

**Date: 20080709**

**Docket: T-833-06**

**Citation: 2008 FC 849**

**Ottawa, Ontario, July 9, 2008**

**PRESENT: The Honourable Mr. Justice Barnes**

**BETWEEN:**

**GLAXOSMITHKLINE INC. and  
THE WELLCOME FOUNDATION LIMITED**

**Applicants**

**and**

**PHARMASCIENCE INC. and  
THE MINISTER OF HEALTH**

**Respondents**

**SUPPLEMENTAL REASONS FOR JUDGMENT AND JUDGMENT**

[1] These reasons address the outstanding issue of costs on which I invited written submissions from the parties in my earlier decision on the merits.

[2] Pharmascience Inc. (Pharmascience) has requested a lump sum award of costs or in the alternative, a direction to the Assessment Officer that costs be fixed at the highest end of Column IV. GSK argues that because of the divided success on several key issues no award of

costs should be made or, in the alternative, that Pharmascience's costs ought to be reduced in light of the factors listed in Rule 400.

[3] While there would certainly be some efficiency in fixing a lump sum for taxable fees and disbursements in this proceeding, I agree with the Applicants, Glaxosmithkline Inc. and the Wellcome Foundation Limited (collectively GSK), that they ought to have the opportunity to have the reasonableness of those claims specifically addressed on a taxation. I will, however, provide some guidance to the parties with respect to some of the issues which may simplify the taxation exercise.

[4] Notwithstanding the fact that Pharmascience was unsuccessful on several key validity issues, it is entitled to an award of costs because of its ultimate success on the application. I would add that the validity arguments raised by Pharmascience were not frivolous and there was an evidentiary basis upon which to have made them. On the other hand, some recognition of GSK's partial success is also appropriate. Ordinarily in a case as complex as this one, I would award costs within Column IV. Having regard to the issue of divided success, I will allow Pharmascience's costs at the middle of Column III.

[5] I am not in a position to determine whether the fees sought to be recovered for Pharmascience's experts are reasonable beyond observing that the evidence they gave was relevant to the issues in play. Dr. Mitra's fee of \$235,000.00 appears somewhat disproportionate to the work product that was produced to the Court. On the other hand, there may well be a valid explanation

for the amount which he has charged for his professional services. Subject to the following limitations, I will leave it to the Assessment Officer to determine the reasonableness of the fees charged by all of Pharmascience's expert witnesses.

[6] The amount awarded for expert fees shall not exceed the hourly rate charged by Pharmascience's Senior Counsel for the hours actually expended in preparing for and in giving evidence (by affidavit and examination). This assessment shall include the expert fees incurred for the actual time expended by each of those witnesses for preparing their individual affidavits, reviewing the patent and the relevant scientific literature, reviewing GSK's experts' affidavits and exhibits and for preparing for and attending their own examinations. Any time spent by Pharmascience's witnesses in preparing Pharmascience's counsel to examine GSK's expert witnesses or in attending the examination of any other witness shall not be recoverable.

[7] I will allow Pharmascience to tax for two counsel at the hearing and at the examination of GSK's witnesses, if two counsel were in attendance. For the examination of Pharmascience's witnesses, I will allow for the attendance of one counsel only, at the rate of senior counsel. The cost of travel by counsel shall also be in accordance with this direction. All other costs for counsel shall be at the discretion of the Assessment Officer.

[8] Where a pretrial motion was determined with an Order for costs, that award will prevail. Otherwise, such costs shall be awarded at the middle of Column III.

[9] All other disbursements shall be at the discretion of the Assessment Officer.

**JUDGMENT**

**THIS COURT ADJUDGES that** Pharmascience shall be entitled to tax its costs in this proceeding in accordance with these reasons.

“ R. L. Barnes ”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-833-06

**STYLE OF CAUSE:** Glaxosmithkline Inc. et al.  
v.  
Pharmascience Inc. et al.

**PLACE OF HEARING:** Toronto, ON

**DATE OF HEARING:** March 3 to 7, 2008

**SUPPLEMENTAL REASONS  
FOR JUDGMENT AND  
JUDGMENT BY:** Mr. Justice Barnes

**DATED:** July 9, 2008

**APPEARANCES:**

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