Federal Court of Appeal | Cour d'appel fédérale

Date: 20210723

Docket: A-474-19

Citation: 2021 FCA 149

CORAM: **WEBB J.A.**
NEAR J.A.
BOIVIN J.A.

BETWEEN:

APOTEX INC.

Appellant

and

ELI LILLY AND COMPANY and
ELI LILLY CANADA INC.

Respondents

Heard by online video conference hosted by the Registry on April 29, 2021.

Judgment delivered at Ottawa, Ontario, on July 23, 2021.

REASONS FOR JUDGMENT BY: BOIVIN J.A.

CONCURRED IN BY: WEBB J.A.
NEAR J.A.

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REASONS FOR JUDGMENT

BOIVIN J.A.

I. Introduction

[1] The appellant, Apotex Inc. (Apotex) appeals from the judgment of Zinn J. of the Federal Court dated December 10, 2019 (2019 FC 1463) (Confidential Judgment and Reasons issued on November 20, 2019). This appeal is the second brought to our Court in connection with the

quantification of damages sought by the respondents Eli Lilly and Company (Lilly US) and Eli Lilly Canada Inc. (Lilly Canada) (collectively referred to as "Lilly"). Specifically, this appeal concerns the computation of an interest award regarding Lilly's damages.

II. Background

[2] Nearly 25 years ago, on June 18, 1997, Lilly commenced an action for patent infringement, claiming that their rights under eight patents were infringed when Apotex imported bulk cefaclor for use in Apo-cefaclor, an antibiotic used to treat bacterial infections. Lilly US owns these patents and Lilly Canada, a wholly-owned subsidiary of Lilly US, has rights to these patents under a license issued by Lilly US. Apotex sold Apo-cefaclor in Canada after January 1997.

[3] Approximately 12 years later, on October 1, 2009, following a lengthy trial, Gauthier J. of the Federal Court (as she then was) rendered the liability judgment and held that at least one valid claim in each of the eight patents owned by Lilly US had been infringed by Apotex (*Eli Lilly and Co. v. Apotex Inc.*, 2009 FC 991; aff'd 2010 FCA 240; leave to appeal to SCC refused, [2010] SCCA No 434). Gauthier J. was subsequently appointed to the Federal Court of Appeal in 2011 and Zinn J. (the Federal Court Judge) was assigned to hear the reference stage and to quantify Lilly's damages.

[4] With respect to the remedy for infringement, Lilly elected damages under subsection 55(1) of the *Patent Act*, R.S.C. 1985, c. P-4 (*Patent Act*), which provides that "[a] person who infringes a patent is liable to the patentee…for all damage sustained…by reason of the

infringement." (*Eli Lilly and Company v. Apotex Inc.*, 2014 FC 1254, [2015] 4 FCR 601 at para. 4 (First Damages Judgment)). Pursuant to subsection 55(1) of the *Patent Act*, the Federal Court Judge found that Lilly had suffered damages on account of loss of profits over 5 years. He therefore awarded damages for lost profits. These damages also included an award of compound prejudgment interest as damages for the "time value" of the lost profits over the 17 years prior to the issuance of the damages judgment. Relying on the Supreme Court of Canada's decision in *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601 [*Bank of America*], the Federal Court Judge reasoned that an award of damages recognizing the time value of the lost profits over so many years was required in order for Lilly to receive compensation for "all damage sustained". On this basis, the Federal Court Judge determined that compound interest reflected the time value of money, unlike simple interest. An award of compound interest was accordingly included as part of the damage award to compensate Lilly for its lost opportunity as a result of Apotex's infringement of the patents.

[5] Apotex appealed the Federal Court Judge's First Damages Judgment to this Court, and the appeal was dismissed, except for the portion of the award dealing with damages in the form of interest - *i.e.* compound interest (*Apotex Inc. v. Eli Lilly and Company*, 2018 FCA 217, 161 C.P.R. (4th) 411 (leave to appeal to SCC refused May 23, 2019, [2019] SCCA No 75) [*2018 FCA 217*]. Regarding the issue of compound interest, our Court found that the Federal Court Judge erred by holding that "in today's world, there is a presumption that a plaintiff …would have generated compound interest on the funds otherwise owed to it" (*2018 FCA 217* at para. 27). Our Court recalled that neither Canadian law, nor other common law jurisdictions, contemplate a general presumption regarding compound interest and "a loss of interest must be

proved in the same way as any other form of loss or damage." (*Ibid* at para. 158). Hence, our Court found that it was incumbent upon the Federal Court Judge to evaluate whether sufficient evidence existed to satisfy the burden of proof in this regard. Our Court also concluded that, the basis on which the Federal Court Judge arrived at the annual rate of profit on sales of Lilly Canada as the rate applicable to all damages, was not readily apparent (*Ibid* at paras. 161, 162). Our Court thus ordered that this distinct aspect of the award dealing with damages in the form of interest be remitted to the Federal Court Judge for reconsideration.

