principles for Costs orders

[23] This Court has full discretionary power over the amount and allocation of costs (Rule 400(1); *Nova Chemicals* at para 10; *Consorzio del Prosciutto di Parma v Maple Leaf Meats Inc*, 2002 FCA 417 at para 9 [*Consorzio*]). Generally, the successful party is entitled to costs, even if it was not successful for every argument it pursued (*Allergan Inc v. Sandoz Canada Inc*, 2021 FC 186 at para 30 [*Allergan*]). 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), 159 F.T.R. 233). This Court may consider two modes of cost awards: party-and-party costs in accordance with column III of Tariff B (per Rule 407), or a lump sum costs award (*Allergan* at paras 24-25).

[24] A comprehensive summary of costs considerations in Federal Court jurisprudence was recently provided by Chief Justice Crampton in *Allergan*, including the three principal objectives underlying a costs award, namely to (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. In certain cases, costs can also facilitate access to justice (*Allergan* at para 19).

[25] The Court has increasingly awarded lump sum costs rather than according to the *Tariff*, since lump sum awards significantly reduce the time and effort involved in preparing and reviewing detailed bills of costs, as well as increasing access to justice. While they may not be appropriate in all cases, where they achieve the benefits mentioned above, lump sum awards also further the objective of securing the “just, most expeditious and least expensive determination” of proceedings (*Allergan* at paras 22-23 and *Nova Chemicals* at para 11, both citing Rule 3 of the *Rules*; see also *Vennngo Inc v Concierge Connection Inc*, 2017 FCA 96 [*Venngo*] at paras 85-86, leave to appeal ref’d [2017] SCCA No 302; *Consorzio* at para 12).

[26] The amount chosen as an appropriate contribution towards the successful party’s costs is not an exact science warranting a granular analysis. This is particularly so where the *Tariff* bears little relationship to the objective of making a reasonable contribution to the costs of litigation (*Consorzio* at paras 9-10), and lump sum awards have increasingly been the trend in the cases of sophisticated litigants that have the means to pay for the legal choices they make (*Nova Chemicals* at paras 10-16). *Nova Chemicals* also points out that where a lump sum award is sought, as a matter of good practice, a Bill of Costs along with evidence of fees incurred should be included, along with a sufficient description of the services provided (at para 18).

[27] With the above principles of the law of costs in mind, I will now apply them to these proceedings.

V. Analysis

[28] I conclude, for the reasons outlined below, that this is not a case of divided success or one where the issues involved militate in favour of the parties bearing their own costs. Instead, I find that costs should be awarded to the Defendant who was entirely successful in defending the claim. As for the type and quantum, I conclude that the *Tariff* bears little or no resemblance to the actual costs incurred, and would be inadequate to meet the goals of a costs award in these circumstances. I will thus exercise my discretion to order lump sum costs in the amount of 20% of the Defendant’s legal fees, in addition to its disbursements that have been comprehensively itemized for the Court and which I find to be mostly reasonable.

A. *An award of costs is merited in this case*

[29] On whether a costs order is warranted, CPRC’s primary argument is that due to divided success, no costs should be awarded in this case, relying on *Eurocopter c. Bell Helicopter Textron Canada Ltee*, 2012 FC 842 [*Eurocopter*] aff’d 2013 FCA 220, and *Bertrand v Acho Dene Koe First Nation*, 2021 FC 525 [*Bertrand*]. CPRC submits that it prevailed on the majority of issues that were raised by the Crown and that the costs outcome should reflect their success.

[30] In *Eurocopter*, Justice Martineau explains at paragraph 23:

> When the Court is of the opinion that the parties’ success […] is truly divided or limited to certain issues, it may (1) reduce the costs awarded to the most successful party; (2) allow one or both parties a relative portion of their respective costs; or, (3) simply decline to award costs of any of the parties…

[31] More recently in *Bertrand*, Justice Grammond clarified the notion of a successful party, explaining that simply because one party wins on a "subset" of arguments does not translate to divided costs (at paras 12-14):

