

Date: 20100223

Docket: T-780-08

Citation: 2010 FC 194

Toronto, Ontario, February 23, 2010

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

**JANSSEN-ORTHO INC. and
ALZA CORPORATION**

Applicants

and

**THE MINISTER OF HEALTH
and NOVOPHARM LIMITED**

Respondents

REASONS FOR ORDER AND ORDER
(Costs)

[1] In the Reasons for Judgment and Judgment in this matter, it was held that the respondent, being successful, was entitled to its costs. Paragraph 166 of the Reasons provided as follows:

[166] The Respondent, Novopharm, is entitled to its costs. I would hope that the experienced counsel who appeared in this application will be able to come to an agreement on the costs to be paid. If they are unable to agree on an amount then I will remain seized to make a further order as to costs. Failing their agreement, counsel are to provide written submissions as to costs within 15 working days following the date hereof.

[2] In light of the inability of the parties to reach agreement on much of anything during the course of this application, the Court was disappointed but not shocked to learn the parties could not reach agreement on costs.

[3] Novopharm asks the Court to consider a number of allegations when awarding costs:

- a. That the applicants did not commit to a position on claims construction until several months after Novopharm's production was delivered;
- b. That there were serial requests for largely irrelevant productions;
- c. That Novopharm requested an early hearing date;
- d. That there was interference with one of Novopharm's proposed experts;
- e. That the applicants engaged in ambush tactics for the purpose of delay;
- a. That unreasonable positions were maintained throughout requiring additional witnesses and hearing time; and
- f. That Novopharm was completely successful.

[4] It is fair to say that this was hard fought litigation on both sides. I find that there was no interference with the expert witness Novopharm wished to call. The situation was that he was in a conflict of interest and had to be excused. I am not satisfied that any of the other allegations have merit, or where there is some merit, it is not to an extent deserving of consideration in determining the costs to be awarded.

[5] The applicants ask that Novopharm's costs be reduced by 25% for what is alleged to be its inappropriate conduct in prematurely distributing marketing and sales information with respect to its product before the notice of compliance and this Court's decision was issued. I agree with the respondent that if such conduct occurred it is tantamount to an offence under Section C.08.002(1)(b) of the *Food and Drugs Regulations* and section 31 of the *Food and Drugs Act*. It is a matter to be resolved and penalized, if appropriate, under that legislative regime, not through costs.

[6] Likewise, the respondent ought not be penalized for the allegations it put forward that have been rejected.

[7] The applicants challenge the fees charged by Dr. Rhodes, one of the respondent's experts which they assert are 400% higher than the respondent's other experts. They also challenge the additional 17% on his fees he charged "because counsel was late in its payment."

[8] Novopharm submits that Dr. Rhodes' "hourly rate for preparation was not higher than the hourly rate for lead counsel and was, on an objective scale, reasonable for someone of his level of expertise." Dr. Rhodes' hourly rate was higher than that of most experts (\$700 per hour versus \$500 per hour). The respondent says that his total fees charged were higher as he was called upon to do more for it. He was the respondent's lead expert and while his accounts are not as detailed as one would expect, the total time spent is within a reasonable range.

[9] Although his hourly rate is high, I cannot say that it is beyond what one would expect from someone of his stature. Moreover, his discounted rate for prompt payment is close to that charged by the other significant experts called upon by the respondent.

[10] There is some merit, in my view, to the applicants' submission that they should not be shouldered with the additional 17% because Novopharm was late in paying the fees charged. As noted, Dr. Rhodes offered a discount if his bills were paid within 30 days. In my view, the respondent should only be entitled to reimbursement for the discounted fee payable if the account was paid in a timely manner.

[11] The respondent is otherwise entitled to its costs determined in a manner that is in keeping with recent decisions of this Court.

ORDER

THIS COURT ORDERS THAT:

1. Novopharm is to have its costs against the plaintiffs, jointly and severally, in accordance with the following directions:
 - a. No costs are awarded for or against the Minister of Health, who did not participate in these hearings.
 - b. The costs awarded Novopharm shall be assessed at the middle of Column IV.
 - c. Costs (fees and related disbursements) for two counsel at the hearing, one senior and one junior may be taxed for each day of hearing.
 - d. Costs (fees and related disbursements) of two counsel, one senior and one junior only if present, may be taxed in conducting cross-examinations. One senior counsel's costs (fees and related disbursements) only may be taxed in defending a cross-examination of a Novopharm witness. No costs are allowed for other lawyers, in house or external counsel, students, paralegals or clerical persons.
 - e. Costs (fees and related disbursements) for interlocutory motions shall be taxed as follows:
 - i. where the Court has previously awarded an amount or level of costs, that amount or level shall prevail;
 - ii. where the Court was silent as to costs, no costs are ordered; and
 - iii. where costs are ordered but silent as to amount or level of costs, costs are to be assessed for one senior counsel at the mid range of Column IV.

- f. Costs (fees and related disbursements) for all case management conferences and pre-trial conferences are to be assessed for one senior counsel at the mid range of Column IV.
 - g. The respondent is entitled to recover the fees paid to its experts, as set out in its submissions, with the exception of Dr. Rhodes. As noted above, his fees are to be recovered on the basis of the discounted rate he charged, regardless as to whether his fees were paid within the 30 day grace period or not.
 - h. All other disbursements charged by the respondent to its client are to be recovered in full.
 - i. Novopharm is entitled to interest on the costs awarded at the rate of 2.0% from January 18, 2010.
2. With these directions, it is hoped, again, that counsel will be able to agree on the amount payable. If within 20 days the parties have not agreed, the costs shall be determined by the Court. The respondent is to file a submission, not exceeding 5 pages, with supporting documents (not including those already submitted) to the Court setting out the amount of fees and disbursements it submits are payable in accordance with these directions. The applicants shall then file a response, not exceeding 5 pages, within 10 days, setting out the amount of fees and disbursements it submits are payable in accordance with these directions. No further submissions from either party are to be filed. After reviewing these submissions, the Court, shall fix the costs payable.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-780-08

STYLE OF CAUSE: JANSSEN-ORTHO INC. and ALZA CORPORATION v.
THE MINISTER OF HEALTH and NOVOPHARM
LIMITED

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: November 16-19, 2009

**REASONS FOR
ORDER AND ORDER:** ZINN J.

DATED: February 23, 2010

APPEARANCES:

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FOR THE APPLICANTS

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FOR THE RESPONDENT
NOVOPHARM

Nil

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