Federal Court Cour fédérale

Date: 20230106

Docket: T-1627-16

Citation: 2023 FC 13

Ottawa, Ontario, January 6, 2023

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

ELI LILLY CANADA INC., ELI LILLY AND COMPANY, LILLY DEL CARIBE, INC., LILLY, S.A. and ICOS CORPORATION

Plaintiffs/Defendants by counterclaim

and

MYLAN PHARMACEUTICALS ULC.

Defendant/Plaintiff by counterclaim

PUBLIC ORDER AND REASONS
(Confidential Order and Reasons issued January 6, 2023)

I. Introduction

[1] This motion is brought by Mylan Pharmaceuticals ULC [Mylan] seeking directions pursuant to Rules 400 and 403 of the *Federal Courts Rules*, SOR/98-106 [the Rules]. In its Motion, Mylan seeks an Order setting the quantum of costs against the Plaintiffs (hereinafter collectively referred to as "Lilly") in this action as it relates to Canadian Letters Patent No.

2,371,684 [the 684 Patent]. Mylan is not seeking costs in relation to the Canadian Letters Patent No. 2,379,948 [the 948 Patent], the 540 Patent or copyright and trademark allegations as a result of agreements between Mylan and Lilly that the parties are to bear their own costs on these matters.

[2] My Reasons relating to the 684 Patent are found at *Eli Lilly Canada Inc v Mylan Pharmaceuticals ULC*, 2020 FC 816.

[3] In brief, and for the reasons that follow, I find that (1) elevated costs in the form of a lump sum are justified; (2) an amount corresponding to 30% of the adjusted amount of legal fees is appropriate; (3) Mylan's accounting of legal fees and of disbursements must be adjusted downward; and (4) this amount will bear post judgment interest of two per cent from the date of this Order. As suggested by the parties, I have offset the costs of Mylan's Motion to strike in the downward calculation of the legal fees.

II. Parties' positions

[4] Per its written representation Mylan seeks costs payable as a lump sum in the amount of $935,830.00 (inclusive of tax) consisting of (i) 30% of fees incurred which represents $793,942.00 and (ii) 100% of its disbursements totalling $141,888.00 (iii) plus pre-judgment and post-judgment interest, and costs of this motion in the amount of $10,000.00.

[5] In the alternative, Mylan seeks an amount of $810,538.00 representing (i) Mylan's costs during trial only ($668,650.00 inclusive of tax), and (ii) 100% of its disbursements ($141,888.00 inclusive of tax).

[6] In the further alternative, if the Court determines that this is not a case where a departure, from the Tariff is warranted, Mylan requests that costs be at the top of column IV of Tariff B ($362,222.00 inclusive of tax) with all reasonable disbursements ($141,888.00 inclusive of tax). This award would only approximately cover 13% of Mylan's 684-related fees ($2,646,472.00 representing $2,342,011.00 in fees plus tax).

[7] Mylan confirmed through a letter addressed to the Court that (1) the Plaintiffs are no longer contesting the disbursement associated with Counsel for Mylan's Ottawa accommodation expense during trial in the amount of $1,151.79; and (2) if the Court is inclined to award Mylan costs based on Tariff B, Mylan agrees to deduct the amount set out at items 3 and 8 of Mylan's Bill of Costs.

[8] In support of its Motion, Mylan relies on the affidavit of Mr. Ryan Howes, a student employed by the law firm of Osler, Hoskin & Harcourt LLP [Osler]. Mr. Howes, who was not cross-examined, introduces 45 exhibits and more than 1700 pages, including, *inter alia*, the copies of dockets and invoices charged by Osler to Mylan (Exhibit LL, Exhibit NN, confidential), a Bill of Costs for the 684 Patent prepared in accordance with high end of column IV, Tariff B (Exhibit OO) with a total of $362,222.00 (inclusive of tax), invoices for travel and

accommodations (Exhibit RR), invoices for expert witness services of Dr. Baughman, Dr. Ellis, Dr. Hellstrom and Dr. Porst (Exhibit QQ), and invoices for all other disbursements (Exhibit SS).

[9] Mylan identifies four factors from Rule 400(3) applicable to its case to submit that a lump sum award of 30% of its actual legal fees is appropriate, which exceeds the amount that could be awarded under the Tariff. These factors are: (1) the result of the proceeding, the importance and complexity of the issues and the amount of work (Rule 400(3)(a)(c),(g)); (2) Lilly's conduct unnecessarily lengthened the duration of the proceeding (Rule 400(3)(i)); and (3) Lilly's failure to admit facts it should have admitted in response to Mylan's reasonable requests (Rule 400(3)(j)).

[10] Lilly opposes the Motion, responding that the circumstances of this case do not warrant elevated or increased costs. In essence, Lilly submits that the evidence provided in support of a lump sum is incomplete and insufficient, that the conduct of the Defendants unnecessarily prolonged the length of the action and caused unnecessary work, and that unsupported allegations of fraud must be sanctioned.

