

Federal Court



Cour fédérale

Date: 20170705

Docket: T-2051-10

Citation: 2017 FC 637

Ottawa, Ontario, July 5, 2017

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

**THE DOW CHEMICAL COMPANY,
DOW GLOBAL TECHNOLOGIES INC. and
DOW CHEMICAL CANADA ULC**

Plaintiffs/Defendants by Counterclaim

and

NOVA CHEMICALS CORPORATION

Defendant/Plaintiff by Counterclaim

PUBLIC SUPPLEMENTAL JUDGMENT AND REASONS
(Confidential Supplemental Judgment and Reasons issued on June 29, 2017)

[1] On April 7, 2017, this Court issued its Confidential Judgment and Reasons in *Dow Chemical Company v Nova Chemicals Corporation*, 2017 FC 350 [*Dow v Nova*]. The Public Judgment and Reasons were issued on April 19, 2017. Pursuant to paragraph 8 of the Judgment, the parties were directed to exchange calculations of damages and profits payable by the Defendant Nova Chemicals Corporation [Nova] to the Plaintiffs Dow Chemical Company, Dow

Global Technologies Inc and Dow Chemical Canada ULC [collectively Dow], and to identify any matters that required resolution by the Court.

[2] The parties subsequently informed the Court that they were in substantial agreement regarding the sums payable by Nova to Dow, but were unable to resolve three issues:

- (a) whether Nova is permitted to deduct capital costs and certain fixed costs relating to the ethylene used to produce the infringing SURPASS products;
- (b) the basis for allocating fixed costs of Nova's PE2 plant between the infringing and non-infringing products made at that facility; and
- (c) when capital expenditures reported in Canadian dollars [CAD] relating to construction of the PE2 plant should be converted to U.S. dollars [USD] for the purpose of calculating annual capital depreciation.

[3] This Supplemental Judgment and Reasons addresses these three outstanding issues, and determines the quantum of damages and profits payable by Nova to Dow as a result of this Reference.

A. Ethelyne

[4] Pursuant to subparagraph 5(a) of the Judgment in *Dow v Nova*, Nova may deduct from the revenues derived from the sales of the infringing products for the period August 22, 2006 to December 31, 2015 the costs it actually incurred to obtain the ethylene used to manufacture the infringing products, after deducting its costs of producing the ethylene.

[5] Nova seeks to deduct capital depreciation expenses for its Western Olefins division, as well as fixed costs relating to the distribution, marketing and research and development of the ethylene used to make the infringing products. Nova argues that this approach is consistent with the Court's finding that Nova may deduct the costs incurred to manufacture the ethylene "using a full cost or absorption approach".

[6] Dow argues that the Judgment in *Dow v Nova* permits Nova to deduct only those costs actually incurred to produce the ethylene used to make the infringing products. Paragraph 140 of the Judgment and Reasons refers only to variable and fixed costs, and does not contemplate the deduction of capital expenses. Capital costs are discussed in paragraphs 144 and 145 as a separate category of costs.

[7] Dow also maintains that costs relating to distribution, marketing and sales, and research and development are not costs that Nova incurred to obtain the ethylene used to produce the infringing products. Put simply, Dow says that Nova has no need to distribute, market and sell ethylene to itself.

[8] I agree with Dow. Capital depreciation costs are expressly listed in subparagraph 5(b) of the Judgment. Subparagraph 5(a) of the Judgment does not contemplate the deduction of capital depreciation expenses for Nova's Western Olefins division. Nor does the Judgment permit Nova to deduct fixed costs relating to distribution, marketing and sales, and research and development of the ethylene used to manufacture the infringing products.

B. Allocation of PE2 Plant Fixed Costs

[9] Subparagraph 5(b) of the Judgment in *Dow v Nova* states that Nova may deduct a proportional amount of certain fixed and capital costs, including costs categorized as Plant, Distribution, Sales & Marketing, Technical and Administration, from the revenues derived from the sales of the infringing products for the period August 22, 2006 to December 31, 2015. The parties disagree on the manner in which these costs should be allocated between infringing and non-infringing products.

[10] The parties' accountants have adopted different approaches to allocating fixed costs of the PE2 plant to the infringing products. Dow's accountant, Ross Hamilton, concluded that these costs should be allocated based on relative production volumes. Nova's accountant, Errol Soriano, allocated the costs on a number of different bases, based on the instructions of counsel and the opinion of Nova's economist, Randall Heeb.

[11] Dow complains that Nova's approach results in the allocation of higher fixed costs to infringing products than to non-infringing products. Dow notes that during discovery, Nova

stated that “[t]he fixed costs associated with producing infringing grades do not materially differ from those for producing non-infringing products”.

