Federal Court  Cour fédérale

Date: 20210519

Dockets: T-1569-15
T-1741-13
T-1728-15

Toronto, Ontario, May 19, 2021

PRESENT: Case Management Judge Kevin R. Aalto

Docket: T-1569-15

BETWEEN:

RAPID COMPLETIONS LLC AND
PACKERS PLUS ENERGY SERVICES INC.

Plaintiffs/
Defendants by Counterclaim

and

BAKER HUGHES CANADA COMPANY

Defendant/
Plaintiff by Counterclaim

AND BETWEEN:

Docket: T-1741-13

PACKERS PLUS ENERGY SERVICES INC.

Plaintiff/
Defendant by Counterclaim

and

ESSENTIAL ENERGY SERVICES LTD. AND
TRYTON TOOL SERVICES LIMITED PARTNERSHIP

Defendants/
Plaintiffs by Counterclaim

AND BETWEEN:

Docket: T-1728-15

**RAPID COMPLETIONS LLC and
PACKERS PLUS ENERGY SERVICES INC.**

**Plaintiffs
Defendants by Counterclaim**

and

**WEATHERFORD INTERNATIONAL PLC.,
WEATHERFORD CANADA LTD., WEATHERFORD CANADA
PARTNERSHIP AND HARVEST OPERATIONS CORP.**

**Defendants
Plaintiffs by Counterclaim**

ORDER

UPON MOTIONS on behalf of the Defendants in each action for:

1. An order under Rules 400 of the *Federal Courts Rules* awarding fees and disbursements in a lump sum amount consisting of:

   (a) 80% of the actual legal fees for all work done in preparation for the trial of the infringement and damages phase of these actions;

   (b) Payment of all reasonable and necessary disbursements for the infringement and damages phase of these actions;

   (c) the costs of this motion; and,

   (d) such further and other Relief as to this Honourable Court may seem just.

AND UPON reading the Motion Records of the Defendants and the Plaintiffs' responding written representations (collectively Packers Plus); and the reply submissions; upon hearing the submissions of counsel for the parties; and upon considering the matter;

I. **Background**

[1] These are three motions for elevated fixed costs in these three separate patent infringement actions (the Baker Hughes Action, the Weatherford Action, the Essential Energy Action or collectively the Actions). The Plaintiff (Packers Plus) is common to all three actions. All three motions were heard together. The reasons in this Order are applicable to all of the motions with brief reasons relating to the individual costs claims in the Baker Hughes Action, the Weatherford Action and the Essential Energy Action. These actions were bifurcated such that the issue of validity of the patent proceeded to trial to be followed by the infringement and damages phase (Phase Two).

[2] A brief chronological summary is required to put the costs issues before the Court in perspective:

• November 3, 2017	Draft confidential judgment of the Honourable Justice O'Reilly;
• November 24, 2017	Motion for lump sum costs of the action and Phase Two and directions regarding same;
• December 6, 2017	Formal judgment of Justice O'Reilly dismissing the action;
• May 17, 2018 (the May 17 Order)	Justice O'Reilly's order giving directions on costs;
• April 24, 2019	Federal Court of Appeal dismisses the appeal of

	Justice O'Reilly's judgment;
• December 19, 2019	Supreme Court of Canada dismisses leave to appeal;
• January 17, 2020 (Costs Order)	Justice O'Reilly issues judgment respecting costs of trial [2020 FC 68];
• May 28, 2020	these motions for costs were commenced

[3] The actions were tried together. Justice O'Reilly dismissed the three actions and granted the counterclaims of invalidity of the Packer Plus patent [2017 FC 1111]. These motions arise as a result of the May 17 Order. That order was in response to a motion for directions concerning costs of the Actions. The directions sought from Justice O'Reilly included the form of evidence appropriate and sufficient to determine lump sum costs and directions as to the hearing of costs issues relating to Phase Two. In the May 17 Order, Justice O'Reilly directed that costs relating to Phase Two be dealt with by the Case Management Judge. In essence, pursuant to the order, the costs were also bifurcated between the trial costs and the costs of Phase Two. Since the judgment, arising from the validity trial disposed of the Actions, there was no Phase Two trial. However, significant steps were taken by the parties in preparing for the Phase Two trial.

