

Federal Court



Cour fédérale

Date: 20170620

Docket: T-1844-07

Citation: 2017 FC 610

Ottawa, Ontario, June 20, 2017

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

TEVA CANADA LIMITED

Plaintiff

and

PFIZER CANADA INC.

Defendant

JUDGMENT AND REASONS

[1] In the Judgment in this matter on redetermination at 2017 FC 526, the Plaintiff [Teva] was awarded its costs of the redetermination and the Defendant [Pfizer] was awarded its “reasonable costs thrown away as a consequence of the cancellation of the initial hearing of this redetermination.” The parties were provided with an opportunity to reach agreement on those costs. The Court has been informed that the parties have come to an agreement on the quantum of Teva’s costs on the redetermination; but have failed to reach agreement on the costs to be awarded to Pfizer. That is the sole issue remaining for determination.

[2] Pfizer submits that it ought to be awarded its costs thrown away on a full-indemnity basis, or in the alternative on a substantial or partial recovery basis, for the two week period prior to the cancellation of the originally scheduled hearing. Teva submits that Pfizer's costs ought to be assessed at the upper end of Column IV of Tariff B, or in the alternative, if Pfizer's costs are awarded on an elevated basis, that they be reduced by at least 50% to reflect preparation work that remained useful. In any event, Teva submits that Pfizer's costs thrown away should not exceed the costs agreed upon by the parties payable to Teva on the redetermination. Teva also seeks its costs in relation to the submissions made to resolve this issue.

[3] Costs thrown away is described in paragraph 8 of *Caldwell v Caldwell*, 2015 ONSC 7715: "The phrase 'costs thrown away' refers to a party's costs for trial preparation which have been wasted and will have to be re-done as a result of the adjournment of the trial."

[4] Both parties agree that this Court has full discretionary power to award costs: Rule 400(1) of the *Federal Courts Rules*, SOR/98-106.

[5] Having read the parties' submissions, I agree with Pfizer that it is reasonable that it be awarded its costs thrown away within the two week period preceding the date the Court ordered the adjournment of the redetermination hearing. I also agree with Teva that some of the work done in that two week period might have been of use when preparing for the actual redetermination hearing. However, given that seven months elapsed from the original redetermination hearing to the rescheduled redetermination hearing, I accept that most of the earlier preparation work was likely of little value when counsel came to prepare again. It was

evident to me from the most able submissions of counsel at the redetermination hearing that the file was fresh in his mind.

[6] I agree with the submission of Teva, that the authorities relied on by Pfizer in support of its request for full indemnity, being cases from the Ontario courts, are of little assistance to me in deciding the matter here. Such an award of costs is not in keeping with this Court's jurisprudence. I find that Teva's actions that led to the adjournment of the earlier hearing date do not come close to being reprehensible, scandalous or outrageous conduct that might justify an award of full indemnity: see *Blackmore v Canada*, 2011 FCA 335 at para 3. It was only as a result of Teva failing to inform the Court and Pfizer as soon as it received instructions to seek leave to appeal the Federal Court of Appeal's decision to the Supreme Court of Canada, that Pfizer was awarded its thrown away costs.

[7] I fail to see any basis for departing from the usual order of the Court on costs in patent litigation. Pfizer will be entitled to its costs incurred in the two week period ending on August 31, 2016, preparing for the redetermination hearing, assessed at the upper end of Column IV of Tariff B. Pfizer is also entitled to recover any disbursements thrown away.

[8] Each party shall bear its own costs with respect to submissions made on this matter.

JUDGMENT IN T-1844-17

THIS COURT'S JUDGMENT IS that: the Defendant is entitled to its costs incurred in the two week period ending on August 31, 2016, in preparing for the redetermination hearing, assessed at the upper end of Column IV of Tariff B, and any disbursements thrown away, and there are no costs awarded with respect to submissions made on this matter.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1844-07

STYLE OF CAUSE: TEVA CANADA LIMITED v PFIZER INC

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCES OF THE PARTIES

JUDGMENT AND REASONS: ZINN J.

DATED: JUNE 20, 2017

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