Federal Court  Cour fédérale

Date: 20111006

Docket: T-1321-97

Citation: 2011 FC 1143

Ottawa, Ontario, October 6, 2011

PRESENT: The Honourable Justice Johanne Gauthier

BETWEEN:

ELI LILLY AND COMPANY
AND ELI LILLY CANADA INC.

Plaintiffs

and

APOTEX INC.

Defendant

AND BETWEEN:

APOTEX INC.

Plaintiff by Counterclaim
(Defendant)

and

ELI LILLY AND COMPANY
AND ELI LILLY CANADA INC.

Defendants by Counterclaim
(Plaintiffs)

and

SHIONOGI & CO. LTD.

Defendant by Counterclaim

REASONS FOR ORDER AND ORDER AS TO COSTS

[1] In my decision on the merits [*Eli Lilly and Co v Apotex Inc*, 2009 FC 991, [2009] FCJ no 1229 (QL), aff'd 2010 FCA 240, [2010] FCJ no 1199 (QL) leave to appeal to SCC refused, [2010] CSCR no 434], I granted costs to the plaintiffs in the infringement action [the main action] as well as costs to the Defendants in the counterclaim which was based on an alleged breach of the *Competition Act*, RSC 1985, c C-34 [the Competition Counterclaim]. I also gave various indications as to how these costs and the disbursements should be calculated in the Competition Counterclaim noting, however, that with respect to the main action, further submissions to quantify the costs would be required.

[2] It now also appears that in both the main action and the Competition Counterclaim various settlement offers were exchanged which require a reconsideration[1] of my conclusions with respect to costs because of the potential impact of Rule 420 of the *Federal Courts Rules*, SOR/98-106 [the *Rules*] or at least a reassessment of the factors referred to in subsection 400(3) of the *Rules*, particularly in light of paragraph 400(3)(*e*).

[3] For a variety of reasons which include, among others, settlement discussions between Apotex Inc. ["Apotex"] and Eli Lilly and Company and Eli Lilly Canada Inc. [collectively referred to as "Eli Lilly"] on the one hand and between Apotex and Shionogi & Co. Ltd. ["Shionogi"] on the other, the final disposition of the costs was delayed. Extensive submissions

[1] Similar to subsection 403(2) but without the need to refer the matter back to an assessment officer.

were filed by the parties and Apotex insisted on an oral hearing which ended up taking place in three stages just to deal with the issues raised with respect to Eli Lilly's costs.

[4] Moreover, after the final hearing with respect to Eli Lilly's costs, and only after the negotiations between Apotex and Shionogi had come to a dead end, Apotex raised a new issue, namely that Eli Lilly should indemnify it for any costs that it was ordered to pay to Shionogi, if the amount offered by Apotex to Eli Lilly to settle all the proceedings in T-1321-97 is equal to or more than the amount ultimately awarded to Eli Lilly (bifurcation order).

[5] In the end, the final submissions were filed on August 26, 2011.

[6] Unsurprisingly, in the main action, given the age and history of this file and the fact that the final assessment of quantum due to Eli Lilly is still far away,[2] both sides initially took what I consider to be unreasonable positions. On the one hand, Eli Lilly went beyond what I had initially mentioned in my reasons seeking a large portion of its solicitor-client costs as well as the doubling of the Tariff items calculated pursuant to Column V. On the other hand, Apotex simply wanted to postpone assessment of all the costs payable to Eli Lilly until after the reference, leaving Eli Lilly, the successful party who established infringement of at least one valid claim in each of the eight patents at issue prior to June 4, 1998, out of pocket, not only of the compensation it is entitled to but also with respect to the sizable disbursements and fees it incurred since the beginning of this action 14 years ago. When the Court asked if Apotex would agree to pay some of the costs now, given that such amount could later be deducted from

[2] No hearing date has yet been requested.

whatever amount was fixed at the reference, its counsel advised that it would be unfair to ask his client to pay costs if none are due.

[7] Frankly, given the number of arguments initially raised with respect to costs in this file, the Court was tempted to simply postpone the assessment to the end of the reference. It would be so much simpler and judges are only human.

