

Pharma in brief - Canada

Federal Court awards patentee over \$6 million in costs

Case:	<i>The Dow Chemical Company v Nova Chemical Corporation</i> , 2016 FC 91
Nature of case:	Costs decision
Successful party:	Dow Chemical Company, Dow Global Technologies Inc. and Dow Chemical Canada ULC
Date of decision:	January 22, 2016

Summary

Justice O’Keefe of the Federal Court awarded the plaintiffs of a successful patent infringement proceeding, Dow Chemical Company, Dow Global Technologies Inc. and Dow Chemical Canada ULC (**Dow**), a lump sum payment of \$2.9 million for legal fees and \$3.6 million for reasonable and necessary disbursements.

Background

At the liability stage of the action, Dow was granted a declaration that the defendant, Nova Chemical Corporation (**Nova**) had infringed Canadian Patent No. 2,160,705, and was awarded costs of the proceeding ([*Dow Chemical Company v Nova Chemicals Corporation*, 2014 FC 844](#)).

The trial was complex, extended over 32 days and involved expert testimony. In addition, both parties carried out large amounts of testing.

The complexity of the trial called for an increased lump sum award

Nova argued that Dow’s costs should be prescribed by the tariff rates under the *Federal Court Rules*, which would have restricted the costs award to \$1,099,725, or only 11% of Dow’s legal costs. Justice O’Keefe stated that this would be “totally inadequate” and “[t]o only recoup 11% of your costs in such a complex case is not acceptable.”

Justice O’Keefe found that a lump sum award of 30% of Dow’s legal fees was more appropriate. He considered the following factors, among others, in awarding the increased costs award:

- the trial involved many complex aspects of chemistry;
- the defendants raised at least 22 allegations of invalidity;
- the length of the trial was extended from 20 to 32 days;
- over 33 days of examinations for discovery were conducted; and

- extensive testing of materials was carried out.

Justice O’Keefe also awarded \$3.6 million for reasonable and necessary disbursements.

Chelsea Nimmo

Link to decision:

[*The Dow Chemical Company v Nova Chemical Corporation, 2016 FC 91*](#)

For more information, please contact your IP/Life sciences and healthcare practice professional at Norton Rose Fulbright Canada LLP.

For a complete list of our IP team, [click here](#). For a complete list of our Life sciences and healthcare team, [click here](#).

Norton Rose Fulbright Canada LLP, Norton Rose Fulbright LLP, Norton Rose Fulbright Australia, Norton Rose Fulbright South Africa Inc and Norton Rose Fulbright US LLP are separate legal entities and all of them are members of Norton Rose Fulbright Verein, a Swiss verein. Norton Rose Fulbright Verein helps coordinate the activities of the members but does not itself provide legal services to clients.

References to “Norton Rose Fulbright”, “the law firm”, and “legal practice” are to one or more of the Norton Rose Fulbright members or to one of their respective affiliates (together “Norton Rose Fulbright entity/entities”). No individual who is a member, partner, shareholder, director, employee or consultant of, in or to any Norton Rose Fulbright entity (whether or not such individual is described as a “partner”) accepts or assumes responsibility, or has any liability, to any person in respect of this communication. Any reference to a partner or director is to a member, employee or consultant with equivalent standing and qualifications of the relevant Norton Rose Fulbright entity.

The purpose of this communication is to provide general information of a legal nature. It does not contain a full analysis of the law nor does it constitute an opinion of any Norton Rose Fulbright entity on the points of law discussed. You must take specific legal advice on any particular matter which concerns you. If you require any advice or further information, please speak to your usual contact at Norton Rose Fulbright.