> [12] "Divided success," in this context, typically means that the case can conceptually be separated in a manner that each part has a different outcome. For example, where the Court deals with two motions at the same time, success is said to be divided where each party prevails with respect to one motion: *Stelpro Design Inc v Thermolec ltée, 2019 FC 363 at paragraph 55; Narte v Gladstone*, 2020 FC 1082 at paragraph 46. Likewise, no costs were awarded in a case where the merits of a judgment were upheld on appeal, but the appeal was allowed only with respect to one aspect of the remedy issued by the trial judge: *Wahta Mohawks v Commandant*, 2008 FCA 195 at paragraph 4.
>
> [13] Cases where the Court accepts only a <u>subset</u> of the prevailing party's submissions or defences, however, are usually not considered cases of divided success. Thus, in a patent infringement action, the defendant who claims that it does not infringe the patent and that the patent is invalid is entitled to costs if it succeeds on one of these two issues: *Raydan Manufacturing Ltd v Emmanuel Simard & Fils (1983) Inc*, 2006 FCA 293.
>
> [14] There is no mathematical formula to distinguish cases of divided success from those where only a <u>subset</u> of the prevailing party's arguments are accepted. The judge who heard the matter must come to a practical appreciation of what was really at stake. The fact that both parties strategically decide to claim victory is not determinative.
>
> [Emphasis added]

[32] In my practical appreciation of what was really at stake, this is not a case of divided success. While it is true that the Plaintiff prevailed on a subset of issues and CPRC may strategically decide to claim victory as a result, the issues on which they succeeded were all subsidiary to the practical end result of the Decision, in that they were not determinative of the

outcome. As with any litigation, there will often be one or a small number “determinative” or “dispositive” issues that carry the day.

[33] Those are naturally primary issues. Secondary or subsidiary issues are a subset of the considerations which factor into the outcome, but which do not necessarily make or break the result. The finding that the three key CPRC Instruments from the 19th century subsist, and have not been rescinded in the years since, did not affect the outcome of the case, or result in the need for a second phase of the trial.

[34] The Crown prevailed on both key issues. The outcome of the first was that due to the absence of any unconstitutional taxing provision, *Kingstreet* does not apply to the taxes claimed and the Court could not grant restitution. The outcome of the second was that the Court declined to grant the declaratory relief sought by the Plaintiff (Decision at paras 746-747).

[35] Had the Plaintiff prevailed on either of these primary issues, they would, subject to an analysis of the equitable defences raised, have been entitled to obtain a remedy. This, in turn could have led to a damages phase of the trial. CPRC is correct that the Crown’s equitable defences did not prove necessary to dispose of the action, but this is only so because CPRC failed to establish their claim, obviating the need to consider equitable defences, for which the Crown cannot be faulted.

[36] In paragraph 26 of *Eurocopter,* Justice Martineau observed as follows:

> [26] In this regard, I would like to underline that much of both parties’ submissions in this motion appeared to be no more than a

> skilful deconstruction of the judgment in view of the successfulness of each of the arguments advanced or pleaded on each side. However, this is not the test established by the jurisprudence. Again, it is the general and practical result of the action which matters and any justified exceptions must depart from this principle

Similarly, and despite CPRC's position on the divided success of the parties, I find that the general and practical result of the action was not divided. The Crown carried the day. Ultimately, success should not be measured in terms of how many issues were argued and won or lost but rather based on the overall finding of the Court (*Aux Sable Liquid Products LP v. JL Energy Transportation Inc*, 2019 FC 788 at para 5).

[37] As a secondary argument in favour of a no costs outcome, CPRC notes the novelty of the issues raised, along with the "wider interests" in litigating this matter, which could be of significance to all taxpayers. CPRC submits that, per *Allergan*, behaviour modification objectives must underlie the cost analysis, in that parties have to be encouraged to bring forward novel issues, rather than dissuaded by the impact of cost awards. In support, they cite the cases of *Schmidt v. Canada (Attorney General)*, 2018 FCA 55, at paragraph 108 [*Shmidt*] and *Hillis v. Canada (Attorney General)*, 2015 FC 1082, at paragraph 77 [*Hillis*].

[38] CPRC's building of the transcontinental railroad was undeniably a cornerstone in Canada's history, and the claim itself was indeed novel in the sense that it was the first time Clause 16 of the 1880 Contract was pleaded with respect to *Kingstreet* and the impugned federal Taxes. Nevertheless, I am unpersuaded that either of the novelty or public interest arguments in this action merit foregoing a costs award. A few points are worth noting in this regard.

[39] Going back to first principles, one of the primary objectives for an order of costs is to provide indemnification for costs associated with successfully pursuing a valid legal right or defending an unfounded claim. The fact that a claim is novel or ground-breaking does not automatically entail that a defending party should not be able to recover from successfully defending against it. This case involved huge sums and was filed by a sophisticated corporate plaintiff, which also happens to be one of Canada's largest and oldest corporations.