[8] However, the wide discretion provided for at subsection 400(3) and Rule 420 of the *Rules* is given to the Court (more particularly to the trial judge) because it is expected that, having presided over the trial, the Court will be well acquainted with all that went on in and out of the court during the trial, as well as during the trial management conferences. The trial judge is also expected to be in a good position to assess the impact of what was done by either party on the length and complexity of the trial.

[9] Indeed, even when compared to other complex patent matters, this case was exceptionally difficult.

[10] Thus, I felt that if I waited any longer to deal with such matter, I would risk forgetting the details that enable me to properly exercise my discretion and, in particular, to see through the skilful rhetoric of the experienced lawyers involved.

[11] The issues raised with respect to the main action and the Competition Counterclaim are quite distinct and will be dealt with separately. I will start with the Competition Counterclaim.

I. The Competition Counterclaim

[12] Although the Court was not told the exact amount agreed to, the parties have advised the Court that they have at least been able to agree on the amount of Shionogi's disbursements in this proceeding.

[13] Eli Lilly and Apotex have also filed a list of figures (most of which were agreed on) showing what the disbursements and their fees would be before and after the April 4, 2008 settlement offer discussed later on, under various scenarios ranging from Column III of Tariff B to solicitor-client costs.

[14] With respect to Shionogi's legal fees, although Apotex still contests two small items[3] (the amount claimed with respect to the pre-trial conferences held on December 21, 2006 and February 6, 2007 and the trial management conference held on February 15, 2008, as well as the amount claimed under item 15 of the Tariff for three sets of written submissions filed during the trial) the main focus of the parties' arguments was on the impact of the various settlement offers exchanged.

[3] Although Apotex clearly had ample time to reflect on the matter before the filing of written submissions, it is only after reviewing Shionogi's written representations that it finally let go of three of the five apparently unresolved items.

[15] The first written offer before me[4] was made by Shionogi in November 2007; the defendants offered to Apotex a discontinuance on a without costs basis. This offer expressly refers to Rule 420 and is said to be open for acceptance until "one minute after the commencement of the trial".

[16] On April 4, 2008, Apotex wrote to Eli Lilly and Shionogi offering to pay an amount of $12.5 million in full satisfaction of "all claims in this proceeding". Both the action and the counterclaim were to be dismissed without costs and a full release would be executed by all parties.

[17] On April 7, 2008 Shionogi advised Apotex that although the proposal that the Competition Counterclaim against Shionogi be dismissed without costs was consistent with its own proposed settlement, the offer as formulated was not one that could dispose of the Competition Counterclaim, absent agreement between the parties in the main action. Shionogi was thus looking forward to a formal response to its own settlement offer.

[18] Apotex states that it could not settle with Shionogi because it could not get Eli Lilly or Shionogi to agree as to how Shionogi's evidence (including the documents in its possession) could be used against Eli Lilly in the event that Shionogi was out of the action. It also argues that Shionogi should have used its influence with Eli Lilly, a party with whom it shared an interest in the Competition Counterclaim, to force an agreement in that respect. Or, it should have agreed to

[4] Not necessarily the first offer between the parties. It is also clear from the letter dated August 12, 2008, filed by Apotex with its written representations, that the Court does not have a full picture of the settlement discussions between the parties.

make its witnesses available to Apotex for the trial in the event the Competition Counterclaim could not be settled with Eli Lilly.

[19] Be it as it may, on August 8, 2008, after all the evidence with respect to the main action had been adduced and only the closing arguments remained to be done, Shionogi presented another written offer to Apotex. After noting that its earlier offer expired on April 21, 2008, Shionogi states that "at this time", it was prepared to accept a discontinuance upon payment of $250,000 to cover its costs (fees and disbursements).[5] At the time, the evidence with respect to Apotex's Competition Counterclaim was scheduled to start on September 2, 2008.

