Federal Court  Cour fédérale

Date: 20230106

Docket: T-1632-16

Citation: 2023 FC 3

Ottawa, Ontario, January 6, 2023

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

ELI LILLY CANADA INC., ELI LILLY AND COMPANY, LILLY DEL CARIBE, INC., LILLY, S.A. and ICOS CORPORATION INC.

Plaintiffs/Defendants by counterclaim

and

APOTEX INC.

Defendant/Plaintiff by counterclaim

PUBLIC ORDER AND REASONS
(Confidential Order and Reasons issued January 6, 2023)

I. Introduction

[1] This motion is brought by Apotex Inc. seeking directions as to costs pursuant to Rules 400 and 403 of the *Federal Courts Rules*, SOR/98-106 [the Rules]. In its motion, Apotex

requests an Order setting the quantum of costs against the Plaintiffs (hereinafter collectively referred to as "Lilly") in this action as it relates to Canadian Letters Patent Nos. 2,379,948 [the 948 Patent], 2,371,684 [the 684 Patent] and 2,492,540 [the 540 Patent].

[2] My Reasons relating to the 684 Patent, which were placed on this file, are found at *Eli Lilly Canada Inc. v Mylan Pharmaceuticals ULC*, 2020 FC 816 and my Reasons relating to the 540 Patent are found at *Eli Lilly Canada Inc. v Apotex Inc* 2020 FC 814.

[3] In brief, and for the reasons that follow, I find that (1) elevated costs in the form of a lump sum are justified; (2) an amount corresponding to 30% of the adjusted amount of Apotex's legal fees is appropriate; (3) Apotex's accounting of legal fees and of disbursements must be adjusted downward; and (4) this amount will bear post-judgment interest of 2 per cent from the date of this Order.

II. Parties' positions

[4] Apotex requests that an award of costs be made in this action as it relates to the 948 Patent, the 684 Patent and the 540 Patent in the amount of $3,079,333.95, consisting of (i) 30% of its actual fees ($2,279,927.39); and (ii) 100% of its disbursements ($789,647.66), plus pre-judgment interest, post-judgment interest, and costs of this motion in the amount of $10,000.

[5] In the alternative, Apotex requests that an award of costs be made in this action as it relates to the 948 Patent, the 684 Patent and the 540 Patent in the amount of $2,071,706.33, consisting of (i) 100% of Apotex's fees as they relate to the trials of the 540 Patent and the 684

Patent; (ii) fees as they relate to the 948 Patent assessed in accordance with the upper end of column IV of Tariff B ($1,272,299.77); and (iii) 100% of its disbursements ($789,647.66), plus pre-judgment interest, post-judgment interest, and costs of this motion in the amount of $10,000.

[6] In the further alternative, it requests that an award of costs be made to Apotex in this action as it relates to the 948 Patent, the 684 Patent and the 540 Patent in the amount of $1,427,975.84, consisting of (i) fees assessed in accordance with the upper end of column IV of Tariff B ($628,569.28); and (ii) 100% of its disbursements ($789,647.66), plus pre-judgment interest, post-judgment interest, and costs of this motion in the amount of $10,000.

[7] Apotex confirmed at the hearing and through a letter addressed to the Court that (1) it had agreed to remove items from its base counsel fees for an amount of $146,576.50; (2) Lilly no longer contested the item 8 entries at Lilly's Exhibit GG for the discovery of Arvie Anderson for July 17-20, 2018; (3) Apotex was now seeking total disbursements of $723,364.54 and that only the four figures outlined in the letter required adjudication by the Court; and (4) it was no longer seeking pre-judgment interest, only post-judgement interest, the computation of which to begin at the date the judgment on the merits was issued, rather than from the date of this Order.

[8] In support of its Motion, Apotex relies on the affidavit of Ms. Lisa Ebdon, a law clerk employed by the firm Goodmans LLP. Ms. Ebdon, who was not cross-examined, introduces 43 exhibits and more than 1500 pages including, *inter alia*, the copies of all invoices from Goodman LLP to Apotex for T-1632-16 fees dated November 2016 to March 2020 (Exhibit A, partially redacted, about 420 pages), a Bill of Costs for the three Patents prepared in accordance with the

upper end of column IV, Tariff B (Exhibit F) for $1,427,975.84, a Bill of Costs for the 948 Patent only (Exhibit G) for $100,741.76, various invoices for travel and attendance, and invoices for the expert witness services of Dr. Neal Anderson, Dr. Robert Williams, Dr. Eric Jacobsen and and Dr. Gary Muirhead.

[9] At paragraph 4 of her affidavit, Ms. Ebdon presents a summary of Goodman's fees, including tax, as they relate to the 684 Patent ($3,514,476.52), the 540 Patent ($3,557,063.89) and the 948 Patent ($528,217.56), and totalling $7,599,757.97, tax included. Per the information contained in the letter sent to the Court, Apotex agreed to remove three items from its base legal fees for an amount of $146,576.50. Per its representations, Apotex's legal fees thus total $7,453,181.47.

[10] At paragraph 3 of her affidavit, Ms. Ebdon outlines why some of the dockets of Exhibit A have been redacted, and affirms that some redacted dockets were not included in her computation while others partially redacted dockets were included.