[40] Furthermore, while I agree that the context of this case is novel, both in terms of its impact on Canadian history and the broad-based taxation exemption contained in Clause 16, this was far from the first time that Clause 16 had been litigated before the courts. The Decision canvasses the long history of previous proceedings involving the 1880 Contract, several of which were decided by the Supreme Court of Canada and the Judicial Committee of the Privy Council.

[41] The gambit of bringing this latest case forward should not, in my view, immunize CPRC from costs. Such an approach could, in my view, achieve the opposite effect of the very "behaviour modification" purpose of costs that the Plaintiff vaunts. Litigants would quickly become creative in characterizing their cases as novel, in an attempt to shield themselves from the imposition of costs. This could then reduce incentives to explore early resolution, or otherwise contain their approaches to litigation.

[42] As for the wider interest aspect of the litigation, I am unmoved. *Shmidt* and *Hillis* are easily distinguishable, if for no other reason than that both were filed by individuals, both were concerned with questions of interpretation involving the *Canadian Charter of Rights and*

Freedoms, and a "no costs" order in those cases arguably furthered the objective of facilitating access to justice.

[43] CPRC, on the other hand, is a sophisticated corporate litigant who chose to engage in complex, lengthy litigation and stood to gain handsomely if their claim had been successful. Unlike *Schmidt* and *Hillis*, a positive outcome for the plaintiff would have inured primarily to CPRC and its shareholders. However significant the potential wider interest of the case for other taxpayers, these would have been purely indirect, in that anyone else who wished to benefit from the more expansive interpretation of *Kingstreet* pursued by the Plaintiff would still have needed to advance their own subsequent claims based on their own individual circumstances. CPRC simply does not meet the indicia of a public interest litigant in the circumstances (see also *Doherty v. Canada (Attorney General)*, 2021 FC 695 at para. 8).

[44] In conclusion, while I accept that CPRC prevailed in certain subsidiary issues, the Plaintiff was unsuccessful on any of the primary relief sought. I cannot agree that CPRC achieved a divided result. Furthermore, neither the novelty of the issues nor the case's wider interest considerations merit a no costs order. I conclude that the Crown, having successfully defended an unfounded claim, merits its costs. The question remains as to its type and quantum.

B. *The appropriateness of a lump-sum costs order*

[45] The Crown estimates that the highest Column (V) of Tariff B would yield a fees order of approximately $152,000, which the Plaintiff feels should apply if costs are ordered. The Crown counters that given the duration, content and complexity of the litigation, and the sophistication

of the parties, this amount bears no resemblance to the actual costs that were incurred defending against the claim, and an advanced costs order is accordingly warranted. Each side provides differing interpretations of what should be given weight in the exercise of my discretion under the various factors of Rule 400, which I will consider next.

(1) Result of the proceeding – (Rule 400(3)(a))

[46] As above, Canada successfully defended the action on the primary issues, shielding itself from a backward-reaching claim for restitution for taxes already collected, as well as forward-looking declarations. Consequently, the Plaintiff did not obtain any of the relief it sought.

(2) Amounts claimed (Rule 400(3)(b))

[47] The Court did not get to the second (damages) portion of the trial due to the result described in the paragraph above. The Defendant nonetheless asserts that the amount of federal tax claimed was substantial. It observes that in 2016 alone, CPRC's income tax assessed was $122M, and that past fuel tax in dispute at the date of the claim was about $82M, with an estimated additional $270M by the end of 2020. In short, stakes were very high for both parties.

(3) Importance and complexity of the issues (Rule 400(3)(c))

[48] Both parties have, at different points during the litigation, acknowledged that the case raised important and complex issues, including the interpretation (constitutional, legislative and contractual) of the CPRC Instruments as they impact federal taxation. The trial took nearly four

weeks of hearing days to litigate spanning a period of over four months. Both sides have also noted the large amounts at stake, as well as the importance of the subject matter, as demonstrated by the ongoing claims in Alberta, Manitoba and Saskatchewan, with this trial having attracted the intervention of the latter.

(4) Amount of work (Rule 400(3)(g))

[49] Both parties clearly worked diligently and went to great lengths to put their best foot forward, with exemplary decorum and civility, as I emphasized at various points over the course of the litigation. The work involved gathering a large amount of historical evidence, since no live witnesses were able to testify about key events, which date back as far as the 1870's.

[50] In addition to the preparation of their own cases, the parties assisted the Court by presenting a Joint Book of Documents for trial, in addition to a Partial Agreed Statement of Facts, which was adopted in whole and incorporated into the Decision. Both parties also provided detailed memoranda of fact and law, and various other compendia of pleadings and evidence to assist the Court. Canada's written submissions in support of its legal arguments comprised some 230 pages, which while delivered to the Court in printed volumes along with authorities, were also then digitized, bookmarked, and fully hyperlinked.

