

Federal Court



Cour fédérale

Date: 20090710

Docket: T-1545-05

Citation: 2009 FC 705

BETWEEN:

**MONSANTO CANADA INC. and
MONSANTO COMPANY**

Plaintiffs

and

**LAWRENCE JANSSENS, RONALD JANSSENS
and ALAN KERKHOF**

Defendants

REASONS FOR ORDER

ZINN J.

[1] In my Reasons for Judgment dated March 26, 2009, the matter of costs was reserved pending receipt of submissions from the parties. The parties' submissions on costs have now been received and reviewed.

[2] By way of background, on January 11, 2007, Justice Noël granted partial judgment against the defendants for the infringement of Canadian Letters Patent 1,313,830, on consent. The case proceeded to trial only on the issues of remedy, costs, and interest. The plaintiffs elected an accounting of profits rather than damages. The Court's Reasons of March 26, 2009, dealt fully with

the accounting claim and established the amounts due to the plaintiffs from each of the defendants as follows:

- a. LAWRENCE JANSSENS: \$1,269.88 and pre-judgment interest for 2004 infringement plus \$3,770.12 and pre-judgment interest for 2005 infringement;
- b. ALAN KERKHOF: \$1,269.88 and pre-judgment interest for 2004 infringement plus \$3,770.12 and pre-judgment interest for 2005 infringement;
- c. RONALD JANSSENS: \$ 634.94 and pre-judgment interest for 2004 infringement plus \$3,822.56 and pre-judgment interest for 2005 infringement.

[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 defendants take no issue with the plaintiffs' claimed disbursements and have 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 defendants' intentional infringement of their patent. They also point to the defendants' conduct throughout this action, including their refusal to

conclude settlement agreements in 2005 and 2007; their public statements to the effect that their infringement liability should not go beyond the cost of a licensing fee, and the waste of time occasioned by the defendants' 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 \$21,288.00 with an additional disbursements component of \$3,209.55.

[6] This is substantially higher than the lump sum amount of \$3,000.00 and disbursements, plus GST on the whole, proposed by the defendants in their submissions on costs. The defendants propose this figure in light of a number of favourable factors they maintain should be reflected in the costs award, including their admission of infringement at the earliest opportunity; their cooperation with the plaintiffs; and their offer to settle of March 27, 2007, for \$7,200.00. They also ask that the Court consider that the infringement was a "one-off event" and that they were "substantially successful with respect to profit assessment." Finally, they refer to an oral settlement offer which was apparently made pre-trial in April of 2008, which was allegedly within ballpark range of the profits awarded by the Court.

[7] It is clear from the defendants' 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 defendants' public statements encouraged others to infringe Monsanto patents, and whether or not the defendants refused to finalize a 2007 settlement and for what reason. There is also disagreement as to 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 defendants' description of what was at issue at trial, and their 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 defendants' 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 defendants' alleged encouragement of others to infringe, in the Court's view, the most that could be held against the defendant farmers is that they 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] In this case, both parties have drawn attention to their respective settlement offers. While the plaintiffs do not suggest that either the 2005 or 2007 settlement offer is sufficient to engage double costs under Rule 420, they do urge the Court to consider them under Rule 420(3).

[13] The plaintiffs’ 2005 settlement offer contemplated that the defendants would each pay \$10,000 and collectively purchase \$30,000 of Monsanto products. The 2007 offer contemplated a collective payment of \$15,000 and purchases of \$15,000 of Monsanto products. In the plaintiffs’ submission, the out-of-pocket expenses of these agreements did not include the product component

because “the defendants would have made herbicide and seed purchases in any event.” They also submit that “had the defendants completed the deals made in either 2005 or 2007 they would have had ongoing access to Monsanto’s agricultural technologies, which is not the case today.”

[14] The defendants say that these offers should not be considered, or should be considered for their full-dollar value if at all. They say they made it clear to Monsanto that availability of Monsanto product was not important to them, which is borne out by a letter at tab 15 of the Joint Mediation Brief. They write that “tying settlement to Monsanto product purchases benefits Monsanto since the farmers would have to buy unwanted Monsanto product and could not take advantage of lower priced alternate products in the market place.”

[15] In the Court’s view, the plaintiffs’ submission that the purchasing component of their settlement offers should be discounted - which would make the 2007 offer more or less equivalent to the profits ultimately awarded in 2009 – is untenable. The defendant’s submissions in this respect are accepted. I would add that the burden such agreements would have placed on the defendants is not amenable to simple monetary quantification, and that it is clear the agreements would have benefited Monsanto by guaranteeing purchases which would not otherwise be certain or even likely. Bearing this in mind, it cannot be said that the plaintiffs’ settlement offers, the 2007 offer included, were even roughly comparable to the result obtained at trial. It hardly needs to be said that the Court would never order a remedy along the lines of Monsanto’s proposed terms of settlement except on consent, and for that reason I decline to consider the plaintiffs’ offers in

relation to costs. Accordingly it is immaterial which party was responsible for failing to effect the finalization of these offers and for what reason.

[16] With respect to the defendants' best written offer, that is, settlement on the basis of a cash payment of \$7,200, calculated with reference to Monsanto's licensing fees for its patented soybean technology, the amount proposed falls short of the profits award actually obtained by roughly half. While the defendants might have lowered their liability for profits had they adduced better expense records at trial, they did not. In the result, the margin between the settlement offer and the profits actually awarded by the Court is simply too large for the offer to have any bearing on costs.

[17] While the defendants' alleged oral offer at the pre-trial conference of April 1, 2008, was apparently within the ballpark range of the profits ultimately awarded, that information is not properly before the Court and will not be taken into account.

[18] As for the alleged waste of time occasioned by the defendants' 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 defendants' 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.

[19] 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 defendants' 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.

[20] 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.

[21] In the result, costs will be fixed at \$10,000 for fees, and \$3,209.55 for disbursements, for a total of \$13,209.55 plus GST. A consequential order will issue in the formal Judgment on the main action.

Judge

Ottawa, Ontario
July 10, 2009

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1545-05

STYLE OF CAUSE: MONSANTO CANADA INC. and
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LAWRENCE JANSSENS, RONALD JANSSENS
and ALAN KERKHOF

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: January 15, 2009

REASONS FOR ORDER: ZINN J.

DATED: July 10, 2009

APPEARANCES:

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| Arthur B. Renaud L. E. Trent Horne | FOR THE PLAINTIFFS |
| Donald R. Good | FOR THE DEFENDANTS |

SOLICITORS OF RECORD:

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|---|--------------------|
| BENNETT JONES LLP Barristers and Solicitors Toronto, Ontario | FOR THE PLAINTIFFS |
| DONALD R. GOOD & ASSOCIATES Barristers and Solicitors Ottawa, Ontario | FOR THE DEFENDANTS |