



The Supreme Court clarifies how an “accounting of profits” should be calculated for patent infringement.

Nova Chemicals Corporation (Nova) and Dow Chemical Company (Dow) are competitors in the plastics industry. Dow patented thin but strong plastics used in products such as garbage bags and food wrappings. When Nova manufactured and sold products covered by Dow’s patent, Dow sued for patent infringement.

The Federal Court found that Nova had violated Dow’s patent. As a remedy, Dow asked the court to calculate its award based on the profits Nova made by violating the patent. This is called an “accounting of profits”. To determine the money owed to Dow, the court calculated the revenues Nova had earned by selling the infringing plastics. It then deducted what Nova had paid to produce the patented plastics.

The main chemical ingredient in these patented plastics is called ethylene. Nova produces ethylene for less than what it would cost to buy this product on the market. Yet, Nova asked the court to use the market cost of ethylene when calculating how much to deduct from its revenues, instead of its actual cost. The Federal Court refused. It deducted the actual cost of Nova’s ethylene production when calculating the amount it had to pay Dow.

In addition to the profits Nova earned before the patent expired, Dow argued it should also receive some of the profits Nova made after the patent’s expiry that resulted from the infringement. An advantage of having a patent is that an inventor has the opportunity to sell their product on the market before anyone else. A company who violates a competitor’s patent will take over market shares more quickly after the expiry of a patent. Profits earned from that advantage are called “springboard” profits.

The Federal Court agreed. Nova then appealed to the Federal Court of Appeal to reduce the award. It argued that, if it had not used its ethylene to make the patented plastics, it would have sold that ethylene to a third party, so it should be able to keep what it would have made from selling it. The Federal Court of Appeal disagreed and upheld the original award. Nova then appealed to the Supreme Court of Canada.

The Supreme Court has dismissed the appeal.

The lower courts did not make errors in calculating the award.

Writing for a majority of the judges, Justice Malcolm Rowe said the lower courts calculated Nova’s accounting of profits correctly. He also said Dow is entitled to the springboard profits.

The majority judges rejected new arguments Nova had raised before the Supreme Court. Nova had said that it could have used its own ethylene to produce a completely different kind of plastic used to make pails and crates. It argued that it should be able to keep what it would have made selling those products.

The majority ruled that the court should only deduct profits made from products that are comparable, but do not infringe the patent. Since pail and crate plastics are nothing like the patented plastics, they could not be used as a hypothetical non-infringing option. “The pail and crate plastics markets and patented plastics markets do not overlap. A potential buyer interested in the patented plastics would not purchase pail and crate plastics as an alternative”, Justice Rowe wrote.

Breakdown of the decision: **Majority:** Justice [Rowe](#) dismissed the appeal (Chief Justice [Wagner](#) and Justices [Moldaver](#), [Karakatsanis](#), [Brown](#), [Martin](#), [Kasirer](#) and [Jamal](#) agreed) | **Dissenting:** Justice [Côté](#) would have allowed the appeal and sent the case back to the Federal Court to calculate the accounting of profits based on the difference between what Nova earned from selling the patented plastics and what it would have earned from selling the products that it could have and would have sold instead.

More information (case # 39439): [Decision](#) | [Case information](#) | [Webcast of hearing](#)

Lower court rulings: [judgment](#) (Federal Court) | [appeal](#) (Federal Court of Appeal)