[11] In regards to the legal fees portion of its request, Apotex submits that an elevated costs award in the way of a lump sum award of 30% of its actual legal fees is appropriate. Apotex submits that this is justified given: (a) the result of the proceeding, the importance and complexity of the issues and the amount of work; (b) Lilly's conduct unnecessarily lengthened the duration of the proceeding; (c) Lilly's failure to identify and produce relevant documents and update its discovery answers in a timely manner; (d) Lilly's allegation of fraud; (e) Lilly's biased expert witness; (f) Lilly's late-breaking updated discovery answers; and (g) that if it were to be

assessed at the upper end of column IV of Tariff B, the fees would amount only to $628,569.29 or approximately 8% of its total fees for the 684 Patent, the 540 Patent and the 948 Patent, inclusive of tax.

[12] Lilly opposes the Motion, responding that the circumstances of this case do not warrant elevated or increased costs. I note however that Lilly does not oppose this Court adjudicating the costs in regards to the three Patents.

[13] In essence, Lilly submits that the evidence provided in support of a lump sum is incomplete and insufficient, that the disbursements include claims to matters that are not compensable or unrecoverable, that the conduct of the Defendants unnecessarily prolonged the length of the action and caused unnecessary work, and that unsupported allegations of fraud must be sanctioned.

[14] In support of its response, Lilly relies on the affidavit of Ms. Kathy Paterson, a law clerk at Borden Ladner Gervais LLP. Ms. Paterson introduces 69 exhibits. These exhibits include, *inter alia*, case management conference notes dated June 1, 2017 (Exhibit A) which, contrary to Lilly's assertion, do not confirm, on their face, a formal undertaking by the Defendants to rely on the same experts. The exhibits also include Apotex's Statement of Defence and Counterclaim raising an allegation of failure to comply with section 53 of the *Patent Act*, RSC 1985, c P-4.

[15] Lilly also includes a Bill of Costs with reductions for various items as its proposition (Exhibit GG) and a chart calculating Apotex's fees, subtracting the amounts in Lilly's written representations under heading "Non-Compensable Fees Included in the Lump Sum Calculation" (Exhibit BBB). The Bill of Costs prepared by Lilly totals some $800,000 less than Apotex's.

[16] Lilly objects to interest being granted, raising that Apotex has not included this relief in its Notice of Motion, which, per Lilly's position, is a fatal flaw. The parties agree that, should interest be ordered, two per cent would be the appropriate rate.

[17] Lilly responds that the Defendants bear the burden to demonstrate why it deserves an award above the Tariff and it cannot be justified solely on the basis that its fees are higher than the Tariff. Lilly acknowledges that upper column IV is considered to be reasonable and appropriate in patent litigation, even recently. Lilly submits, *inter alia*, that (1) "[t]here is no trend toward awarding lump sum costs based on fees, including since Nova" (referring to *Nova Chemicals Corporation v Dow Chemical Company,* 2017 FCA 25 [*Nova*]); (2) the *Nova* decision was recently "[…] distinguished on the basis that the complexity in the two proceedings were not comparable. Costs were awarded at the top of column V of Tariff B even though a lump sum was sought" referring to *Georgetown Rail Equipment Company v Tetra Tech Eba Inc,* 2020 FC 1188 [*Georgetown*]; and (3) the Defendants submitted to the Case Management Judge that they would work efficiently together to avoid duplication in effort, witnesses and experts (relying on the Paterson affidavit, Exhibit A) so that essentially, it would be inappropriate and inequitable for Lilly to pay a lump sum to each of the Defendants.

[18] More particularly, Lilly submits that (1) the Defendant's reliance on *Packers Plus Energy Services Inc v Essential Energy Services Ltd*, 2020 FC 68 [*Packers*] is flawed; (2) Lilly was successful on most issues at trial; (3) the Defendants' conduct tended to lengthen the proceeding (abandoned standing allegation, validity issues, calling expert, and expert objections, infringement not contested on the 684 Patent, allegations akin to fraud were made but not pursued, compendium allegations at trial); (4) Lilly took steps to make the proceeding shorter (narrowing their pleading following discovery, conducting follow-up discovery of the Defendants' corporate representatives in writing, bringing a motion in writing to compel); (5) the fees being charged are insufficiently described and redacted, referring to *Bristol-Myers Squibb Canada Co v Pharmascience Inc*, 2021 FC 354 [*Bristol-Myers Squibb Co*]; (6) it is unclear which docket entries Apotex removed; and (7) some items should not be awarded by the Court under the Tariff.

[19] In the alternative, if the Court disagrees with Lilly and believes a lump sum based on legal fees is still appropriate, then only the "lead" counsel should be awarded a lump sum. The other counsel should receive the Tariff. Lilly submits that in this scenario Apotex should be awarded a lump sum for its work on the 540 Patent, after Lilly discontinued with Teva, and the Tariff for the remaining claim.

[20] In the further alternative, if a lump sum is warranted, Lilly asks for fees to be awarded based on *Teva Canada Limited v Janssen Inc*, 2018 FC 1175 [*Bortezomib*] as Apotex's legal fees are unreasonably high at over $7.5 million.