[51] Aside from the volumes of materials that formed the trial record, the parties also distilled their presentation into daily PowerPoints, used by most counsel to present their cases and witnesses. These slide decks provided simple roadmaps that guided the trial, which was conducted virtually due to COVID-19. The remote access both facilitated the appearances of

witnesses from various locations around North America, and allowed for easy access to all documents using the "e-Toolkit", this Court's trial database supported by FilemakerPro software. The e-Toolkit itself took a vast amount of time and effort from both sides to populate, with the required digitizing and indexing of all documents for trial.

(5) The public interest in having the proceeding litigated (Rule 400(3)(h))

[52] Both sides described what they saw as being important interests of the public, in bringing and defending these proceedings, respectively. This factor, in my view, is neutral in this case.

(6) Conduct impacting the duration (Rule 400(3)(i))

[53] CPRC submits that the Crown committed an unnecessary amount of resources (lawyers and paralegals), as well as third parties (experts and archival services), in its defense of the claim. In doing so, the Plaintiff contends that the Defendant unnecessarily lengthened the duration of proceedings, particularly with respect to the equitable defenses raised.

[54] I cannot accept this argument. As I have already noted, both parties conducted themselves admirably throughout the proceedings; there was certainly no conduct that could be described as abusive or otherwise unreasonable. As I will explain in detail below with respect to the appropriate quantum, the Defendant cannot be faulted for mounting a robust and successful defense in this case simply because the entirety of it did prove necessary to address. This factor is also neutral.

[55] Taking all of the above factors into account, I agree that a lump sum award would be more appropriate in the circumstances. Quite apart from the added time and inefficiency that would result from a detailed *Tariff* assessment of the minutiae of over 14 years of legal costs and expenses, the amount generated would be completely unsatisfactory to make a reasonable contribution to the actual costs of the litigation.

[56] By contrast, a lump sum, based on a percentage of the Defendant's actual costs, will more accurately reflect partial compensation for the costs of successfully defending the claim while taking into account the lengthy and complex litigation pursued by sophisticated parties, as well as the just, most expeditious determination of costs.

C. *The appropriate quantum of lump sum fees*

[57] The Defendant asks the Court to order the Plaintiff to pay 60% of their fees, for the reasons it outlines in under the various components of Rule 400 above. In support, they point to recent Tax Court jurisprudence, namely *Grenon*, where the Court fixed costs at 60%. In *Grenon* (at paras 15-19), Justice Smith canvassed a series of Tax Court cases before concluding that the range of indemnification is somewhere between 30% and 75%, which did not preclude lower amounts being awarded in appropriate circumstances.

[58] While the Defendant asserts that the factors considered by this Court pursuant to Rule 400(3) are almost identical to those used in the Tax Court, they cite no examples of Federal Court cases where such a high percentage was applied, nor do they cite authorities from this Court for the usual range of indemnification that might serve as a useful basis of comparison.

[59] In contrast to the high percentage award sought by the Defendant, the Plaintiff argues that if lump sum costs are to be awarded at all, they must be "heavily discounted" and this case warrants "the very lowest of levels" of costs. CPRC contends that the Crown merits nothing higher than 25%, given that:

> This case cannot be compared to the most intricate pharmaceutical patent cases in its complexity, duration, or number of witnesses. Those cases involve fee-paying clients on both sides who exercise control over their counsel's legal spend. The Plaintiff argues that here, "the Crown approach resulted in conduct that expanded both Crown counsel time and the length and complexity of the trial" (Plaintiff's Cost Submissions at para 31).

[60] I start from the proposition, as cited above, that an appropriate lump sum contribution towards the successful party's costs is not an exact science or an exercise in accounting warranting a granular analysis (*Allergan* at para 27). Neither is the exercise intended to serve as a forensic audit of the litigation strategy employed by the successful party. Instead, I must arrive at a principled percentage of actual legal fees incurred in this case.

[61] Just over five years ago, the Federal Court of Appeal in *Nova Chemicals* concluded that "[a] review of the case law indicates that increased costs in the form of lump sum awards tend to range between 25% and 50% of actual fees. However, there may be cases where a higher or lower percentage is warranted" (at para 17).

