

Federal Court



Cour fédérale

**Date: 20090710**

**Docket: T-1515-05**

**Citation : 2009 FC 717**

**BETWEEN:**

**MONSANTO CANADA INC. and  
MONSANTO COMPANY**

**Plaintiffs**

**and**

**CHARLES RIVETT**

**Defendant**

**REASONS FOR ORDER**

**ZINN J.**

[1] In my Reasons for Judgment of March 26, 2009, I indicated that the matter of costs was reserved pending receipt of submissions from the parties. These submissions have now been received and reviewed.

[2] The plaintiffs' action for patent infringement was commenced in September of 2005. Justice Simon Noël issued a consent Judgment on January 11, 2007, holding that Mr. Rivett had infringed various claims of Canadian Letters Patent 1,313,830 ("the '830 Patent") by growing, harvesting and selling crops which he knew to contain genes and cells as claimed in the '830 Patent. Mr. Rivett was also permanently enjoined from further infringing activities and required to deliver

up any infringing seed and plants in his possession to Monsanto Canada Inc. The case proceeded to trial only on the issues of remedy, costs, and interest. The plaintiffs elected an accounting of profits rather than damages. My Reasons of March 26, 2009 established that Mr. Rivett must disgorge profits to the plaintiffs in the amount of \$40,137.94, with prejudgment and post-judgment interest on the whole.

[3] There is no dispute between the parties that the plaintiffs are entitled to costs in accordance with the usual rule that costs follow the event, and both parties appear to be in favour of a lump sum award. Rule 400(4) of the *Federal Courts Rules* contemplates lump sum costs awards and I agree that such an award is appropriate to the circumstances of this case, particularly where the defendant takes no issue with the plaintiffs' claimed disbursements and has focused on overall quantum rather than challenging specific items of the fee component of the plaintiffs' draft bill of costs.

[4] The plaintiffs submit that the fee component of the cost award should be fixed at the high end of Column IV of Tariff B, that is to say, at a higher scale than the default rate set out at Rule 407, which refers to Column III of Tariff B, and their draft bill of costs is calculated on the basis of Column IV values at the high end of the range. The plaintiffs argue that a lump sum award reflective of the higher scale is justified in light of the defendant's intentional infringement of their patent. They also point to the defendant's public statements to the effect that his infringement liability should not go beyond the cost of a licensing fee, and the waste of time occasioned by the defendant's failed attempt to introduce expert evidence without complying with the Rules. They point the Court to the costs award in *Dimplex North America Ltd. v. CFM Corp.*, 2006 FC 1403,

where costs on a higher tariff were awarded on account of the intentional nature of the defendant's infringement notwithstanding that punitive damages had been denied to the plaintiff in the main action.

[5] The fee component of the plaintiffs' draft bill of costs is \$26,712.00 with an additional disbursements component of \$4,997.55 and GST.

[6] This is substantially higher than the lump sum amount of \$3,000.00 and disbursements, plus GST on the whole, proposed by the defendant in his submissions on costs. The defendant proposes this figure in light of a number of favourable factors he maintains should be reflected in the costs award, including his admission of infringement at the earliest opportunity; his cooperation with the plaintiffs; and his offers to settle of 2004 and 2007. He also asks that the Court consider that the infringement was a "one-off event" and that he was "substantially successful with respect to profit assessment."

[7] It is clear from the defendant's costs submissions and the plaintiffs' reply submissions on costs that the parties do not agree on a number of issues, including whether or not the defendant's public statements encouraged others to infringe Monsanto patents, and whether or not the plaintiffs' primary claim at trial was for a "damage assessment" in the range of \$200 per acre of infringing crop.

[8] For present purposes, it is not necessary for the Court to come to any conclusion on these disputes except to note that the defendant's description of what was at issue at trial, and his claim to have been "substantially successful," should not stand uncorrected. The plaintiffs were the successful party. It should be clear from the Court's Reasons of March 26, 2009, that whatever "success" may have come the defendant's way was inherent in the accounting remedy elected by the plaintiffs.

[9] Beyond this, and for reasons that will be explained below, there is no need to comment on the parties' disagreements. As will be explained, the Court does not consider that any of the offers that have been brought to its attention, by either party, should have any bearing on costs. As to the defendant's alleged encouragement of others to infringe, in the Court's view, the most that could be held against the defendant is that he encouraged a conception of the law of damages which, however wrongheaded, is not so preposterous that it hasn't been pleaded in earnest by distinguished members of the patent bar, in this Court.

### **Analysis**

[10] As it was noted by the Federal Court of Appeal in *Thibodeau v. Air Canada*, 2007 FCA 115, the objectives of costs awards are to effect partial compensation, to promote settlement, and to deter abusive behaviour. The Court of Appeal further remarked that "Tariff B is a compromise between awarding full compensation to the successful party and imposing a crushing burden on the unsuccessful party," and that "Column III concerns cases of average or usual complexity."