[6] The Federal Court Judge accordingly reconsidered his initial damage award. In doing so, he reached the same result and maintained his initial award of damages in the form of interest (2019 FC 1463) (Second Damages Judgment).

[7] Apotex now appeals the Second Damages Judgment and asks this Court to set aside the interest award maintained by the Federal Court Judge. For the reasons that follow, I would dismiss the appeal with costs.

III. The Judgment under Appeal: The Second Damages Judgment

[8] The Federal Court Judge reviewed the directions provided by our Court for the purpose of reconsidering his initial award of damages. From the outset, he examined the issue of Lilly's lost opportunity cost. The Federal Court Judge pointed out that the determination of the lost opportunity cost is made by reference to a hypothetical question, which is articulated as follows: "But for Apotex wrongfully depriving Lilly of profits from lost sales of cefaclor (totalling the Lost Profits), what could and would Lilly have done with the Lost Profits at the time when they

should have been received?" (Second Damages Judgment at para. 22). In seeking to answer this question, he stated that jurisprudence establishes that the real-world informs the hypothetical world - *i.e.* the but-for world. On this basis, the Federal Court Judge accepted the evidence led by Lilly that it would not have kept the Lost Profits without earning any return and that Lilly US's business model was to maximize return on investments and maximize return on revenue.

[9] More particularly, the Federal Court Judge examined Lilly's evidence of net sales and income before taxes. He accepted Lilly's expert evidence with respect to the range of profit margins for Lilly Canada and found that the Rate of Return - *i.e.* the interest rate - is the average of the annual rates of return. The Federal Court Judge also found that Lilly's Lost Profits never exceeded a certain percentage of its world-wide average annual profit, and hence concluded that the addition of the Lost Profits would have had a minimal impact on Lilly's business operations or profitability.

[10] Turning to the standard of proof in the but-for-world, the Federal Court Judge held that more than a mere statement, made without foundation, that the plaintiff (in this case Lilly) might have conducted itself in a particular manner is required. On this point, the Federal Court Judge recalled Justice Snider's comments in *Sanofi-Aventis Canada Inc. v. Teva Canada Limited*, 2012 FC 552, 410 F.T.R. 1 [*Ramipril FC*], affirmed by this Court (2014 FCA 67, 126 C.P.R. (4th) 1) [*Ramipril FCA*], that a claim for losses flowing from being unable to use profits requires that the "plaintiff provides clear and non-speculative evidence of a lost opportunity." (Second Damages Judgment at paras. 38-39). However, he was of the view that the comments made in *Ramipril FC* do not rule out recovery of lost opportunity damages in all cases other than those where a

specific lost opportunity is proven because such a requirement in the but-for-world "would result in a plaintiff failing to recover damages in nearly every case." (*Ibid* at para. 40). The Federal Court Judge further explained that, in the but-for-world, the plaintiff will typically "on evidence … show, on the balance of probabilities, what the result would have been if, at that time, the Lost Profits had been pooled with the other corporate profits and invested or spent together." (*Ibid* at para. 40).

[11] Turning to the present circumstances, the Federal Court Judge concluded that in order to establish a claim for interest as damages, Lilly must establish on a balance of probabilities how they could have and would have used the additional profits that would have been earned from the lost sales of cefaclor from 1997 to 2001 through to the date of judgment. He adopted the "could-have" and "would-have" language from our Court's decision in *Pfizer Canada Inc. v. Teva Canada Limited*, 2016 FCA 161, 483 N.R. 275 [*Pfizer v. Teva*] which involved a claim for damages under section 8 of the *Patented Medicines (Notice of Compliance) Regulations*, S.O.R. 93-133, while also acknowledging that "quantifying…damage in a hypothetical world cannot be exact." (Second Damages Judgment at para. 48). Specifically, the Federal Court Judge indicated that the "could-have" component is satisfied if Lilly demonstrates that nothing made it impossible for it to be in the position to generate the Rate of Return on the Lost Profits. As for the "would-have" component, it is satisfied if Lilly demonstrates that it would have generated the Rate of Return on the Lost Profits. The Federal Court Judge added that the "could-have" and "would-have" components must be examined separately and that proof of one does not entail proof of the other.

