

Federal Court



Cour fédérale

Date: 20101118

Docket: T-811-08

Citation: 2010 FC 1154

Ottawa, Ontario, November 18, 2010

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

NOVOPHARM LIMITED

Plaintiff

and

ELI LILLY AND COMPANY

Defendant

SUPPLEMENTARY REASONS FOR JUDGMENT AND JUDGMENT

[1] In my Reasons for Judgment and Judgment in this proceeding (see 2010 FC 915), I reserved on the issue of costs pending the receipt of further submissions from the parties. These are my supplementary reasons concerning that outstanding issue.

[2] Novopharm Limited (Novopharm) advances a claim to lump sum costs including disbursements of \$701,702.62. This figure comprises \$427,736.00 for assessable counsel fees with the balance made up of disbursements. Novopharm's claim to counsel fees is based on an assessment at the high end of Column V, Tariff B.

[3] Eli Lilly and Company's (Lilly) position is that an award of costs ought to be made under the middle of Column III and that, because of "multiple errors" made in Novopharm's draft Bill of Costs, a taxation of costs is required. In the alternative, Lilly says that if a lump sum is awarded it should be no more than \$167,738.30 made up of \$55,862.63 in counsel fees and \$109,400.20 in disbursements.

[4] I agree with counsel for Novopharm that a lump sum is a desirable disposition for an award of trial costs. However, the parties are so far apart and disagree on so many points that I have concluded that an assessment is required, subject to the following guidance.

[5] Lilly is correct that Column III represents the default measure for a claim to costs under our Rules. That assumes, however, that the case is one of average complexity. This action involved a challenge to the validity of Lilly's Canadian Patent No. 2,209,735 claiming the use of atomoxetine to treat ADHD. Like many cases of this kind, the determinative evidence was given by expert witnesses and involved multiple issues of more than average complexity.

[6] In support of their positions on the application of the Tariff, each party has also made allegations concerning the conduct of the other that is said to have extended the litigation or was obstructionist or improper. Lilly also argues that it successfully defended several of Novopharm's assertions of invalidity and success should therefore be seen to be divided.

[7] While I agree that this litigation was unusually acrimonious and was undoubtedly prolonged by the strategic manoeuvrings of the parties, I am not in a position to attribute fault in a meaningful way to one party over the other. I do not agree, though, that the success of the case was divided or that Column III is the appropriate basis for assessing Novopharm's costs. It is more common in cases of this type for the upper end of Column IV to be applied. Furthermore, the successful party is generally not penalized for raising substantive issues that are not ultimately accepted by the Court: see *Sanofi-Aventis Canada Inc. v. Novopharm Limited*, 2009 FC 1139. On this basis, I would award costs to Novopharm at the upper end of Column IV.

[8] I am also prepared to allow Novopharm to recover for more than one counsel. Although the authority of an Assessment Officer to allow for more than one counsel fee may be limited by the Tariff, the jurisdiction of the Court in fixing costs is not so circumscribed: see Rules 400(1), 400(4) and 400(6). Novopharm will be entitled to claim for two first counsel and one second counsel for preparation and attendance (where engaged) at trial, including the preparation of the outline of opening argument. Preparation time shall be allowed at one day for every day of trial including argument. For the following pre-trial and post-trial matters Novopharm shall be entitled to claim for one first counsel and one second counsel (where in attendance):

- (a) preparation of pleadings and motion materials and attendance on motions where costs were awarded to Novopharm (offset by any costs awarded to Lilly) or for pre-trial conferences;

- (b) preparation for and attendance for document and oral discovery. Preparation time shall be allowed at one day for every two days of discovery of Novopharm's witnesses and one day for each day of discovery of Lilly's witnesses;
- (c) preparation of reports or affidavits for those witnesses who appeared at trial and for review of reports from Lilly's witnesses, whether they testified or not; and
- (d) preparation of Novopharm witnesses who testified and for preparation to cross-examine Lilly witnesses.

[9] With respect to disbursements for counsel, I will allow regular economy air fares for counsel on trips of up to 3 hours in duration and business class fares for anything of longer duration. Hotel expenses shall not exceed \$300.00 per night. Local travel by counsel is not recoverable except for trips to and from the airport and to and from the Court. Out-of-town meals and incidentals will be allowed up to \$175.00 per diem for each person. The cost of meals during the trial shall not exceed \$75.00 per diem per person.

[10] The fees charged by United States counsel are assessed at 90% of the amount billed to reflect the adverse outcome of that motion.

[11] The cost of transcripts from T-1565-08 is not allowed.

[12] Reasonable expert fees and disbursements for any witness who testified are allowed. This shall include time spent with counsel in preparation of reports or to testify, as well as any time spent assisting counsel to examine opposing witnesses.

[13] Notwithstanding the above, all disbursements shall be taxed to ensure that they are reasonable and necessary for the conduct of this litigation.

[14] It is my hope that with the guidance of these reasons the parties will be able to resolve the outstanding issue of costs or to substantially narrow the issues in dispute.

JUDGMENT

THIS COURT'S JUDGMENT is that Novopharm Limited is entitled to tax its costs in accordance with these reasons.

“ R. L. Barnes ”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-811-08

STYLE OF CAUSE: Novopharm Limited
v.
Eli Lilly and Company

PLACE OF HEARING: Toronto, ON

DATE OF HEARING: May 11 to 13;
May 17 to 21;
May 25 to 28;
May 31 to June 2; and
June 7 to 9.

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** Mr. Justice Barnes

DATED: November 18, 2010

APPEARANCES:

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