Court of King's Bench of Alberta

Citation: Dow Chemical Canada ULC v NOVA Chemicals Corporation, 2025 ABKB 343

Date: 20250605
Docket: 0601 07921
Registry: Calgary

Between:

Dow Chemical Canada ULC and Dow Europe GmbH

Plaintiffs

- and -

NOVA Chemicals Corporation

Defendant

Endorsement
of the
Honourable Justice B.E. Romaine

---

[1] This endorsement addresses submissions made on the form of a judgment roll arising from this Court's April 7, 2025 Reasons for Judgement, which assessed Dow's damages, both as remanded by the Court of Appeal for the period through 2012 and as reserved in the Court's reasons for the first phase of the trial relating to the "top-up" period.

[2] First, what should have been a non-issue had NOVA followed the agreed-upon court-directed procedure for finalizing the judgment roll.

[3] Dow has said on the record that it agrees not to enforce the collection of its damages from NOVA until the Court's second remand decision has been issued. Dow has also said that it has no intention of forcing NOVA to apply for a stay of enforcement.

[4] There is no need to include this as part of the judgement roll, as if it had been a highly contested issue that NOVA had won. In the extremely unlikely event that Dow resiles from its assurance, NOVA would be entitled to immediate relief.

[5] NOVA, however, appears anxious that this concession appears somewhere in the judgment roll. It can be added to the preamble as follows: "and upon Dow agreeing not to enforce the collection of its damages from NOVA until the second remand issue has been issued".

[6] Second, given this assurance, there is no need to delay the finalization of the judgment roll. Indeed, this is best done before I retire on July 3, 2025 and the task is left to another judge who has not written the decision and does not have this Court's long history with the issues.

[7] Third, I decided in my Reasons for Judgment that Mr. Kapur's proposed post-2024 turnaround productivity capability ought to be adjusted to account for the impact of the Nox emissions limit on operations. I noted that I agreed with NOVA's suggestion that the correct fix would be to change the 68% conversion rate to a 65% conversion rate, but this was not intended to eliminate or limit the obvious adjustments that would accompany this change – some of which I had specifically noted in the Reasons at: para 140:

> Because conversion had been increased from 65% to 68 percent, Mr. Kapur adjusted the furnace run length with maximum feed rate from 40 days as used previously to 30 days.

[8] My direction was to adjust Mr. Kapur's calculations, not to limit them beyond the obvious conversion rate change. Thus, the other changes that arise from a lowering of the conversion rate are necessary and appropriate, as part of the Court approved productive capability methodology.

[9] NOVA's suggestion that the parameters of a 68% conversion rate should remain the same for a 65% conversion rate would skew the rationale of Mr. Kapur's report in an inappropriate and inaccurate manner.

[10] Fourth – the dispute over the date of currency conversion.

[11] This Court issued its Reasons for Judgment on April 7, 2025. Both parties tendered forms of judgment roll dated April 7, 2025. Both parties calculate pre-judgment interest on Dow's damages and on NOVA's October 10, 2019 "credit" payment up to the agreed date of judgment, April 7, 2025. But NOVA submits that, for the singular purpose of currency conversion, the April 7, 2025 date of the damages judgment must be June 20, 2018. NOVA is wrong.

[12] I repeat what I said in my Reasons for Judgment at para 517:

> The Court of Appeal noted at para 107 of its Appeal Reasons:
>
> A review of the case law confirms that a trial judge has a discretion in selecting a conversion date. The trial judge's exercise of this discretion is entitled to deference. The equities between the parties need to be balanced with the burden being placed more heavily on the wrongdoer. Apart from those background principles, there are no fixed rules.

[13] This Court ruled, and the Court of Appeal agreed, that the date for conversion of Dow's damages from USD to CAD is to be the date of judgment. Trial Reasons, para 1180, Appeal Reasons, paras 103, 104,111, where the Court stated that:

> The trial judge concluded that the balance of the damages should be converted to Canadian currency as of the date of judgement. That conclusion was reasonably available on this record, and no reviewable error has been shown with respect to it.

[14] In the Reasons for judgment, I concluded on Issue M that Dow's claim, other than for allocation damages, is to be calculated in US dollars and then converted to Canadian dollars as of the date of judgment. This is consistent with my previous decision, and not a new date for the purpose of currency conversion.

[15] NOVA submits that this Court "specifically reaffirmed that 'Dow's claim... is to be calculated... and converted... as of the date of Judgment – June 20, 2018". This is a mischaracterization. NOVA added the reference to June 20, 2018, not this Court.

[16] NOVA compounds this error by alleging that "[t]he Court of Appeal confirmed this Court's findings that currency conversion was to occur as of June 20, 2018". The Court of Appeal did not say "June 20, 2018": This is a NOVA addition.

[17] NOVA's submission that this Court is bound by an "already-exhausted judicial discretion" and must use June 20, 2018 for currency conversion is therefore wrong

[18] What, then, is the date of judgment?