[62] Since then, several decisions have focused on an appropriate level to select within that range. In *Bauer* at paragraph 14, Justice Grammond arrived at a starting point of 25% for lump sum awards of fees, based on his earlier analysis, as well as Justice Locke's in *Teva*:

> Lump sum awards are typically calculated as a percentage of the legal fees actually incurred by the successful party. The objective

> is to simplify the process and to avoid complex calculations or accounting exercises. There is, however, no rigid guideline regarding the percentage of recovery to be used. In the interests of consistency and predictability, <u>I proposed to set the starting point at 25% and to analyze whether the circumstances of a specific case warrant a higher or lower number</u>: *Seedlings Life Science Ventures, LLC v Pfizer Canada ULC*, 2020 FC 505, 172 CPRC (4th) 375, at paragraph 22 [*Seedlings*]; see also *Teva Canada Limited v Janssen Inc*, 2018 FC 1175, at paragraphs 35–36 [*Teva*].
>
> [Emphasis added.]

[63] More recently in *Allergan*, the Chief Justice of this Court favoured a higher starting point for costs of 37.5% as the mid-point between 25 and 50%. However, the Chief Justice's analysis was clearly driven by the inadequacies of the *Tariff* for particular types of cases, namely, patent litigation in drug patent proceedings. This is evident from his explanation of a 37.5% starting point, as explained below at paragraphs 33-35 of *Allergan*:

> [33] I recognize that this Court has recently suggested that the proper method for determining a lump sum award based on a percentage of fees its to start at the lower end of the 25%-50% range: *Seedlings*, above, at para 22; *Bauer*, above, at para 14. However, in *Seedlings*, this was because neither party had demonstrated that a greater or lesser award was justified (*Seedlings*, above, at para 24), and in *Bauer* the Court adopted the 25% starting threshold "[i]n the interests of consistency and predictability": *Bauer*, above, at para 14.
>
> [34] In my view, there are very good reasons for beginning with the mid-point of the 25%-50% range in complex drug patent proceedings under the Regulations. In particular, the Court is still in the process of effecting a change in the litigation culture in the area of drug patent disputes. For many years, trials of such disputes have typically taken several weeks and pre-trial processes have been complicated, lengthy and costly. This contrasts with the experience elsewhere, such as in the U.K., were trials apparently are ordinarily of much shorter duration. Given that the shift from paper-based applications to full trials under the new Regulations was not accompanied by a lengthening of the 24-months statutory stay period, the Court adopted a standard of 10 days as the new default duration for drug patent trials, unless the Court determines

> that additional time is required: Case and Trial Management Guidelines for Complex Proceedings and Proceedings under the PM(NOC) Regulations, at para 37 (available on the Federal Court website <www.fct-cf.gc.ca>). This policy was adopted after considerable consultation with representatives of the drug patent bar.
>
> [35] Adopting the mid-point of the 25%-50% range as the starting point for determining a lump sum cost award to the prevailing party in this type of proceeding would provide a better incentive than the lower end of this range for parties to conduct their litigation in a manner that permits the Court to achieve its objective of shorter trials in the drug patent area. This is particularly so given that legal costs tend to be very small compared to what is at stake in these types of proceedings. This has been repeatedly drawn to the Court's attention by representatives of the intellectual bar over the course of the last several years, in support of their efforts to persuade the Court to increase its cost awards in complex IP litigation. Moreover, the parties to such disputes generally are very sophisticated commercial litigants who can be assumed to calibrate the strategic decisions made over the course of the proceeding with a keen eye on the economic consequences of those decisions.

[64] Indeed, drug patent proceedings arise out of a unique regulatory context: the *Patented Medicines (Notice of Compliance) Regulations,* SOR/93-133 ["PM (NOC)"]. They have a unique litigation culture driven by their patent regime, and the tension between brand name pharmaceutical companies, and their generic competitors. Drug patent litigation has a long history before the Federal Courts.

[65] This action, though different in subject area to IP law, nonetheless shares some similarities with patent cases, namely, the scope and complexity of the litigation, the involvement of sophisticated parties, the huge amounts at stake, active case management, significant pre-trial steps, trials usually measured in weeks rather than days, and the involvement of multiple expert witnesses, and significant amounts of evidence.

[66] Mindful of the trend in our jurisprudence, and the fact that this is not a PM (NOC) case, I will nonetheless begin with the 25% starting point adopted by Justice Grammond outside of the unique PM (NOC) context and litigation culture that Chief Justice Crampton addressed in *Allergan*. With that in mind, I consider some of the factors in this case that may warrant a lower number.