[12] In his expert report, Mr. Hamilton relied on Nova’s discovery evidence that the fixed costs per pound were substantially the same for infringing and non-infringing products. In cross-examination, counsel for Nova suggested to Mr. Hamilton that this supported Nova’s claim that the production of alternative non-infringing products would have absorbed the fixed costs associated with the manufacture of the infringing products. Counsel for Nova did not suggest to Mr. Hamilton that this assumption was incorrect.

[13] Nova’s experts have proposed the use of three different allocation keys: (a) “pounds produced” or “billed volumes” for its costs relating to distribution; (b) “net revenue” for costs categorized as “Administration, Sales and Marketing”; and (3) “reactor hours” for “Plant and Technical” costs. While this approach is premised on potentially valid distinctions between different categories of costs, I agree with Dow that Nova has not adduced evidence to support it.

[14] Given the evidence provided by Nova on discovery, Mr. Hamilton’s reasonable reliance on that evidence in formulating his opinion, and Nova’s reinforcement of his assumption in cross-examination, I conclude that the appropriate basis for allocating fixed costs for the PE2 plant is “billed volume”, as described by Mr. Hamilton.

C. Timing of Conversion

[15] Pursuant to paragraph 5(b) of the Judgment in *Dow v Nova*, Nova may deduct a proportional amount of, *inter alia*, annual capital depreciation expenses for the PE2 plant, as well as ongoing capital costs for the PE2 plant, against the revenues derived from the sales of the infringing products for the period August 22, 2006 to December 31, 2015. The parties differ on when initial capital expenditures for the construction of the PE2 plant should be converted to USD for the purpose of calculating annual capital depreciation.

[16] Dow says that the appropriate date of conversion for initial PE2 plant construction costs is 2001, when the expenditure was incurred. Dow notes that Mr. Soriano generally converted expenditures reported in CAD to USD at the time they were incurred, except for the initial PE2 construction costs. In his calculation of initial PE2 plant construction costs, Mr. Soriano maintained capital expenditures in CAD, calculated the annual depreciation in CAD, and then converted the annual depreciation amount to CAD using the average exchange rate in the year of deduction.

[17] Dow complains that Mr. Soriano's approach results in a greater deduction for depreciation in USD than the costs Nova actually incurred in USD. Given the Court's finding that "[t]he preponderance of the evidence demonstrates that Nova retained the profits from the infringing grades primarily in U.S. dollars", Dow says that converting capital expenditures to USD at the time they were incurred best reflects Nova's economic reality.

[18] Nova responds that the methodology used by Mr. Soriano was not challenged by Dow on cross-examination. Mr. Hamilton did not take issue with his approach, or offer a competing opinion. According to Nova, standard accounting principles recognize capital-related expenditures as multi-year expenses. They represent the economic cost of consumed capital from the use of an asset.

[19] When the PE2 plant was constructed, Nova's functional currency was not yet USD. The Court's finding that Nova generally retained its profits from the infringing products in USD pertains to the period of infringement, and is not necessarily applicable to initial PE2 plant construction expenses.

[20] The PE2 plant was built over a number of years. Nova notes that the conversion rate in 2001 was unusually low: 1.55. This may be contrasted with a conversion rate of 1.38 in 1997, 1.48 in 1998, and 1.49 in 1999 and 2000. Nova maintains that it would be unjust to apply only the lowest conversion rate from the relevant period.

[21] There is a danger that imposing 2001 as the single point of conversion would be punitive, contrary to the purpose of an accounting of profits. Mr. Soriano's approach is reasonable, supported by the evidence, and unchallenged by the other expert witnesses who testified in this Reference. I therefore agree with Nova that it is the preferred approach.

SUPPLEMENTAL JUDGMENT

THIS COURT'S JUDGMENT is that:

1. Nova shall pay to Dow \$644,623,550.00, inclusive of pre-judgment interest to April 7, 2017, together with pre-judgment interest calculated in accordance with this Court's Judgment in *Dow v Nova* from April 7, 2017 to the date of this Judgment.
2. Nova shall pay to Dow post-judgment interest of 5%, not compounded, from the date of this Judgment.
3. The parties shall file written submissions on the confidentiality of Court File No. T-2051-10 by July 14, 2017, and any reply submissions by July 19, 2017.
4. The parties shall file written submissions on costs, not exceeding ten pages, by July 14, 2017, and any reply submissions, not exceeding three pages, by July 19, 2017.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-2051-10

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PUBLIC SUPPLEMENTAL JUDGMENT AND REASONS ISSUED: JULY 5, 2017

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