

Federal Court



Cour fédérale

Date: 20170525

Docket: T-705-13

Citation: 2017 FC 495

Ottawa, Ontario, May 25, 2017

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

MEDIATUBE CORP. AND NORTHVU INC.

Plaintiffs

and

BELL CANADA

Defendant

PUBLIC ORDER AND REASONS

(Identical to the Confidential Order and Reasons issued on May 12, 2017)

I. Background

[1] On January 4, 2017, I issued my decision on the merits of this patent infringement action by the plaintiffs MediaTube Corp. (MediaTube) and NorthVu Inc. (NorthVu) against Bell Canada (Bell). The neutral citation of the decision on the merits (the Trial Decision) is 2017 FC 6. In the Trial Decision, I dismissed the action and the counterclaim, and ordered as follows in respect of costs:

The plaintiffs shall pay Bell's costs in an amount to be determined on the basis of submissions on aspects not addressed in this judgment, and elevated by 50% for all issues except the punitive damages claim which are to be calculated on a solicitor-and-client basis.

[2] The parties were invited to make written submissions on costs in the days following the Trial Decision. This decision assesses costs following consideration of the parties' submissions.

[3] For reasons particular to the present action, 13 pages of the Trial Decision were devoted to various arguments concerning costs that were made by the parties during the trial. Important aspects of these arguments concerned (i) the weakness of the plaintiffs' theory of infringement, and (ii) the plaintiffs' withdrawal, during trial, of their claim for punitive damages. As suggested in the Trial Decision, I will not revisit my conclusions related to costs, but I am prepared to take into account issues that were not dealt with at trial. Accordingly, I start this decision on costs from the perspective that the plaintiffs shall pay Bell's costs at the following levels:

- a) For all issues except the punitive damages claim (the Infringement Case), costs are elevated by 50%; and
- b) For the punitive damages claim (the Punitive Damages Case), costs are on a solicitor-and-client basis.

II. The Parties' Positions

A. *Bell's Position*

[4] Bell seeks costs in the amount of \$7,120,499; comprising \$5,686,576 for the Infringement Case and \$1,433,923 for the Punitive Damages Case.

[5] The \$5,686,576 sought for the Infringement Case is calculated on the basis of a lump sum representing 50% of Bell's actual legal fees for the Infringement Case plus 100% of its disbursements for the Infringement Case, both amounts then elevated by 50%. As an alternative, Bell calculates costs with only the legal fees (and not the disbursements) elevated by 50%. This way, Bell arrives at a figure of \$5,129,423 for the Infringement Case.

[6] As a further alternative, Bell calculates costs for the Infringement Case on the basis of Tariff B of the *Federal Courts Rules*, SOR/98-106 [*Rules*], and specifically the top of Column IV of Tariff B. The amounts sought according to this method of calculation are \$2,154,647 (if both fees and disbursements are elevated by 50%) or \$1,655,552 (if only fees are elevated).

[7] The \$1,433,923 sought for the Punitive Damages Case is based on full indemnification of legal fees and disbursements.

B. *The Plaintiffs' Position*

[8] The plaintiffs argue that the costs award should be \$1,324,000; comprising \$739,000 for the Infringement Case and \$585,000 for the Punitive Damages Case.

[9] With regard to the Infringement Case, the figure of \$739,000 comes from fees calculated based on the top of Column IV of Tariff B, and only the legal fees (and not the disbursements) being elevated by 50%. The plaintiffs also dispute several of the fees and disbursements identified by Bell in its Bill of Costs.

[10] The plaintiffs' figure of \$585,000 for the Punitive Damages Case is based on an argument that costs on a solicitor-and-client basis are intended to provide substantial indemnity rather than full indemnity. The plaintiffs also argue that many of Bell's fees and disbursements related to the Punitive Damages Case were not reasonable and hence should not be allowed in the costs award.

III. Consideration of Issues in Dispute

[11] I have considered the factors indicated in Rule 400(3) of the *Rules* in setting the amount of costs. Some of these factors were already taken into account in the context of the Trial Decision. With regard to the result of the proceeding, Bell was successful in defending against the plaintiffs' claim. With regard to the importance and complexity of the issues, I find that the matter was of considerable importance to the parties, and the issues in dispute, especially the factual issues, were numerous and complex. I have been given no information concerning any offer to settle which would affect the amount of costs to be awarded. With regard to the amount of work involved in this matter, I find that it was substantial, but in keeping with the importance and complexity of the issues.

[12] The parties agree that a lump-sum award of costs is appropriate. Accordingly, I have calculated the amount due rather than sending the matter of costs to an assessment officer.

A. *Preliminary Issue – Separating Costs of the Punitive Damages Case from Costs of the Infringement Case*

[13] As indicated above, the Trial Decision provides for a different measure of costs for the Punitive Damages Case than for the Infringement Case. It is necessary, therefore, to determine which costs incurred by Bell relate to the Punitive Damages Case. There are several ways in which the allocation of costs could be done. Some of these ways might yield a more precise figure but would demand much more work. Other ways of determining the appropriate allocation of costs are less precise but have the benefit of being less demanding to calculate. Bearing in mind that the assessment of costs is rough justice (“in the sense of being compounded of much sensible approximation”: *Lundbeck Canada Inc v Canada (Health)*, 2014 FC 1049 at para 32, citing *Abbott Laboratories v Canada (Health)*, 2008 FC 693 at para 70, itself quoting from *Re Eastwood (deceased)* (1974), 3 All E.R. 603 at 608), I have adopted a relatively simple, albeit less precise, approach.

