

Federal Court of Appeal



Cour d'appel fédérale

Date: 20160301

Docket: A-43-16

Citation: 2016 FCA 66

Present: DE MONTIGNY J.A.

BETWEEN:

NOVA CHEMICALS CORPORATION

Appellant

and

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

Respondents

Heard at Ottawa, Ontario, on February 25, 2016.

Order delivered at Ottawa, Ontario, on March 1, 2016.

REASONS FOR ORDER BY:

DE MONTIGNY J.A.

Federal Court of Appeal



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REASONS FOR ORDER

DE MONTIGNY J.A.

[1] This is a motion by the Appellant, Nova Chemicals Corporation (Nova) seeking (i) a stay of the Judgment of Justice O'Keefe (the Judge) dated January 16, 2016 regarding costs (Costs Judgment), and (ii) a stay of this appeal (Costs Appeal).

[2] Having carefully considered the parties' written and oral submissions, I have come to the conclusion that the motion must be dismissed on both counts.

I. Facts

[3] This motion arises from a patent infringement action between the Respondents (collectively to be referred to as Dow) and Nova. By a judgment dated May 7, 2014, the Judge held that the patent in issue was valid and had been infringed by Nova, and provided that Dow was entitled to their costs. That decision is under appeal in Court File A-379-14 (Merits Appeal), and was heard on December 7 and 8, 2015; judgment is still under reserve.

[4] Following the decision on the merits, the parties made written submissions to the Judge regarding the quantum of costs to be awarded to Dow. On January 16, 2016, confidential Reasons for Judgment and Judgment were issued (a public version followed on January 22, 2016), awarding Dow \$6.5 million in costs. This Costs Judgment is the subject of this appeal and motion.

[5] In support of this motion, Nova has adduced the affidavit of Gary Matz, who is the Chief Intellectual Property Counsel of Nova's U.S. subsidiary. In paragraph 11 of his affidavit, Mr. Matz undertakes on behalf of Nova to provide a letter of credit for \$6.5 million as security for the costs awarded in the Costs Judgment in the event a stay is granted. He also asserts in paragraphs 13 to 17 of his affidavit that Nova would be irreparably harmed if a stay of the Costs Judgment is not granted because, in the event Nova succeeds in the Merits Appeal and the costs award has to be repaid by Dow, pre-judgment interest would not make Nova whole, based on

what it might otherwise be able to do with the money. More specifically, he states at paragraph 16:

I am informed by counsel for NOVA and verily believe that, in their opinion, in the absence of an agreement by DOW to pay interest on some other basis, NOVA would be entitled to pre-judgment interest from the date of payment on any monies recoverable from DOW and that it is expected that the pre-judgment interest rate would be the bank rate similar to that awarded in paragraph 4 of the Trial Judgment. I am informed by counsel for NOVA that currently the bank rate is 0.75%. Nova's cost of capital based on the cost of its long term debt is between 5% and 5.25%.

[6] On cross-examination, it was made clear that not being in the finance department of either Nova U.S. or Nova Canada, Mr. Matz could provide very few details relevant to a possible letter of credit (whether the letter would be irrevocable, whether it would have an expiry date, and whether there were any terms or conditions that would be required to be satisfied by the Court or Dow prior to acting on the letter). At the hearing, however, counsel for Nova made it clear that Nova would comply with any terms or conditions ordered by the Court.

II. The applicable legal tests

[7] The applicable legal test with respect to Nova's motion to stay the Costs Judgment is undoubtedly the tri-partite test set out in *RJR-MacDonald v. Canada*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385 [*RJR-MacDonald*], according to which Nova must establish (i) a serious issue to be tried; (ii) that it would suffer irreparable harm if a stay is not granted; and (iii) that the balance of convenience is in its favour.

[8] On Nova's motion to stay this appeal, there is agreement between the parties that the legal test is whether such a stay is in the interests of justice (*Mylan Pharmaceuticals ULC v.*

Astrazeneca Canada Inc. et al., 2011 FCA 312 at para. 3, 426 N.R. 167). This is clearly a less demanding test than the one prescribed in *RJR-MacDonald*.

III. Application of the legal tests to the facts of this case

[9] The Respondents did not really debate the seriousness of the issues raised by the Appellant in its Costs Appeal.

[10] As for irreparable harm, it is well established that it must be clear and non-speculative. In the case at bar, I have not been satisfied that Nova would be irreparably harmed if a stay of the Costs Judgment is not granted. First of all, I agree with the Respondents that it is speculative to assume that the pre-judgment interest rate to which the Appellant would be entitled if it were successful on the Merits Appeal would be the bank rate of 0.5% to 0.75%. Section 36(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 provides that the Court has discretion to award pre-judgment interest at any rate “that it considers reasonable in the circumstances”.

[11] More importantly, the extent of the loss that Nova would potentially incur as a result of the difference between the aforesaid 0.5% to 0.75% bank rate and Nova’s cost of capital based on the cost of its long-term debt, which it states is between 5% and 5.25%, has not been clearly established. Nova has failed to establish that the cost of its long-term debt is an appropriate measure of how much interest Nova would save by holding on to the \$6.5 million. As Chief Intellectual Property Counsel of Nova’s U.S. subsidiary, he could not say how Nova would use the money and whether it would actually be used to pay down its long-term debt. Moreover, Nova has not provided any information as to the commission rate that would be charged by the

bank for its proposed letter of credit. Finally, it must be borne in mind that any difference between the bank rate and the interest rate paid on Nova's long-term debt would not apply for a full year but would have to be pro-rated over a few months only (that is, between the date of release of this Order and the date of release of the judgment in Court file A-379-14 in the Merits Appeal).

[12] As a result, I have not been satisfied that Nova would be harmed, let alone irreparably, in the event the Merits Appeal is allowed. Indeed, it has been found in many cases that the mere possibility of incurring unrecoverable legal costs is inherent to litigation and thus cannot be considered irreparable harm in the absence of special circumstances: *Brocklebank v. Canada (Minister of National Defence)* (1994), 86 F.T.R. 23 at paras. 10-12, [1994] F.C.J. No. 1496 (Fed. T.D.); *Bell Canada v. Communications, Energy and Paperworks Union of Canada et al.* (1997), 127 F.T.R. 44 at paras. 37-41, [1997] F.C.J. No. 207 (Fed. T.D.); *Canadian Imperial Bank of Commerce v. Kollar*, 2003 FC 985 at para. 8, [2003] F.C.J. No. 1249. There are no such special circumstances in the present case.

[13] As for Nova's motion to stay this appeal, I am similarly incapable to find in its favour. As pointed out by the Respondents, the next steps in this appeal do not involve a huge expense of time or money, as they only consist of filing an agreement as to the content of the appeal book, and the service and filing of that appeal book. Moreover, the content of the appeal book will likely be minimal since the appeal only relates to the issue of costs, and the timeline for completing that last step can be extended on consent of all parties. Accordingly, it would be premature to stay this appeal.

IV. Conclusion

[14] For all of the foregoing reasons, the motion to stay the Costs Judgment and the Costs Appeal shall be dismissed, with costs.

"Yves de Montigny"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-43-16

STYLE OF CAUSE: NOVA CHEMICALS
CORPORATION v. THE DOW
CHEMICAL COMPANY, DOW
GLOBAL TECHNOLOGIES INC.
AND DOW CHEMICAL CANADA
ULC

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: FEBRUARY 25, 2016

REASONS FOR ORDER BY: DE MONTIGNY J.A.

DATED: MARCH 1, 2016

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