[11] Lilly responds that the Defendant bears the burden to demonstrate why it deserves an award above the Tariff. Lilly acknowledges that upper column IV is considered to be reasonable and appropriate in patent litigation, even recently. Lilly submits, *inter alia*, that (1) "[t]here is no trend toward awarding lump sum costs based on fees, including since *Nova*" (referring to *Nova Chemicals Corporation v Dow Chemical Company,* 2017 FCA 25 [*Nova*]); (2) the *Nova* decision was recently "[…] distinguished on the basis that the complexity in the two proceedings were not

comparable. Costs were awarded at the top of column V of Tariff B even though a lump sum was sought" referring to *Georgetown Rail Equipment Company v Tetra Tech Eba Inc*, 2020 FC 1188 [*Georgetown*]; and (3) the Defendants submitted to the Case Management Judge that they would work efficiently together to avoid duplication in effort, witnesses and experts (relying on the Paterson affidavit, Exhibit A), so that essentially, it would be inappropriate and inequitable for Lilly to pay a lump sum to each of the Defendants.

[12] More particularly, Lilly submits that (1) Lilly was successful on most issues at trial (twelve out of fifteen issues for the 684 Patent); (2) the Defendants' conduct tended to lengthen the proceeding (abandoned standing allegation, validity issues, calling expert and expert objections, meritless allegations about Dr. Whitaker, infringement not contested on the 684 Patent, allegations akin to fraud were made but not pursued, compendium allegations at trial, Mylan has continued meritless abuse of process and collateral attack allegations even in these costs motions); (3) Lilly took steps to make the proceeding shorter (narrowing its pleading following discovery, conducting follow-up discovery of the Defendants' corporate representatives in writing, bringing a motion in writing to compel); (4) the fees being charged are insufficiently described and redacted (referring to *Bristol-Myers Squibb Canada Co v Pharmascience Inc*, 2021 FC 354 [*Bristol-Myers Squibb Co*]; (5) Mylan's lump sum requests should be disallowed since it is impossible to separate the work it did on the 684 Patent from work on other issues for which the parties agreed there would be no costs; and (6) some items should not be awarded by the Court under the Tariff (i.e., items 2, 3, 7, 8, 9, 11, 13(a), 13(b), 14, 15, 16, 26 and 27 (Exhibit JJ)).

[13] In the alternative, if the Court disagrees with Lilly and believes a lump sum based on legal fees is still appropriate, then only the "lead" counsel should be awarded a lump sum. The other counsel should receive the Tariff. As a result, Lilly submits that in this scenario Mylan should be awarded a lump sum for its work on the 684 Patent, given that it was the lead counsel with respect to this Patent.

[14] In the further alternative, if a lump sum is warranted, Lilly suggests that an appropriate percentage is 25% of Mylan's legal fees, which should then be reduced by 40%, amounting to $345,689.58, inclusive of tax.

[15] In regards to a lump sum award, Lilly states that the percentage awarded on a lump sum award must be reasonable in the context of the litigation. It opines that the starting point for a lump sum award is 25% (*Bauer Hockey Ltd v Sport Maska Inc (CCM Hockey)*, 2020 FC 862 at para 14 [*Bauer*]; *Seedlings Life Science Ventures, LLC v Pfizer Canada ULC*, 2020 FC 505 at para 22 [*Seedlings*]), duplicate work should not be compensated (multiple counsel per party at discoveries was unreasonable and numerous counsel per party attending trial was unreasonable), and some fees are non-compensable. Lilly also submits that Mylan's total lump sum fees should be reduced by 40% (total $147,156.51 in reduction) as a result of Mylan's unproven fraud allegations (20%), and collateral attacks on prior decisions (15%).

[16] Lilly objects to many of the disbursements as they include claims to matters that are not compensable or unrecoverable, including (1) costs for books, articles, online databases; (2) "expert" fees for Dr. Porst; (3) attendances and discovery costs; and (4) travel and

accommodations costs. Lilly submits that Mylan should be entitled to disbursements in the amount of $117,432.00, inclusive of tax. At the hearing, and in a letter sent to the Court, Lilly confirmed it was no longer contesting the disbursement associated with Counsel for Mylan's Ottawa accommodation expense during trial in the amount of $1,151.79, suggesting thus an award of $118,583.79 in disbursements, inclusive of tax.

[17] Additionally, Lilly argues that Mylan seeks pre- and post-judgment interest in its written representations and that these interest are not available, as pre-judgement interest is not available by statute (*Federal Courts Act*, RCS, 1985, c F-7 at s 36(1), (2), (4)(c); *Courts of Justice Act*, RSO 1990, c C.43 at s 128(4)(c)) and post-judgement interest is included in an all-inclusive lump sum award.

[18] In a letter sent to the Court, Lilly now seeks offsetting costs for Mylan's Motion to strike at the upper end of column III, plus disbursements, totalling $7,976.39 (including tax), as detailed by the attached Bill of Costs to the letter. Mylan accepts that Lilly's motion for costs should offset its costs award only in the event costs are calculated according to Tariff B (and not in the case of a lump sum award) in the aggregate amount of $4,029.75 (calculated at the middle of column III), including one travel disbursement.