[14] Rather than attempting to determine, for each step in this matter, whether it concerned the Punitive Damages Case or the Infringement Case, I prefer to determine a fraction representing the amount of the total that was devoted to the Punitive Damages Case. At paragraph 257 of the Trial Decision, I noted that the plaintiffs spent about two and a half days, or about one third of their case in chief, on the Punitive Damages Case. The plaintiffs withdrew their claim for punitive damages before Bell began presenting its case on this issue, and therefore no further time was spent on it at trial. This offers one rough measure of the fraction of the case that related to the Punitive Damages Case.

[15] I am mindful that the amount of time and effort devoted to the Punitive Damages Case may have evolved during the life of this proceeding. In Appendix A below, I provide a table indicating the total amount of time spent in examinations for discovery in this matter, as well as the fraction that each side argues related to the Punitive Damages Case. I note that the figures in Appendix A exclude lunch breaks. As shown, the parties are not far apart on this issue: Bell argues for a fraction of about 34%, while the plaintiffs argue for about 31%. For the sake of simplicity, I have adopted a figure of one third as the fraction of examinations for discovery (and preparations therefor) that relate to the Punitive Damages Case. It follows that the other two thirds relates to the Infringement Case. I use this allocation below to simplify the calculation of fees associated with discovery.

[16] The fraction is different, and the parties are further apart, when we consider the fraction of time and effort devoted to the Punitive Damages Case at trial. In Appendix B below, I provide a table similar to Appendix A, but indicating time spent at trial. Here, Bell argues for a fraction of about 15%, while the plaintiffs argue for about 10%. With regard to trial (and preparations therefor), I prefer Bell's figure of 15% as a better reflection of the time devoted at trial to the Punitive Damages Case. It follows that the other 85% relates to the Infringement Case. I use this allocation below to simplify the calculation of fees associated with trial.

[17] Having decided on an allocation of costs between the Punitive Damages Case and the Infringement Case, I turn now to discussion of the following subsets of costs: (i) fees related to the Infringement Case; (ii) fees related to the Punitive Damages Case; and (iii) disbursements.

B. *Fees Related to the Infringement Case*

[18] As indicated above, Bell argues that fees related the Infringement Case should be calculated on the basis of a portion of the total legal expenses actually incurred by Bell. For their part, the plaintiffs argue that fees related to the Infringement Case be calculated based on the top of Column IV of Tariff B.

[19] In my view, Tariff B should be used as the basis for calculating costs related to the Infringement Case. The elevation of those costs by 50% represents a premium on costs. Calculation of costs on the basis of a portion of the total legal expenses actually incurred represents another form of premium on costs. Bell's argument on costs for the Infringement Case essentially seeks to place one premium on top of another. This is not appropriate in the present case.

[20] Having determined that Tariff B should be the basis for calculating costs related to the Infringement Case, I note that the parties are in agreement that the appropriate level of costs is the top of Column IV. I concur.

[21] It is also my view that the 50% elevation should apply only to fees and not to disbursements. Though the Trial Decision could have been more explicit on the point, it should be understood that disbursements were not intended to be elevated. Elevating disbursements would make some of the costs awarded higher than those actually incurred. This would be

inappropriate. As normal, disbursements may be included in the costs calculation at 100% to the extent that they are reasonable.

[22] Another important issue on which the parties disagree in the Infringement Case concerns the number of counsel. Bell argues that two counsel should be allowed (where they were present) for preparation and attendance at all examinations for discovery, mediations, motions and case management conferences, and that four counsel (two senior and two junior) should be allowed for preparation and attendance at trial. The plaintiffs counter that fees for counsel should be limited to two, one senior and one junior, throughout.

[23] In my view, costs should be allowed for two counsel (one senior and one junior, where present) for preparation and attendance at all examinations for discovery and all allowed pre-trial conferences. As usual, fees for junior counsel should be calculated at half the rate for senior counsel. For preparation and attendance at trial, costs should be allowed for one senior and two junior counsel.

[24] The plaintiffs also dispute Bell's claim of costs in respect of motions in which costs were not awarded, were already paid, or were awarded to the plaintiffs. Even where costs were awarded to Bell on certain motions, the plaintiffs argue that costs should be based on the default middle of Column III, unless the order awarding costs indicates otherwise.

[25] Costs of motions granted to Bell but without any indication as to the amount should be based on the default of Column III: *Apotex Inc v Merck & Co*, 2006 FCA 324 at para 15. Bell

does not dispute that account should be taken of costs already paid by the plaintiffs and costs granted to the plaintiffs in certain motions.

[26] The plaintiffs also argue that costs should not be allowed for Bell's amended pleadings. Given that Bell's amended pleadings do not appear to have been necessitated by any amended originating document, pleading, notice, or affidavit of the plaintiffs, as contemplated by Item A.3 of Tariff B, I accept the plaintiffs' argument.