[19] June 20, 2018 is certainly the date that this Court found that NOVA had engaged in a deliberate and continuing course of conduct to favour its own interests to the legal detriment of Dow, with respect to both imposing ethane allocation and failing to operate E3 with the objective of optimizing production. I further found NOVA was in breach of its contractual obligations, its actions constituting gross negligence and wilful misconduct.

[20] I also made a damages award for the period ending on December 31, 2012, but this award was subsequently overturned on appeal. Had it not been, the date of judgment for pre 2013 damages would have been June 20, 2018. The Court of Appeal, noting that "the trial judge was not asked to decide the issue that has formed the basis of the appeal" (2020 ABCA 320, para 101) directed this Court to determine damages on a value of Dow's lost ethylene basis for the first time. There would be nothing to convert until that determination was made.

[21] NOVA has reportedly insisted that there is no quantified judgment as of June 20, 2018 or as at any other date.

[22] On October 12, 2021, in its opening submissions for the damages hearing, NOVA described the "trial judgment" as having been "overturned", and emphasized that "at this moment, there is no *judgment for damages in favour of Dow"*. On August 10, 2023, during the damages hearing, NOVA counsel insisted that, "as of today and since the decision of the Court of Appeal in 2020 ABCA 320, there has not been and is not an extant judgment". He repeated, "there is no judgment". On September 20, 2023, in its damages hearing closing brief, NOVA submitted that the Court of Appeal "overturned the Court's.... award of damages to Dow". Since then, NOVA has declared that "there has been no extant, enforceable judgment order entitling Dow to any damages".

[23] This is correct. Courts have consistently held that there can be no judgment debt until damages are quantified.:*0679372 B.C. Ltd v The Winking Judge Pub*, 2011 BCSC 633 at paras 14-18. In this case, the defendants unsuccessfully argued that contractual interest should only run until the date of default judgment, with damages and costs to be assessed. The Court noted that the quantification of damages is "a substantial matter still to be determined": paras 14-18. The Court referred to *Uram v Uram*, 1985 CanLII 590 at paras 5,8:"

> [A]ll substantial matters in an action must be determined before a judgment is deemed to be rendered for the purpose of postjudgment interest" ....
>
> Where the amount to be paid at the date of the pronouncement is unascertainable the judgment is considered conditional and unsettled. The terms are insufficient to adjudge payment of a specific amount so that some further step is necessary to have the amount of the judgment finally determined. In short, such judgments lack the required elements of clarity, certainty and finality. In the instant case the amount payable on December 14, 1981 ... It would seem reasonable to conclude, therefore, that the order did not create a judgment debt on the day it was pronounced.

[24] In *Remington Development Corporation v Canadian Pacific Railway Company*, 2023 ABKB 493 at para 119, Woolley, J., as she then was, noted that "for a court's decision to create a 'judgment debt', it must allow for a precise calculation of what one party owes to another"... [i]t cannot be an approximation, or a close estimate; it must establish the particular sum to be paid".

[25] While many of these cases involve interest or the concept of "judgment debt", the principles are apposite.

[26] There is similar case law about currency conversion. Where conversion is to be at the "date of judgment", and where liability has been found but quantum is to be determined by a referee and then adopted by the court, "the date of judgment shall be the date the debt is determined" in that fashion: *Romspen Mortgage Ltd Partnership v 3443 Zen Garden Ltd Partnership*, 2023 ABKB 730 paras 120, 122, affirmed 2024 ABCA 333. The common sense of this approach is obvious; converting a US dollar damages award into Canadian dollars requires a specific dollar amount to convert.

[27] This issue also involves the characterization of the damages remand.

[28] This Court has said repeatedly that the damages remand is a continuation of the trial.

[29] In its May 3, 2021 decision, the Court of Appeal pointed out that the additional "top-up" damages had still "not yet been quantified", but they would be "when the trial resume[d]". The trial resumed on November 8, 2021, and the damages remand part of it finished on November 2, 2023. On April 7, 2025 this Court then granted judgment for a combination of two amounts – the remanded damages for the initial 2001 to 2012 period and the "top-up" damages quantification according to the terms of the remand.

[30] In further guidance, the Court of Appeal in *Stevenson Estate v Siewert*, 2001 ABCA 180 at paras 15-16 said:

> The Court's task is to select the most fair and equitable of the two possible conversion dates. It cannot be expected that either of these will allow perfect

> justice to be rendered. Given this, *if any equities must fall unequally on the parties, they should fall more heavily on the wrongdoer than on the victim.*
>
> In the circumstances of this case, the most just date for conversion, as between the breach date and the judgment date, is the latter, being *the date of this decision.*

[31] In accordance with established principles and statements of this Court and the Court of Appeal and taking into account that NOVA is clearly the wrongdoer in this case, the appropriate date of judgment for the purpose of conversion is April 7, 2025.

[32] Fifth, NOVA now challenges Mr. Mikulka's calculation of currency conversion of interest on Dow's allocation damages according to his damages hearing approach.