[12] The Federal Court Judge went on to consider the perspective from which the "could-have and would-have" components have to be examined, focusing on what Lilly could and would have done with the Lost Profits had they been received when they ought to have been. In this respect, he found the parties' expert evidence "unhelpful" given that it focussed on how the Lost Profits could have and would have been used as if these profits were a separate sum set apart from Lilly's other profits, as opposed to a scenario considering what Lilly could and would have done had it received the Lost Profits at the same time as its other profits.

[13] In examining what Lilly "could have" done with its profits, the Federal Court Judge accepted the evidence from Lilly US's Director of Finance, Brendan Crowley, that the Lost Profits would have been gathered together with Lilly's other profits into the pool of resources available to the company to make investments. Upon reviewing Lilly's financial documents and all of the uses to which Lilly put the profits it received in the real-world, the Federal Court Judge concluded that most probably the Lost Profits could have been spread among those same uses. This led the Federal Court Judge to conclude that these profits could have generated, at a minimum, the Rate of Return as this average rate takes into account what he referred to as Lilly's successes and failures. As such, the Federal Court Judge held that Lilly could have generated the Rate of Return on the Lost Profits and there was nothing that made it impossible to do so. (Second Damages Judgment at paras. 61-62).

[14] The Federal Court Judge then examined what Lilly "would have" done with the Lost Profits had they been received when they ought to have been. He found that the additional profits Lilly would have earned if Apotex had not infringed the patent *would* have been gathered

together with all the other profits, and that decisions about their use would have been based on the global amount of profits, not the specific revenue generated from the additional sales of cefaclor. He accepted the evidence put forward by Lilly's expert, Dr. Foerster, a Chartered Financial Analyst and Professor of Finance, that the Lost Profits would have been invested in the business. The Federal Court Judge concluded that, because the Lost Profits represented a very slight increase in Lilly's profits per year from 1997 to 2001, the past was good evidence for Lilly's "but-for world". Hence, because Lilly generated at least the Rate of Return on its received pool of profits, the Federal Court Judge determined that it would have done the same if those profits were increased slightly by the Lost Profits.

[15] Furthermore, in discussing the Rate of Return, the Federal Court Judge explained that the opportunity lost was "by-and-large an opportunity lost to Lilly Canada" and that the Rate of Return selected represented the profit margin of Lilly Canada in the period under consideration. He further explained that the Rate of Return was the minimum average profit rate of Lilly and therefore represented the average return for Lilly Canada, and that fixing an appropriate rate of interest is within the discretion of the trial judge (Second Damages Judgment at paras. 71-72).

[16] Lastly, the Federal Court Judge did not consider the tax consequences of the interest award as the issue was first raised at trial indirectly by Apotex and had not been pleaded. The Federal Court Judge found that there was no evidence from either party on the applicable tax rates, deductions or rebates and any analysis done by the Court would be speculative. As a result, the interest award in the Federal Court Judge's First Damages Judgment was maintained in his Second Damages Judgment.

IV. Issues on Appeal

[17] The only issue in this appeal is whether the Federal Court Judge made a reviewable error in his reconsideration of the award of interest described above.

V. Analysis

A. *Standard of Review*

[18] The standard of review applicable in this case is as described in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. The standard of review to be applied to questions of law is correctness. Findings of fact and inferences of fact are to be reviewed on the basis of palpable and overriding error which is a "highly deferential standard of review". The error must be obvious and go to the "very core of the outcome of the case" (*ADIR v. Apotex Inc.*, 2020 FCA 60, 172 C.P.R. (4th) 1 at paras. 71-73). Findings of mixed fact and law are to be reviewed on the same deferential standard unless an extricable legal error can be demonstrated. In that case, such an error is reviewed under the correctness standard.

B. *Causation and Mitigation*

[19] In this appeal, Apotex submits that the Federal Court Judge erred by failing to assess causation and that he further erred in not considering whether Lilly properly mitigated its damages.