[19] In support of its response, Lilly relies on the affidavit of Ms. Kathy Paterson, a law clerk at Borden Ladner Gervais LLP. Ms. Paterson introduces 43 exhibits. These exhibits include, *inter alia*, case management conference notes dated June 1, 2017, (Exhibit A) which,

contrary to Lilly's assertion, do not confirm, on their face, a formal undertaking by the Defendants to rely on the same experts.

[20] Lilly includes a Bill of Costs prepared by Lilly according to top of column IV of Tariff B with reductions for various items as their proposition (Exhibit JJ). The Bill of Costs totals $155,175.00 (before tax, and $175,347.75 tax inclusive), reduced by 40% for allegations of fraud (25%) and collateral attack (15%), for a total of $105,208.65, inclusive of tax.

[21] If a lump sum award is appropriate, Lilly includes a chart calculating Mylan's fees, subtracting the amounts Lilly contest (Exhibit FFF). The total amount claims is $345,689.58 (inclusive of tax), representing 25% ($576,149.30) of the total fees allowed ($2,304,597.21, including tax), reduced by 40% for allegations of fraud (25%), and collateral attack (15%).

[22] Lilly also includes a Bill of Costs in regards to disbursements, including various reductions (Exhibit MM), which totals $24,456 in reductions, inclusive of tax. As previously mentioned, Lilly is no longer contesting the disbursements associated with Counsel for Mylan's Ottawa accommodation expense during trial.

III. Principles

[23] The law of costs is not an exact science. In adjudicating costs, courts attempt to strike an appropriate balance between three main objectives: compensation, providing incentive to settle, and dissuasion of abusive conduct in litigation. In this exercise, Rule 400(1) of the Rules

provides that the Court "shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are paid".

[24] Rule 400(3) provides a non-exhaustive list of considerations. With respect to quantum, Rule 407 provides that column III of Tariff B is the "default" scale (*Consorzio del Prosciutto* at para 9). However, the Court's broad discretion includes the power to order an assessment under a different column of Tariff B or to permit a departure from the Tariff (*Philip Morris Products SA v Marlboro Canada Limited*, 2015 FCA 9 at para 4 [*Philip Morris*]). Rule 400(4) allows the Court to fix costs and award a lump sum in lieu of an assessment of costs pursuant to Tariff B.

[25] Following the discussion I had with the parties during the hearing, I confirm that I consider myself bound by the Federal Court of Appeal [FCA] decisions in *Raydan Manufacturing Ltd v Emmanuel Simard & Fils (1983) Inc*, 2006 FCA 293 and *Illinois Tool Works Inc v Cobra Anchors Co*, 2003 FCA 358, and find that success with respect to only some grounds of invalidity does not constitute "divided success" or "mixed results" (*Allergan Inc v Sandoz Canada Inc*, 2021 FC 186 at para 31 [*Allergan*]).

[26] Chief Justice Crampton outlined the applicable Rules as well as the general principles that must guide the Court in deciding an award of costs (*Allergan*). I adopt these principles, and note particularly the following statement of paragraph 27:

> For essentially the same reasons identified immediately above, it is also increasingly common in intellectual property cases to award a significant lump sum amount "well in excess of the Tariff": Vengo, above, at para 85; Bauer Hockey Ltd v Sport Maska Inc, 2020 FC 862 at para 12 [Bauer]. In this regard, a lump sum award in the range of 25-50% of actual fees, plus reasonable

> disbursements, is often made: Nova v Dow, above, at paras 17 and 21; Seedlings, above, at para 6; Bauer, above, at para 13. See also Loblaws Inc v Columbia Insurance Company, 2019 FC 1434 at para 15. In approaching this assessment, it should be kept in mind that determining the level of a lump sum award "is not an exact science": Nova v Dow, above, at para 21.

[27] On the topic of a lump sum, I wish to stress the FCA's comments at paragraph 11 of its Nova decision, indicating that lump sum costs awards further the objective of the Rules of securing "the just, most expeditious and least expensive determination" of proceedings (Rule 3) and that, when a court can award costs on a lump sum basis, granular analyses are avoided and the costs hearing does not become an exercise in accounting.

[28] The FCA adds that "[l]ump sum awards may be appropriate in circumstances ranging from relatively simple matters to particularly complex matters where a precise calculation of costs would be unnecessarily complicated and burdensome: *Mugesera v Canada (Minister of Citizenship & Immigration)*, 2004 FCA 157 at para 11" (*Nova* at para 12). At paragraph 15 of the decision *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 157, the FCA outlined that "[…] the Court should be guided, as much as possible, by the standards established in the table to Tariff B when awarding a lump sum in lieu of assessed costs".

[29] In the context of patent litigation, the Court accepts as appropriate the upper end of column IV (*Sanofi-Aventis Canada Inc v Apotex Inc*, 2009 FC 1138 at para 14; *Adir v Apotex Inc*, 2008 FC 1070 at paras 10-12; *Eurocopter v Bell Helicopter Textron Canada Limitée*, 2012 FC 842 at para 22, aff'd 2013 FCA 220; *Apotex Inc v H Lundbeck A/S*, 2013 FC 1188 at para 10).

