Federal Court Cour fédérale

Date: 20251205

Docket: T-3222-24

Ottawa, Ontario, December 5, 2025

PRESENT: Madam Justice McDonald

BETWEEN:

SCHLEGEL HEALTH CARE INC., HOMEWOOD HEALTH INC. AND HOMEWOOD HEALTH CENTRE INC.

Plaintiffs

and

EDGEWOOD HEALTH NETWORK INC.

Defendant

SUPPLEMENTARY ORDER AND REASONS

[1] In *Schlegel Health Care Inc v Edgewood Health Network Inc*, 2025 FC 1639 (Motion Decision), I dismissed the Plaintiffs' motion for an interlocutory injunction brought in the context of a trademark infringement action against the Defendant.

[2] The Defendant was awarded costs and the parties filed written submissions on costs. Having considered the submissions from the parties, the following are my Reasons on costs.

I. Analysis

A. *Preliminary issue*

[3] I will begin by addressing an issue that has arisen in the cost submissions relating to settlement privilege.

[4] The Defendant objects to the Plaintiffs including a letter from the Defendant which is marked "without prejudice" and which discusses a proposal for the settlement of costs following the Motion Decision (Settlement Letter). The Defendant argues that this letter is protected by settlement privilege and is inadmissible.

[5] In response, the Plaintiffs argue that the Settlement Letter is admissible based on Rule 400(3)(e) of the *Federal Courts Rules*, SOR/98-106, [Rules] which states the Court can consider "any written offer to settle". The Plaintiffs also point to Rule 422 which states:

422 No communication respecting an offer to settle or offer to contribute shall be made to the Court…until all questions of liability and the relief to be granted, other than costs, have been determined.	**422** Aucune communication concernant une offre de règlement ou une offre de contribution ne peut être faite à la Cour…tant que les questions relatives à la responsabilité et à la réparation à accorder, sauf les dépens, n'ont pas été tranchées.

[6] In my view, Rule 422 does not apply here as it "provides that settlement offers cannot be referred to until a decision on the merits is made" (*Voltage Pictures, LLC v Salna*, 2017 FCA 221 at para 18). This was an interlocutory motion for an injunction and the underlying action for trademark infringement remains to be determined. Thus, there has not been a determination of all issues of liability as required by Rule 422.

[7] The Settlement Letter does not fall within the exception to settlement privilege provided in Rule 422 and will not be considered under Rule 400(3)(e). I will therefore disregard the Settlement Letter for the purpose of determining costs on the Motion.

II. *General principles*

[8] Rule 400(1) provides the Court full discretionary power over the amount and allocation of costs (*Nova Chemicals Corporation v Dow Chemical Company*, 2017 FCA 25 at para 10). Rule 400(3) outlines factors that the Court may consider in exercising its discretion, including the result of the proceeding, and the importance and complexity of the issues.

[9] The default position is for the Court to award costs according to Column III of Tariff B (Rule 407) and the burden is on the party requesting elevated costs to justify departing from Tariff B.

A. *Defendant's cost submissions*

[10] The Defendant, in their Bill of Costs seeks lump sum costs in the amount of $212,428, comprised of $190,000 in legal fees (based on 30% of their total fees) and $22,428 in

disbursements. Alternatively, they seek costs of $83,295, consisting of $60,867 in fees (based on the high end of Tariff B Column V) and $22,428 in disbursements.

[11] The Defendant cites several factors supporting their position, including: the complexity of the injunction motion, the Plaintiffs' conduct, the importance of the case, sophistication of the parties, the inadequate compensation under the Tariff system, and the Defendant's success on the motion.

B. *Plaintiffs' cost submissions*

[12] The Plaintiffs note the interlocutory nature of the motion, and the moderate complexity of the motion, in support of their position that any award of costs should be based upon Tariff B, Column IV which they have calculated at $39,128.79 ($21,865.50 in fees and $17,263.29 in disbursements). Alternatively, the maximum amount for costs should be calculated under Column V, in the amount of $78,130.74 ($60,867.45 in fees and $17,236.29 in disbursements). I note here that there is a disagreement on the disbursement for Professor Moorthy in the amount of $5,164.86. As there is no invoice in the submissions in support of this disbursement, I agree with the Plaintiffs that it should not be allowed.

C. *Lump sum costs*

[13] The parties agree that lump sum costs are appropriate but disagree on whether costs should be based on the Tariff B amount or as a percentage of the Defendant's legal fees.

[14] Lump sum costs as a percentage of legal fees are increasingly awarded in intellectual property cases (*Allergan Inc v Sandoz Canada Inc*, 2021 FC 186 at para 27). This is justified, in part, by the fact that parties in intellectual property litigation bear costs far above the Tariff amount. However, this development is seen when costs are assessed after the final determination of proceedings, rather than on interlocutory decisions. The Defendant cites several of such cases, including *Loblaws Inc v Columbia Insurance Company*, 2019 FC 1434 and *Philip Morris Products SA v Marlboro Canada Ltd*, 2011 FC 1113.

[15] In contrast, this Court has a mixed approach when awarding costs on interlocutory motions in intellectual property cases. In some instances, the Court has awarded costs based on the Tariff (*TFI Foods Ltd v Every Green International Inc*, 2021 FC 241 at para 76; *2572495 Ontario Inc v Vacuum Specialists (1985) Ltd*, 2023 FC 345 at para 53), and in other cases, based on percentage of legal fees (*Fluid Energy Group Ltd v Exaltexx Inc*, 2020 FC 299 at para 17 [*Fluid Energy*]).