[27] The plaintiffs dispute many of the claims for costs relating to pre-trial conferences. Bell includes 19 such conferences in its Bill of Costs. The plaintiffs argue that only four should be allowed: a pre-trial conference before Prothonotary Milczynski on April 25, 2016, and three trial management conference before me on April 27, July 5, and August 31, 2016. I agree with the plaintiffs that costs should not be allowed for most of the others which are case management conferences and mediations. An award of costs in respect of unsuccessful mediations would be inappropriate. The same is true of case management conferences, unless the case manager has indicated that costs should be awarded. However, I would also allow costs relating to a trial management conference before me on August 17, 2015.

[28] Bell claims \$3,395 for the preparation of a Bill of Costs related to the Infringement Case by a law clerk. This claim is based on half of the work she did – the other half relating to the Bill of Costs for the Punitive Damages Case. The plaintiffs argue that the costs allowed for the preparation of a Bill of Costs related to the Infringement Case should be limited to what is provided for in Item G.28 of Tariff B, and that little should be allowed for the preparation of a

Bill of Costs related to the Punitive Damages Case since law clerk fees are typically unrecoverable. I agree with the plaintiffs as regards the Infringement Case. However, I will allow Bell's claim for the cost of preparing the Bill of Costs related to the Punitive Damages Case based on the work of a law clerk. I accept that her work was likely at least as valuable and efficient as could have been achieved by a lawyer for the same cost.

C. *Fees Related to the Punitive Damages Case*

[29] As indicated above, the assessment of costs related to the Punitive Damages Case is to be done on a solicitor-and-client basis. Bell argues that this calls for complete indemnification of all costs that were reasonably incurred. The plaintiffs argue that complete indemnification would be excessive, and that costs should instead be calculated on the basis of a substantial indemnity.

[30] Bell relies on the following passage from *Maison des Pâtes Pasta Bella Inc v Olivieri Foods Ltd* (1999), 86 CPR (3d) 356 at para 6 (FCTD):

It is useful to note at the outset that costs awarded on a solicitor and client scale, as opposed to a party and party scale, are intended to provide complete indemnity to the successful party; the party and party scale provides only a partial indemnity. In *Apotex Inc. v. Egis Pharmaceuticals et al.* (1991), 4 O.R. (3d) 321 (Ont. Ct. Gen. Div.), Henry J. succinctly articulated the principle behind the solicitor and client scale at page 325, in an effort to clarify the “woolly thinking” characterizing this area of the law:

The general principle that guides the court in fixing costs as between parties on the solicitor and client scale, as provided in my order, is that the solicitor and client scale is intended to be complete indemnification for all costs (fees and disbursements) reasonably incurred in the course of prosecuting or defending the action or proceeding, but is not, in the absence of a special order, to

include the costs of extra services judged not to be reasonably necessary.

Thus, the unsuccessful party must pay the costs which the successful party would have to pay his or her lawyer, with the *caveat* that the costs awarded must be those reasonably incurred.

[31] The plaintiffs' argument in favour of substantial indemnity cites *Entral Group International Inc v MCUE Enterprises Corp (Di Da Di Karaoke Company)*, 2010 FC 606, in which the Federal Court appeared to equate solicitor-and-client costs with costs calculated on a substantial indemnity basis. The plaintiffs also rely on authorities that distinguish costs on a substantial indemnity basis from costs on a full indemnity basis. However, these authorities appear to be tied to the specific wording of *Ontario's Rules of Civil Procedure*, RRO 1990, Reg 194 (see r 1.04(5)).

[32] I prefer to be guided by authorities from the federal courts on this issue. In addition to those discussed above, I note also the following passage from *Merck & Co v Apotex Inc*, 2002 FCT 1210 at para 11:

The award of costs on a solicitor and client basis is intended to provide full indemnification of costs reasonably incurred in the course of carriage by the plaintiffs of this litigation. In fixing those costs, the Court must carefully consider the costs claimed in relation to the work reasonably required, not on the basis of hindsight with 20/20 vision of what was finally required, and not as an assessment item by item as an assessing or taxing officer would do, but sufficiently reviewed to ensure that costs awarded are reasonably incurred. [Citation omitted.]

[33] In my view, the term "solicitor-and-client costs" in this Court generally contemplates the full amount of a party's necessary expenses reasonably incurred. Nothing I have seen in the

plaintiffs' authorities clearly convinces me that solicitor-and-client costs, in this Court, should be construed to mean anything less.

[34] The hourly rates charged by Bell's counsel for legal services varied over time and between the various lawyers involved in this matter. In order to simplify my calculations, and in order to rely on reasonable rates, I have determined that a maximum hourly rate of \$800 for senior counsel and \$400 for junior counsel should be applied for this complex patent action.

[35] The plaintiffs object to a claim by Bell for four hours of a senior counsel's time for review of the Trial Decision. The plaintiffs argue that there is no information as to who performed this work. In my view, this claim is reasonable. It would be reasonable for several of the counsel acting on behalf of Bell in this matter to have reviewed that decision and, all told, to have spent at least four hours doing so.

D. *Disbursements*

[36] Because the measure of disbursements to be included in the costs award is the same for the Infringement Case and for the Punitive Damages Case – 100% of reasonably necessary expenses incurred – it is not necessary, for the most part, to separate disbursements between the two.

[37] The plaintiffs argue that disbursements should be reduced for Bell's three experts who testified at trial. The plaintiffs assert that the testimony of these experts was redundant, and therefore the costs incurred were not reasonable. The plaintiffs propose that the costs associated

with these experts be reduced by 50%. The plaintiffs also challenge any claim for costs associated with a fourth expert, Michel Proulx, who did not testify at trial.