[30] In addition, some circumstances warrant increased costs, i.e., in excess of the Tariff. Under the general discretionary power, the two most common justifications for increased costs are (1) to sanction reprehensible conduct; and (2) to use when the default scale would provide inadequate compensation for particularly costly or complex litigation. Regarding the costly and complex litigation, the court has to consider if the default Tariff scale would be unjust because it would leave the successful party insufficiently compensated (*Crocs Canada Inc v Holey Soles Holdings Ltd*, 2008 FC 384 at para 2).

[31] The FCA in *Nova* does acknowledges the existence of a trend, in regards to the award of a lump sum costs as a percentage of actual costs reasonably incurred, citing *Philip Morris*; *H-D USA, LLC v Berrada*, 2015 FC 189; *Eli Lilly and Company v Apotex Inc*, 2011 FC 1143.

[32] In *Nova* at paragraph 15, the FCA also examines the evidentiary considerations, mentioning, "[a]n award of costs on a lump sum basis must be justified in relation to the circumstances of the case and the objectives underlying costs. It is not a matter of plucking a number or percentage out of the air". The FCA examines the evidentiary considerations of legal fees (*Nova* at paras 16-19).

[33] In regards to the evidentiary burden, the parties should provide both a Bill of Costs and evidence demonstrating the fees actually incurred (*Nova* at para 18). "What is required is sufficient evidence of the nature and extent of the services provided so that a party can make an informed decision whether to settle the fees or contest and that the Court can be satisfied that the actual fees incurred and the percentage awarded are reasonable in the context of the litigation" (*Nova* at para 18).

[34] In *Georgetown,* the Court noted that "[i]n its costs submissions dated September 4, 2020, Tetra Tech did not provide detailed accounts of its legal fees, nor copies of invoices to demonstrate the necessity or reasonableness of its disbursements. It provided only tables of amounts" (*Georgetown* at para 18. See also at para 28 on the insufficient evidence adduced). In *Teva Canada Limited v Janssen Inc*, 2018 FC 1175 [*Bortezomib*], Justice Locke indicated the hesitations concerning the fact that, though Teva has provided data concerning fees charged by its counsel, there was little basis for assessing the reasonableness of those fees.

[35] Concerning the disbursements, "[w]here disbursements are outside of the knowledge of the solicitor, they should generally be accompanied by an affidavit such that the Court can be satisfied that they were actually incurred and were reasonably required" (*Nova* at para 20). As set forth in subsection 1(4) of Tariff B, no disbursement shall be assessed or allowed under the Tariff B unless it is reasonable and it is established by affidavit or by the solicitor appearing on the assessment that the disbursement was made or is payable by the party. The FCA repeated that principle, stating that a party is allowed to recover disbursements when reasonable and necessary for the conduct of the proceeding (*Exeter v Canada (Attorney General)*, 2012 FCA 153 at para 13, citing *Merck & Co Inc v Apotex Inc*, 2006 FC 631).

[36] Moreover, the FCA specifies that disbursements cannot be awarded without actual proof: "[w]ith no evidence other than the fact that these costs must ordinarily be incurred in connection with legal proceedings, it is difficult for me to judge whether the disbursements sought were necessary and reasonable" (*Bell v Canada (Minister of Indian and Northern Affairs),* 2000 CanLII 15565 (FCA) at para 5). The FCA also states that "[t]he assessment of whether a claim

for disbursements was permissible, actually incurred and reasonable cannot be sacrificed on the altar of simplicity" (*Apotex Inc v Shire LLC*, 2021 FCA 54 at para 28 [*Shire*]). Citing paragraph 20 of *Nova*, the FCA reiterates that a claim for disbursements should be supported by evidence in the form of an affidavit (*Shire* at para 28).

IV. Application to the facts of the case

A. *Motion for directions*

[37] I note from the outset that the parties have opined that the present Motion under Rule 403 is appropriate. Given the circumstances of the case and in light of the relevant case law (see for example *Consorzio del Prosciutto di Parma v Maple Leaf Meats Inc*, 2002 FCA 417 [*Consorzio del Prosciutto*]; *Apotex Inc v Bayer AG*, 2005 FCA 128; *Maytag Corp v Whirlpool Corp*, 2001 FCA 250), I agree that it is appropriate.

B. *Costs to each Defendant*

[38] I have not been convinced that the Defendants' reliance on the Court's decision in *Packers* is flawed, and I am satisfied that each Defendant is entitled to its award of costs. I note first that the evidence submitted by Lilly in Exhibit A to the Paterson affidavit refers to an attempt to by all Defendants to rely on the same witnesses and experts reports – not to a firm engagement.