[21] In regards to a lump sum award, Lilly adds that the percentage awarded on a lump sum award must be reasonable in the context of the litigation and the starting point is 25% (*Bauer Hockey Ltd v Sport Maska Inc (CCM Hockey)*, 2020 FC 862 at para 14 [*Bauer*]; *Seedlings Life Science Ventures, LLC v Pfizer Canada ULC*, 2020 FC 505 at para 22 [*Seedlings*]), duplicate work should not be compensated (multiple counsel per party at discoveries was unreasonable and numerous counsel per party attending trial was unreasonable), and some fees are non-compensable.

III. Principles

[22] The law of costs is not an exact science. In adjudicating costs, courts attempt to strike an appropriate balance between three main objectives: compensation, providing incentive to settle, and dissuasion of abusive conduct in litigation. In this exercise, Rule 400(1) of the Rules provides that the Court "shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are paid".

[23] Rule 400(3) provides a non-exhaustive list of considerations. With respect to quantum, Rule 407 provides that column III of Tariff B is the "default" scale (*Consorzio del Prosciutto* at para 9). However, the Court's broad discretion includes the power to order an assessment under a different column of Tariff B or to permit a departure from the Tariff (*Philip Morris Products SA v Marlboro Canada Limited*, 2015 FCA 9 at para 4 [*Philip Morris*]). Rule 400(4) allows the Court to fix costs and award a lump sum in lieu of an assessment of costs pursuant to Tariff B.

[24] Following the discussion I had with the parties during the hearing, I confirm that I consider myself bound by the Federal Court of Appeal [FCA] decisions in *Raydan Manufacturing Ltd v Emmanuel Simard & Fils (1983) Inc*, 2006 FCA 293 and *Illinois Tool* Works Inc v Cobra Anchors Co, 2003 FCA 358, and find that success with respect to only some grounds of invalidity does not constitute "divided success" or "mixed results" as warranting divided costs (*Allergan* at para 31).

[25] Chief Justice Crampton outlined the applicable Rules as well as the general principles that must guide the Court in deciding an award of costs (*Allergan Inc v Sandoz Canada Inc*, 2021 FC 186 [*Allergan*]). I adopt these principles, and note particularly the following statement of paragraph 27:

> For essentially the same reasons identified immediately above, it is also increasingly common in intellectual property cases to award a significant lump sum amount "well in excess of the Tariff": Vengo, above, at para 85; Bauer Hockey Ltd v Sport Maska Inc, 2020 FC 862 at para 12 [Bauer]. In this regard, a lump sum award in the range of 25-50% of actual fees, plus reasonable disbursements, is often made: Nova v Dow, above, at paras 17 and 21; Seedlings, above, at para 6; Bauer, above, at para 13. See also Loblaws Inc v Columbia Insurance Company, 2019 FC 1434 at para 15. In approaching this assessment, it should be kept in mind that determining the level of a lump sum award "is not an exact science": Nova v Dow, above, at para 21.

[26] On the topic of a lump sum, I wish to stress the FCA's comments at paragraph 11 of its *Nova* decision, indicating that lump sum costs awards further the objective of the Rules of securing "the just, most expeditious and least expensive determination" of proceedings (Rule 3) and that, when a court can award costs on a lump sum basis, granular analyses are avoided and the costs hearing does not become an exercise in accounting.

[27] The FCA adds that "[l]ump sum awards may be appropriate in circumstances ranging from relatively simple matters to particularly complex matters where a precise calculation of costs would be unnecessarily complicated and burdensome: *Mugesera v Canada (Minister of Citizenship & Immigration)*, 2004 FCA 157 at para. 11" (*Nova* at para 12) At paragraph 15 of the decision *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 157, the FCA outlined that "[…] the Court should be guided, as much as possible, by the standards established in the table to Tariff B when awarding a lump sum in lieu of assessed costs".

[28] In the context of patent litigation, the Court has also accepted as appropriate the upper end of column IV (*Sanofi-Aventis Canada Inc v Apotex Inc*, 2009 FC 1138 at para 14; *Adir v Apotex Inc*, 2008 FC 1070 at paras 10-12; *Eurocopter v Bell Helicopter Textron Canada Limitée*, 2012 FC 842 at para 22 [*Eurocopter*], aff'd 2013 FCA 220; *Apotex Inc v H. Lundbeck A/S*, 2013 FC 1188 at para 10).

[29] In addition, some circumstances warrant increased costs. Under the general discretionary power, the two most common justification for increased costs are (1) to sanction reprehensible conduct; and (2) to use when the default scale would provide inadequate compensation for particularly costly or complex litigation. Regarding the costly and complex litigation, the court has to consider if the default Tariff scale would be unjust because it would leave the successful party insufficiently compensated (*Crocs Canada Inc v Holey Soles Holdings Ltd*, 2008 FC 384 at para 2).

[30] The FCA in *Nova* does acknowledge the existence of a trend in regards to the award of a lump sum costs as a percentage of actual costs reasonably incurred, citing *Philip Morris, H-D U.S.A., LLC v Berrada*, 2015 FC 189, and *Eli Lilly and Company v Apotex Inc*, 2011 FC 1143.