[4] In the order dated January 17, 2020, Justice O'Reilly disposed of the trial costs and awarded individual costs calculated at 40% of their actual costs plus disbursements as adjusted. Thereafter, pursuant to Justice O'Reilly's May 17 Order these motions for elevated costs were brought. Specifically, the May 17 Order provides as follows:

> 5. The trial judge assigned to hear the outstanding issues of infringement and damages should be seized of the costs relating to those matters, which are currently in abeyance pending appeal of the trial decision: Denied, given that the judicial officer most

> involved in those proceedings and best-placed to decide the cost issues is Prothonotary Aalto.

[5] The parties filed extensive affidavit materials, exhibits and written representations in support of their respective positions. Whittling it all down, the main issue is whether elevated costs or costs under the Tariff should be awarded. If the latter, what column of costs is appropriate and what reasonable disbursements are recoverable especially those dealing with experts fees.

[6] Packers Plus argues that there is a "knockout punch" disentitling the Defendants from receiving elevated costs. They argue that the Defendants failed to invoke Rule 403 by moving within 30 days of the decision to be able to claim elevated costs. Not having done so they are limited to costs under the Tariff. I disagree.

[7] Rule 403 (1) provides that a party may request directions be given to an assessment officer respecting any matter referred to in Rule 400, (a) by serving and filing a notice of motion within 30 days after judgment has been pronounced. That is precisely what the parties did which resulted in the May 17 Order. Packers Plus argue that a second Rule 403 motion was required after the May 17 Order to deal with post trial costs. This is an unnecessary step which would simply be duplicative of the motion already brought under Rule 403. Packers Plus has been on notice of a request for elevated costs with respect to Phase Two since the motion resulting in the May 17 Order was brought. While Packers Plus makes much ado about the two-year interregnum between the May 17 Order and the bringing of the motion for elevated costs, nothing of significance turns on it. While Packers Plus raised other technical arguments about the scale of costs, as the Case Management Judge involved in these cases since they were commenced, I am not persuaded that costs according to the Tariff are appropriate. Costs under

the Tariff are woefully inadequate in the circumstances of this case. Tariff costs for each party is less than $30,000.00 while the actual fees charged in each case range among the Defendants from approximately $421,000.00 to over $750,000.00.

[8] Rule 400 is quite explicit that the Court "shall have full discretionary power over the amount and allocation of costs". Rule 400 also sets out the many factors the Court may consider in determining the quantum of costs. Those factors have been taken into consideration in the awards of costs made herein.

[9] In my view, the Plaintiffs are entitled to an award of elevated lump sum costs and a reasonable amount for disbursements as discussed below. Among the many factors which support such an award are the following:

i).	these cases were intensively case managed which required considerable time of the parties;
ii).	the cases were complex raising many issues including limitations periods; inducement; non-infringing alternatives; abandonment; pre-issuance profits; liability for third party profits; and whether a non-practicing entity (Rapid Solutions] was entitled to an accounting of profits;
iii).	these highly complex issues required the parties to marshal a large amount of expert evidence;
iv).	the potential damages sought amounted to at least two hundred million dollars;
v).	the cases were aggressively litigated by Packers Plus on a fairly tight schedule;
vi).	Packers Plus proceeded with the infringement/damages phase notwithstanding that the trial decision was under reserve;
vii).	Packers Plus pursued document production and discovery notwithstanding recommendations made by the Court and parties that the labour intensive

	aspects of the case await the release of Justice O'Reilly's trial decision;
viii).	Packers Plus got what it wanted with full knowledge that vigorously pursuing the infringement/damages phase might render it all moot if it lost the validity decision;
ix).	the Tariff amounts in cases such as this are woefully inadequate and do not reflect value of the work done which resulted in an entirely successful result for the Defendants.

