

Federal Court



Cour fédérale

**Date: 20230829**

**Docket: T-374-21**

**Citation: 2023 FC 1162**

[ENGLISH TRANSLATION]

**Ottawa, Ontario, August 29, 2023**

**PRESENT: Mr. Justice Sebastien Grammond**

**BETWEEN:**

**VIDÉOTRON LTÉE  
GROUPE TVA INC  
TVA PRODUCTIONS II INC**

**Plaintiffs  
Defendants by Counterclaim**

**and**

**TECHNOLOGIES KONEK INC  
COOPÉRATIVE DE  
CÂBLODISTRIBUTION HILL VALLEY  
LIBÉO INC  
LOUIS MICHAUD  
JOÉ BUSSIÈRE  
JEAN-FRANÇOIS ROUSSEAU**

**Defendants  
Plaintiffs by Counterclaim**

**ORDER AND REASONS  
(COSTS)**

[1] The plaintiffs instituted proceedings against the defendants for copyright infringement. They accused the defendants of retransmitting television programs, without their consent, in hotel rooms. In a judgment bearing neutral citation 2023 FC 741, I allowed the action in part, issued an injunction prohibiting the retransmission of the TVA Sports channels and ordered some of the defendants to pay \$553,000 in statutory damages.

[2] At trial, the parties asked that I postpone the award of costs. These reasons address that issue.

I. Background

[3] For the sake of clarity, it is important to note that the parties first filed a motion for summary trial in order to have certain issues determined. In a judgment bearing neutral citation 2022 FC 256, I decided that motion and held, among other things, that the defendant Libéo Inc [Libéo] was exempt from any liability. I then awarded costs with respect to the summary trial: 2022 FC 733. Given that the defendants against whom I decided the summary judgment are start-up companies, I decided not to award increased costs in the form of a lump sum but rather to rely on the Tariff.

[4] The Federal Court of Appeal then amended the decision I rendered at the end of the summary trial and held that Libéo was liable for the copyright infringements committed by the defendants: 2023 FCA 92. This finding is reflected in my judgment on the merits.

II. Parties' submissions

[5] The plaintiffs seek a lump sum cost award in the amount of \$291,625.88, which represents 30% of their actual fees, as well as an amount of \$15,479.48 in disbursements. They submit that the circumstances that led me to refuse to award a lump sum at the summary judgment stage have changed. In the alternative, they seek an award of \$148,077, calculated in accordance with the upper range of Column IV of Tariff B.

[6] The defendants deny any change in circumstances and submit that the costs should be assessed in accordance with Column III of the Tariff. Moreover, they state that a distinction must be drawn between the remedy provided for in *Copyright Act*, RSC 1985, c C-42, which concerns only the plaintiff Groupe TVA, and the remedy provided for in the *Trademarks Act*, RSC 1985, c T-13, which concerns only the plaintiff Vidéotron. Because the latter remedy was denied, the defendants submit that only Groupe TVA is entitled to costs and that they should be calculated based on half of the actual fees jointly incurred by the plaintiffs. Finally, because I dismissed the action against defendants Bussière and Michaud, they submit that costs should be awarded in their favour.

III. Analysis

[7] I will deal first with the defendants' submissions regarding divided success and which parties are entitled to costs. I will then determine whether it is appropriate to award a lump sum, and I will set the amount.

A. *Divided success?*

[8] Contrary to the defendants' submissions, I am of the view that the various components of this case are inseparable and that this is not a case in which success is divided, which would justify a reduction of costs.

[9] There is no magical formula to “distinguish cases of divided success from those where only a subset of the prevailing party’s arguments are accepted”: *Bertrand v Acho Dene Koe First Nation*, 2021 FC 525 at para 14; see also *Allergan Inc v Sandoz Canada Inc*, 2021 FC 186 at para 31, [2021] 2 FCR 357. I must come to a practical appreciation of what is really at stake.

[10] There is no doubt that the main basis of this case is the illegal retransmission of the TVA Sports signal, contrary to the *Copyright Act*. The plaintiffs, subsidiaries of the same media and communications company, have joined forces to be indemnified for all of the harm that this situation has allegedly caused them. The allegations based on the *Trademarks Act* relate only to a secondary aspect of the harm in question. Accordingly, the rejection of the remedy sought by Vidéotron under the *Trademarks Act* does not mean that success was divided, but only that the plaintiffs were partially successful. This does not justify a reduction in the costs to which the plaintiffs are entitled.

[11] For similar reasons, I find that the action against defendants Bussière and Michaud is inseparable from the action against the other defendants. I am aware that this Court’s jurisprudence does not provide a uniform solution for this issue. See, for example, *Desnoes &*

*Geddes Ltd v Hart Breweries Ltd*, 2002 FCTD 632; *Ruggles v Fording Coal Ltd* (1999), 168 FTR 106. It all depends on the circumstances of each case. In this case, even though, for insurance reasons, the defendants were represented by two different law firms, they essentially presented a common defence. If Messrs. Bussière and Michaud were exonerated from all liability, it was partly because of Mr. Rousseau's testimony at trial, and partly because I did not grant the remedy under the *Trademarks Act*. None of this arose from a defence applicable only to Messrs. Bussière and Michaud.

B. *Lump sum?*

[12] As I noted in *Seedlings Life Science Ventures, LLC v Pfizer Canada ULC*, 2020 FC 505 at paras 3 to 5 [*Seedlings*], awarding a lump sum simplifies the process of assessing costs. In complex cases, it also allows for a higher degree of indemnification than what is set out in the Tariff, which can better achieve the purposes of costs awards.