[31] In *Nova* at paragraph 15, the FCA also examines the evidentiary considerations, mentioning that "[a]n award of costs on a lump sum basis must be justified in relation to the circumstances of the case and the objectives underlying costs. It is not a matter of plucking a number or percentage out of the air". The FCA examines the evidentiary considerations of legal fees (*Nova* at paras 16-19).

[32] In regards to the evidentiary burden, the parties should provide both a Bill of Costs and evidence demonstrating the fees actually incurred (*Nova* at para 18). "What is required is sufficient evidence of the nature and extent of the services provided so that a party can make an informed decision whether to settle the fees or contest and that the Court can be satisfied that the actual fees incurred and the percentage awarded are reasonable in the context of the litigation" (*Nova* at para 18).

[33] In *Georgetown,* the Court noted that "[i]n its costs submissions dated September 4, 2020, Tetra Tech did not provide detailed accounts of its legal fees, nor copies of invoices to demonstrate the necessity or reasonableness of its disbursements. It provided only tables of amounts" (*Georgetown* at para 18. See also at para 28 on the insufficient evidence adduced). In *Bortezomib,* Justice Locke indicated the hesitations concerning the fact that, though Teva has provided data concerning fees charged by its counsel, there was little basis for assessing the

reasonableness of those fees, as Teva had provided no breakdown of the fees, nor any description of the services rendered.

[34] Concerning the disbursements, "[w]here disbursements are outside of the knowledge of the solicitor, they should generally be accompanied by an affidavit such that the Court can be satisfied that they were actually incurred and were reasonably required" (*Nova* at para 20). As set forth in subsection 1(4) of Tariff B, no disbursement shall be assessed or allowed under the Tariff B unless it is reasonable and it is established by affidavit or by the solicitor appearing on the assessment that the disbursement was made or is payable by the party. The FCA repeated that principle, stating that a party is allowed to recover disbursements when reasonable and necessary for the conduct of the proceeding (*Exeter v Canada (Attorney General)*, 2012 FCA 153 at para 13, citing *Merck & Co Inc v Apotex Inc*, 2006 FC 631).

[35] Moreover, the FCA specifies that disbursements cannot be awarded without actual proof: "[w]ith no evidence other than the fact that these costs must ordinarily be incurred in connection with legal proceedings, it is difficult for me to judge whether the disbursements sought were necessary and reasonable" (*Bell v Canada (Minister of Indian and Northern Affairs)*, 2000 CanLII 15565 (FCA) at para 5). The FCA also states that "[t]he assessment of whether a claim for disbursements was permissible, actually incurred and reasonable cannot be sacrificed on the altar of simplicity" (*Apotex Inc v Shire LLC*, 2021 FCA 54 at para 28 [*Shire*]). Citing paragraph 20 of *Nova*, the FCA reiterates that a claim for disbursements should be supported by evidence in the form of an affidavit (*Shire* at para 28).

IV. Application to the facts of the case

A. *Motion for Directions*

[36] I note from the outset that the parties have opined that the present Motion under Rule 403 is appropriate. Given the circumstances of the case and in light of the relevant case law (see for example *Consorzio del Prosciutto di Parma v Maple Leafs Meats Inc*, 2002 FCA 417 [*Consorzio del Prosciutto*]; *Apotex Inc v Bayer AG*, 2005 FCA 128; *Maytag Corp v Whirlpool Corp*, 2001 FCA 250), I agree that it is appropriate.

B. *Costs to each Defendant*

[37] I have not been convinced that the Defendants' reliance on the Court's decision in Packers is flawed, and I am satisfied that each Defendant is entitled to its award of costs. I note first that the evidence submitted by Lilly in Exhibit A to the Paterson affidavit refers to an attempt to by all Defendants to rely on the same witnesses and experts reports – not to a firm engagement.

[38] In Packers, even though the actions had been consolidated, the judge concluded that the defendants should receive individual lump sum cost awards calculated at 40% of fees, plus reasonable disbursements (*Packers* at 3). The Court first examined if the defendants should be granted individual costs (*Packers* at 3). The plaintiffs, or defendants by counterclaim Packers, argued that "[…] the defendants should be awarded a collective amount for costs in light of the shared interests among them and the efficiencies that resulted from a consolidated trial" (*Packers*

at 3). *Packers* also argued that, because the defendants' interests were aligned, there was no risk of conflict among them and they could all have been represented by the same counsel. According to Packers, it would be improper to compensate for overlapping costs (*Packers* at 4).

[39] The Court disagreed with Packers and the defendants were entitled to separate cost awards (*Packers* at 4). The Court outlined that the consolidation order simply achieved a merger of the validity issues and associated costs in order that they could be litigated together. There was no provision in the order establishing a single set of costs (*Packers* at 4). Concerning Packers' argument on the defendants' interests aligned, the Court disagreed (*Packers* at 4). The judge concluded that a lump sum was more appropriate given the complex nature of the case (*Packers* at 5). The Court also stated that this "[…] approach would effect an arbitrary discount of the defendants' fees and yield a reimbursement of only 10% of the defendants' taxable costs" (*Packers* at 5).

[40] In this case, given the evidence and the facts at hand, I am satisfied, as was the judge in *Packers*, that each Defendant is entitled to its award of costs.