[20] For Apotex, none of the offers made by Shionogi can trigger the application of Rule 420 of the *Rules* because neither remained open until the matter was taken under advisement or before judgment was rendered. Apotex also argues that the August 8, 2008 offer was not clear and did not include any element of compromise (or incentive to settle) given that, in Apotex's view, "it is expected" that the $250,000 would have been equal to if not more than the fees and disbursements that would have been payable to Shionogi as of August 2008 (see para 48 of Apotex's responding written submissions re: quantum of costs payable to Shionogi).

[21] Furthermore, and as an alternative to its first position referred to above, Apotex submits that Shionogi's November 2007 offer, which expired on April 21, 2008, could not meet the requirements of Rule 420 because at that time the Court was only scheduled to deal with the

[5] It appears from the August 12, 2008 letter that Shionogi had actually not closed the door to a lower offer.

main action and the evidence, including the opening statements, with respect to the Competition Counterclaim was not expected to start until after the summer recess.

[22] Thus, in Apotex's view, not only should Shionogi not be entitled to any doubling of its taxable fees but its said fees calculated pursuant to Column III (pre-trial matters) and Column IV (during trial) as well as its disbursements should be reduced by 25% to account for Apotex's efforts to settle the Competition Counterclaim without the need for a trial.

[23] Finally, as mentioned, Apotex states that should it ultimately be found that the quantum payable to Eli Lilly in the main action is less than $12.5 million, Eli Lilly should pay for any costs paid by Apotex to Shionogi for in fairness, Eli Lilly should be held responsible for the failure to settle the Competition Counterclaim with Shionogi in April 2008.

[24] Starting with the argument that an offer must remain open until judgment or until a matter is taken under advisement, it is evident that Apotex did not consider the effect of the amendments to Rule 420 of the *Rules* made in 2005. The words "not revoked" in the former subsection 420(2), which prompted the line of cases referred to by Apotex, were deleted in 2005 and a new subsection 420(3) was added to make it very clear that an offer only needs to remain open until the start of the trial or hearing at issue.

[25] Having been closely involved in the process leading to such amendment, I have absolutely no doubt that Apotex's argument in that respect is ill-founded.[6]

[26] That said, the purpose of the amendment and the spirit of the rule is to promote settlement before the beginning of the trial of the proceedings with respect to which the offer is made and to ensure that the person receiving it has sufficient time to consider it. In that context, the Court agrees that, although there was only one scheduling order issued for the trial of the various proceedings in T-1321-97, the main action and the Competition Counterclaim were two completely distinct proceedings and the evidence, including the opening statements with respect to the Competition Counterclaim, was never intended to start on April 21, 2008. In fact, Shionogi's counsel were excused on the very first day by the Court from attending the first leg of the hearing given that it was not party to the main action.[7]

[27] This means that to trigger the application of Rule 420 of the *Rules* the November 2007 offer had to remain open until the start of the trial with respect to the Competition Counterclaim – September 2, 2008. It is clear from the letter dated August 8, 2008 and from Shionogi's submissions that it thought that the trial started on April 21, 2008, even if its November 2007 offer does not expressly refer to that date. If the November 2007 letter could have been construed as referring to September 2, 2008, the August 8, 2008 offer implicitly revoked it before then.

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[6] It is not clear whether Justice O'Reilly, in *Tradition Fine Foods Ltd v Oshawa Group Ltd*, 2006 FC 93, [2006] FCJ no 120 (QL), felt that he had to apply the old rule because the offer, the trial and the judgment on the merits had occurred prior to the 2005 amendments.

[7] Except that on June 19, 2008, the Court expressly requested the presence of Shionogi's counsel, as Apotex was arguing that it should be entitled to file extracts from Shionogi's examination for discovery as part of its read-ins in the main action.

[28] Still, the November 2007 offer must be considered pursuant to subsection 400(3) of the *Rules*.

[29] It is worth mentioning that, if Apotex was in any way interested in settling its Competition Counterclaim with Shionogi between April 21 and August 8, 2008, it could easily have advised Shionogi that, in its view, the trial did not start with respect to the Competition Counterclaim until after the summer recess.