[67] Turning to this case, while not an instance of divided success, CPRC kept their arguments to a minimum, both in terms of their written and oral submissions. Furthermore, the Plaintiff withdrew certain arguments at the earliest available opportunities, for instance, on the *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186 immediately after the Supreme Court released its decision in *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 (Decision at para 18). On the procedural side, CPRC also withdrew multiple objections to the Crown's evidence in a mid-trial motion. In the language of Rule 400(3)(h), their conduct shortened the duration of the proceedings.

[68] However, with respect to CPRC's arguments about the Crown's inefficient, overstaffing and unnecessarily lengthening the defense of the case, it is not the place of this court to conduct a post-mortem on the litigation strategy of the winning side. As Justice Grammond recently noted: "[m]y role in awarding costs, however, is not to engage in an autopsy of the trial and criticize retrospectively the parties' tactical decisions". (*Bauer* at para32, see also para 20).

[69] Here, the stakes of the litigation were very significant for the government, both in general terms for the future application of the *Kingstreet* remedy, and in the specific terms of the

Plaintiff's past and future tax position. Had I found in the Plaintiff's favour on any of the primary issues, it would have been necessary to address the Crown's equitable defences, which made up a substantial portion of their closing brief and read-ins tendered. Neither party knew, in preparing their case, how the Court would rule on the application of *Kingstreet*.

[70] It is sometimes said that hindsight is an exact science. Litigation strategy, on the other hand, is not, with parties having to prepare for contingencies and present alternate arguments. The Crown's equitable defences fall into this camp. I cannot agree with the Plaintiffs that the amounts claimed by the experts are unreasonable, inappropriate or disproportionate, nor, more generally, fault the Defendant for raising robust defenses or calling relevant experts simply because the defenses were ultimately unnecessary to address. Indeed, the Court already considered whether those experts were necessary in two pre-trial motions (*Canadian Pacific Railway Company v. Canada*, 2019 FC 1531; *Canadian Pacific Railway v. Canada*, 2020 FC 690; *Canadian Pacific Railway Company v. Canada*, 2020 FC 1058).

[71] Neither will I accept the Plaintiff's invitation to dissect the docket entries of the 18 timekeepers or deconstruct whether or not each lawyer and paralegal was necessary from September 2007 through April 2021, based on the thousands of docket entries on the over 650 pages of entries provided by the Crown's affiant, Ms. Brown.

[72] CPRC also calls the quality of the Crown's dockets entries into question, stating that they fail to meet the standards set out in *Shire* and *Nova Chemicals*. I do not agree. While some might argue that the dockets could have been more detailed and may not be as exacting as what a

private sector client might expect in certain circumstances, I note that there was no specific evidence on standards of docketing that should be expected for either private or public sector lawyers. In any event, the Crown provided ample evidence with its Bill of Costs, with descriptions of each time entry for each timekeeper both by time period, and by classification level. Ultimately, I am satisfied that the level of detail for docketing meets the requirements set out in *Nova Chemicals*.

[73] Having said all of that, I am still somewhat sympathetic to the idea that it may not be appropriate for a taxpayer – in this case one of Canada's largest corporations but a single taxpayer nonetheless – to bear the full brunt of government's decision to pour huge amounts of resources into a case that might have significant precedential knock-on impacts for the administration of taxes. As I noted above, CPRC had a significant financial interest in the outcome of this case and the wider interests involved should not exempt them from bearing a percentage of the costs of their opponent in their unsuccessful claim. However, the Crown's interests in this dispute were not limited to the significant value of the claim, and undoubtedly extended to the broader potential consequences of CPRC's more expansive interpretation of *Kingstreet*, if it succeeded. They appear to have invested in the case accordingly.

[74] Here, both sides were sophisticated parties, and both mounted comprehensive arguments that required a great deal of preparation. Voluminous historical evidence was prepared, with experts to fill in gaps with opinions outside of the ken of counsel. And, when asked whether the Crown should not have the ability to choose how vigorously to defend the claim, counsel for the Plaintiff noted that despite his client's best efforts to streamline and contain their own case, the

Crown had every right to expand theirs. However, he stressed, that choice should not be made on CPRC's dime. In light of the unique circumstances of the present case, I am inclined to agree, at least to the extent that this warrants a reduction to the percentage of costs appropriately awarded.

[75] In light of all of the above, I agree with CPRC that 60%, being well above the 25-50% range discussed in the recent jurisprudence, is excessive here. 60% has been awarded by this Court in situations of misconduct, such as for deliberate infringers and counterfeiters (see *Chanel S. de R.L. v. Lam Chan Kee Company Ltd.*, 2016 FC 987 at para 5, confirming the costs order in *Chanel S. de R.L. v. Kee*, 2015 FC 1091 at paras 26-27).