[10] There is substantial guidance on these motions from the Costs Order. In the Costs Order, Justice O'Reilly comments as follows:

> It was Packers' choice to pursue each of the defendants separately. It could have limited its costs exposure by proceeding only against the first defendant, Essential Energy Services Ltd, and pursuing the other defendants later if successful. Its approach complicated the proceedings and increased the costs incurred.
>
> In addition, while the defendants had a common interest as against Packers, they are otherwise competitors. It was not axiomatic that they would all take the same position on each of the issues. They were entitled to be represented separately. At the same time, defendants' counsel made considerable efforts to divide their labours and reduce duplication throughout the trial – in examinations-in-chief, cross-examinations, representations on motions, and oral and written submissions.
>
> Therefore, the defendants are entitled to individual cost awards.

[11] Thus, in this case there is no reason to depart from awarding each party its own costs. Justice O'Reilly held that 40% of fees plus reasonable disbursements was appropriate. This is a guideline for these motions.

[12] The main argument of the Defendants is that the costs relating to Phase Two were entirely unnecessary had Packers Plus agreed to an abeyance of Phase Two pending the outcome

of the validity phase. They did not. Thus, they are the author of all of the costs thrown away. As noted in paragraph 29 of the written representations of Baker Hughes, with which I agree:

> 29. Aggressive litigation schedules are not, in and of themselves, undesirable, but the parties that choose that strategy, where there is no legal or practical requirement for such a schedule must suffer the consequences of their decisions [*Hospira Healthcare Corporation v The Kennedy Trust for Rheumatology Research et al.*, 2018 FC 1067 at para. 8]. Otherwise, there is no incentive to bifurcate proceedings and save judicial resources and unnecessary costs for all parties [*Apotex Inc. v Sanofi-Aventis Canada Inc*., 2009 CarswellNat 5922 (FC)]. Parties that choose to proceed with unnecessary multiple proceedings must bear the consequences of so doing [*Hospira, supra*].

[13] The Defendants each sought costs of 80% of their respective fees, a doubling of the costs awarded by Justice O'Reilly, plus their reasonable disbursements.

[14] The Defendants were unable to provide a case where a lump sum in the magnitude of 80% of fees was awarded. In a recent decision of the Chief Justice in a patent infringement action [*Allergan Inc. v. Sandoz Canada Inc*., 2021 FC 186] the principles relating to lump sum awards were discussed at length. Those general principles are set out in paragraphs 19 through 36 of the decision and will not be repeated here other than to provide a summary of some of the more salient principles as follows:

•	the Court has a broad discretion regarding costs in accordance with established principles [para 21]
•	lump sum awards have become common in patent litigation [paras 22 and 26]
•	lump sums are appropriate where the case is complex and the legal fees are far in excess of Column III of Tariff B [para 26]

•	a range of 25 – 50% plus reasonable expenses is often made [para 27]
•	adopting the mid-point of the range as a starting point is appropriate in complex drug patent cases [para 35]
•	disbursements are typically assessed in full, provided they are reasonable [para 36]

[15] While this decision refers to using the mid-point as a starting point in complex drug patent litigation, in my view, there is no principled basis why it should not be used in other types of complex patent litigation. Certainly, this case was vigorously fought by all parties and involved complex issues. The legal fees far exceed what would otherwise be recoverable under Column III of Tariff B. Thus, it is appropriate to use the mid-point of the 25 – 50% range as a starting point.

[16] Another factor for consideration in assessing a lump sum is the avoidance of conducting an autopsy on each and every docket and disbursement but to deal with them in a generalized way.

[17] Based on a consideration of the factors discussed above, the provisions of Rule 400 and the extensive submissions of the parties, I am satisfied that lump sum should be awarded to each set of Defendants amounting to 66% plus reasonable disbursements as more fully discussed below.

II. **Baker Hughes' Costs**

[18] Baker Hughes seeks 80% of its legal fees of $588,077.00 plus disbursements of $341,649.00. The Plaintiffs raise several issues with the quantum of costs with respect to all of

the Defendants. It is argued the amount of Baker Hughes' fees claimed are unreasonable and that a reduction of approximately $157,000.00 be applied before assessing the percentage lump sum. This amount is arrived at based on a number of arguments. Those arguments include duplicate costs and ramp up costs incurred by the firm Aird & Berlis who took over the case for Phase Two and were not involved in the validity phase. However, there is no evidence to support this argument, as the evidence is that Aird & Berlis did not charge the client for ramping up nor for duplicative work. At the hearing, counsel for Baker Hughes suggested that if there was any duplication it was a modest amount of $5,000.00. A reduction in that amount is allowed.