[39] In *Packers*, even though the actions had been consolidated, the judge concluded that the defendants should receive individual lump sum cost awards calculated at 40% of fees, plus

reasonable disbursements (*Packers* at 3). The Court first examined if the defendants should be granted individual costs (*Packers* at 3). The plaintiffs, or defendants by counterclaim *Packers,* argued that "[…] the defendants should be awarded a collective amount for costs in light of the shared interests among them and the efficiencies that resulted from a consolidated trial" (*Packers* at 3). *Packers* also argued that, because the defendants' interests were aligned, there was no risk of conflict among them and they could all have been represented by the same counsel. According to *Packers,* it would be improper to compensate for overlapping costs (*Packers* at 4).

[40] The Court disagreed with Packers and concluded that the defendants were entitled to separate cost awards (*Packers* at 4). The Court outlined that the consolidation order simply achieved a merger of the validity issues and associated costs in order that they could be litigated together. There was no provision in the order establishing a single set of costs (*Packers* at 4). Concerning Packers' argument on the defendants' interests aligned, the Court disagreed (*Packers* at 4). The judge concluded that a lump sum was more appropriate given the complex nature of the case (*Packers* at 5). The Court also stated that this "[…] approach would effect an arbitrary discount of the defendants' fees and yield a reimbursement of only 10% of the defendants' taxable costs" (*Packers* at 5).

[41] In this case, given the evidence and the facts at hand, I am satisfied, as was the judge in *Packers*, that each Defendant is entitled to its award of costs.

C. *Redaction of privileged information*

[42] Mr. Howes's affidavit indicates that portions of narratives within the dockets that are privileged or not being claimed as part of this Motion have been redacted. More specifically, Mylan submits over 2,500 docket entries, 610 of which were removed from the assessment and 368 dockets are partially redacted to include only the portions of the docket entry for which a cost award is being claimed.

[43] I am satisfied the redactions are properly justified. I am also satisfied the remaining information is sufficiently detailed and that the solicitor-client privilege justifies the redactions. Mylan has provided comprehensive evidence of the nature and extent of the legal fees it is claiming on this Motion. This evidence includes invoices showing Mylan counsel's dockets, which contain for each docket entry a narrative describing the work performed, the amount of time spent, and the amount billed.

[44] Additionally, Lilly has submitted no authorities to support its proposition that dockets destined to a client do not, cannot or should not contain information covered by the solicitor-client privilege owned by the said client. Moreover, the decision *Stevens v Canada (Prime Minister)*, [1997] 2 FC 759 (aff'd *Stevens v Canada (Prime Minister)*, [1998] 4 FC 89 (FCA)) confirms portions of solicitors' accounts can be subject to solicitor-client privilege. There is no indication that Mylan waived its privilege expressly or implicitly and it is consequently entitled to its privilege.

[45] I also consider the Order of Associate Judge Aalto of May 19, 2021, in files T-1569-15, T-1741-13 and T-1728-15 whereby, at paragraph 2, the Court states that the redacted docket is a factor to consider. In regards to the redactions relating to solicitor client privilege, the Court then concludes that "[…] those dockets are a relatively modest amount and it is realistic that some solicitor-client would attach to some entries". Associate Judge Aalto's Order of May 19, 2021, has since been affirmed on appeal in *Packers Plus Energy Services Inc v Essential Energy Services Ltd*, 2021 FC 986.

[46] I am satisfied the evidence adduced by Mylan allows for assessment in regards to the factors of Rule 400(3). In addition, the partial redactions of dockets, to protect privileged information, do not prevent me from evaluating the criteria set forth in Rule 400(3).

D. *Evidence on the costs related to the action on the 684 Patent*

[47] Following an agreement between the parties to settle all costs related issues relating to the 540 and 948 Patents, only Mylan's Patent 684 fees are compensable at this time.

[48] However, Lilly submits that Mylan has included dockets for which the nature of the work is at best unclear and/or relates to issues for which the parties agreed there would be no costs (e.g., Exhibit "PP" of the Paterson affidavit). It is Lilly's opinion that Mylan fails to meet its burden to prove that the costs are related to the 684 Patent only, citing *Bristol-Myers Squibb Co* at paragraphs 22 and 23. In particular, Lilly opines that no weight should be given to Mylan's affidavit evidence because (1) Mylan's affiant has no personal knowledge as he was hired in August 2020, after the trial was completed, and fails to disclose the source of the information,

and; (2) Mylan has shielded the people who have actual knowledge of these dockets entries. Lilly notably refers to one of Mylan's counsel (Y. Konarski) who billed $364,226.00 before tax who left Mylan's counsel's firm prior to the trial on the 684 Patent.

[49] Rule 81 (2) allows an adverse inference to be drawn from the failure of the party to provide evidence from persons having personal knowledge. Affidavits on information and belief should provide an explanation as to why the best evidence is not available unless this is otherwise apparent (*Kootenhayoo v Alexis First Nation (Council)*, 2003 FC 1128). However, evidence is not inadmissible just because it is not the best available (*Split Lake Cree First Nation v Sinclair*, 2007 FC 1107 at para 26).