[76] Similar costs in the amount of 66% were also recently confirmed in *Packers Plus Energy Services Inc. v. Essential Energy Services Ltd.*, 2021 FC 986 at paras 34-36, on account of unnecessary steps taken during the proceedings, and an "aggressive strategy".

[77] At the other end, 0% of the Crown's fees, as advocated by the Plaintiff, is also inappropriate in these circumstances, for all the reasons explained above.

[78] I note that even before *Allergan, Seedlings Life Science Ventures, LLC v Pfizer Canada ULC*, 2020 FC 505, 172 CPRC (4^{th}) 375, and *Bauer*, reviewing lump sum ranges, 20% of fees was awarded by this Court where the plaintiff prevailed on most, but not all, of the issues (see, for instance *Dimplex North America Limited v. CFM Corporation.*, 2006 FC 1403 at paras 18 and 39).

[79] Weighing the various factors reviewed above, I find that the specific circumstances of this case warrant a number lower than the 25% starting point. I will accordingly award the Crown a lump sum in the amount of 20% of its fees, given the various considerations reviewed above, including the Crown resources devoted, important issues at stake, and CPRC's success on certain issues raised.

D. *Disbursements*

[80] I find the majority of the disbursements claimed to be reasonable.

[81] CPRC disputes the majority of the $471,464.03 in Disbursements claimed by the Crown, such that only $93,237 can reasonably be claimed, according to the following breakdown:

a) Public History Inc. and Library and Archives Canada's ("LAC") archival research and photocopying ($100,192): CPRC asserts that only $826 of this amount, for photocopying fees at, is reasonable;

b) The Regehr, Ely and Urban expert reports ($304,012): CPRC contends that only the Regehr disbursement is reasonable ($65,068), having removed his travel to meetings with DOJ in Ottawa, and his purchase of MS Word. The entire amounts for the Ely and Urban reports, with all associated travel and other fees for those two experts, should be disallowed. As a subsidiary argument, they propose discounts to be applied to the expenses associated with the Ely Report;

c) Outsourced photocopying and document processing ($41,136): According to CPRC this should be disallowed except for the copying of expert reports ($1,211)

d) Court reporting fees: having been divided between the parties ($26,132), these are not contested by CRPC.

(a) *Historical research*

[82] A great deal of historical evidence was used to frame this trial, and one can hardly claim LAC research to have been unnecessary or unreasonable, particularly given the Defendant's disclosure obligations and the lack of first-hand witnesses to the events.

[83] Having said that, Public History Inc.'s invoices provide almost no details as to what the research entailed. In fact, for each of the nine invoices submitted, which total 1,991 hours of archival research, the description of the services provided and subject of the research are the same, namely: "Archival Research and Project Management Services" and "Historical Research for Canadian Pacific Railway v. Her Majesty the Queen", respectively. There is no list of the documents that were located or copied, nor does the Defendant indicate to what extent the research turned up documents that were produced at trial.

[84] The only indication of whether the $99,366.13 the Crown spent on archival research were justified is Ms. Brown's affidavit, where she states, referring to all of the $471,464.03 in disbursements claimed: "[e]ach of the Disbursements was incurred by the Defendant for the purposes of the CPR matter, and I believe each disbursement was necessary for the Crown's defence of the claim."

[85] I am satisfied that some archival research must have been necessary, and would be inclined to allow the expense claimed, with a heavy discount applied to account for the insufficient details provided. However, I am bound by the recent guidance of the Federal Court

of Appeal in *Shire*, where the Court cautioned against such an approach. There the Court explained, at paragraph 28:

> [28] The assessment of whether a claim for disbursements was permissible, actually incurred and reasonable cannot be sacrificed on the altar of simplicity. Put otherwise, reducing a disbursement by 25% does not justify compelling a party to pay 75% of a cost that was never incurred, not properly incurred or not properly substantiated. In the ordinary course, a claim for disbursements should also be supported by evidence in the form of an affidavit (*Nova Chemicals* at para. 20).

[86] In response to the Plaintiff's challenge that the archival claim is excessive and should be disallowed, the Crown refers the Court to *Canada (Citizenship and Immigration) v. Rogan*, 2011 FC 1119, at paragraphs 10-12 [*Rogan*], where this Court allowed disbursements for expert historical research where the evidence was relevant to establishing the underlying facts of the case. The problem with this submission is that in *Rogan*, the expense in question was for an expert witness who testified in Court about their historical research. By contrast, here, there is no report, compilation or list of what exactly was produced by the archival research or the extent to which it was necessary or relied on.