[38] With regard to the three experts who testified at trial, I agree with Bell that they each brought a different perspective to the case, and there was no redundancy in having them all testify. I will allow disbursements in respect of each of them in full. With regard to the expert who did not testify, I am not convinced by Bell's arguments that costs related to his involvement should be included in the calculation of costs. Though Bell asserts that Mr. Proulx's testimony was essential to assisting in understanding the plaintiffs' infringement case, and that his testimony was rendered unnecessary only after the plaintiffs dramatically narrowed their case, I have not been provided enough detail about Mr. Proulx's expertise or proposed testimony to convince me that costs associated with him should be allowed.

[39] Bell claims disbursements related to (i) six fact witnesses who testified for Bell in relation the Infringement Case, and (ii) five other fact witnesses who were prepared to testify for Bell in relation to the Punitive Damages Case. The plaintiffs challenge any expenses for these witnesses beyond what is contemplated in Tariff A. They argue that the amounts claimed are for consultancy fees, and should not be included without information about details of the various consultancy agreements.

[40] Bell has quite rightly not claimed expenses in relation to its own employees who testified at trial. For non-employees, fees paid to fact witnesses may be awarded where they are reasonable. Though it is difficult to assess reasonableness in the absence of details concerning

these witnesses' work, I accept that some amount for each witness is reasonable, even for the witnesses on the Punitive Damages Case who never testified.

[41] With regard to the Infringement Case, the expenses claimed by Bell in relation to the following witnesses appear reasonable to me, and I would allow them in full: Christopher Butler, Martin Weston, and Donna Gates. Cory Wishak had only recently left the employ of Bell and, since it is not clear that all of the expenses claimed in relation to his work dated from after his departure, I will reduce the amount allowed for him to \$2,000. The amounts claimed in relation to Mark Carpenter and Allan Cameron were substantially higher than for the other fact witnesses. I recognize that some of this increased amount may be due to their relative seniority, but I will limit the allowable amount for each of them to \$5,000. This yields a total of \$16,193 for Bell's fact witnesses on the Infringement Case (about 57% of what Bell has claimed).

[42] With regard to the five fact witnesses who were prepared to testify for Bell on the Punitive Damages Case, it is all the more difficult to assess the reasonableness of the claims because I did not even see these witnesses. For lack of a better approach, I will allow Bell's claim here in the same proportion as I allow it in relation to the Infringement Case: 57%.

[43] Footnote 43 of the plaintiffs' cost submissions makes reference to an apparent error in the costs associated with Martin Cullum, one of Bell's intended fact witnesses on the Punitive Damages Case. The plaintiffs note that Bell claims \$12,267.40, whereas Bell's Schedule A indicates only \$1,875 in expenses associated with Mr. Cullum. It appears that the confusion comes from the fact that the amount of \$1,875 is in reference to taxable expenses, and another

amount (\$10,393) is listed in association with Mr. Cullum in another table in Schedule A relating to non-taxable expenses. The sum of these two amounts matches Bell's claim. Though Bell's Bill of Costs for the Punitive Damages Case shows the whole amount of \$12,267.40 as taxable, I will maintain the split between taxable and non-taxable amounts as shown in Schedule A.

[44] Bell claims disbursements to a third-party document review and processing company called Epiq. Bell asserts disbursements totaling \$706,247.57. It allocates \$204,879.72 of this amount to the Infringement Case, and \$501,367.85 to the Punitive Damages Case. Without giving a precise breakdown, Bell indicates that it reaches these figures based on an allocation of 75% to the Punitive Damages Case until February 2015 (after providing responses to undertakings from the first round of examinations for discovery) and 25% thereafter. Bell indicates that, to meet the plaintiffs' Punitive Damages Case, it collected data for over three million documents and hired Epiq to streamline the review process. This was done using various data processing techniques and having contract lawyers at Epiq review the documents for relevance.

[45] The plaintiffs dispute Bell's allocation of expenses between the two cases, arguing that it is arbitrary. The plaintiffs also argue that no disbursements should be allowed for lawyers' services. Further, the plaintiffs argue that the various expert reports and the How-it-Works documents that were prepared to describe the allegedly infringing systems indicate that only a limited number of technical documents were relevant. Finally, the plaintiffs argue that Epiq's services should be considered as part of the normal overhead costs of litigation. The plaintiffs

propose that, in relation to Epiq, \$100,000 be allowed for the Infringement Case, and another \$100,000 be allowed for the Punitive Damages Case.

[46] I agree that, in relation to the Infringement Case, no amount for legal services of contract lawyers at Epiq should be allowed as disbursements because legal services are already accounted for, to the extent appropriate, in Tariff B. However, the same restriction does not apply in relation to the Punitive Damages Case, for which costs are based on actual expenses reasonably and necessarily incurred.

[47] I also agree that Bell's allocation of costs between the Infringement Case and the Punitive Damages Case lacks justification. I accept Bell's post-February 2015 allocation of 25% to the Punitive Damages Case, but I would bias the pre-February 2015 allocation more toward the Infringement Case – perhaps about 50/50%.