C. *Redaction of privileged information*

[41] Based on paragraphs 3(b)(i), (ii), and (iii) of Ms. Ebdon's affidavit, I am satisfied the redactions are properly justified. I am also satisfied the remaining information is sufficiently detailed and that the solicitor-client privilege justifies the redactions, as opposed to my colleague in *Bristol-Myers Squibb Co*. No authority has been submitted speaking to the argument raised by Lilly that dockets destined to a client do not, cannot or should not contain information covered

by the solicitor-client privilege owned by the said client. Moreover, the decision *Stevens v Canada (Prime Minister)*, [1997] 2 FC 759 (aff'd *Stevens v Canada (Prime Minister)*, [1998] 4 FC 89 (FCA)) confirms portions of solicitors' accounts can be subject to solicitor-client privilege. There is no indication that Apotex waived its privilege expressly or implicitly, and it is consequently entitled to its privilege.

[42] I also consider the Order of Associate Judge Aalto of May 19, 2021, in files T-1569-15, T-1741-13 and T-1728-15 whereby, at paragraph 2, the Court states that the redacted docket is a factor to consider. In regards to the redactions relating to solicitor client privilege, the Court then concludes that "[…] those dockets are a relatively modest amount and it is realistic that some solicitor-client would attach to some entries". Associate Judge Aalto's Order of May 19, 2021, has since been affirmed on appeal in *Packers Plus Energy Services Inc v Essential Energy Services Ltd*, 2021 FC 986.

[43] I am satisfied the evidence adduced by Apotex allows for assessment in regards to the factors of Rule 400(3). In addition, the partial redactions of dockets to protect privileged information do not prevent me from evaluating the criteria set forth in Rule 400(3).

D. *Lump sum*

[44] After considerations of the circumstances of the case, I am satisfied that an award of costs in the form of a lump sum is justified. As the FCA stated at paragraph 11 of *Nova*, it will avoid granular analyses and an exercise in accounting.

E. *Elevated costs as a percentage of the actual legal fees*

[45] I am also satisfied it is reasonable and appropriate in this case to award elevated costs, i.e., in excess of the Tariff, in the form of a lump sum calculated as a percentage of Apotex's actual legal fees. This was a complex drug patent proceeding, the parties are sophisticated litigants, their legal fees were substantially above the amounts contemplated by Tariff B, and the parties "are in a position to respond to the incentives provided by an elevated award of costs" (*Allergan* at para 38, citing *Bauer* at para 22).

[46] Apotex was successful in its counterclaim based on obviousness and anticipation on both the 684 Patent and the 540 Patent. As mentioned earlier, the fact that it was not successful on all the invalidity grounds it raised does not constitute mixed results or divided success warranting divided costs, as discussed by Chief Justice Crampton in *Allergan* at paragraph 31. I also consider myself bound by the decisions of the FCA on the same issue.

[47] The amount of work was considerable. The action was commenced more than three years before the trial, and included two rounds of discovery of the parties' corporate representatives. The two trials, with a combined duration of 22 days of evidence and four days of oral closing argument, canvassed numerous complex issues, including those related to claims construction, infringement, obviousness, anticipation, and method of medical treatment. The Court heard testimony from eight expert witnesses and three fact witnesses. Apotex's written closing argument for the 540 Patent was 86 pages long, and the written closing argument of the Defendants was 74 pages long for the 684 Patent. Apotex provided the Court with over 600 tabs

of legal and evidentiary citations. Lilly's written closing argument for the 540 Patent was 100 pages long, and 75 pages long for the 684 Patent, with a combined total of over 800 footnotes containing legal and evidentiary citations. At the oral closing argument, Lilly delivered additional trial compendia and written argument. Apotex similarly delivered an additional 30 pages of closing submissions at the oral closing argument.

[48] As the Court has observed, "[p]atent litigation is typically complex, and obviousness is typically among the most complex legal issues that are raised in patent litigation" (*Bortezomib* at para 14). In this case, I am satisfied that the matters heard and adjudicated in December 2019 through 2020 meet the description of "complex drug patent" as described at page 3 of Apotex's hearing outline.

[49] Each party finds issues with a number of its adversary's conduct. As the objective of the awarding of a lump sum commands, and to avoid a granular examination of the circumstances, I will give this factor a neutral weight. There are various allegations of misrepresentations, delays as between the parties and I cannot reward one to the detriment of the other or punish one in these circumstances. I therefore disregard all of them. Each party vigorously defended the interest of its client with available and sometimes non-available means.

[50] I find that in these circumstances, the costs generated even at the high end of column V of Tariff B bear little relationship to the objective of making a reasonable contribution to the costs of litigation (*Nova* para 13).

[51] There remains the question of whether Apotex has demonstrated its legal fees to be reasonable or not. As Justice Manson states in *Janssen v Teva Canada*, 2022 FC 269:

> While a detailed accounting is to be avoided, the party seeking costs must provide sufficient information to satisfy the Court that the fees were reasonably incurred in the context of the litigation [Seedlings Life Science Ventures, LLC v. Pfizer Canada ULC, 2020 FC 505 [SLSV] at paragraph 5]. An affidavit should be provided explaining the amounts and that the amounts do in fact relate to the action. The burden is on the Plaintiffs to provide evidence as to what work was performed, what that work involved, that it relates to this action, and that it was reasonable.