[30] With respect to Shionogi's second written offer, the Court is satisfied that, when read in its proper context (considering that a first lower offer had already been made), it is clear that it did not expire, nor was it revoked before the hearing of the Competition Counterclaim started on September 2, 2008. This offer was made more than 14 days before the hearing (para 420(3)*a*) of the *Rules*).

[31] The Court agrees with Apotex that to determine if an offer includes the required element of compromise or incentive to settle, it must be compared to what Apotex, as plaintiff in the Competition Counterclaim, would have had to pay to bring the matter to an end on its own on August 8, 2008 – a discontinuance with costs.

[32] In cases where costs are the only issue, that does not mean, however, that one totally discards the fact that by settling before the trial, a party avoids exposure to the payment of the costs of the trial, for this is clearly an additional incentive to settle.

[33] Apotex estimates the taxable fees payable to Shionogi prior to August 8, 2008 at $107,393.40, using Column III as per the Court's directions in the judgment.[8] From Exhibit F (Tab 6F of Volume 2 of Shionogi's submissions) to the Affidavit of Jayson B. Dinelle, filed by Shionogi, it appears that the disbursements included in the bill of costs provided to Apotex on December 1, 2010 amounted to $336,666.48. Apotex has not disclosed the exact amount it has agreed to. There is no indication that it is really less than the amount included in the bill of costs.

[34] Based on the evidence before me, it appears that the portion of the disbursements incurred before August 8, 2008 is about $215,417.00.[9]

[35] This means that even using the approach adopted by Apotex, the total costs that would have been due to Shionogi were well above the amount it offered to settle for (almost 30% more). I have thus not been persuaded that this offer does not meet all the conditions required to trigger the application of Rule 420 of the *Rules*; in fact, I am satisfied that it does.

[36] Obviously, the Court has the discretion to lower the amount of fees payable under that rule. In this case, I have considered, among other things,

a. the relative value of the compromise offered;

b. the fact that my initial assessment of the fees payable to Shionogi was extremely conservative, considering the trend in recent caselaw favouring the award of a

[8] Shionogi, at the time, was seeking solicitor-client costs.

[9] The $121,249.40 deducted from the total amount includes $24,376.62 paid to Dr. Low. The Court notes that if this matter had been settled in August, Shionogi would likely have been entitled to the fees, or at least part of the fees, it paid to Dr. Low to prepare his expert report as well as those paid to the other expert (Dr. Tepperman) who filed a report with respect to the other issues raised in the Competition Counterclaim (even if he did not ultimately testify at trial). Thus, the estimate used is probably on the low side.

lump sum based on a percentage of the actual costs to the party when dealing with sophisticated commercial litigants that clearly have the means to pay for the legal choices they make;

c. the fact that, to my knowledge, this is the first time that an offer (the November 2007 offer) is not considered to meet the requirements of Rule 420 because of the distinction between two related proceedings heard one after the other;

d. all the arguments and caselaw submitted by Apotex, not only to lower the premium to be granted pursuant to Rule 420, but also to reduce the fees and disbursements payable to Shionogi.

[37] In the end, I have concluded that Shionogi was entitled to double the party-to-party fees payable since August 8, 2008, with some small adjustments with respect to services rendered between November 14, 2007 and August 8, 2008 on account of the November 14, 2007 offer.[10] I hereby fix those at $519,000.00. Shionogi is also entitled to full reimbursement of the disbursements agreed upon.

[38] This means that I have not accepted Apotex's argument with respect to the two small items described at para 14 above. Essentially, I agree with Shionogi's arguments set out in para 59-67 of its written submissions. As to the written submissions during the trial, it was made clear at the time that the Court favoured such written submissions in order to avoid delaying the

[10] The Court reduced the premium (double) claimed by Shionogi on the taxable fees (Column III) with respect to all taxable services rendered between November 2007 and August 2008 from $18,950.52 to $9,475.26 (x1.5). The total was then rounded up to $519,000.00.

conclusion of the trial. Without them, I have little doubt that an additional day of hearing would have been required.