[20] More particularly, with respect to causation, Apotex argues that the plaintiff must prove that the defendant's conduct *caused* the claimed loss and that the plaintiff could not have mitigated the loss. Apotex submits that, in the present case, the Federal Court Judge neither asked nor answered the following relevant causation question: "was Apotex's infringement, which resulted in lost profits on lost sales of cefaclor totaling approximately $31 million over the 1997-2000 period, a necessary cause of a claimed lost opportunity to invest approximately $31 million and to earn a return of more than $75 million by 2015?" (Apotex's Memorandum of Fact and Law at para. 46).

[21] In support of this argument, Apotex alleges that, during the relevant period, Lilly was in an incredibly strong financial position with excess funds and unused cash deposited at the bank earning only 2.5930% compounded interest. It follows, according to Apotex, that if Lilly otherwise had the money available to pursue an investment opportunity, then causation cannot be established. In other words, given that Lilly had vast quantities of excess cash, the absence of the $31 million in Lost Profits simply did not cause a lost opportunity to invest.

[22] The problem with Apotex's alleged error is that it is based on a lack of proof for a specific lost opportunity whereby the issue before the Federal Court Judge regarding the assessment of interest as damages was an issue of the "time value" of money, not a specific lost opportunity (First Damages Judgment at paras. 118-121).

[23] Be that as it may, Apotex relies on two cases for the principle that causation cannot be established if a plaintiff otherwise has the money available to pursue a lost investment

opportunity: *Mortgage Express v. Countrywide Surveyors Limited*, [2016] EWHC 1830 (Ch) at paras. 53-55 and *Bielanski v. Mundenchira*, 2019 ONSC 1162 at paras. 116-117. Yet, both of these cases deal with specific lost investment opportunities namely a lost opportunity to offer alternative loans and a lost opportunity to invest in condominium projects. These cases are therefore distinguishable from the case at bar. The damages award in this appeal concerns the general position that Lilly would have been in had it received the Lost Profits, in other words, its inability to generate income from the lost profits over the relevant time period. It is also noteworthy that in *2018 FCA 217*, at paras. 157 and 162, our Court expressly recognized that damage awards regarding compound interest may reflect the time value of money owed or be intended to compensate a specific opportunity lost.

[24] Here, there is no doubt that the Federal Court Judge understood that Lilly was claiming damages for the time value of money and not a specific lost opportunity (Second Damages Judgment at paras. 14-15). By definition, an award of compound interest is concerned with compensating for the lost opportunity cost of being able to use a sum of money over a certain time period (*Bank of America* at paras. 21-23) - in this case, more than 17 years. I am of the view that the Federal Court Judge properly addressed the causation issue. He asked the right question and correctly focused on what Lilly "could have" and "would have" done with the Lost Profits when they should have been received (*Pfizer v. Teva*).

[25] The Federal Court Judge likewise properly identified that the burden of proof fell on Lilly to establish, on the balance of probabilities, how they "could have" and "would have" used the Lost Profits at issue. The Federal Court Judge correctly identified that the damage award in this

case is comprised of two components: the Lost Profits and the opportunity Lilly lost to use those profits between the date when they ought to have been received and the date of judgment. There is accordingly no reviewable error in that regard either.

[26] As noted earlier, Apotex also submits that the Federal Court Judge erred by failing to address the issue of mitigation or by otherwise ignoring the fact that Lilly did not properly mitigate its damages. In this regard, it is recalled that the burden to establish the failure to mitigate falls on the defendant (Apotex) (*Apotex v. Canada*, 2017 FCA 73, 146 C.P.R. (4th) 93 at para. 153). First, the mitigation issue was not properly raised before the Federal Court Judge at the redetermination hearing (Reconsideration Hearing Transcript, Sept 19, 2019, Lilly's Compendium at Tabs 38 and 39), nor identified in Apotex's notice of appeal. Second, Apotex has submitted no evidence to this effect, thus leaving this Court in a position to evaluate bare assertions. In these circumstances, I find that the mitigation argument is not properly before our Court and I decline to address it.

C. *Appreciation of the Evidence and Rate of Return*

[27] In this appeal, Apotex further argues that the Federal Court Judge made a palpable and overriding error in his appreciation of the evidence. Specifically, it is argued that the Federal Court Judge erred by giving little weight to the evidence put forward by Apotex's expert, Mr. Harington.