[52] Lilly relies on *Bortezomib* for the proposition that Apotex's legal fees in excess of $7 million are unreasonably high and clearly excessive. It relies on *Bortezomib* and *Georgetown* for the proposition that decisions that post-date *Nova* have awarded a lump sum that was comparable to the Tariff and that there is no trend in awarding lump sum for fees. Lilly adds that *Nova* was distinguished in *Georgetown* on the basis that the complexity in the two proceedings were not comparable and that costs were awarded at the top of the column V of Tariff B even though a lump sum was sought.

[53] However, I note paragraphs 17 and 18 of *Georgetown*, where the Court stated that:

> As a matter of good practice, a party seeking a percentage of actual legal fees above the amounts provided for in the Tariff should provide a sufficient description of the services rendered to satisfy an opposing party and the Court that the fees actually incurred were reasonable (Nova at para 18). Before fixing a lump sum costs award, the Court should have a detailed record and sufficient information on which to base such an award. It is inappropriate for the Court to award a lump sum on the basis of mere assertions of the amounts spent without evidence or explanation (Sanofi-Aventis Canada Inc. v Novopharm Limited, 2009 FC 1139 at para 6, aff'd 2012 FCA 265).

> In its costs submissions dated September 4, 2020, Tetra Tech did not provide detailed accounts of its legal fees, nor copies of invoices to demonstrate the necessity or reasonableness of its disbursements. It provided only tables of amounts.

[54] Reading paragraph 28 as well, it is clear that the lack of evidence was a determining factor in the Court's decision, in addition to the level of complexity.

[55] Likewise in *Bortezomib*, where Justice Locke indicated, as mentioned earlier, at paragraph 32, that "As a complex litigation between sophisticated litigants and in the context of commercial litigation, this case is appropriate, in principal, for a lump sum award of costs. My principal hesitation concerns the fact that, though Teva has provided data concerning fees charged by its counsel, there is little basis for assessing the reasonableness of those fees. Teva has provided no breakdown of the fees, nor any description of the services rendered". Justice Locke's decision was based on lack of evidence precisely to assess the reasonableness of the legal fees. In this case, Apotex has provided detailed evidence of its legal fees and the cases relied upon by Lilly are thus distinguishable.

[56] This being said, it is difficult for the Court to appreciate whether or in what instances the legal fees incurred, charged by counsel to their client and paid by said client are unreasonable or excessive.

[57] However, I find the points raised by Lilly at paragraphs 97 to 114 of its submissions to be persuasive in showing that some legal fees are unreasonable and excessive. I will establish

Apotex's reasonable legal fees to be 80% of the fees it presented, which leaves us with a total of $5,962,545.18.

[58] I am satisfied that granting an Order for payment of costs representing 30% of the legal fees is justified in this case. Calculated on $5,962,545.18, it amounts to $1,788,763.55.

F. *Disbursements*

[59] According to the side agreement made by the parties, Apotex seeks total disbursements of $723,364.54, inclusive of tax.

[60] Per the letter provided to the Court, four figures require the Court's adjudication as Lilly disputes (1) potential fact witness fees of Dr. Porst ($4,312.50); Mr. Muirhead Expert Fees ($59,440.43); (3) Dr. Jacobsen Expert fees ($50,606.40); and (4) Dr. Williams Expert Fees ($210,719.72).

[61] Lilly's position is that Apotex's total disbursements should be $380,281.98 as witness and experts who did not appear at trial or were unhelpful should not be reimbursed. I agree. The case law cited by Lilly supports its position: "The jurisprudence has established that, in principle, fees for the winning party's experts who appeared at trial or experts who assisted counsel in reviewing and understanding expert opinions is justifiable and should be recovered: Sanofi II, above, at paras 17-18; Adir, above, at paras 21-22" (*Eurocopter* at para 54). Unnecessary and unhelpful expert testimony should not be reimbursed (*Swist v MEG Energy Corp*, 2021 FC 198).

[62] Based on the foregoing, the amount allowed under the disbursements is reduced to $380,281.98.

G. *Post-judgment interest*

[63] Lilly objects to interest being granted, raising that Apotex has not included this relief in its Notice of Motion, which, per Lilly's position, is a fatal flaw. Lilly adds that the post-judgment interest is included when seeking an all-inclusive lump sum award (see *Seedlings* at para 33, on paragraphs 57 to 61 of *Bortezomib* and on paragraph 19 of *Safe Gaming System Inc v Atlantic Lottery Corporation*, 2018 FC 871 [*Safe Gaming*]).

[64] Apotex refers to *Jackson v Ucluelet Princess*, [1994] FCJ No 137 (FCTD) at paragraph 81 and *Apotex Inc v Wellcome Foundation Ltd*, [2000] FCJ No 1770 (FCTD) at paragraph 119 to argue that post-judgment interest does not need to be specifically pleaded in a notice of motion. Addressing the decision *Safe Gaming,* Apotex underlines that the purpose of post-judgment interest, namely incentivizing timely payment, was satisfied in the present case and that the costs in *Safe Gaming* have been posted and were going to be released. Finally, Apotex argues that the Court has awarded post-judgment interest in far more cases referring to *Seedlings* at paragraphs 33 to 40, *Bortezomib* at paragraphs 57 to 61, and *Bauer* at paragraph 67. Apotex also refers to the decision *Guest Tek Interactive Entertainment Ltd v Nomadix, Inc,* 2021 FC 848 at paragraph 78 to state that 2.5% has already been awarded by the Court as post-judgment interest.

