Federal Court of Appeal | Cour d'appel fédérale

Date: 20251202

Dockets: A-291-24
A-16-25

Citation: 2025 FCA 214

CORAM: **RENNIE J.A.**
LASKIN J.A.
GOYETTE J.A.

Docket: A-291-24

BETWEEN:

AGI SURETRACK, LLC

Appellant

and

FARMERS EDGE INC.

Respondent

Docket: A-16-25

AND BETWEEN:

AGI SURETRACK, LLC

Appellant

and

FARMERS EDGE INC.

Respondent

Dealt with in writing without appearance of parties.

Judgment delivered at Ottawa, Ontario, on December 2, 2025.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: LASKIN J.A.
GOYETTE J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20251202

Dockets: A-291-24
A-16-25

Citation: 2025 FCA 214

CORAM: **RENNIE J.A.**
LASKIN J.A.
GOYETTE J.A.

Docket:A-291-24

BETWEEN:

AGI SURETRACK, LLC

Appellant

and

FARMERS EDGE INC.

Respondent

Docket:A-16-25

AND BETWEEN:

AGI SURETRACK, LLC

Appellant

and

FARMERS EDGE INC.

Respondent

REASONS FOR JUDGMENT

RENNIE J.A.

Overview

[1] It is common for the Federal Court to award lump-sum costs well in excess of the Tariff in intellectual property proceedings. These awards are often fixed as a percentage of actual legal costs. The range of awards is wide but frequently settles in the 30 to 50% range (*Venngo Inc. v. Concierge Connection Inc. (Perkopolis)*, 2017 FCA 96, at para. 85 [*Venngo*]; *Nova Chemicals Corporation v. Dow Chemical Company*, 2017 FCA 25, at para. 17 [*Nova Chemicals*]). Several considerations support this practice, including the greater than average complexity of intellectual property trials, the sophistication of the parties, and legal bills far in excess of what Tariff B allows (*Allergan Inc. v. Sandoz Canada Inc.*, 2021 FC 186, at para. 26).

[2] This type of award (a percentage of actual costs) is distinct from the fixed amount awards that are routinely granted in the Federal Court and this Court. These fixed amount awards are a reasonably generous but rough approximation of what the Tariff would grant for a trial, judicial review, motion or appeal. The purpose of fixing costs peremptorily is to provide certainty to the parties, facilitate closure and reduce litigation costs. The reasons that follow do not address these types of costs orders and should not be understood to affect the continuation of this practice.

[3] In this motion, the respondent, who was successful at both trial and appeal, seeks an elevated award of costs. The respondent asks for costs of $441,195, plus interest, representing about 90% of its actual fees and disbursements for the appeal. The respondent argues that an

elevated costs award is justified given the lack of merit in the appeal, the complexity of the issues and two settlement offers made in advance of the appeal hearing.

[4] The respondent seeks to migrate the practice of awarding costs based on a percentage of actual legal fees from trials to appeals. In the circumstance of this appeal, I am not convinced this practice should be followed. It is not a foregone conclusion that elevated lump-sum costs are justified in every intellectual property trial nor in every intellectual property appeal. Whether at trial or appeal, the burden is on the successful party, to "demonstrate why their particular circumstances warrant an increased award" (*Nova Chemicals*, at para. 13). While I am satisfied that an elevated award of costs is warranted, I would, in the circumstances, confine it to a modest premium over what the Tariff, B, Column V, would allow.

No Default Costs Award

[5] The unsuccessful appellant claims that this Court's award was "with costs" and, as a consequence, Rule 407 of the *Federal Courts Rules*, SOR/98-106 [Rules] applies such that costs are confined to Column III of Tariff B. On this basis, the appellant contends that costs should be fixed no higher than $15,000.

[6] This argument may be quickly addressed. Rule 400 establishes that the Court has "full discretionary power" over the amount of costs. The Rules set out a multitude of factors that may be taken into consideration by the Court in exercising its discretion including, for example, the result of the proceeding, the importance and complexity of the issues, and any written offer to settle (Rule 400(3)(a), (c), (e)). A decision dismissing the appeal "with costs" does not prevent

this Court from subsequently issuing further directions and orders as to costs where there is no agreement between the parties as to what those costs should be.

