

Federal Court



Cour fédérale

Date: 20200117

Docket: T-2092-17

Citation: 2020 FC 65

Ottawa, Ontario, January 17, 2020

PRESENT: Madam Justice McDonald

BETWEEN:

ELANCO CANADA LIMITED

Applicant

and

CANADA (MINISTER OF HEALTH)

Respondent

ORDER AND REASONS

[1] By Confidential Judgment and Reasons issued on November 19, 2019, 2019 FC 1455, Elanco Canada Limited (Elanco) was successful in its section 44 *Access to Information Act*, RSC, 1985, c A-1 [ATIA] judicial review application requesting that Health Canada be prohibited from disclosing information about Fortekor, a veterinary medication.

[2] Upon the issuance of the Judgment, the parties were advised that if they could not agree on costs, they could make submissions.

[3] In their submissions, Elanco requests a lump sum payment of \$21,760.65 for legal fees and disbursements based upon Tariff B, Column V of the *Federal Courts Rules*. In requesting a lump sum, Elanco relies upon *Nova Chemicals v Dow Chemical Company*, 2017 FCA 25. They argue that they seek the higher Column V measure of costs on the basis of the outcome of the application, the complexity of the issues, and the conduct of Health Canada which, it says, lengthened the litigation.

[4] Elanco argues that the Rule 400(3) of the *Federal Courts Rules*, factors mitigate in favour of costs based upon Column V of Tariff B, and they further note that the costs requested represent a fraction of the fees actually incurred by Elanco. Elanco relies on *Eurocopter v Bell Helicopter Textron Canada Limitée*, 2012 FC 842, at para 20, for its position that the complexity of the matter should be determinative of the scale of costs to be applied.

[5] Health Canada disagrees with the amount requested, and argues that there is no basis to depart from the default application of Column III of Tariff B (*Apotex Inc v Merck & Co*, 2006 FCA 324 at para 15).

[6] Health Canada argues that this was a typical section 44 judicial review application and it denies any conduct on its behalf that lengthened the litigation. With respect to the actual fees claimed by Elanco, Health Canada takes issue with the costs claimed for amending documents, attendance at a conference, second counsel fee and charges for costs submissions.

[7] Health Canada submits that the appropriate amount, following an adjustment for these deductions, based upon Tariff B Column III calculation, is \$6,596.40.

[8] Each party has prepared a draft Bill of Costs in support of its position.

[9] Having reviewed and considered the submissions of Elanco and Health Canada, and having considered the Rule 400(3) factors, and taking guidance Column III of Tariff B, and exercising my discretion, I award costs to Elanco in the amount of \$12,900.00 inclusive of disbursements.

ORDER in T-2092-17

THIS COURT'S JUDGMENT is that Health Canada will pay Elanco Canada Limited costs and disbursements in the all inclusive amount of \$12,900.00.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2092

STYLE OF CAUSE: ELANCO CANADA LIMITED v CANADA
(MINISTER OF HEALTH)

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: AUGUST 20, 2019

ORDER AND REASONS: MCDONALD J.

DATED: JANUARY 17, 2020

APPEARANCES:

Alex D. Cameron
Pavel Sergejev

FOR THE APPLICANT

Sadian Campbell

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Fasken Martineau DuMoulin LLP
Toronto, Ontario

FOR THE APPLICANT

Attorney General of Canada
Department of Justice
Toronto, Ontario

FOR THE RESPONDENT