

Federal Court



Cour fédérale

**Date: 20100216**

**Docket: T-894-07**

**Citation: 2010 FC 156**

**Toronto, Ontario, February 16, 2010**

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

**BETWEEN:**

**NOVOPHARM LIMITED**

**Applicant**

**and**

**MINISTER OF HEALTH  
and PFIZER CANADA INC.**

**Respondents**

**ORDER AS TO COSTS AND REASONS FOR ORDER**

[1] These proceedings deal with an application by Novopharm Limited under sections 18 and 18.1 of *the Federal Courts Act*, R.S.C. 1985, c. F-7 for various declarations respecting the conduct of the officials of the Respondent, Minister of Health, in administering certain provisions of the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133 as amended (*NOC Regulations*). In brief, the circumstances arise out of Novopharm's endeavours to receive a Notice of Compliance from the Minister to distribute in Canada a generic version of a Pfizer drug and

issues surrounding the listing by Pfizer under the *NOC Regulations* of a certain patent, the '201 patent, during the pendency of proceedings in this Court and the Federal Court of Appeal respecting other listed patents pertaining to that drug.

[2] The present proceedings were instituted by Novopharm in 2007 as against the Minister of Health only. By an Order of the Prothonotary, Pfizer was added as a necessary party respondent. All three parties provided evidence by way of affidavits and cross-examined on each other's affidavits. The nature of the relief sought by Novopharm changed during the course of the proceedings. Certain claimed relief was struck out by the Prothonotary. Other amendments to the claimed relief were voluntarily made by Novopharm. Ultimately, at the hearing, Novopharm's Counsel agreed that the relief claimed by Novopharm was that as set out in the last substantive paragraph of its Memorandum of Argument.

[3] These proceedings were case managed. At least four case management teleconferences were held during 2008 and 2009. The matter was set down for hearing several months in advance of the date set for the hearing. The hearing took place in Toronto on January 25 and 26, 2010 following which I took the matter under reserve. Late in the afternoon of Friday, January 29, 2010 Counsel for Novopharm contacted the Court Registry to advise that Novopharm was going to file a Notice of Discontinuance subject to a resolution as to costs with Pfizer and the Minister of Health. On Monday, February 1, 2010 Novopharm did file a Notice of Discontinuance. Apparently, a settlement as to costs has been reached with the Minister of Health. No such settlement has been reached with Pfizer hence the necessity for this Order. In making this Order I have considered the

whole of the record in these proceedings as well as the letters from Counsel for each of Novopharm and Pfizer as to costs.

[4] Rule 402 of the *Federal Courts Rules* permits a party against whom a Notice of Discontinuance of an application has been filed, to be entitled to costs forthwith. That Rule does not stipulate the level of such costs. Such level falls to be determined by the Court under the provisions of Rule 400 including Rule 400(3).

[5] Parties are always encouraged to resolve the issues that are in dispute before this Court. Several opportunities are offered for resolution including case management, as was the situation here, and Court assisted mediation. The primary obligation, however, to assess the merits of a case and endeavour to arrive at a resolution always falls upon the parties themselves and their Counsel. In particular such is the case where the parties are, as they are here, sophisticated and well accustomed to litigation, and their Counsel are well versed in the subject matter at hand and the litigation process. The Court can propose that the parties settle but the parties themselves must dispose of the matter.

[6] I am satisfied, having reviewed the file thoroughly before the hearing began, and heard Counsel for Novopharm during the hearing, that Novopharm was unsure of the remedy that it was seeking, or why it was seeking such a remedy. I had a clear impression that a good deal of last minute adjustments were being made by Novopharm and its Counsel. I note Novopharm's Counsel's letter to the Court dated February 10, 2010 in which it is stated:

*... after oral submissions of all parties, [Novopharm] was of the view that the precedent- setting issues... would be better left for another case having a clear live controversy without any potential justiciability complications...*

[7] I cannot accept that Novopharm or its Counsel recognized the possible futility of its case only after the conclusion of oral argument. There was ample opportunity as the case developed, and after the evidence was finalized several months before the hearing, to assess the strength of the case and the futility of any judgment.

[8] The Court, in setting a matter down for hearing, provides to the Judge hearing the matter time before the hearing to review the file. After the matter is heard, the Judge is afforded time to write the reasons. In a matter such as this when a matter is discontinued after the hearing, the time to review the file and the hearing time as well as time spent preparing reasons is forever lost. Every party is entitled to its day in Court, but it is not entitled to deprive other persons seeking their own day in Court to the time that the Court could have spent on their matter. Here a consideration by Novopharm and its Counsel as to the merits of its case should have occurred well before the hearing, not after the hearing was over. Regretfully, except to provide remarks such as this, the Court has, at present, no means to afford a remedy to itself for the loss of judicial resources better spent elsewhere.

[9] The Rules, however, do provide a remedy, by way of costs, to a party whose time has been wasted and money and resources unnecessarily spent. Pfizer was a proper party to these proceedings. I find nothing in the conduct of Pfizer in the proceedings that would disentitle it to

costs or to a lesser remedy as was alluded to in Novopharm's Counsel's correspondence with the Court. I have reviewed Pfizer's proposed bills including its representations that actual fees, excluding disbursements, as charged to the client, Pfizer, were close to or even exceeded \$100,000.00. The constant theme in discussions between the bench, the bar, and the client community, is that legal fees, in this case for representation for one of two respondents in a two day hearing, including preparation of affidavits cross-examination and written argument, is getting well beyond the means of those other than the very affluent.

[10] Having reviewed Pfizer's various proposed bills of costs and disbursements calculated on a variety of different presumptions, I am satisfied that Pfizer's claimed disbursements in the sum of \$29,854.60 are proper and allowable. I am satisfied that, in the circumstances of this case, that Pfizer is entitled to one of the alternatives proposed by it being fees at the Column IV level up to and including cross-examinations, and at the high end of Column V the preparation and attendance at the hearing. To these fees 5% GST should be added for making a total of \$33,572.18. The sum of the fees, GST and disbursements allowable therefore is \$63,426.78.

**ORDER**

**FOR THE REASONS provided:**

**THIS COURT ORDERS that:**

1. Pfizer is entitled to its costs and disbursements as against Novopharm in these proceedings in the sum of \$63,426.78 payable forthwith, calculated as follows:
  - a) Said costs are allowed in the sum of \$33,572.18 which sum includes 5% GST;
  - b) Said disbursements are allowed in the sum of \$29,854.60.
2. No additional costs are allowed in respect of the dispute as to costs.

“Roger T. Hughes”

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-894-07

**STYLE OF CAUSE:** NOVOPHARM LIMITED v. MINISTER OF HEALTH  
and PFIZER CANADA INC.

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATES OF HEARING:** JANUARY 25-26, 2010

**ORDER AS TO COSTS AND  
REASONS FOR ORDER:** HUGHES J.

**DATED:** FEBRUARY 16, 2010

**APPEARANCES:**

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