[65] Per paragraph 4 of the decision *Rhaman v Public Service Labour Relations Board*, 2013 FCA 117 [*Rhaman*], the purpose of a Notice of Motion is to provide the recipient with adequate

notice of the order sought and the grounds for seeking the order and to tell the Court with exactitude what is being sough and why. In that case, the motion was not dismissed because the applicant has not suffered any prejudice and there was an interest in dealing with the matter efficiently and promptly (*Rhaman* at para 5). Lilly has submitted no evidence of a prejudice. In its Notice of Motion, Apotex asked for "such further and other relief as this Honourable Court may deem just", which, in any event, makes it open to the Court to use its discretionary power to order interest despite the Apotex not having sought the particular remedy in its Motion.

V. Conclusion

[66] For the aforementioned reasons, I will award Apotex total costs of $2,169,045.00 inclusive of all fees, disbursements and tax, with post-judgment interest at a rate of 2 per cent from the date of this Order.

ORDER IN T-1632-16

THIS COURT'S ORDER is that:

1. Apotex is awarded total costs of $2,169,045.00 inclusive of all fees, disbursements and tax, with post-judgment interest at a rate of 2 per cent from the date of this Order.
2. No costs are awarded on this Motion.

"Martine St-Louis"
Judge

ANNEX A

The Rules 400, 401, 402 and 403 are reproduced to allow for an easier reading

iscretionary powers of Court	**Pouvoir discrétionnaire de la Cour**
00 (1) The Court shall have full iscretionary power over the amount nd allocation of costs and the etermination of by whom they are to e paid.	400 (1) La Cour a le pouvoir discrétionnaire de déterminer le montant des dépens, de les répartir et de désigner les personnes qui doivent les payer.
rown	**La Couronne**
) Costs may be awarded to or gainst the Crown.	(2) Les dépens peuvent être adjugés à la Couronne ou contre elle.
actors in awarding costs	**Facteurs à prendre en compte**
) In exercising its discretion under ubsection (1), the Court may onsider	(3) Dans l'exercice de son pouvoir discrétionnaire en application du paragraphe (1), la Cour peut tenir compte de l'un ou l'autre des facteurs suivants :
) the result of the proceeding;	a) le résultat de l'instance;
) the amounts claimed and the mounts recovered;	b) les sommes réclamées et les sommes recouvrées;
) the importance and complexity of e issues;	c) l'importance et la complexité des questions en litige;
) the apportionment of liability;	d) le partage de la responsabilité;
) any written offer to settle;	e) toute offre écrite de règlement;
) any offer to contribute made under le 421;	f) toute offre de contribution faite en vertu de la règle 421;
) the amount of work;	g) la charge de travail;
) whether the public interest in aving the proceeding litigated stifies a particular award of costs;	h) le fait que l'intérêt public dans la résolution judiciaire de l'instance justifie une adjudication particulière des dépens;

) any conduct of a party that tended shorten or unnecessarily lengthen e duration of the proceeding;

i) la conduite d’une partie qui a eu pour effet d’abréger ou de prolonger inutilement la durée de l’instance;

) the failure by a party to admit ything that should have been dmitted or to serve a request to dmit;

j) le défaut de la part d’une partie de signifier une demande visée à la règle 255 ou de reconnaître ce qui aurait dû être admis;

) whether any step in the roceeding was

k) la question de savoir si une mesure prise au cours de l’instance, selon le cas :

) improper, vexatious or nnecessary, or

(i) était inappropriée, vexatoire ou inutile,

) taken through negligence, mistake excessive caution;

(ii) a été entreprise de manière négligente, par erreur ou avec trop de circonspection;

) whether more than one set of costs ould be allowed, where two or more arties were represented by different olicitors or were represented by the me solicitor but separated their efence unnecessarily;

l) la question de savoir si plus d’un mémoire de dépens devrait être accordé lorsque deux ou plusieurs parties sont représentées par différents avocats ou lorsque, étant représentées par le même avocat, elles ont scindé inutilement leur défense;

n) whether two or more parties, presented by the same solicitor, itiated separate proceedings nnecessarily;

m) la question de savoir si deux ou plusieurs parties représentées par le même avocat ont engagé inutilement des instances distinctes;

) whether a party who was ccessful in an action exaggerated a aim, including a counterclaim or ird party claim, to avoid the peration of rules 292 to 299;

n) la question de savoir si la partie qui a eu gain de cause dans une action a exagéré le montant de sa réclamation, notamment celle indiquée dans la demande reconventionnelle ou la mise en cause, pour éviter l’application des règles 292 à 299;

.1) whether the expense required to ave an expert witness give evidence as justified given

n.1) la question de savoir si les dépenses engagées pour la déposition d’un témoin expert étaient justifiées compte tenu de l’un ou l’autre des facteurs suivants :

) the nature of the litigation, its ublic significance and any need to arify the law,

i) the number, complexity or chnical nature of the issues in spute, or

ii) the amount in dispute in the roceeding; and

) any other matter that it considers levant.

ariff B

4) The Court may fix all or part of ny costs by reference to Tariff B and ay award a lump sum in lieu of, or addition to, any assessed costs.

irections re assessment

5) Where the Court orders that costs e assessed in accordance with Tariff , the Court may direct that the sessment be performed under a ecific column or combination of olumns of the table to that Tariff.