[48] I disagree with the plaintiffs' argument concerning the simplicity of the Infringement Case on the technical side. Having presided over the trial, I am satisfied that the issues on the technical side (including document production) were far from simple. The need for, and evolution of, the How-it-Works documents are indicative of this fact.

[49] I do not consider Epiq's services to be overhead in the way that Justice Judith Snider considered Summation technology to be in *Sanofi-Aventis Canada Inc v Apotex Inc*, 2009 FC 1138 at para 19. I understand Summation to be a tool that most law firms dealing with patent litigation, and some sophisticated parties, have regardless of any particular litigation. That does

not appear to be the case for Epiq, which I understand provided services to Bell that it would not have used but for the present litigation.

[50] Though I lack sufficient information to be precise in revising the figures claimed by Bell in relation to Epiq, I am satisfied that some amount is appropriate. In my view, the amount allowable in relation to the Infringement Case should be limited to \$125,000. For the Punitive Damages Case, Bell is less constrained in its claim for costs relating to legal services. In my view, \$275,000 is appropriate.

[51] The plaintiffs also challenge Bell's claims for disbursements other than in relation to witnesses and Epiq (Miscellaneous Disbursements) in the Infringement Case. These claims total roughly \$135,000 (about \$114,234 taxable and \$20,936 non-taxable). The plaintiffs propose that these amounts be reduced to about \$65,195 inclusive of tax. With respect to taxable disbursements, the plaintiffs seek to reduce substantially disbursements for which no amounts were deducted for pre-trial steps in which no costs were awarded to Bell. The plaintiffs also seek to eliminate entirely taxable disbursements they characterize as overhead. They do not object to Bell's claim (in the amount of \$37,425) relating to court reporter services. With respect to non-taxable disbursements, the plaintiffs seek to deny entirely Bell's disbursements in relation to prior art searches.

[52] I agree that some reduction is merited to reflect the fact that some of the Miscellaneous Disbursements apparently relate to motions in which no costs were awarded to Bell. I also agree that some of the Miscellaneous Disbursements should be disallowed because they relate to

overhead: *e.g.*, tabs/binding, books/periodicals/subscriptions, media preparation. With regard to travel expenses, I accept that the disbursements are inadequately detailed. However, they should not be denied entirely. Bell's claim for taxable Miscellaneous Disbursements in the Infringement Case should be reduced to \$85,000.

[53] With regard to non-taxable Miscellaneous Disbursements in the Infringement Case, I agree with the plaintiffs that the amounts spent on prior art searches seem excessive. In my view, \$5,000 is an appropriate amount for all non-taxable Miscellaneous Disbursements in the Infringement Case.

[54] In respect of the Punitive Damages Case, Bell's only claim for Miscellaneous Disbursements is \$17,099 (taxable) for court reporter services. The plaintiffs do not object to this claim.

IV. Calculations

[55] Having analysed the various issues in dispute, I turn now to the calculation of costs payable. I have not done this based on a mark-up of either party's Bills of Costs. Rather, I have adopted a method that is the most efficient and expeditious for the preparation of this decision.

A. *Fees Related to the Infringement Case*

[56] As indicated above, fees related to the Infringement Case are to be calculated based on the top of Column IV of Tariff B. The figure arrived at in this way is then to be elevated by 50%, with the exception mentioned below.

[57] Tariff B comprises the following sections that are relevant to this decision:

- A. Originating Documents and Other Pleadings
- B. Motions
- C. Discovery and Examination
- D. Pre-Trial and Pre-Hearing Procedures
- E. Trial or Hearing
- G. Miscellaneous

[58] I will address each of these sections in turn.

- (1) A. Originating Documents and Other Pleadings

[59] With the removal of Bell's claim for amendment of pleadings, the amount allowed in this section is \$1,260 as argued by the plaintiffs.

(2) B. Motions

[60] Taking into account:

- i. the motions in respect of which costs were already paid by the plaintiffs, were not awarded to Bell, or were awarded against Bell, and
- ii. that the costs associated with motions should be calculated on the basis of Column III unless ordered otherwise in an Order in relation to the motion;

The amount allowed in this section is -\$3,152 (*i.e.*, amount owed by Bell). I arrive at this figure based on the amounts suggested by the plaintiffs for Bell's conflict motion (-\$1,932), Bell's second motion for security for costs (-\$1,500) and the plaintiffs motion appealing Prothonotary Milczynski's Order regarding routing tables (\$1,400), as well as Bell's motion to strike (which I calculate to be -\$1,120, being -\$700 for preparation and -\$420 for attendance).

[61] Because the measure of costs payable in relation to interlocutory motions was set before trial, these costs are to be excluded from the 50% elevation of costs.

(3) C. Discovery and Examination

[62] For examinations for discovery and preparation therefor, I rely on my conclusion above that two thirds of the time spent in examinations for discovery related to the Infringement Case. I first calculate the total fees allowable for both the Infringement Case and the Punitive Damages Case, and then take two thirds of that amount. I also rely on allowance for two counsel (one senior and one junior).

[63] The initial amount for preparation for four examinations for discovery is \$6,720, being \$4,480 (or $4 \times \$1,120$) for senior counsel and \$2,240 for junior counsel.

[64] The initial amount for attendance at four examinations for discovery is \$129,528. This is based on a total of 154.2 hours of examinations (per Appendix A) – $(154.2 \times 4 \times 140) + (154.2 \times 2 \times 140)$.