[28] However trite, it is recalled that the Federal Court Judge is presumed to have examined all of the evidence (*Teva Canada Limited v. Novartis Pharmaceuticals Canada Inc.*, 2013 FCA

244, 451 N.R. 246 at para. 12; *Alcon Canada Inc. et al. v. Actavis Pharma Company et al*., 2015 FCA 191, [2015] F.C.J. No 1083 (QL) at para. 11). In the present case, the Federal Court Judge indeed considered Mr. Harington's evidence but preferred another witness testimony. Again, however trite, preferring one witness over another does not amount to an overriding and palpable error. Here, the Federal Court Judge found Mr. Harington's testimony unhelpful due to its focus on the lost profits as a "sum separate and apart" from Lilly's other profits (Second Damages Judgment at paras. 53-54). In reality, the Federal Court Judge gave both parties' expert opinions little weight as he found that they both approached the question of what Lilly would have done with its Lost Profits by assuming that all decisions had been made and that the use of the Lost Profits was being determined after the fact (*Ibid* at para. 64). It was open to the Federal Court Judge to prefer Lilly's fact witness evidence over Apotex's expert evidence in answering the question of what Lilly could have and would have done with its Lost Profits. It is not this Court's role to re-weigh evidence and substitute its own appreciation of the witnesses' testimonies (*Packers Plus Energy Services Inc. v. Essential Energy Services Ltd.,* 2019 FCA 96, 164 C.P.R. (4th) 191 at para. 33; *Eli Lilly and Company v. Apotex Inc.*, 2010 FCA 240, 409 N.R. 173 at para. 8).

[29] Apotex also contends that there is no logical connection between the Federal Court Judge's decision and the *basis* for his decision. Specifically, Apotex advances three main gaps in the Federal Court Judge's reasoning:

- There is no logical connection between the lost profits entering Lilly's "pool of resources" and being "spread among" all of Lilly's uses of money;

- There is no logical connection between the lost profits being “spread among” all of Lilly’s uses of money and earning a return equal to Lilly Canada’s profit margin, and;

- There is a lack of logical connection (and supporting evidence) rendering the reference judge’s decision irreconcilable with *Ramipril FC.*

[30] Apotex does not dispute that Lilly would not have done nothing with the Lost Profits. Nor does Apotex dispute that the money would have gone into Lilly’s available pool of resources. Rather, Apotex takes issue with what Lilly could and would have done with the Lost Profits after they entered Lilly’s pool of resources (Apotex’s Memorandum of Fact and Law at paras. 69, 75). In reality, Apotex’s allegations of lacking “logical connections” between the lost profits entering Lilly’s “pool of resources” and being “spread among” all of Lilly’s uses of money, amount to challenging the Federal Court Judge’s factual findings. Indeed, the Federal Court Judge accepted the evidence of Brendan Crowley that the money would not have been put under Lilly’s “corporate mattress” but that instead Lilly would have maximized its return on investment and revenue. This is a finding of fact. The Federal Court Judge accepted this evidence because he determined that “it was within the scope of Mr. Crowley’s duties to know it and because it accords with common sense” (Second Damages Judgment at paras. 27 and 55). Likewise, the Federal Court Judge accepted Mr. Crowley’s evidence that the additional Lost Profits would have been put into the pool of resources available to Lilly to make investments. Upon reviewing the financial documents, the Federal Court Judge concluded that “it is most probable that had the Lost Profits been received when [they] should have, [they] would [have been] spread among those same uses.” (*Ibid* at para. 56). These findings are based on the

evidentiary record, which was fully considered, and they are subject to deference. Apotex has failed to establish a palpable and overriding error.

[31] Apotex also submits that there is no logical connection between the Federal Court Judge's finding that the Lost Profits would have been "spread among" all of Lilly's uses of money and the conclusion that doing so would earn a return equal to Lilly Canada's profit margin (Apotex's Memorandum of Fact and Law at paras. 77-80, 85). Apotex thus disputes that Lilly Canada's profit margin reflects the return that Lilly could or would have generated by spreading the lost profits across all of Lilly's historical uses of money. In other words, Apotex argues that the Federal Court Judge's finding of "spreading" lost profits across all disparate uses of Lilly's pool of resources renders it impossible to determine a consistent rate of return for lost investment opportunities (Apotex's Memorandum of Fact and Law at paras. 76-80). Apotex accordingly disagrees with the Federal Court Judge's finding that the documentary financial evidence from the real-world informs how Lilly could have and would have used these additional funds in the but-for world (Apotex's Memorandum of Fact and Law at paras. 80-82).