[39] It also means that the Court was not persuaded by Apotex's argument that in any event Shionogi's costs should be reduced because of its genuine attempt to settle the Competition Counterclaim and because it would be unfair not to consider the fact that Apotex's ability to litigate the said counterclaim against Eli Lilly was severely hindered absent an agreement from Shionogi to provide evidence at trial (see paras 31-33 of Apotex's written submissions).

[40] Here, it is worth mentioning that Apotex only added Shionogi as a defendant to the Competition Counterclaim two years after instituting such suit against Eli Lilly. Apotex did not file any evidence explaining why it felt it was reasonable or necessary to add this party. It only argued about the need to get evidence from Shionogi and the fact that its Competition Counterclaim had some merits as it survived two attempts to get it dismissed by way of summary judgment.

[41] The Court should not be taken as condoning the practice of suing a party solely to facilitate the acquisition of evidence or to put pressure on a third party. There are more appropriate means to obtain evidence from a non-party, including a foreign company.

[42] Ultimately, as noted in my reasons for judgment, the testimony of Shionogi's witnesses at trial was of little value to Apotex. In fact, Apotex vigorously argued that little weight should be given to Mr. Wada's testimony and Mr. Tokaji had little personal knowledge of the events,

especially those that took place in 1975 (see para 33 of Apotex's written submissions). Mainly, Apotex tried to use Mr. Tokaji as a channel to put into evidence correspondence about which Mr. Tokaji had little or no knowledge and that could have been included in the agreed book of documents proposed by the defendants in the Competition Counterclaim.

[43] None of the read-ins from Shionogi's discovery played an important role in the final determination of the Competition Counterclaim. Eli Lilly's version of the relevant events was pretty much in line with that presented by Shionogi's witnesses.

[44] Furthermore, Apotex argued at length that the Court was bound by the findings of the Federal Court of Appeal with respect to the 1975 and 1995 agreements.

[45] Considering all that was known to Apotex before April 4, 2008, the Court is not even convinced that it was reasonable for Apotex to pursue its Competition Counterclaim against Shionogi as of that date.

[46] In light of the test applicable on motions for summary judgment and the position taken by the Federal Court of Appeal at the time, the latter's decision did not add any weight to Apotex's position with respect to time limitation, the first basis on which I dismissed the Competition Counterclaim (see paras 728 to 753 of my reasons).

[47] Apotex produced scant evidence as to exactly why it could not find a solution to its "alleged evidentiary dilemma". From Shionogi's counsel's letter dated August 12, 2008, it is

evident that Apotex had ample time to reflect on the matter before April 2008. In its November 2007 letter, Shionogi refers to various suggestions made in that respect. Also, before the trial, the Court asked, on several occasions, if commission evidence would be required and was certainly ready to help the parties in any way possible in that respect.

[48] Certainly, Apotex could have agreed to include all of Shionogi's correspondence in the proposed book of admitted documents which included TX-252 to TX-259, for example. Had it done so, it would have achieved more than what it actually ultimately did at trial, especially with respect to the above-mentioned documents.

[49] When the Court considers Apotex's attempt at introducing Shionogi's discovery evidence as part of its read-ins in the main action, it is far from clear that Apotex was not simply trying to have its cake and eat it too.[11] Obviously, that is not to say that Apotex did not have the right to insist on the strict application of the rules of evidence with respect to the filing of documents. It could also try to obtain a procedural advantage in order to settle its Competition Counterclaim with Shionogi. However, it cannot expect to impose its choices on Shionogi or Eli Lilly.

[50] Apotex submits that an order akin to a Sanderson or Bullock order should be made on the basis that Rule 420 somehow transforms a successful defendant into an unsuccessful one, at least with respect to costs (see paras 21 to 24 of Apotex's written reply submissions (re: indemnity costs submissions)). In any event, Apotex also states that the Court has discretion to issue such an order pursuant to subsection 400(3) of the *Rules* and that it would be just to do so here.

[11] Shionogi had offered that its evidence at discovery be available to both Apotex and Eli Lilly to be used as they wished.