[65] The total of the foregoing initial amounts is \$136,248, two thirds of which is \$90,832.

[66] To this should be added an amount for documentary discovery of Bell Canada and Bell Aliant - \$2,520 (on which the parties agree) – yielding a total of \$93,352 for this section.

(4) D. Pre-Trial and Pre-Hearing Procedures

[67] I allow the following amounts in this section:

- Preparation for and attendance at trial management conference dated August 17, 2015: \$2,520, being \$1,680 for senior counsel and \$840 for junior counsel;
- Preparation for and attendance at pre-trial conference dated April 25, 2016: \$2,520, being \$1,680 for senior counsel and \$840 for junior counsel;
- Preparation for and attendance at trial management conference dated April 27, 2016: being \$2,100, being \$1,400 for senior counsel and \$700 for junior counsel;
- Preparation for and attendance at trial management conference dated July 5, 2016: being \$2,100, \$1,400 for senior counsel and \$700 for junior counsel;

- Preparation for and attendance at trial management conference dated August 31, 2016: being \$2,100, \$1,400 for senior counsel and \$700 for junior counsel;
- Notice to admit: \$560, as agreed by the parties;
- Preparation for trial: \$26,418, being \$13,209 for senior counsel and half that again for each of two junior counsel.

[68] The figure for preparation for trial is arrived at as follows. The trial lasted 18 days. As indicated above, I allocate 85% of the time spent at trial to the Infringement Case. Accordingly, I calculate the fees allowable for preparation for the trial as a whole and take 85% of that amount. For senior counsel, the number of units allowable for preparation for the trial as a whole (based on Items D.13(a) and D.13(b) of Tariff B) is $9 + (6 \times (18 - 1))$, or 111. The amount allowed is 85% of 111×140 : \$13,209.

[69] The total amount allowed under this section is \$38,318.

(5) E. Trial or Hearing

[70] The parties agree on an amount of \$1,260 for preparation and filing of written arguments.

[71] I calculate the counsel fee for trial based on the total number of hours spent in trial (per Appendix B) and the 85% thereof that related to the Infringement Case. The initial amount for senior counsel based on the whole trial is \$51,352, being $91.7 \text{ hours} \times 4 \times 140$. Each of two junior counsel adds half that amount again ($2 \times \$25,676$), yielding a total of \$102,704. 85% of this amount is \$87,298.

[72] The total amount for attendance at trial and written argument is therefore \$88,558.

(6) G. Miscellaneous

[73] \$980 is allowed under this section as proposed by the plaintiffs.

(7) Total Fees Allowed for the Infringement Case

[74] The total of the amounts allowed in each of the relevant sections of Tariff B, and the total amount awarded as costs for fees related to the Infringement Case, are therefore:

Section	Amount Allowed	Elevation	Elevated Amount
A. Originating Documents and Other Pleadings	\$1,260	50%	\$1,890
B. Motions	-\$3,152	n/a	-\$3,152
C. Discovery and Examination	\$93,352	50%	\$140,028
D. Pre-Trial and Pre-Hearing Procedures	\$38,318	50%	\$57,477
E. Trial or Hearing	\$88,558	50%	\$132,837
G. Miscellaneous	\$980	50%	\$1,470
Total			\$330,550
Total with HST added		13%	<u>\$373,522</u>

B. *Fees Related to the Punitive Damages Case*

[75] As discussed above, fees related to the Punitive Damages Case are to be calculated on a solicitor-and-client basis and without reference to Tariff B.

[76] Bell's Bill of Costs for the Punitive Damages Case contains amounts under the following headings:

- Examinations for Discovery and Preparations therefor
- Trial and Preparation therefor
- Miscellaneous
- Meetings with Fact Witnesses, Document Collection, Read-Ins

[77] I will address each of these sections in turn.

(1) Examinations for Discovery and Preparations Therefor

[78] My calculation of fees allowed under this section is based on one third of discovery time, which I have determined to be the proportion allocated to the Punitive Damages Case. This yields a figure of 51.4 hours.

[79] Applying an hourly rate of \$800 for senior counsel and \$400 for junior counsel, and accepting Bell's proposal of two hours of preparation time for each hour of examination (to which the plaintiffs do not object), I arrive at a figure of \$185,040. This is based on \$41,120 for attendance of senior counsel (51.4 hours × \$800), twice that much for preparation (\$82,240), and half these amounts again (\$20,560 and \$41,120) for junior counsel.

(2) Trial and Preparation Therefor

[80] My calculation of fees allowed under this section is based on the 15% of trial time that I have allocated to the Punitive Damages Case. This yields a figure of 13.7 hours.

[81] Again applying an hourly rate of \$800 for senior counsel and \$400 for junior counsel (two are allowed at trial), and again accepting Bell's proposal of two hours of preparation time for each hour of examination, I arrive at a figure of \$65,760. This is based on \$10,960 for attendance of senior counsel (13.7 hours \times \$800), twice that much for preparation (\$21,920), and half these amounts again for each of two junior counsel (\$5,480 twice and \$10,960 twice).

(3) Miscellaneous

[82] In this section, Bell claims half of its actual legal costs for preparing the Bills of Costs and four hours of a senior lawyer's time for reviewing the Trial Decision. As indicated above, I find both of these claims to be reasonable. Accordingly, I allow the amount of \$14,080 as claimed by Bell.