[50] Mr. Howes indicates that "Where I do not have direct knowledge of the matters contained in this affidavit, I have outlined the source of the information and believe it to be true". Mr. Howes confirms in his affidavit that Mylan's legal fees have been revised downward to reflect costs incurred in respect of the 684 Patent only (Howes affidavit at para 51). He indicates that the review of approximately 2,500 dockets was conducted as follows:

> a) Dockets pertaining to activities solely directed to the 948 Patent and 540 Patent were excluded from the assessment, unless the dockets involved work necessary to the 684 Patent or the overall proceeding, in which case the dockets were included in the assessment with deductions as deemed reasonable;
>
> > i) The deductions were made in the form of a percentage claimed; and
> >
> > ii) The percentage claimed reflects counsel for Mylan's good faith attempt to determine, based on each docket's narrative and independent recollection, what portion of the docket pertained to events that were in furtherance of Mylan's defence and counterclaim against Lilly's 684 Patent claims

> or general defence in the proceeding that otherwise was required, and should therefore be included;
>
> (a) All dockets pertaining to the activities associated with the 784 Patent were excluded from the assessment, with apportionment of dockets in a similar manner as in (a), above, as required;
>
> (b) All dockets involving work related to copyright and trademark allegations, removed early in the proceeding on a without costs basis, were excluded from the assessment;
>
> (c) All dockets related to any contested motions were excluded from the assessment, except for trial-related motions, which were included.

[51] I am satisfied the evidence, although not perfect, is sufficiently reliable to establish the actual legal costs of the 684 Patent litigation.

E. *Lump sum*

[52] After consideration of the circumstances of the case, I am satisfied that an award of costs in the form of a lump sum is justified. A lump sum award of costs is particularly appropriate in complex litigation between sophisticated litigants and in the context of commercial litigation (*SNF Inc v Ciba Specialty Chemicals Water Treatments Limited*, 2018 FC 245 at para 3). Additionally, as the FCA stated at paragraph 11 of *Nova*, it will avoid granular analyses and an exercise in accounting.

F. *Elevated costs award-in excess of the Tariff*

[53] I am also satisfied it is reasonable and appropriate in this case to award elevated costs, i.e., in excess of the Tariff, and to calculate the amount as a percentage of Mylan's actual legal

fees, in the form of a lump sum. Elevated costs are justified in this case having regard to the importance and complexity of the issues and the amount of work. This was a complex drug patent proceeding, the parties are sophisticated litigants, their legal fees were substantially above the amounts contemplated by Tariff B, and the parties "are in a position to respond to the incentives provided by an elevated award of costs" (*Allergan* at para 38, citing *Bauer* at para 22).

[54] Mylan was successful in its counterclaim based on obviousness and anticipation on the 684 Patent. As mentioned earlier, the fact that it was not successful on all the invalidity grounds it raised does not constitute mixed results or divided success as warranting divided costs, as discussed by Chief Justice Crampton in *Allergan* at paragraph 31. I also consider myself bound by the decisions of the FCA on the same issue.

[55] The amount of work was considerable. The Action was commenced on September 28, 2016, more than three years before the trial. This Action proceeded to a 14 days common trial on the 684 Patent beginning on December 5, 2019. The trial involved numerous complex patent law issues, including relating to claim construction, common general knowledge, obviousness, anticipation, method of medical treatment, and infringement. Although additional issues such as inutility and insufficiency were not addressed in closing argument, they remained live throughout the action and trial due to Lilly not taking clear positions on interpretation of the 684 Patent and claims at an earlier time. The parties' written closing arguments were 75 pages long with extensive citations and accompanying compendium and Lilly submitted an additional document addressing one of the expert evidence.

[56] As the Court has observed, "[p]atent litigation is typically complex, and obviousness is typically among the most complex legal issues that are raised in patent litigation" (*Bortezomib* at para 14). I am satisfied that the matters heard and adjudicated in December 2019 through December 2020 were a complex drug patent.

[57] Each party finds issues with a number of its adversary's conduct. As the objective of the awarding of a lump sum commands, and to avoid a granular examination of the circumstances, I will give this factor a neutral weight. There are various allegations of misrepresentations, delays as between the parties and I cannot reward one to the detriment of the other or punish one in these circumstances. I therefore disregard all of them. Each party vigorously defended the interest of its client with available, and sometimes non available, means. Notably, I will consequently not reduce the amounts of 40% as Lilly suggested.

[58] I find that in these circumstances, the costs generated even at the high end of column V of Tariff B bear little relationship to the objective of making a reasonable contribution to the costs of litigation (*Nova* para 13).

[59] After review of the evidence, deduction of Lilly's costs on the Motion to Strike ($9,783.26) and of other fees deemed impermissible per Lilly's KKK exhibit (except redacted entries), I find the Mylan's reasonable fees to be more around net $2,241,814.00.

[60] I will grant Mylan 30% of these legal fees.

G. *Disbursements*

[61] Mylan seeks total disbursements of $141,888, inclusive of tax.

[62] In regards to disbursements, four figures require the Court's adjudication as Lilly disputes (1) costs for books, articles, online databases; (2) witness fees for Dr. Porst ($4,312.50); (3) attendances and discovery costs; (4) travel and accommodations costs. Lilly argues that thus totalling an award of $118,583.79 in disbursements, inclusive of tax.