[87] This leaves the Court without sufficient details to determine whether the significant expense incurred can be considered "justified expenditures in relation to the issues at trial" (*Nova Chemicals* at para 20). I am thus unable to determine on the basis of the evidence provided whether the $99,366.13 in archival expenses incurred were reasonable or justified. As such, they will be disallowed. I will, however, allow the claim for $826.45 in LAC photocopying, which the Plaintiff does not contest.

(b) *Experts*

[88] The expert fees are recoverable given that they all provided information that assisted the Court. Even if I did not end up having to rely on the Ely and Urban reports for the reasons detailed above, I carefully read, listened to, and considered the expert reports in my deliberations and they would have been relied on more heavily had it been necessary to address equitable defenses claim. Ultimately, the disbursement for an expert must be prudent and reasonable in the circumstances existing <u>at the time that it was incurred</u> (*Biovail Corporation v. Canada (Health)*, 2007 FC 767 at para 18), rather than viewing those expenses with 20/20 post-judgment vision as to which expert(s) might have been avoided.

[89] Considering their expertise, the comprehensiveness of their reports, and the extensive supporting sources they provided, I find their fees, travel, and time consumed to have been reasonable. The hourly rates were reasonable given their particular fields of expertise – in the case of Dr. Ely, an expert on the history of U.S. railway law, and for Mr. Urban, an expert in the field of Canadian subsidies and regulation. Despite the Plaintiff's submissions, I find Dr. Ely's hourly rate of $US350/hour to be reasonable and I can see no useful comparison to the circumstances of *Eli Lilly Canada Inc. v. Apotex Inc.*, 2015 FC 1165 at paragraph 18, cited by the Plaintiff, in which an expert was billing in excess of $1,000/hour for their time.

[90] I also have no dispute with their limited travel expenses – by my count one trip each – taken using economy airlines, with reasonable hotel fees and per diems, for 2-day business trips to meet with counsel. All such expenses are meticulously documented, without any unnecessary

extravagance. One exception to my acceptance of their expenses is Dr. Regehr's purchase of MS Word, which is basic software that should be considered as part of the cost of preparing his expert report and should not be borne by CPRC. It will be excluded.

(c) *Photocopying expenses*

[91] Finally, I do not take issue with $41,136 of outsourced copying and printing over the long lifespan of this proceeding. A huge amount of evidence was adduced through the course of this action, and its various interlocutory steps. I note additionally that a considerable portion of the litigation took place during the COVID-19 pandemic when access to workplaces and in-house printing may not have been available. I cannot agree with the Plaintiff that these third party printing costs should be excluded due to a claim that they were not "essential", based on *Diversified Products Corp v. Tye-Sil Corp*, [1990] FCJ No 1056 at paragraph 36. In that case, the amount claimed was an arbitrary charge the firm had applied for its own in-house printing. Here, detailed invoices of the printing and binding costs have been provided.

VI. <u>Conclusion</u>

[92] Since the claimant launched its action in 2007, the Crown has vigorously defended against the claim. It ultimately prevailed some fourteen years later. Canada now seeks partial indemnification for its legal fees and disbursements. There is a significant delta between the Crown's request for a lump sum of 60% of fees incurred, plus disbursements, and CPRC's "no costs" position based on divided success. As a result, this Court must exercise its discretion over the amount and allocation of costs.

[93] Ultimately, the Crown successfully defended against the claim and I find that they are entitled to a lump-sum costs order, the *Tariff* bearing little resemblance to the actual costs incurred in the case. Considering all the circumstances, including its complexity of the issues, the length of the trial, the amount of work, the broader interests involved, and the ultimate result of the trial, I conclude that a lump sum of 20% of the Crown's legal fees of $6,318,115.66 reflects an appropriate level of costs. The majority of the disbursements claimed are granted.

<u>**ORDER in file T-1359-07**</u>

THIS COURT ORDERS that:

1. Costs are payable by the plaintiff in the total amount of $1,635,575.08, which is the aggregate of $1,263,623.13, representing 20% of the defendant's legal fees, plus $371,951.95 in disbursements.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1359-07
STYLE OF CAUSE:	CANADIAN PACIFIC RAILWAY COMPANY v HER MAJESTY THE QUEEN
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	FEBRUARY 14, 2022
ORDER AND REASONS:	DINER J.
DATED:	MARCH 22, 2022

APPEARANCES:

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