[51] I doubt very much that it was ever envisaged that Rule 420 could give rise to the analogy suggested by Apotex, or that it was ever purported to apply to offers that make the settlement of one action conditional on the settlement of such a distinct proceeding, as was the case with Apotex's April 4, 2008 offer. In fact, it appears more appropriate to consider Apotex's offer and its impact on Eli Lilly as part of my assessment of the factors enumerated at subsection 400(3) of the *Rules*.

[52] Certainly, Apotex was at all times able to settle the Competition Counterclaim independently of the main action. Contrary to the usual counterclaim seeking a declaration of invalidity which relies basically on the same evidence and the same arguments that are raised in the defence of invalidity, the Competition Counterclaim instituted by Apotex against Eli Lilly and Shionogi was based on a completely different statutory regime that had nothing to do with the *Patent Act*, RSC 1985, c P-4 *per se* (see also my reasons with respect to the defence of set-off, particularly paras 644 to 645). There is no evidence before me that Apotex ever attempted to settle this proceeding independently of the main action. This could even have been done without Eli Lilly's consent, as all that was required is a discontinuance with costs.[12]

[53] Apotex cannot pass on its duty to pay the additional costs due to Shionogi pursuant to Rule 420, nor can it delay the assessment and payment of the costs relating to the Competition Counterclaim by unilaterally choosing to link the settlement of that proceeding to the settlement of the main action.

[12] Using the approach adopted with respect to Shionogi, it appears that, as of April 4, 2008, the disbursements and taxable fees of Eli Lilly would have been less than $30,000.00.

[54] The Court, on the facts of this matter, is simply not prepared to exercise its discretion to issue the order sought by Apotex.

[55] Pursuant to my judgment on the merits of the Competition Counterclaim, both defendants were successful and were granted their costs. Apotex has not persuaded me that there is any valid reason to exercise my discretion to reduce the amount of the costs already granted to Eli Lilly or to deny it the immediate payment of these costs.

[56] Eli Lilly's disbursements with respect to the Competition Counterclaim have been agreed upon ($318,666.60). Its taxable fees, as per my original directions, were agreed to amount to $145,444.00.

II. The Main Action

[57] As mentioned, this action raises very different questions. In my judgment, I noted that, for a variety of reasons, there was no doubt in my mind that an elevated award of costs was appropriate. What was not clear to me at the time was exactly what the award should be. Thus, I decided to give the parties an opportunity to make further representations only as to the amount of costs.

[58] Although I did request some specific information, like a ballpark figure of the costs assessed using Column V of Tariff B and of the solicitor-client costs in relation to certain

services, I made no ruling that the award to be made would indeed be calculated on that basis. As I said, this information was sought to give the Court a better understanding of actual amounts involved in such scenarios.

[59] During the various hearings that followed, I requested even more information from the parties. Although not all the figures provided were agreed upon, they still have enabled me to finalize my assessment with respect to the costs due for the period ending on April 4, 2008.

[60] As usual, counsel made extensive submissions which were all considered in detail although it will not be necessary for me to discuss them thoroughly given the course of action I have chosen to take.

[61] I agree with Apotex that the Court cannot properly assess the costs to be paid for the period after April 4, 2008 because of the two written offers of settlement it has made.

[62] I have already described the offer of April 4, 2008. On June 14, 2008, Apotex made another written offer, this time applicable only to the main action and more particularly to its challenge to the validity of the eight patents at issue. At that time, "Apotex offered to withdraw its invalidity allegations in exchange for Lilly agreeing to a stipulated reduction in any monetary award that might be made at the reference following infringement should Lilly succeed on liability."[13]

[13] Paragraph 5 of Apotex's supplemental written submissions regarding costs. I note, however, that by that date most (if not all) the evidence with respect to these allegations had been presented.

[63] It is not necessary at this stage to further discuss whether the April 4, 2008 offer triggers the application of Rule 420 of the *Rules* or should only be considered, like the June 14, 2008 offer, as part of the assessment pursuant to subsection 400(3).

[64] At this stage, despite the affidavit evidence filed by Eli Lilly, the Court is not in a position to assess whether, as Dr. Norman swore, it is extremely unlikely that the quantum awarded to Eli Lilly will be less than $35 million, especially considering the applicable interest (between 1997 and 2008).

