

Federal Court



Cour fédérale

Date: 20110503

Docket: T-1565-08

Citation: 2011 FC 509

Ottawa, Ontario, May 3, 2011

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

ELI LILLY CANADA INC.

Applicant

and

**APOTEX INC.
THE MINISTER OF HEALTH**

Respondents

and

ELI LILLY AND COMPANY

Respondent/Patentee

SUPPLEMENTARY REASONS FOR JUDGMENT AND JUDGMENT

[1] These are my supplementary reasons concerning costs in this proceeding.

[2] Eli Lilly Canada Inc. (Lilly) has presented a Bill of Costs in the amount of \$232,751.56 which includes disbursements of \$135,381.56. Of the claimed disbursements, slightly more than \$80,000.00 relates to expert fees charged by Dr. McGough and by Dr. Barkley. Lilly has calculated its indemnity entitlement at the high end of Tariff Column IV with a further premium of 15% to reflect what it describes as Apotex Inc.'s (Apotex) unjustified allegations of fraud and bad faith. In total Lilly is seeking a lump sum of \$247,357.06.

[3] Apotex contends that, having regard to my decision in *Novopharm Limited v Eli Lilly and Company*, 2010 FC 1154, which rendered this proceeding moot, no award of costs should be made. In the alternative, Apotex has presented a Revised Bill of Costs suggesting that costs at the low end of Tariff Column III would be more appropriate. Among other things, Apotex takes issue with Lilly's claims to multiple counsel fees, to Dr. McGough's fees for four days in connection with a one-day examination, to several travel related disbursements, and to the 15% premium claimed by Lilly for unwarranted and unproven allegations. In the result, the Bill of Costs proposed by Apotex comes to \$147,071.84, which includes disbursements of \$120,395.64.

[4] Having considered the parties' submissions on costs I agree with Lilly that an award of costs at the upper end of Column IV is justified for essentially the same reasons I gave in *Novopharm*, above. I do not agree with Apotex that the award should be reduced because the application was dismissed for mootness. The case was fully presented on the merits and, but for my intervening decision in *Novopharm*, Lilly would have been successful. I also do not agree that the case was rendered any less complex by Lilly's involvement in the *Novopharm* proceeding. In these particular

circumstances, though, I am not prepared to award a premium to Lilly in connection with Apotex's unsubstantiated allegations of misconduct.

[5] I also agree with Apotex that, having regard to the nature of the proceeding, some of Lilly's claims to multiple counsel fees are excessive.

[6] On the other hand, I can see nothing inappropriate about the amounts charged by Lilly's experts. Dr. McGough was required to travel from California to Chicago and back again to attend his examination. A further day of preparation with counsel is not, in my thinking, unreasonable.

[7] This is a case where a lump sum is appropriate and I will award Lilly the sum of \$215,000.00 inclusive of disbursements, GST and HST.

[8] I would add that Mr. Brodtkin's affidavit of December 14, 2010 is clearly irregular in the sense that it is argumentative and improperly exceeds the page limit imposed in my Order of September 14, 2010. I have therefore not considered that evidence.

JUDGMENT

THIS COURT'S JUDGMENT is that Apotex shall pay lump sum costs to Lilly in the sum of \$215,000.00 inclusive of disbursements, GST and HST.

"R.L. Barnes"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1565-08

STYLE OF CAUSE: ELI LILLY CANADA INC.
v
APOTEX INC. AND THE MINISTER OF HEALTH

PLACE OF HEARING: Toronto, ON

DATE OF HEARING: May 3 to 5 and
May 10

**SUPPLEMENTARY REASONS
FOR JUDGMENT AND
JUDGMENT:** Mr. Justice Barnes

DATED: May 3, 2011

APPEARANCES:

Patrick Smith
Jane Clark

FOR THE APPLICANT

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