[32] Yet, it was open to the Federal Court Judge, after considering several different rates, to settle on a retrospective rate of return that reflects all the historical uses of Lilly's funds. For example, Dr. Foerster recognized that a compounded rate equivalent to Lilly Canada's profit margins would be a "viable scenario" as the actual profit margins are actual returns (Foerster Direct at pp. 62-63, Appeal Book, Vol. 54/Tab 231/015773). He also opined that it would not have been a realistic option for Lilly to invest at a bank rate as compared to making money through further investments in its business (Foerster Direct at pp. 32-33, Appeal Book, Vol.

54/Tab 231/015766). It follows that, as contended by Lilly, on the basis of the record, "it was entirely reasonable for [the Federal Court Judge] to conclude as a matter of fact that compound pre-judgment interest at a rate based on historical uses and results, was necessary, as an element of compensation, to properly compensate Lilly for its lost profits in view of the passage of time and the time-value of money." (Lilly's Memorandum of Fact and Law at para. 91). In so doing, the Federal Court Judge reached a conclusion consistent with the directions of this Court. I am also satisfied that he provided a proper explanation in support of his decision based on the evidence. I see no palpable and overriding error in the Federal Court Judge's appreciation of the evidence.

[33] Along the same lines, Apotex contends that the Federal Court Judge erred in failing to properly apply the *Ramipril FC* framework. However, the parallels Apotex is asking our Court to draw between *Ramipril FC* and the case at bar are misconceived. For example, in *Ramipril FC* there was no argument relating to damages for the time value of money. Rather, Teva was seeking compensation for the lost opportunity to reinvest profits "towards building more value into Teva, for example, through investing in research and development and litigation" and the evidence to establish this lost opportunity was found to be speculative (*Ramipril FC* at paras. 288-292). Further, Teva was not only requesting prejudgment interest but also damages for indirect loss (*Ramipril FC* at paras. 283-300). As emphasized earlier, the Federal Court Judge understood that Lilly was seeking damages with respect to the time value of money and he found the evidence - as opposed to the evidence tendered in *Ramipril FC* - not to be speculative. Specifically, the Federal Court Judge accepted that Lilly could and would have spread the Lost Profits in its pool of resources to invest in its business, generating a return on these profits

similar to historical returns (Second Damages Decision at paras. 55-69). Thus, the *Ramipril FC* decision is distinguishable from the case at bar in a number of aspects. It follows that the parallels Apotex is also trying to establish with respect to *Ramipril FCA* are equally flawed. Apotex's argument fails.

[34] Finally, Apotex submits that the Federal Court Judge failed to consider the impact of income tax on the award. Essentially, Apotex argues that annual tax rates can be estimated from the financial statements in the record and, as such, our Court can direct Mr. Harington to re-compute the interest award by applying Lilly Canada's estimated tax rate (Apotex's Memorandum of Fact and Law at paras. 103-105). In this regard, it bears emphasizing that tax implications in this context are quite complex and likely require sufficient evidence led by the parties. Here the evidence on record does not include information about Lilly's actual tax rates for all of the relevant taxation years or any calculations regarding the amount of gross-up (Harington Direct at pp. 84, 92, 93 Appeal Book Vol. 54/Tab 235/016043/016045/016046). At the hearing, Apotex admitted to a potential lack of evidence with respect to the taxation issue. In the circumstances, given this lack of evidence on record regarding the impact of taxation on the interest award, I agree with the Federal Court Judge that any finding in this regard would have been based on speculation (Second Damages Decision at para. 77). Therefore, the Federal Court Judge did not err in deciding as he did.

VI. Conclusion

[35] For all of these reasons, I would dismiss the appeal with costs.

"Richard Boivin"
J.A.

"I agree.
Wyman W. Webb J.A."

"I agree.
D. G. Near J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-474-19
STYLE OF CAUSE:	APOTEX INC. v. ELI LILLY AND COMPANY and ELI LILLY CANADA INC.
PLACE OF HEARING:	BY ONLINE VIDEO CONFERENCE
DATE OF HEARING:	APRIL 29, 2021
REASONS FOR JUDGMENT BY:	BOIVIN J.A.
CONCURRED IN BY:	WEBB J.A. NEAR J.A.
DATED:	JULY 23, 2021

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