[16] Percentage lump sum costs are not automatically awarded in intellectual property cases and the fact that a party's costs are significantly higher than the Tariff amount is insufficient on its own to justify percentage lump sum costs (*Vidéotron Ltd v Technologies Konek Inc*, 2022 FC 7332020 FC 299 at para 4; *Nova Chemicals Corporation v Dow Chemical Company*, 2017 FCA 25 at para 13).

[17] The Defendant argues that an award of lump sum costs outside Tariff B is justified here for several reasons. They highlight that the Motion involved an extensive record and, required

the parties to address substantive trademark law issues including: (i) whether the Plaintiffs have an unregistered trademark; (ii) whether the Plaintiffs have goodwill in any GUARDIANS mark; (iii) whether there would be confusion between the Plaintiffs' asserted GUARDIANS mark and the Defendant's use of EHN GUARDIANS; and (iv) whether the Plaintiffs would suffer actual or potential damage.

[18] However, in my view, the complexity of the Motion Decision is already reflected in the Defendant's Bill of Costs. The Defendant had three counsel at the motion hearing and used two counsel while preparing for and attending discovery and examinations. The Tariff accounts for these additional resources, and therefore sufficiently captures the complexity of the Motion Decision.

[19] The Defendant also submits that the Plaintiffs' conduct justifies elevated lump sum costs. This alleged conduct includes the original notice of motion containing "erroneous relief", which required amendment; the inclusion of "serious issues" that were not pursued at the hearing; the serving of an affidavit without the attached exhibits; and the filing of reply representations on a motion.

[20] In turn, the Plaintiffs argue that the Defendant's allegations are exaggerated and that the Defendant also engaged in conduct that complicated the proceeding, including adding an addendum to an affidavit a few days before cross-examination of the affiant.

[21] I do not view either party's conduct as improper so as to warrant costs consequences. In any event, the consequences of the Plaintiffs' conduct is arguably captured in the increased costs of the Defendant's legal fees and the Court's role in awarding costs is not to engage in an autopsy of the motion and retrospectively criticize the parties' legal strategies (*Energizer Brands, LLC v Gillette Company*, 2024 FC 717 at para 48; *Bauer Hockey Ltd v Sport Maska Inc (CCM Hockey)*, 2020 FC 862 at para 32).

[22] Despite the factors noted by the Defendant, in my view they do not support reasons to depart from the default Tariff B. The Motion Decision did not determine the final merits of the underlying action for trademark infringement, but rather conducted a preliminary assessment of the merits for the purposes of the serious issue branch of the interlocutory injunction test. Further caution is appropriate on a costs awards on interlocutory motions, given that the ultimate merits of the dispute have yet to be determined. In my view, this case is different from *Fluid Energy*, which the Defendant relies upon in claiming lump sum costs. In *Fluid Energy*, the Court awarded 25% lump sum costs on a motion for an interlocutory injunction. However, the Court awarded lump sum costs of $25,848.04, which is significantly lower than the $212,428 sought by the Defendant.

[23] While I decline to award lump sum costs, there are factors that support departing from Column III of Tariff B. Both parties are sophisticated commercial litigants capable of retaining experienced legal counsel and fully appreciating their legal decisions. I also note that the Defendant was successful across all three branches of the interlocutory injunction test. Finally,

elevated costs on Tariff B provide more reasonable compensation for the legal fees incurred by the Defendant, without becoming excessive.

[24] I will thus award costs according to the high end of Column V of Tariff B.

D. *Should costs be payable forthwith?*

[25] The Defendant also seeks an order for costs to be payable forthwith, pursuant to Rule 401(2). The Court can only make such an order if "…the Court is satisfied that a motion should not have been brought or opposed" (Rule 401(2)). Motions that "should not have been brought or opposed" include "motions that are plainly ill-conceived, are not supported by admissible evidence, are based on a clearly incorrect understanding of well-settled law, or are otherwise an abuse of process" (*Trophy Lodge NWT Ltd v Canada (Attorney General)*, 2024 CanLII 4210 (FC) at para 14).

[26] The Plaintiffs' motion does meet this threshold. While the Plaintiffs failed to demonstrate a serious issue, they faced the high threshold of a "strong *prima facie* case", and there were arguable issues on the motion that required a through analysis to resolve. I note that an order of costs payable forthwith is the exception, not the rule (*Vidéotron Ltd v Technologies Konek Inc*, 2022 FC 733 at para 12, citing *Fluid Energy* at paras 27-29). As such, I decline to order costs payable forthwith.

III. Conclusion

[27] The Defendant is entitled to costs pursuant to Tariff B Column V in the amount of $78,130.00.

ORDER IN T-3222-24

THIS COURT ORDERS that the Defendant is entitled to costs pursuant to Tariff B Column V in the amount of $78,130.00.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-3222-24
STYLE OF CAUSE:	SCHLEGEL HEALTH CARE INC. ET AL V EDGEWOOD HEALTH NETWORK INC.
SUBMISSIONS ON COSTS CONSIDERED AT:	OTTAWA, ONTARIO
SUPPLEMENTARY ORDER AND REASONS:	MCDONALD J.
DATED:	DECEMBER 5, 2025

WRITTEN REPRESENTATIONS BY:

Aiyaz A. Alibhai Kathryn Frelick Tiffany A. Syyong	FOR THE PLAINTIFFS
Kristin Wall William Chalmers	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Miller Thomson LLP Vancouver, British Columbia	FOR THE PLAINTIFFS
Norton Rose Fulbright Canada LLP Toronto, Ontario	FOR THE DEFENDANT