[33] This was not an issue that was tested during the damages hearing. The Court of Appeal in 2020 ABCA 320 paras 109, 110, 117 adjusted the currency conversion treatment of Dow's allocation damages as follows:

> The trial judge found that NOVA failed to deliver appropriate amounts of ethylene to Dow over a period of years. The shortfall of ethylene could be measured on a daily or monthly basis over that period of time. In any month. Dow could have calculated the monetary value of the missing ethylene and conceptually converted it into Canadian dollars at that time. One could therefore argue that the conversion from American to Canadian dollars should occur at the exchange rates prevailing in any particular month. On the other hand, the fact is that Dow did not get its ethylene, or its notional dollar value, when it should have. Dow is only getting that value now, in the form of a judgment. This supports the argument that conversion should occur at the date of judgment.
>
> In this case the trial judge concluded that the allocation damages should be converted as of the date of breach. That was a reasonable conclusion, but the single conversion date selected for the date of breach reflects palpable and overriding error. A proper balancing of the equities called for a periodic conversion rate as the damages accrued. The appeal on this point should therefore be allowed. The allocation damages should be converted using a monthly or other periodic exchange rate, such as ones proposed by Dow's expert. If the parties cannot agree on details of conversion, the issue is referred to the trial judge.
>
> ...
>
> The interest should accordingly be calculated on the last day of each calendar month, applying the Prime Rate plus two percentage points on that date to all of the damages that occurred during that month. (emphasis added)

[34] Dow's expert Mr. Mikulka calculated the allocation damages each month in USD. He then added those monthly damages to the accrued total allocation damages from all preceding months and calculated interest on it each month in USD using the appliable monthly interest rate. Finally, he converted each month's allocation damages and interest to CAD using the applicable monthly exchange rate.

[35] NOVA's expert Mr. Williams testified as follows:

[36] Mr. Mikulka also now in this reference model, as with the top-up model, converts US dollar damages into Canadian. And, in particular, he converts allocation damages at the monthly

average Canadian/US dollar exchange rates. That's in accordance with the decision of the Court of Appeal, and I – I do the same thing as Mr. Mikulka. I don't believe there are any differences between us on this point...

...

> Lastly, in the reference model, Mr. Mikulka has made one further update with respect to the calculation of prejudgment interest, and this emanates from the decision of the Court of Appeal, which indicated that prejudgment interest should be calculated from the beginning of each month in which damages were owed. Mr. Mikulka has done his calculation based on that instruction. I've done the same calculation in, I believe, exactly the same manner, and there are no differences as to Mr. Mikulka and myself at this point. (emphasis added)

[37] Unfortunately, despite Mr. Williams' testimony, the small difference that NOVA now submits is appropriate could have been discernible by a detailed comparison of Mr. Williams' model versus Mr. Mikulka's model, but it was neither identified nor tested at the damages hearing.

[38] NOVA submits that the approach taken by Mr. Mikulka is in error. It submits that Dow's allocation damages should be calculated monthly in USD, then converted to CAD using the applicable monthly exchange rate, then added to the accrued allocation damages from all prior months, and then interest should be calculated thereon each month in CAD using the applicable monthly interest rate.

[39] Over time, converting interest in the slightly different way NOVA now suggests would sometimes have benefited NOVA and would sometimes have benefited Dow. Currently, the difference benefits NOVA.

[40] Given that during the damages hearing, NOVA did not challenge Mr. Mikulka's approach, and it is implicit in the decision that I accepted that approach, I agree that there is no principled reason to change that now on the basis of an untested different theory.

[41] Finally, NOVA submits that certain changes should be made to the preamble, structure and content of Dow's draft of the judgment roll.

[42] There is no good reason for NOVA's removal of the word "partial" in the preamble. It would cause confusion and seems to be directed to NOVA's past unsuccessful attempts to characterize the remands as new trials.

[43] The same problem arises with respect to NOVA's suggestion that previous payments should be characterized as "fully paid and satisfied Trial Damages", which fails to mention post-judgment interest.

[44] There is no reason to delete "inter alia" in Dow's draft preamble. NOVA's suggested definition of the second remand as the "Pool Illegality Remand" is inaccurate.

[45] Dow's reference to "Judgment having been reserved" in the preamble is accurate.

[46] References to submissions made by NOVA in the second remand are unnecessary and inappropriate in this judgment roll relating to the first remand.

[47] Potentially unclear language with respect to NOVA's credit for its October 10, 2019 payment is inappropriate. The damages hearing awarded gross damages. Of course, NOVA is entitled to a credit.

[48] Dow's final paragraph references to "Judgment remains reserved with respect to costs" is accurate. I understand that NOVA has submitted with respect to costs that this Court should not be making any decision with respect to that matter until all the remanded hearings are over, and that submission shall be addressed in the cost decision.

[49] I therefore accept Dow's form of Judgment Roll with a slight addition to the preamble as directed.

Heard on the 02nd day of June, 2025.
Dated at the City of Calgary, Alberta this 5th day of June, 2025.

B.E. Romaine
J.C.K.B.A.

Appearances:

Blair Yorke-Slader, K.C
E. Bruce Mellett, K.C
Ciara J. Mackey
David J. Wahl
Adam J. Williams
Tao Browne
for the Plaintiffs

Steven Leitl, K.C
Bryan Walker
Gunnar Benediktsson
Olivia Dixon
Emily MacKinnon
for the Defendant