[13] In *Apotex Inc v Shire LLC*, 2021 FCA 54, the Federal Court of Appeal affirmed that the insufficiency of the amounts available under the Tariff is one relevant factor in determining whether awarding an increased lump sum is appropriate, but not the sole factor to be considered. It is important to look at the whole picture, including the degree of complexity of the case and the fact that the proceedings are between sophisticated commercial parties. The factors listed in section 400 of the *Federal Courts Rules*, SOR/98-106, may also be taken into consideration.

[14] In awarding costs on summary judgment, I noted that the unsuccessful defendants were start-up companies. At the time, Libéo was not one of them.

[15] Since the Federal Court of Appeal amended this part of the summary judgment, the plaintiffs argue that the circumstances have changed and that Libéo is a sophisticated commercial party whose conviction warrants an increased lump sum award. In addition, the plaintiffs argue that the defendants acted in bad faith in certain respects in illegally retransmitting the TVA Sports signal, that they attempted to delay the proceedings and that the purpose of the *Copyright Act* is to encourage copyright owners to assert their rights in court. I will address these issues in reverse order.

[16] As I pointed out at paragraph 82 of the judgment on the merits, the purpose of awarding statutory damages under section 38.1 of the *Copyright Act* is, among other things, to facilitate access to justice for copyright owners and, ultimately, to foster greater respect for the law. However, insofar as I have awarded a substantial amount in statutory damages, far in excess of the loss actually suffered by the plaintiffs, an award of increased costs on this ground alone would be duplicative.

[17] The same reasoning applies to the defendants' bad faith. In this case, the statutory damages have a significant punitive aspect. I took into account the defendants' bad faith in concluding that awarding an amount five times greater than the damage actually suffered was not extremely disproportionate. In short, the bad faith has already been punished and does not, on its own, warrant increased costs.

[18] The conduct of the defendants during the proceedings is also a neutral factor. At the stage of awarding costs, parties frequently accuse each other of delaying proceedings, unduly

prolonging them or acting unreasonably. However, as I pointed out in *Bauer Hockey Ltd v Sport Maska Inc (CCM Hockey)*, 2020 FC 862 at paragraphs 15 to 20 [*Bauer*], it is not desirable for the Court to undertake a detailed analysis of the parties' conduct during the proceedings. In this case, suffice it to say that I have not witnessed any misconduct of such seriousness as to warrant an award of increased costs.

[19] I must now consider the consequences of my holding against Libéo. It is true that Libéo is not a start-up company. It was founded more than 25 years ago and currently has several dozen employees. That said, this is not a large-scale company like those that often clash in pharmaceutical patent cases. Libéo's size weighs moderately in favour of awarding increased costs.

[20] I am also taking into account the medium complexity of the case. The trial lasted only four days. Only one expert witness was heard. Although I had to resolve several legal issues, this is not a case on the scale of *Seedlings* or *Bauer*, cases that lasted weeks rather than days and in which each party called several expert witnesses.

[21] In light of all these factors, I consider it fair and reasonable to award a slight increase in costs over the amount that would result from the application of the Tariff. I will therefore award a lump sum of \$200,000, which represents approximately 20% of the fees actually incurred by the plaintiffs. By way of comparison, a rate of 20% was recently awarded in *Canadian Pacific Railway Company v Canada*, 2022 FC 392.

[22] This amount of \$200,000 also includes disbursements. There is no reason to award additional costs in respect of the assessment of costs.

IV. Conclusion

[23] For these reasons, the plaintiffs will be awarded \$200,000 in costs.



**ORDER in T-374-21**

**THIS COURT ORDERS as follows:**

1. Defendants Technologies Konek Inc, Coopérative de câblodistribution Hill Valley, Libéo Inc and Jean-François Rousseau are jointly and severally ordered to pay the plaintiffs the sum of \$200,000 in costs, including taxes and disbursements, plus interest at the legal rate and the additional indemnity provided for in article 1619 of the *Civil Code of Québec* from the date of this judgment.

“Sébastien Grammond”

---

Judge

Certified true translation  
Francie Gow

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-374-21

**STYLE OF CAUSE:** VIDÉOTRON LTÉE, GROUPE TVA INC, TVA PRODUCTIONS II INC v TECHNOLOGIES KONEK INC, COOPÉRATIVE DE CÂBLODISTRIBUTION HILL VALLEY, LIBÉO INC, LOUIS MICHAUD, JOÉ BUSSIÈRE, JEAN-FRANÇOIS ROUSSEAU

**WRITTEN SUBMISSIONS ON COSTS CONSIDERED AT OTTAWA, ONTARIO, PURSUANT TO JUDGMENT 2023 FC 741**

**ORDER AND REASONS:** GRAMMOND J

**DATED:** AUGUST 29, 2023

**WRITTEN SUBMISSIONS BY:**

Jean-Sébastien Dupont  
François Guay  
Étienne Lacroix-Couillard  
Lambert Beaulac

FOR THE PLAINTIFFS

Joshua Spicer  
William Audet  
Abdulkadir Abkey

FOR THE DEFENDANTS

**SOLICITORS OF RECORD:**

Smart & Biggar LLP  
Montréal, Quebec

FOR THE PLAINTIFFS

Bereskin & Parr LLP  
Toronto, Ontario

FOR THE DEFENDANTS

Abkey Avocats inc.  
Québec, Quebec