[63] I find Lilly's arguments persuasive and the disbursements it highlights not to be reasonable. The amount allowed under the disbursements is thus reduced to $118,583.79, inclusive of tax.

H. *Post-judgment interest*

[64] Lilly objects to interest being granted, raising that Mylan has not included this relief in its Notice of Motion for direction pursuant to Rule 403, which, per Lilly's position, is a fatal flaw. Lilly adds that the post-judgment interest is included when seeking an all-inclusive lump sum award (see *Seedlings* at para 33, on paragraphs 57 to 61 of *Bortezomib* and on paragraph 19 of *Safe Gaming System Inc v Atlantic Lottery Corporation*, 2018 FC 871).

[65] Per paragraph 4 of the decision *Rhaman v Public Service Labour Relations Board*, 2013 FCA 117 [*Rhaman*], the purpose of a notice of motion is to provide the recipient with adequate notice of the order sought and the grounds for seeking the order and to tell the Court with exactitude what is being sough and why. In that case, the motion was not dismissed because the applicant has not suffered any prejudice and there was an interest in dealing with the matter

efficiently and promptly (*Rhaman* at para 5). Lilly has submitted no evidence of a prejudice. In its Notice of Motion for direction, Mylan asked for "[s]uch further and other relief as this Honourable Court may deem just", which, in any event, makes it open to the Court to use its discretionary power to order interest despite the Mylan not having sought the particular remedy in its Motion.

V. Conclusion

[66] For the aforementioned reasons, I will thus award Mylan total costs of $878,218.00 inclusive of all fees, disbursements, and tax with post-judgment interest at a rate of 2 per cent from the date of this Order.

ORDER IN T-1627-16

THIS COURT'S ORDER is that:

1. Mylan is awarded total costs of $878,218.00 inclusive of all fees, disbursements, and tax with post-judgment interest at a rate of 2 per cent from the date of this Order.

2. No costs are awarded on this Motion.

"Martine St-Louis"
Judge

ANNEX

iscretionary powers of Court	**Pouvoir discrétionnaire de la Cour**
00 (1) The Court shall have full scretionary power over the amount nd allocation of costs and the etermination of by whom they are to e paid.	400 (1) La Cour a le pouvoir discrétionnaire de déterminer le montant des dépens, de les répartir et de désigner les personnes qui doivent les payer.
rown	**La Couronne**
) Costs may be awarded to or gainst the Crown.	(2) Les dépens peuvent être adjugés à la Couronne ou contre elle.
actors in awarding costs	**Facteurs à prendre en compte**
) In exercising its discretion under ubsection (1), the Court may onsider	(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 :
) the result of the proceeding;	a) le résultat de l'instance;
) the amounts claimed and the mounts recovered;	b) les sommes réclamées et les sommes recouvrées;
) the importance and complexity of e issues;	c) l'importance et la complexité des questions en litige;
) the apportionment of liability;	d) le partage de la responsabilité;
) any written offer to settle;	e) toute offre écrite de règlement;
) any offer to contribute made under le 421;	f) toute offre de contribution faite en vertu de la règle 421;
) the amount of work;	g) la charge de travail;
) whether the public interest in aving the proceeding litigated stifies a particular award of costs;	h) le fait que l'intérêt public dans la résolution judiciaire de l'instance justifie une adjudication particulière des dépens;
) any conduct of a party that tended shorten or unnecessarily lengthen e duration of the proceeding;	i) la conduite d'une partie qui a eu pour effet d'abréger ou de prolonger inutilement la durée de l'instance;

) the failure by a party to admit ything that should have been lmitted or to serve a request to dmit;

) whether any step in the roceeding was

) improper, vexatious or nnecessary, or

) taken through negligence, mistake excessive caution;

) whether more than one set of costs hould be allowed, where two or more arties were represented by different olicitors or were represented by the me solicitor but separated their efence unnecessarily;

n) whether two or more parties, presented by the same solicitor, itiated separate proceedings nnecessarily;

) whether a party who was ccessful in an action exaggerated a aim, including a counterclaim or ird party claim, to avoid the peration of rules 292 to 299;

.1) whether the expense required to ave an expert witness give evidence as justified given

) the nature of the litigation, its ublic significance and any need to arify the law,

j) le défaut de la part d'une partie de signifier une demande visée à la règle 255 ou de reconnaître ce qui aurait dû être admis;

k) la question de savoir si une mesure prise au cours de l'instance, selon le cas :

(i) était inappropriée, vexatoire ou inutile,

(ii) a été entreprise de manière négligente, par erreur ou avec trop de circonspection;

l) la question de savoir si plus d'un mémoire de dépens devrait être accordé lorsque deux ou plusieurs parties sont représentées par différents avocats ou lorsque, étant représentées par le même avocat, elles ont scindé inutilement leur défense;

m) la question de savoir si deux ou plusieurs parties représentées par le même avocat ont engagé inutilement des instances distinctes;

n) la question de savoir si la partie qui a eu gain de cause dans une action a exagéré le montant de sa réclamation, notamment celle indiquée dans la demande reconventionnelle ou la mise en cause, pour éviter l'application des règles 292 à 299;

n.1) la question de savoir si les dépenses engagées pour la déposition d'un témoin expert étaient justifiées compte tenu de l'un ou l'autre des facteurs suivants :

