

Federal Court



Cour fédérale

Date: 20160725

Docket: T-1693-14

Citation: 2016 FC 870

St. John's, Newfoundland and Labrador, July 25, 2016

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

**GILEAD SCIENCES, INC. AND
GILEAD SCIENCES CANADA, INC.**

Applicants

and

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

Respondents

ORDER AND REASONS

[1] Apotex Inc. (“Apotex”) brought a motion to dismiss, in part, the within application for a prohibition order pursuant to the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133, (the “Prohibition Proceeding”). The motion was granted with costs, by the Confidential Judgment issued on February 18, 2016. The Confidential Reasons for Judgment were issued on February 19, 2016.

[2] The parties were at liberty to resolve the issue of costs or file brief submissions on costs within two weeks of the issuance of the Confidential Judgment.

[3] A Notice of Appeal in respect of the Confidential Judgment was filed on February 29, 2016.

[4] By letter dated March 3, 2016, the parties sought an extension to serve and file costs submissions.

[5] The Public Judgment and Reasons for Judgment were issued on March 8, 2016.

[6] The parties sought, by letter dated March 17, 2016, another extension of time to serve and file costs submissions. By Oral Directions dated March 18, 2016, it was proposed that the matter of costs be deferred pending disposition of the appeal from the February 18, 2016 Judgment.

[7] By letter dated March 23, 2016, the parties informed this Court of their agreement to defer the issue of costs pending the disposition of the appeal.

[8] On May 4, 2016, the Federal Court of Appeal dismissed the appeal by Gilead Sciences, Inc. and Gilead Sciences Canada, Inc. (“Gilead”); see the decision in *Gilead Sciences, Inc. v. Apotex Inc.*, 2016 FCA 140.

[9] By Oral Direction issued on May 13, 2016, the parties were requested to file brief submissions on costs by May 20, 2016.

[10] Gilead filed costs submissions on May 20, 2016. Apotex filed submissions and a draft Bill of Costs on May 20, 2016.

[11] Counsel for Gilead were asked by Oral Direction dated May 30, 2016, to advise of their position on the disbursements claimed by Apotex and to provide a draft Bill of Costs by June 6, 2016.

[12] Gilead served and filed further submissions, including a draft Bill of Costs, on June 6, 2016.

[13] Apotex was invited, by Oral Direction issued on July 11, 2016 to serve and file, on or before July 18, 2016, evidence and submissions about the following disbursements claimed in their draft Bill of Costs:

- the Copies;
- the Telephone (long distance/cellular); and
- the Computer Searches - Infotrieve.

[14] The further submissions were invited in response to certain objections raised by Gilead about the reasonableness of the disbursements for which Apotex seeks recovery.

[15] Apotex filed further submissions and evidence on July 18, 2016.

[16] Apotex requests costs in the amount of \$68,401.15 inclusive of tax and disbursements. It calculated its counsel fees at the high end of Column V of Tariff B, *Federal Courts Rules*, SOR/98-106 (the “Rules”).

[17] Gilead submits that costs should be awarded in accordance with Column III of Tariff B in the amount of \$26, 888.35.

[18] I refer to Rule 400(1) of the Rules which confers absolute discretion upon the Court over the award of costs.

[19] I agree with Apotex’s submissions that counsel fees at the high end of Column V of Tariff B are appropriate considering the factors set in Rule 400(3). I refer, in particular, to Rules 400(3)(a), (c), (g) and (i) which provide as follows:

400. (3) In exercising its discretion under subsection (1), the Court may consider

(a) the result of the proceeding;

...

(c) the importance and

400. (3) Dans l’exercice de son pouvoir discrétionnaire en application du paragraphe (1), la Cour peut tenir compte de l’un ou l’autre des facteurs suivants :

a) le résultat de l’instance;

...

c) l’importance et la complexité des questions en

complexity of the issues;	litige;
...	...
(g) the amount of work;	g) la charge de travail;
...	...
(i) any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding;	i) la conduite d'une partie qui a eu pour effet d'abrèger ou de prolonger inutilement la durée de l'instance;

[20] Apotex was successful on all grounds in this motion in both the Federal Court and the Federal Court of Appeal.

[21] According to the motion materials filed by Gilead, the issues were important and complex. Gilead raised many arguments, all of which that were addressed in the Confidential Reasons for Judgment issued on February 19, 2016. The Federal Court of Appeal was economical in its judgment dismissing the appeal from the Confidential Judgment.

[22] Again, I refer to the lengthy briefs filed by Gilead. Although the reply brief filed by Apotex was significantly shorter than the materials filed by Gilead, that does not mean less work by Apotex was involved.

[23] There is no evidence that Apotex's motion had a negative impact upon the duration of the Prohibition Proceeding.

[24] Gilead argues that the fees claimed for the work of Dr. Paul Grieco, an expert witness retained by Apotex, should be reduced from \$25,154.03 to \$10,000.00. It submits that Dr. Grieco's evidence was of minimal assistance in the disposition of the motion because there was no factual dispute about the claims in the 619 Patent.

[25] In my opinion, this argument is without merit. The evidence of Dr. Grieco was relevant to this motion and was of assistance to this Court. This is illustrated by the reference to his affidavit at paragraph 48 of the both the Confidential and Public Reasons for Judgment.

[26] I note that, in responding to this motion, Gilead filed affidavits from four experts. In my opinion, Gilead cannot now complain about the usefulness and cost of Apotex's expert evidence when it relied, itself, upon the evidence of multiple expert witnesses.

[27] I have read Apotex's submissions dated July 18, 2016 and I am satisfied that the disbursements claimed for photocopies and computer searches are reasonable.

[28] Finally, Apotex, in its July 18, 2016 submissions, said that \$378.78 was spent on long distance telephone calls to experts ultimately not engaged to give evidence. It accepted that the claim for telephone charges should be reduced to \$454.21. Accordingly, this disbursement shall be reduced to \$454.21.

[29] In the result, Apotex shall have its costs in the amount of \$67,973.13 inclusive of tax and disbursements.

THIS COURT ORDERS THAT Apotex shall have its costs in the amount of \$67,973.13 inclusive of tax and disbursements.

“E. Heneghan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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STYLE OF CAUSE: GILEAD SCIENCES, INC. AND GILEAD SCIENCES
CANADA, INC. v THE MINISTER OF HEALTH AND
APOTEX INC.

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: AUGUST 18, 2015

ORDER AND REASONS: HENEGHAN J.

DATED: JULY 25, 2016

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