[11] Rule 400(3) lists a number of factors the Court may take into account in exercising its discretion over the amount and allocation of costs. These include *inter alia* the result of the proceeding; the amounts claimed and the amounts recovered; the importance and complexity of the issues; the apportionment of liability; the existence of written settlement offers; the failure of any party to make admissions it should have; whether steps were taken which were improper, vexatious, or unnecessary; and any other matter the Court “considers relevant.”

[12] The plaintiffs made a series of settlement offers. In October 2004, prior to instituting proceedings, they offered to settle their claim for a cash payment of \$50,000 and an undertaking on the part of Mr. Rivett to purchase Monsanto herbicides for the following three years. In December 2004, they made a revised settlement offer on the basis of a \$40,000 cash payment over four years, and an undertaking to buy Monsanto herbicides exclusively for three years. In March of 2007, the plaintiffs offered to settle either on the basis of a consent judgment for \$30,000, coupled with a denial of access to present or future Monsanto technologies, or a consent judgment of \$60,000, coupled with an undertaking to purchase \$60,000 more of Monsanto products over the course of five years. Either option would also have required Mr. Rivett to publish a statement in the *Ontario Farmer* newsletter admitting infringement and acknowledging the payment of damages in an amount greater than the licence fee. Finally, in November of 2007, the plaintiffs offered to settle on the basis of judgment for \$94,700.00 plus interest and costs, the latter to be waived if the principle was paid. The final offer was open at the commencement of trial.

[13] The defendant Mr. Rivett also offered to settle. In December of 2004, he proposed a settlement on the basis of a \$20,000 cash payment over time, and an undertaking to purchase Monsanto products exclusively for five years. In March of 2007, he offered to settle on the basis of a \$19,000 cash payment, and costs. This offer remained open at the commencement of trial.

[14] Although the existence of settlement offers is specifically set out at Rule 400(3) of the *Federal Courts Rules* as a factor that the Court may consider for the purpose of assessing costs, and while the promotion of settlement is one of the recognized objectives of costs awards, the Court is not of the view that any of the settlement offers extended by the parties in this case should have any bearing on costs. The defendant's offers were for less than half the amount he was ultimately required to disgorge. The plaintiffs' offers, including its best offer of December 2004, all included conditions that are not amenable to simple monetary quantification and which in some cases would have severely restricted Mr. Rivett's commercial autonomy.

[15] As for the alleged waste of time occasioned by the defendant's failure to comply with the *Federal Courts Rules* on expert evidence, such that the plaintiffs were required to prepare for a cross-examination which did not happen, irregularities of this sort, however regrettable, are not unusual or exceptional. In this case, the issue did not require much of the Court's time, and whatever time counsel for the plaintiffs actually spent in anticipation of a cross-examination is presumably reflected in the draft bill of costs submitted to the Court under item 13, "Counsel Fee." Further, the irregularity was more than compensated by the defendant's conduct in general, for

instance, forthrightness in testimony, cooperation with opposing counsel, and the making of admissions which speeded the proceedings and narrowed the issues.

[16] Finally, with regard to the plaintiffs' submission that that the Court should follow the decision in *Dimplex*, above, and order costs on a higher scale than usual on account of the defendant's intentional infringement, there is no general principle that deliberate patent infringement should be sanctioned through higher costs awards. Moreover, *Dimplex* is distinguishable on its facts; the defendant in that case was a sophisticated commercial entity which was unable to come up with a competitive alternative and therefore chose to copy a proven success in which the plaintiff had rights. Here, the parties are not commercial competitors. Further, in *Dimplex* the decision to award costs at the high end of Column V was made on account of all of the circumstances, including the large amount of work the plaintiff was required to undertake to assert its rights and the existence of settlement proposals that would have resulted in substantial savings to the defendants. Neither of those circumstances is present here.

[17] Bearing in mind that that this was not an unusually complex case, and in light of my view of the various other factors pleaded by the parties, I do not feel that this is a case where a departure from the default column of the tariff would be justified, despite the plaintiffs' arguments. Accordingly, I will fix costs on the basis of the plaintiffs' draft bill of costs, with the fee component reduced by roughly 50% to bring the values into line with the mid-range of Column III amounts.

[18] In the result, costs will be fixed at \$13,000 for fees, and \$4,997.55 for disbursements, for a total of \$17,997.55 plus GST. A consequential order will issue in the formal Judgment on the main action.

“Russel W. Zinn”

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Judge

Ottawa, Ontario  
July 10, 2009



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

**DOCKET:** T-1515-05

**STYLE OF CAUSE:** MONSANTO CANADA INC. and  
MONSANTO COMPANY v. CHARLES RIVETT

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** January 12, 13 & 14, 2009

**REASONS FOR ORDER:** ZINN J.

**DATED:** July 10, 2009

**APPEARANCES:**

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