[19] A second factor relates to spoliation and documents that were unavailable because of corporate restructurings within Baker Hughes. There is some indication that this led to additional time and expense and some reduction should be allowed based on the need for a third party discovery motion. The Plaintiffs seek a reduction of $75,000.00 but there is no specific evidence to account for such a substantial reduction. A reduction of $25,000.00 is allowed.

[20] A third factor is the costs associated with the mediation. In the ordinary course, each party should bear its own costs relating to efforts to resolve a case. Here the mediation costs are included the Plaintiffs' claim and are not allowed. As pointed out by the Plaintiffs the precise amount cannot be determined from the general nature of the docket entries. Thus, in keeping with the above principles a reasonable estimation can be made. The amount to be deducted is $25,000.00 plus disbursements associated with the mediation.

[21] A fourth factor is in relation to redacted dockets. The redactions relate to solicitor client privileged information. Overall, those dockets are a relatively modest amount and it is realistic

that some solicitor-client would attach to some entries. No reduction for those dockets is allowed.

[22] The last deduction relates to a concession made by the Defendant of $9,363.00 and a further $400.00 for a Tariff amount. Those amounts will also be deducted.

[23] The disbursements sought to be recovered amount to $341,639.00 of which almost $300,000.00 relates to experts' fees. This was a case where no expert reports were served. The Defendants' expert reports would be responding to the positions of Packers Plus in their experts' reports. Packers Plus did not serve any expert reports on the Defendants. This begs the question, given the enormity of the amounts claimed, what were the experts doing? There would be a lack of focus to their work because they did not know specifically how Packers Plus was structuring its case for damages. That would only be clearly apparent if the Defendants had Packers Plus' expert reports so the Defendants' experts would know precisely what they had to do. Much of their work they did would have had to be speculating on how Packers Plus would approach their claim for a royalty or damages. As no work product from the Defendants' experts was prepared or served it is difficult to determine whether the work had any real value for which Packers Plus should be responsible as part of the reasonable recoverable litigation costs.

[24] The Defendants argue that based on the examinations for discovery they had an understanding of the damages and reasonable royalty issues. Further, they argue that as there was no cross-examination on the amounts claimed for experts, Packers Plus cannot attack the credibility of the experts. In my view, Packers Plus are not attacking credibility but only arguing that there is uncertainty as to the value of the work of the experts. Further, because they were not responding to any expert reports it is more than likely that the Defendants' experts were to a

degree developing their own theories and speculating as to what they might have to respond to. Packers Plus seek a reduction of expert fees and argue they should be capped at 25%. I agree that the expert fees are somewhat excessive where no work product or report was produced. I am also mindful of the observation of the Honourable Mr. Justice Hughes in *Janssen-Ortho Inc. v Novopharm Ltd*, 2006 FC 1333 as follows:

> I am concerned with what has been increasingly observed as mounting and often extravagant fees charged by expert witnesses. While a party is free to engage a person for expert services and pay whatever fee is negotiated, that fee should not become simply allowable on an assessment.

[25] The expert fees should be reduced but Packers Plus position that they be reduced to 25% is too steep and does not reflect the reality of the case and the time pressures under which they were working. In my view, a more appropriate reduction would be to 75%. The Defendants shall receive 75% of their respective experts' fees plus their other disbursements.

[26] Finally, there was a dispute over travel costs for first class airfares. Those should be reduced to economy rates.

[27] Having reviewed all of the evidence on this motion and keeping in mind the general principles relating to costs noted above I am of the view that the starting point for costs in this matter should be the top end of the range plus additional compensation reflecting the unique circumstances of this case. Because much of the work in on Phase Two could have been avoided, had agreements been made pending disposition of the validity phase it is fair that the Packers Plus bears the responsibility for the majority of the costs incurred by the Defendants. In my view, a lump sum amounting to 66% of legal fees is appropriate and reflects the right balance based on the facts of this case.