(4) Meetings with Fact Witnesses, Document Collection, Read-Ins

[83] The parties submit that the following amounts should be allowed for each category in this section:

Heading	Claimed by Bell	Proposed by Plaintiffs
Meetings with Fact Witnesses	\$234,905	\$150,416

Document Collection	\$103,274	\$72,630
Read-Ins	\$30,272	\$18,495
Total	\$368,451	\$241,541

[84] The basis of the plaintiffs' proposed reductions is the hourly rate to be applied, as well as the impropriety of allowing fees for a law clerk. I agree that fees for a law clerk should not be allowed since fees for multiple counsel are already allowed. I will allow an hourly rate of the lesser of \$800 or the rate actually charged for senior counsel and the lesser of \$400 or the rate actually charged for junior counsel.

[85] For each of the categories in this section, I allow the following amounts:

- Meetings with Fact Witnesses

Name	Hours	Hourly Rate	Amount
Andrew Reddon	29.4	\$800	\$23,520
Steve Mason	36.8	\$777.91	\$28,627
Fiona Legere	285.9	\$400	\$114,360
Atrisha Lewis	56.3	\$346.64	\$19,516
Bart Nowak	0.5	\$389.50	\$195
Total			\$186,218

- Document Collection

Name	Hours	Hourly Rate	Amount
Fiona Legere	195.3	\$400	\$78,120

Atrisha Lewis	19.9	\$346.01	\$6,886
Total			\$85,006

- Read-Ins

Name	Hours	Hourly Rate	Amount
Andrew Reddon	0.8	\$800	\$640
Steve Mason	14.5	\$800	\$11,600
Fiona Legere	29.0	\$400	\$11,600
Bart Nowak	2.0	\$373.68	\$747
Total			\$24,587

[86] The total of these amounts is \$295,811.

(5) Total Fees Allowed for the Punitive Damages Case

[87] The total of the amounts allowed for each of the foregoing parts, and the total amount awarded as costs for fees related to the Punitive Damages Case, are therefore:

Section	Amount Allowed
Examinations for Discovery and Preparations therefor	\$185,040
Trial and Preparation therefor	\$65,760
Miscellaneous	\$14,080
Meetings with Fact Witnesses, Document Collection, Read-Ins	\$295,811
Total	\$560,691
Total with 13% HST added	<u>\$633,581</u>

C. *Disbursements*

[88] The disbursements that are relevant in this matter fall into five categories:

- Expert Witnesses
- Fact Witnesses on the Infringement Case
- Fact Witnesses Prepared for the Punitive Damages Case
- Epiq
- Miscellaneous Disbursements

[89] Disbursements must also be divided between those that are taxable and those that are non-taxable.

[90] Under the headings below, I apply the conclusions from my discussion above of the various issues relating to disbursements.

(1) Expert Witnesses

[91] Bell claims amounts in relation to the three expert witnesses who testified for Bell and one expert who was prepared to testify. As discussed above, the full amount for the three expert witnesses who testified is allowed, but the claim for the expert who did not testify is not allowed.

The allowed amounts (all non-taxable) are therefore as follows:

Name	Amount
Richard Jones	\$156,212

Henry Houh	\$318,675
William Weeks	\$22,738
Total	\$497,625

(2) Fact Witnesses on the Infringement Case

[92] Based on my discussion above, the amounts allowed for each of Bell's fact witnesses on the Infringement Case are as follows:

Name	Amount (Taxable)	Amount (Non-Taxable)
Christopher Butler		\$771
Mark Carpenter		\$5,000
Cory Wishak		\$2,000
Martin Weston		\$1,114
Allan Cameron	\$5,000	
Donna Gates	\$2,308	
Total	\$7,308	\$8,885

(3) Fact Witnesses Prepared for the Punitive Damages Case

[93] In my discussion above, I allowed 57% of the amounts claimed by Bell for fact witnesses who were prepared to testify for Bell on the Punitive Damages Case. The amounts claimed and allowed are as follows:

Name	Amount (Taxable)	Amount (Non-Taxable)
Doug Hanchard		\$12,044

Jeff Burney		\$3,780
David Cox	\$5,400	
Martin Cullum	\$1,875	\$10,393
Doug Walls	\$1,100	
Total Claimed	\$8,375	\$26,217
57% Allowed	\$4,774	\$14,944

(4) Epiq

[94] Disbursements related to Epiq are taxable and, as discussed above, are allowed in the amount \$400,000, being \$125,000 for the Infringement Case and \$275,000 for the Punitive Damages Case.