(i) la nature du litige, son importance pour le public et la nécessité de clarifier le droit,

) the number, complexity or chnical nature of the issues in spute, or

(ii) le nombre, la complexité ou la nature technique des questions en litige,

i) the amount in dispute in the roceeding; and

(iii) la somme en litige;

) any other matter that it considers levant.

o) toute autre question qu'elle juge pertinente.

ariff B

Tarif B

) The Court may fix all or part of ay costs by reference to Tariff B and ay award a lump sum in lieu of, or addition to, any assessed costs.

(4) La Cour peut fixer tout ou partie des dépens en se reportant au tarif B et adjuger une somme globale au lieu ou en sus des dépens taxés.

irections re assessment

Directives de la Cour

) Where the Court orders that costs e assessed in accordance with Tariff , the Court may direct that the sessment be performed under a ecific column or combination of olumns of the table to that Tariff.

(5) Dans le cas où la Cour ordonne que les dépens soient taxés conformément au tarif B, elle peut donner des directives prescrivant que la taxation soit faite selon une colonne déterminée ou une combinaison de colonnes du tableau de ce tarif.

) Notwithstanding any other rovision of these Rules, the Court ay

(6) Malgré toute autre disposition des présentes règles, la Cour peut :

) award or refuse costs in respect of particular issue or step in a roceeding;

a) adjuger ou refuser d'adjuger les dépens à l'égard d'une question litigieuse ou d'une procédure particulières;

) award assessed costs or a ercentage of assessed costs up to and cluding a specified step in a roceeding;

b) adjuger l'ensemble ou un pourcentage des dépens taxés, jusqu'à une étape précise de l'instance;

) award all or part of costs on a licitor-and-client basis; or

c) adjuger tout ou partie des dépens sur une base avocat-client;

) award costs against a successful arty.

d) condamner aux dépens la partie qui obtient gain de cause.

ward and payment of costs **Adjudication et paiement des dépens**

(7) Costs shall be awarded to the party who is entitled to receive the costs and not to the party's solicitor, but they may be paid to the party's solicitor in trust.

(7) Les dépens sont adjugés à la partie qui y a droit et non à son avocat, mais ils peuvent être payés en fiducie à celui-ci.

Costs of Motion

401 (1) The Court may award costs of a motion in an amount fixed by the Court.

Dépens de la requête

401 (1) La Cour peut adjuger les dépens afférents à une requête selon le montant qu'elle fixe.

Costs payable forthwith

(2) Where the Court is satisfied that a motion should not have been brought or opposed, the Court shall order that the costs of the motion be payable forthwith.

Paiement sans délai

(2) Si la Cour est convaincue qu'une requête n'aurait pas dû être présentée ou contestée, elle ordonne que les dépens afférents à la requête soient payés sans délai.

Costs of discontinuance or abandonment

402 Unless otherwise ordered by the Court or agreed by the parties, a party against whom an action, application or appeal has been discontinued or against whom a motion has been abandoned is entitled to costs forthwith, which may be assessed and the payment of which may be enforced as if judgment for the amount of the costs had been given in favour of that party.

Dépens lors d'un désistement ou abandon

402 Sauf ordonnance contraire de la Cour ou entente entre les parties, lorsqu'une action, une demande ou un appel fait l'objet d'un désistement ou qu'une requête est abandonnée, la partie contre laquelle l'action, la demande ou l'appel a été engagé ou la requête présentée a droit aux dépens sans délai. Les dépens peuvent être taxés et le paiement peut en être poursuivi par exécution forcée comme s'ils avaient été adjugés par jugement rendu en faveur de la partie.

Motion for directions

Requête pour directives

403 (1) A party may request that directions be given to the assessment officer respecting any matter referred to in rule 400,

403 (1) Une partie peut demander que des directives soient données à l'officie taxateur au sujet des questions visées à la règle 400 :

(a) by serving and filing a notice of motion within 30 days after judgment has been pronounced; or

(b) in a motion for judgment under subsection 394(2).

Motion after judgment

(2) A motion may be brought under paragraph (1)(a) whether or not the judgment included an order concerning costs.

Same judge or prothonotary

(3) A motion under paragraph (1)(a) shall be brought before the judge or prothonotary who signed the judgment.

a) soit en signifiant et en déposant un avis de requête dans les 30 jours suivan le prononcé du jugement;

b) soit par voie de requête au moment d la présentation de la requête pour jugement selon le paragraphe 394(2).

Précisions

(2) La requête visée à l’alinéa (1)a) peu être présentée que le jugement comport ou non une ordonnance sur les dépens.

Présentation de la requête

(3) La requête visée à l’alinéa (1)a) est présentée au juge ou au protonotaire qu a signé le jugement.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1627-16
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