[28] The Defendants' request in each of the actions for 80% of their legal costs in my view would amount to a punitive award reserved for cases where there has been egregious conduct of a party deserving of censure by the Court. Here, the Plaintiffs pursued an aggressive strategy. That, in and of itself is not a reason for a punitive award of costs. Litigation, as has been said, is not an afternoon tea party. Sophisticated parties and their counsel fully understand that costs awards never amount to full compensation absent truly exceptional circumstances.

III. **Essential's Costs**

[29] The fees and disbursements of Essential were challenged on the same basis as noted above. There was but one item relating to business travel which was specifically disputed. That amount claimed is reduced to $1,765.25. Essential shall receive 66% of its fees plus its disbursements with experts' fees being reduced to 75%.

IV. **Weatherford's and Harvest's Costs**

[30] Weatherford and Harvest (Weatherford) also seek 80% of their costs, which amount to $797,660.00 for fees plus $316,452.00 for disbursements. The bulk of the disbursements relate to experts' fees. There appeared to be only one disbursement apart from the experts' fees in dispute and that is for first air travel in the amount of $4,351.25. It will be reduced to $1,765.25. The experts' fees will be reduced to 75% of the amount claimed based on the analysis above relating to Baker Hughes.

[31] Packers Plus' arguments about the magnitude of Weatherford's fees are deserving of consideration. They point out that Weatherford's fees of $797,660.00 are not just more than both

Baker Hughes and Essential but are significantly more. They make the following argument in their written submissions:

> 16. Costs are not intended to compensate a party for looking under every stone and going down every rabbit hole. Parties are not required to compensate for over-preparation. As stated by the Ontario Court of Appeal:
>
> If a lawyer wants to spend four weeks in preparing for a motion when one week would be reasonable, this may be an issue between the client and his or her lawyer. However, the client, in whose favour a costs award is made, should not expect the court in fixing costs to require the losing party to pay for over-preparation, nor should the losing party reasonably expect to have to do so. [*Moon v Sher*, 192 OAC 222]

[32] While counsel for Weatherford and Harvest argued that there was extra work and claims against Weatherford not faced by the other parties it is still difficult to understand how the fees could be so significantly greater. Further, they had been involved during the validity phase of the case and had background knowledge of all of the issues. Weatherford also argues that there were different issues of liability between Weatherford and Harvest, which resulted in additional work and justifies the greater amount fees that were incurred. Further, they point out that Weatherford and Harvest used the same counsel, which resulted in efficiencies, and cost saving as the total fees of Weatherford and Harvest if separately represented would have been significantly more that the amount claimed. While that may be true it is not the reality. The Court is not persuaded that the costs of Weatherford should be that significantly higher than either of the other Defendants. In the result the fees of Weatherford are capped at $750,000.00 before the application of the percentage recovery of 66%. Weatherford shall also recover its disbursements and expert fees reduced to 75%.

V. **Costs of This Motion**

[33] The Defendants have been substantially successful on this motion for increased costs. They are entitled to the costs of this motion. Essential sought $30,000.00 while the other parties requested costs or directions from the Court. Having considered the matter based on the volume of documentation and the time for argument and noting that counsel for Baker Hughes carried the bulk of the argument, Baker Hughes should receive costs in the amount of $20,000.00 and Essential and Weatherford $15,000.00 each plus HST as appropriate plus reasonable disbursements.

[34] Each of the parties shall calculate their respective fee and disbursement recoveries which shall be incorporated into a further order.

[35] The Court thanks counsel for their excellent submissions and patience.

THIS COURT ORDERS that:

1. The parties shall calculate the costs recoverable based on the reasons set out above and provide the calculation to the Court to be incorporated into an Order.

2. The Defendants in each action shall have their costs of this motion fixed in the amount of $20,000.00 plus their reasonable disbursements plus HST for Baker Hughes and $15,000.00 each for Essential and Weatherford plus their reasonable disbursements plus HST as applicable.

3. Should any issues arise relating to carrying out the calculations decided by this Order or any specific disputed docket entries or disbursement overlooked, the parties may arrange a case management conference to finalize the calculations.

"Kevin R. Aalto"
Case Management Judge