

Federal Court



Cour fédérale

**Date: 20111122**

**Docket: T-152-10**

**Citation: 2011 FC 1345**

**Ottawa, Ontario, November 22, 2011**

**PRESENT: The Honourable Mr. Justice de Montigny**

**BETWEEN:**

**CANADIAN GENERIC PHARMACEUTICAL  
ASSOCIATION**

**Applicant**

**and**

**THE MINISTER OF HEALTH AND  
GLAXOSMITHKLINE INC.**

**Respondents**

**REASONS FOR ORDER AND ORDER**

[1] On April 15, 2011, I wholly dismissed the appeal brought by the Canadian Generic Pharmaceutical Association (“CGPA”) from the Order of Prothonotary Lafrenière dismissing CGPA’s application for lack of standing. I also awarded costs to GlaxoSmithKline Inc. (“GSK”) and the Minister of Health.

[2] GSK seeks an order for a lump sum award of costs on a substantial indemnity basis, as the parties have not been able to agree as to how costs should be apportioned. It requests that costs be

fixed in the amount of \$20,000 (approximately 75% of its claimed actual fees), and that it be given complete recovery of its disbursements in the amount of \$2,554.43, for a total award of \$22,554.43.

[3] As for the Minister of Health, she did not seek her costs on the motion before the Prothonotary. She now asks for costs in the amount of \$2,656.50, calculated in accordance with Column III of Tariff B of the *Federal Courts Rules*, SOR/98-106 [*Rules*], on the basis that the appeal was unnecessary.

[4] Rule 400(1) gives the Court discretion over costs. Rule 400(3) sets out a non-exhaustive list of factors that the Court may consider when determining costs. Rule 407 states that unless the Court orders otherwise, party-and-party costs are to be assessed in accordance with Column III of Tariff B. The rationale behind the Tariff is that costs are not intended to fully compensate a successful party for the costs incurred in a proceeding. The Tariff represents a compromise between compensating a successful party and not unduly burdening an unsuccessful party (*Apotex Inc v Wellcome Foundation Ltd.* (1998), 159 FTR 233 (FCTD), aff'd (2001) 199 FTR 320 (FCA)).

[5] It is trite law that the Court's discretion to award amounts in excess of the Tariff is the exception and should not be exercised lightly. Costs on a solicitor-client scale are rarely awarded and even in exceptional cases should neither be punitive nor extravagant.

[6] Counsel for GSK submits that CGPA's application was completely without merit as it was held, both at first instance and on appeal, that it was not directly affected and that there was no evidence that it or any of its member generic manufacturers intended to make a drug submission for

the drug the listing of which (on the Register of Innovative Drugs) it was challenging. It is also contended that both parties were represented by experienced counsel, as the issues raised were complex and involved legal provisions which have been given little judicial consideration. Finally, GSK argued that they were successful both before the Prothonotary and in the *de novo* hearing before me.

[7] This is far from sufficient to award costs in excess of the Tariff. An award of substantial indemnity costs is typically ordered when there has been reprehensible, scandalous or outrageous conduct. It is interesting to note that in *Air Canada v Toronto Port Authority*, 2010 FC 1335 [*Air Canada*], upon which GSK relies for its claim, the Court found that the applicant was an aggressive litigator, threatening interlocutory injunction proceedings until an early hearing date could be fixed. The Court also found that the applicant was aware that the Court had no jurisdiction to deal with the matters at hand, as evidenced by the shifting issues it raised from time to time, including at the hearing itself. Finally, the Court also took into account that the applicant made essentially irrelevant allegations as to misconduct and anti-competitive activity of the respondents.

[8] None of these factors which motivated the Court to award increased costs in *Air Canada*, above, are present in this case. The conduct of the litigators representing CGPA was responsible and irreproachable. Far from being vexatious or taken in bad faith, the proceeding undertaken by CGPA could not be said to be entirely baseless, and GSK indeed acknowledged that the issues raised in the motion and the appeal were complex and had not previously been settled. Finally, CGPA had a genuine interest in bringing this proceeding, as there was evidence that it would be

unlikely that any generic company would individually bring such a challenge. While the Court rejected that argument, it was clearly not improper to make it.

[9] In light of the foregoing, I am not prepared to deviate from the Tariff, and more particularly from Column III of the Tariff. It is not one of those cases where the conduct of a party or its counsel deserves sanctions. When I granted costs to the Respondents in my original Reasons without any further elaboration, it was implicit that they were to be calculated in the usual manner in accordance with Column III of Tariff B. None of the arguments put forward by GSK have persuaded me to alter my decision in that respect.

[10] Costs and disbursements are therefore fixed in the amount of \$5,999.43 (\$3,445 for costs and \$2,554.43 for disbursements) to GSK and \$2,656.50 (\$2,600 for costs and \$56.50 for disbursements) to the Minister.

**ORDER**

**THIS COURT ORDERS that** costs in this matter be granted to GSK in the amount of \$5,999.43, and to the Minister in the amount of \$2,656.50.

"Yves de Montigny"

---

Judge

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

**DOCKET:** T-152-10

**STYLE OF CAUSE:** CANADIAN GENERIC PHARMACEUTICAL  
ASSOCIATION v. THE MINISTER OF HEALTH  
AND GLAXOSMITHKLINE INC.

**WRITTEN SUBMISSIONS CONSIDERED AT OTTAWA, ONTARIO**

**REASONS FOR ORDER  
AND ORDER:** de Montigny J.

**DATED:** November 22, 2011

**APPEARANCES:**

Jonathan Stainsby FOR THE APPLICANT  
Mark Edward Davis  
Julian Worsley

Mr. Eric Peterson FOR THE RESPONDENT MINISTER

Mr. Jason Markwell FOR THE RESPONDENT GSK INC.  
Ms. Amy E. Grenon

**SOLICITORS OF RECORD:**

Heenan Blaikie LLP FOR THE APPLICANT  
Toronto, Ontario

Myles J. Kirvan FOR THE RESPONDENT MINISTER  
Deputy Attorney General of Canada  
Toronto, Ontario

Norton Rose OR LLP FOR THE RESPONDENT GSK INC.  
Toronto, Ontario