Costs as a percentage of actual fees

[7] The respondent advances several factors in support of its request for elevated costs; the actual legal fees are much higher than the Tariff would grant, the weakness of the appellant's case, the result of the case, the complexity of, and the high stakes raised by, the appeal. To the contrary, the appellant argues that its appeal did not lack merit, that it was successful in overturning a point of law, and the amount at stake was already accounted for in the award of trial costs, which amounted to $2,500,000 in legal fees and $1,777,435 in disbursements for a total of $4,277,435 (*AGI Suretrack, LLC v. Farmers Edge Inc.*, 2024 FC 1887, at para. 105).

[8] Lump sum awards "cannot be justified solely on the basis that a successful party's actual fees are significantly higher than the Tariff amounts" (*Nova Chemicals*, at para. 13; see also *Apotex Inc. v. Shire LLC*, 2021 FCA 54, at para. 18 [*Apotex*]). If this argument were to succeed, there would be no need for a Tariff at all. Actual legal fees will invariably be higher than the Tariff.

[9] The respondent cites *Nova Chemicals*, *Venngo*, *Apotex*, and *Steelhead LNG (ASLNG) Ltd. v. ARC Resources Ltd.*, 2025 FCA 5 [*Steelhead LNG*] in support of its position that actual legal fees should supersede tariff amounts. Notably, other than *Steelhead LNG*, none of these decisions arise in an appellate context.

[10] In *Steelhead LNG*, the successful party requested costs in an amount that was "less than one-third of their actual legal costs" (*Steelhead LNG*, at para. 4). Ultimately, this Court awarded less than half of the amount requested, falling well outside of the 25 to 50% range that the respondent suggests is "generally considered" in the context of complex patent litigations. In *Steelhead LNG*, Stratas J.A. characterized the appeal as "less than a low-chance case, especially given the strict and demanding appellate standard of review of 'palpable and overriding error'" (*Steelhead LNG*, at para. 7).

[11] Costs awards in the context of intellectual property trials are not benchmarks for costs awards in the appellate context. Cost awards in intellectual property trials engage considerations that are generally not present in their counterpart appeals: parties need not prepare expert reports and lead evidence, the life span of an action can exceed two years, compared to nine months from notice of appeal to hearing in a routine appeal, there are fewer motions at an appellate level to name but a few. In appeals to this Court, timelines, page limits and the length of hearing are strictly controlled. But most importantly, appeals are constrained by the grounds of appeal, the standard of review and oral arguments are, or should be, laser-focused on questions of law or palpable and overriding errors of evidence. The considerations driving costs awards as a percentage of actual legal fees cannot be summarily transposed to an appellate context.

[12] Moving from this general observation to the particulars of this case, the respondent justifies an elevated costs award arguing:

> As held by this Court, "this case [wa]s particularly complicated", the subject matter of the patent was "highly technical", and the appeal book was extraordinarily long, comprising an "immense volume of evidence", including 13 expert reports on claim construction, infringement, and validity alone.

(Respondent's Written Representations, at para. 9)

[13] It is difficult to reconcile the respondent's contention that this case "implicated complex factual matters", with its simultaneous contention that "many of [the appellant's] claim construction and anticipation arguments had no evidentiary support or were contradicted by the evidence and factual findings of the Federal Court below" and that the appeal was "less than a low-chance case" (Respondent's Written Representations, at paras. 10, 15, 18).

[14] While this appeal was complicated, it was not exceptionally so. Nor was it frivolous. While it is true that the issues of anticipation and obviousness fell away, that was only after the contested question of construction of the patent was determined. Further, while there was an immense volume of evidence in the Federal Court, much of it was not pertinent to the grounds of appeal or argument before the us.

[15] Therefore, I am not satisfied that, in the circumstances of this appeal, an award based on actual legal fees is warranted. Nevertheless, strict adherence to the Tariff, even at the high end of Column V, does not adequately serve the purpose of making a reasonable contribution to the successful party's costs. The respondent submitted a bill of costs for $17,370 based on the highest end of Column V. (I note, parenthetically, that the respondent's calculation is incorrect. The bill of costs erroneously sums costs to $17,370). The sum of costs for each of the line items on the respondent's bill of costs, at the highest end of the Tariff, is $20,520.

