

Federal Court



Cour fédérale

Date: 20161102

Docket: T-366-14

Citation: 2016 FC 1218

Ottawa, Ontario, November 2, 2016

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

ELI LILLY CANADA INC.

Applicant

and

**HOSPIRA HEALTHCARE CORPORATION
AND THE MINISTER OF HEALTH**

Respondents

and

**TAKEDA PHARMACEUTICAL COMPANY
LIMITED**

Respondent Patentee

SUPPLEMENTARY JUDGMENT AND REASONS

[1] Hospira Healthcare Corporation (Hospira) brings this motion seeking directions concerning the assessment of its costs in this proceeding. It requests a lump sum award of

\$576,001.12 plus interest of 5% per annum from the date of my decision. This figure is made up of \$202,412.00 for legal costs and \$373,589.12 for disbursements. Of the disbursements, \$255,968.42 is made up of fees charged by five experts. In the alternative, Hospira seeks directions from me that will facilitate the assessment of its costs entitlement at a taxation.

[2] Eli Lilly Canada Inc. (Lilly) suggests that a more appropriate lump sum would be \$317,032.42 plus interest. This figure is obtained by recognizing an allowance for legal costs of \$139,556.08 and disbursements of \$283,709.89 subject to a 25% reduction for Hospira's "unsubstantiated" allegations of fraud made under Section 53 of the Patent Act, RSC 1985, c P - 4.

[3] Takeda Pharmaceutical Company Limited relies on Lilly's arguments as to quantum and argues that, as a mandatory responding party with a truncated role in the application, it should not bear any cost consequences. Takeda also points out that Hospira made no explicit claim to costs against it and should not be allowed to resile from that position.

[4] I agree with the parties that it is preferable to resolve the outstanding issue of costs with a lump sum award.

[5] On the issue of a reduction of costs for unproven Section 53 allegations, I agree with Hospira that this was an alternative allegation in the NOA that was contingent on Lilly's adoption of a position it did not assert. There was, accordingly, no live Section 53 issue

presented to the Court for determination. In the result, the award for costs will not reflect any reduction on this point.

[6] I agree with counsel for Hospira that this proceeding was complex but that is the very reason for an award at the high end of Column IV. It is not a basis for a further increase. The usual practise is to allow for two counsel at the hearing and not three, as claimed here. The fact that the unsuccessful party may employ three or more counsel at various stages of the case is of no particular relevance. An award of costs is not intended to represent a full indemnity, but only a reasonable contribution to the costs of litigation.

[7] I do agree with Hospira that travel once from Toronto to Ottawa and return for the hearing is justified for two counsel and for the other required attendances where two counsel were present. On the other hand, twelve attendances to meet with Dr. Kalman before his cross-examination seems unusual and excessive.

[8] The fees paid to Hospira's experts appear to be reasonable and there is no basis to discount any of those charges. Although I have no reason to doubt the veracity of the remaining disbursement claims, I have nothing, beyond counsel's general assurances, to attest to their reasonableness. Some allowance should therefore be made to reflect this evidentiary gap.

[9] In the absence of an allowance for a Section 53 reduction, the parties are effectively \$153,291.0 apart. The differential for disbursements is \$90,436.00 and for costs, \$62,856.00.

[10] In the circumstances, I will allow Hospira costs and disbursements in the amount of \$495,000.00 plus interest at 3.5% per annum from January 15, 2016 to the date of payment. This includes amounts for the costs payable in the earlier motions and for this motion. The award is wholly payable by Lilly.

JUDGMENT

THIS COURT'S JUDGMENT IS that: Hospira Healthcare Corporation is awarded its costs against Eli Lilly Canada Inc. in the amount of \$495,000 plus interest at 3.5% calculated from January 15, 2016 to the date of payment.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-366-14

STYLE OF CAUSE: ELI LILLY CANADA INC. v HOSPIRA HEALTHCARE CORPORATION AND THE MINISTER OF HEALTH

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: OCTOBER 13 TO 16, 2015

SUPPLEMENTARY JUDGMENT AND REASONS: BARNES J.

DATED: NOVEMBER 2, 2016

APPEARANCES:

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FOR THE APPLICANT

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