6) Notwithstanding any other rovision of these Rules, the Court ay

) award or refuse costs in respect of particular issue or step in a roceeding;

) award assessed costs or a ercentage of assessed costs up to and cluding a specified step in a roceeding;

) award all or part of costs on a licitor-and-client basis; or

(i) la nature du litige, son importance pour le public et la nécessité de clarifier le droit,

(ii) le nombre, la complexité ou la nature technique des questions en litige,

(iii) la somme en litige;

o) toute autre question qu'elle juge pertinente.

Tarif B

(4) La Cour peut fixer tout ou partie des dépens en se reportant au tarif B et adjuger une somme globale au lieu ou en sus des dépens taxés.

Directives de la Cour

(5) Dans le cas où la Cour ordonne que les dépens soient taxés conformément au tarif B, elle peut donner des directives prescrivant que la taxation soit faite selon une colonne déterminée ou une combinaison de colonnes du tableau de ce tarif.

(6) Malgré toute autre disposition des présentes règles, la Cour peut :

a) adjuger ou refuser d'adjuger les dépens à l'égard d'une question litigieuse ou d'une procédure particulières;

b) adjuger l'ensemble ou un pourcentage des dépens taxés, jusqu'à une étape précise de l'instance;

c) adjuger tout ou partie des dépens sur une base avocat-client;

) award costs against a successful party.

d) condamner aux dépens la partie qui obtient gain de cause.

ward and payment of costs

Adjudication et paiement des dépens

(7) Costs shall be awarded to the party who is entitled to receive the costs and not to the party's solicitor, but they may be paid to the party's solicitor in trust.

(7) Les dépens sont adjugés à la partie qui y a droit et non à son avocat, mais ils peuvent être payés en fiducie à celui-ci.

Costs of Motion

401 (1) The Court may award costs of a motion in an amount fixed by the Court.

Dépens de la requête

401 (1) La Cour peut adjuger les dépens afférents à une requête selon le montant qu'elle fixe.

Costs payable forthwith

(2) Where the Court is satisfied that a motion should not have been brought or opposed, the Court shall order that the costs of the motion be payable forthwith.

Paiement sans délai

(2) Si la Cour est convaincue qu'une requête n'aurait pas dû être présentée ou contestée, elle ordonne que les dépens afférents à la requête soient payés sans délai.

Costs of discontinuance or abandonment

402 Unless otherwise ordered by the Court or agreed by the parties, a party against whom an action, application or appeal has been discontinued or against whom a motion has been abandoned is entitled to costs forthwith, which may be assessed and the payment of which may be enforced as if judgment for the amount of the costs had been given in favour of that party.

Dépens lors d'un désistement ou abandon

402 Sauf ordonnance contraire de la Cour ou entente entre les parties, lorsqu'une action, une demande ou un appel fait l'objet d'un désistement ou qu'une requête est abandonnée, la partie contre laquelle l'action, la demande ou l'appel a été engagé ou la requête présentée a droit aux dépens sans délai. Les dépens peuvent être taxés et le paiement peut en être poursuivi par exécution forcée comme s'ils avaient été adjugés par jugement rendu en faveur de la partie.

Motion for directions

Requête pour directives

403 (1) A party may request that directions be given to the assessment

403 (1) Une partie peut demander que des directives soient données à l'officie

officer respecting any matter referred to in rule 400,

(a) by serving and filing a notice of motion within 30 days after judgment has been pronounced; or

(b) in a motion for judgment under subsection 394(2).

Motion after judgment

(2) A motion may be brought under paragraph (1)(a) whether or not the judgment included an order concerning costs.

Same judge or prothonotary

(3) A motion under paragraph (1)(a) shall be brought before the judge or prothonotary who signed the judgment.

taxateur au sujet des questions visées à règle 400 :

a) soit en signifiant et en déposant un avis de requête dans les 30 jours suivan le prononcé du jugement;

b) soit par voie de requête au moment d la présentation de la requête pour jugement selon le paragraphe 394(2).

Précisions

(2) La requête visée à l’alinéa (1)a) peu être présentée que le jugement comport ou non une ordonnance sur les dépens.

Présentation de la requête

(3) La requête visée à l’alinéa (1)a) est présentée au juge ou au protonotaire qu a signé le jugement.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1632-16
STYLE OF CAUSE:	**ELI LILLY CANADA INC., ELI LILLY AND COMPANY, LILLY DEL CARIBE, INC., LILLY, S.A. and ICOS CORPORATION INC.v. APOTEX INC.**
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	OCTOBER 18, 2021
CONFIDENTIAL ORDER AND REASONS:	ST-LOUIS J.
DATED:	JANUARY 6, 2023

APPEARANCES:

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