[16] The claims construction issue was novel and the Court was well served by the preparation of compendia and oral argument, I would award a modest premium over the Tariff

amount, granting the respondent costs in the amount of $25,000 inclusive plus interest as discussed below.

[17] In reaching this conclusion, I note that this award, while at the low end of the range, is not out of line with what has been ordered by appellate courts in other jurisdictions in matters of medium complexity (see, *e.g.*, *Apotex Inc. v. Eli Lilly and Company, 2025 ONCA 176*; *Petrowest Corporation v. Peace River Hydro Partners*, 2023 BCCA 240; *Apotex Inc. v. Eli Lilly Canada Inc.*, 2022 ONCA 620).

Settlement Offers Do Not Engage Rule 420

[18] The respondent argues that, under Rule 420, the 45% of costs it submits should be awarded should be doubled to 90% from October 7, 2024, when it made the first of two settlement offers to the appellant. The appellant says that costs should not be doubled on the basis that the respondent has not discharged its burden of proving its offers were less favourable than the Court's judgment.

[19] On February 19, 2025, the respondent made two settlement offers to the appellant, replacing its first offer. Each of the two new offers corresponded to the two appeals, one in Court File No. A-291-24, and another in Court File No. A-16-25.

[20] The two offers are identical. Both offers state that the appellant shall discontinue the appeal, with costs payable to the respondent "determined in accordance with the high end of

Column V of Tariff B.” Absent a departure from the Tariff, this is the maximum possible costs award that the appellant could have expected to pay.

[21] The appellant did not respond to the offers.

[22] For Rule 420 to be engaged, “the offer in question must be clear and unequivocal, must contain an element of compromise, must comply with the time limits in the Rules and must bring the litigation to an end” (*Venngo*, at para. 87). In this case, Rule 420 is not engaged because both of the respondent’s latter offers lacked an “ingredient of compromise (or incentive to accept)” (*H-D U.S.A., LLC v. Berrada*, 2015 FC 189, at para. 32, citing *Apotex Inc v. Sanofi-Aventis*, 2012 FC 318, at para. 30). The respondent’s first offer is also of no consequence since it was terminated in advance of the hearing, upon the introduction of the two new offers.

[23] The respondent has not discharged its burden of proving that its offer includes the necessary “ingredient of compromise” or incentive to accept. The appellant’s acceptance of the offers would have resulted in it discontinuing the appeal and incurring roughly the same costs consequences as I would award. The difference between what was offered and what was obtained in this motion is, given the parties and the amounts in issue, immaterial.

Post-judgment Interest

[24] The respondent claims post-judgment interest at a rate of 2.75%, and the appellant agrees with this rate.

[25] Subsection 37(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, states that a judgment "in respect of causes of action arising in more than one province bears interest at the rate that court considers reasonable in the circumstances." 2.75% is a reasonable interest rate bearing in mind the fact that the parties are both headquartered in Manitoba, and under *The Court of King's Bench Act*, CCSM c. C280, the post-judgment interest rate at the relevant time was 2.75%. While pre- and post-judgment rates have reduced by .25% since October 1, the substantive judgment was rendered on July 29, 2025 and this motion was filed on August 28, 2025.

Conclusion

[26] Costs of the appeal are fixed at $25,000.00 plus interest and reasonable disbursements. The disbursements are referred to the Assessment Officer for determination.

"Donald J. Rennie"
J.A.

"I agree.
John B. Laskin J.A. "

"I agree.
Nathalie Goyette J.A. "

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-291-24
STYLE OF CAUSE:	AGI SURETRACK, LLC v. FARMERS EDGE INC.
AND DOCKET:	A-16-25
STYLE OF CAUSE:	AGI SURETRACK, LLC v. FARMERS EDGE INC.

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR JUDGMENT BY:	RENNIE J.A.
CONCURRED IN BY:	LASKIN J.A. GOYETTE J.A.
DATED:	DECEMBER 2, 2025

WRITTEN REPRESENTATIONS BY:

Scott Foster	FOR THE APPELLANT
David Tait James S. S. Holtom	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lewis Silkin LLP Vancouver, BC	FOR THE APPELLANT
McCarthy Tétrault LLP Toronto, ON	FOR THE RESPONDENT