[65] Although the parties have some means to determine what the sales of cefaclor were during the applicable period of time, the fact remains that it is difficult to estimate a quantum at this stage.

[66] The goal behind subsection 420(3) is that a party to whom an offer is made must be in a position to fully assess it before the start of the trial. This normally implies that one has in had all the information to make a considered decision. When discoveries on the issues relating to quantum have not yet taken place and a party has yet to be appraised of all the arguments raised by the other side,[14] this goal is not really achieved. Certainly, in the context of bifurcated action, the application of Rule 420 can be difficult and will require more judicial consideration.

[14] Even if the innovator elects to claim its profits.

[67] In any event, at this stage the Court should not comment on quantum; this is an issue for adjudication by another decision maker.

[68] Thus, I am satisfied that the assessment of the costs payable after April 4, 2008 should be made only after a definite quantum has been established. The parties are nevertheless directed to further review the issue of Apotex's disbursements after April 4, 2008 in order to determine the exact portion of the agreed disbursements relating to the main action and to advise the Court of the result.

[69] That said, the Court can now deal with the disbursements and fees for the pre-April 4, 2008 period.

[70] Apotex shall pay forthwith the agreed amount of $879,929.60[15] for Eli Lilly's disbursements incurred during that period.

[71] After considering the various arguments with respect to the amount of the fees, it became clear that it is impossible to pinpoint exactly the amounts attributable to the various activities referred to in my reasons. I am now convinced that it is not an appropriate way to quantify the fees.

[15] Amounts agreed by the parties were $899,049.60 for all matters as of April 4, 2008, less $19,120.00 incurred solely with respect to the Competition Counterclaim.

[72] It is also clear to me that a calculation of the fees on the basis of Tariff B, even Column V, is not appropriate when one properly considers all the factors listed in subsection 400(3) of the *Rules*.

[73] I have already said that there was (and still is) no good reason for me to grant full solicitor-client fees in this action. That is not to say, however, that like in other jurisdictions and what was done recently by my colleague, Justice Roger Hughes, in *Air Canada v Toronto Port Authority*, 2010 FC 1335, [2011] FCJ no 1 (QL) and other colleagues before[16] and since then, the Court should not have regard to the actual fees paid by the successful party to determine the appropriate level of the fees to be adjudged.

[74] After careful consideration, I am satisfied that the fees for the pre-April 4, 2008 period should be set at $675,000.00 (about 25% of the estimated $2,724,000.00 paid during that period with respect to the main action alone).

[16] See *Consorzio del Prosciutto di Parma v Maple Leaf Meats Inc*, 2002 FCA 417, [2002] FCJ no 1504 (QL).

THIS COURT ORDERS that:

1. Apotex shall pay forthwith the following:
    a. To Shionogi, a lump sum of $519,000.00 plus the full amount of disbursements agreed to between the parties;
    b. To Eli Lilly:
        i. An all inclusive lump sum of $464,110.60 for costs in the Competition Counterclaim, and;
        ii. An all inclusive lump sum of $1,554,929.60 for costs in the main action for the period ending April 4, 2008;

2. The Court retains jurisdiction to assess, in a subsequent order and after a final quantum has been fixed with respect to the infringement referred to in my judgment dated October 1, 2009, the costs for the period after April 4, 2008.

"Johanne Gauthier"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1321-97
STYLE OF CAUSE:	ELI LILLY AND COMPANY AND ELI LILLY CANADA INC. v APOTEX INC. AND BETWEEN: APOTEX INC. v ELI LILLY AND COMPANY AND ELI LILLY CANADA INC. AND SHIONOGI & CO. LTD.
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	THE TRIAL STARTED ON APRIL 21, 2008 AND CONTINUED, WITH VARIOUS INTERRUPTIONS, UNTIL NOVEMBER 13, 2008 WITH FINAL REPRESENTATIONS BEING HEARD ON DECEMBER 9, 2008.
REASONS FOR ORDER AND ORDER AS TO COSTS:	GAUTHIER J.
DATED:	OCTOBER 5, 2011

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