(5) Miscellaneous Disbursements

[95] In my discussion above, I have allowed the following amounts for Miscellaneous Disbursements:

	Amount (Taxable)	Amount (Non-Taxable)
Infringement Case	\$85,000	\$5,000
Punitive Damages Case	\$17,099	
Total	\$102,099	\$5,000

(6) Total Disbursements Allowed

[96] The total of the amounts allowed for each of the foregoing parts, and the total amount awarded as costs for disbursements, are therefore:

Section	Amount Allowed (Taxable)	Amount Allowed (Non-Taxable)
Expert Witnesses		\$497,625
Fact Witnesses on the Infringement Case	\$7,308	\$8,885
Fact Witnesses Prepared for the Punitive Damages Case	\$4,774	\$14,944
Epiq	\$400,000	
Miscellaneous Disbursements	\$102,099	\$5,000
Total	\$514,181	\$526,454
Total with 13% HST added	\$581,025	
TOTAL DISBURSEMENTS ALLOWED	<u>\$1,107,479</u>	

D. *Conclusion*

[97] The total amount payable by the plaintiffs as costs is as follows:

[blank/en blanc]	Amount
Fees Allowed for the Infringement Case	\$373,522
Fees Allowed for the Infringement Case	\$633,581
Disbursements	\$1,107,479
GRAND TOTAL	<u>\$2,114,582</u>

[98] With regard to post-judgment interest on the costs award, the plaintiffs argue that it should be delayed to provide them with an ability to pay the amount owed without incurring interest charges. This is a reasonable request.

[99] The plaintiffs also note that this Court has declined to apply interest to a costs award: see *Mitchell Repair Information Company LLC v Long*, 2014 FC 562 at para 20, and *Airbus Helicopters SAS v Bell Helicopter Textron Canada Limitée*, 2017 FC 170 at para 443. However, I agree with the reasoning of Justice Roger Hughes in *Astrazeneca Canada Inc v Apotex Inc*, 2011 FC 663 at para 5, that a party should not be encouraged not to pay a Judgment simply because it is cheaper to let the interest accumulate. Accordingly, I award interest on this costs award.

ORDER in T-705-13

THIS COURT ORDERS that:

1. The plaintiffs shall pay Bell's costs in this matter in the amount of \$2,114,582.
2. The security for costs posted by the plaintiffs in the amount of \$750,000 plus accrued interest shall be paid to Bell forthwith.
3. Interest at a rate of 2% compounded annually shall begin accumulating 30 days following the date of this decision on the amount of costs still owing after payment of the security for costs.

“George R. Locke”

Judge

APPENDIX A

Time spent in examinations for discovery that related to the Punitive Damages Case:

Name of Representative	Date of Examination	Duration without lunch (H:M)	Punitive Damages Time (Bell)	Punitive Damages Time (Plaintiffs)
Ross Jeffery (NorthVu)	October 14, 2014	6:03	0	0
	October 15, 2014	6:07	0	0
	October 16, 2014	6:05	0	0
	October 17, 2014	4:53	0	0
	October 20, 2014	6:01	6:01	5:35
	June 17, 2016	5:53	0	0
	June 18, 2016	5:24	0	0
	June 19, 2016	5:20	0	0
Douglas Lloyd (MediaTube)	October 30, 2014	5:11	5:11	4:27
	October 31, 2014	4:49	4:49	4:37
	November 3, 2014	4:45	4:45	4:45
	November 4, 2014	5:28	5:28	5:11
	June 8, 2015	5:14	5:14	4:58
Shawn Omstead (Bell Canada)	December 8, 2014	5:36	0	0
	December 9, 2014	6:10	0	0
	December 10, 2014	5:41	0	0
	December 12, 2014	5:11	3:54	3:54
	December 15, 2014	4:37	4:37	4:37
	June 24, 2015	5:49	0	0
	June 25, 2015	6:45	1:36	1:22

Name of Representative	Date of Examination	Duration without lunch (H:M)	Punitive Damages Time (Bell)	Punitive Damages Time (Plaintiffs)
	July 13, 2015	5:32	2:50	2:37
	January 14, 2016	4:11	4:11	4:11
Kevin Hastings (Bell Aliant)	November 10, 2014	5:10	0	0
	November 11, 2014	5:57	0	0
	November 12, 2014	5:47	0	0
	November 13, 2014	6:33	3:41	1:23
	July 23, 2015	5:31	0	0
	July 24, 2015	4:28	0	0
Total	28	154:11	52:17 (≈34%)	47:37 (≈31%)

APPENDIX B

Time spent at trial that related to the Punitive Damages Case:

Date	Duration without lunch (H:M)	Punitive Damages Time (Bell)	Punitive Damages Time (Plaintiffs)
September 12, 2016	5:55	1:00	0
September 13, 2016	5:54	0	0
September 14, 2016	5:57	2:22	1:53
September 15, 2016	5:45	2:30	1:26
September 16, 2016	5:48	5:48	5:48
September 19, 2016	5:39	2:04	0
September 20, 2016	6:24	0	0
September 21, 2016	6:00	0	0
September 22, 2016	5:24	0	0
September 23, 2016	5:17	0	0
September 26, 2016	4:15	0	0
September 27, 2016	0:12	0	0
October 3, 2016	5:44	0	0
October 4, 2016	5:01	0	0
October 5, 2016	1:47	0	0
October 6, 2016	5:00	0	0
October 17, 2016	5:38	0	0
October 18, 2016	6:01	0	0
Total	91:41	13:44 (≈15%)	9:07 (≈10%)

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-705-13
STYLE OF CAUSE: MEDIATUBE CORP. AND NORTHVU INC. v BELL
CANADA

COSTS SUBMISSIONS MADE IN WRITING CONSIDERED AT OTTAWA, ONTARIO.

**PUBLIC ORDER
AND REASONS:** LOCKE J.

**CONFIDENTIAL ORDER
AND REASONS DATED:** MAY 12, 2017

**PUBLIC ORDER
AND REASONS DATED:** MAY 25, 2017

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