Federal Court  Cour fédérale

Date: 20121204

Docket: T-1144-05

Citation: 2012 FC 1418

Winnipeg, Manitoba, December 4, 2012

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

APOTEX INC.

Plaintiff

and

MERCK CANADA INC. AND MERCK FROSST CANADA & CO.

Defendants

FURTHER REASONS FOR JUDGMENT AND JUDGMENT

[1] These Reasons and Judgment are further to those dated October 24, 2012 (cited as 2012 FC 1235) wherein I provided a number of determinations as to matters in dispute in the expectation that the parties, with the aid of their accounting experts, could arrive at a final figure representing the amount of compensation, together with pre-judgment interest, that the Court would award to the Plaintiff Apotex in this action arising from section 8 of the Patented Medicines (Notice of Compliance) Regulations, SOR/93-133.

[2] In my October Reasons, I noted a number of matters upon which the parties were in agreement and resolved what appeared to be those matters remaining in dispute. I invited the parties, with the assistance of their accounting experts if needed, to calculate a final figure representing compensation and pre-judgment interest; and if needed, to come back to me to resolve any matters that could not be resolved among themselves. As a result, one matter remains in dispute. I am grateful that the parties have provided final figures which represent the result, depending on how I resolve that dispute.

[3] The matter still requiring resolution arises from the question of rebates, which was discussed at paragraphs 92 to 101 of my October Reasons. I concluded at paragraph 101 that a certain percentage of the selling price should be allowed for in the period of exclusivity and a larger percentage allowed for in the period of non-exclusivity.

[4] The experts for the parties, Mr. Rosen for Apotex, and Mr. Hamilton for Merck, are in disagreement as to how those figures should be applied. Mr. Rosen has provided reasons for the disagreement in his reporting letter dated November 26, 2012. I repeat a portion of that letter (deleting the precise percentages):

> a. *At paragraphs 100 and 101 of the Judgment, the Court determined that, in the competitive environment, the "real world" figure of XX% was the appropriate rebate level. Mr. Hamilton takes the view that the XX% rebate figure should be applied from the first date upon which Apotex would have faced competition in the "but for" world, namely, the date of Novopharm's hypothetical NOC on January 7, 2005.*
>
> b. *The resulting calculation of total damages, with interest, is computed by Mr. Hamilton to be $54,168,579. In my view, this calculation is*

> *inappropriate and inconsistent with the goal of my damages analysis, namely, putting the aggrieved party in the position it would have been but for the event which caused the harm.*

[5] Mr. Hamilton's calculations are based on a rebate of YY% to the date when Novopharm entered the relevant market, and XX% thereafter. Mr. Rosen argues for a more sophisticated approach. He states in his letter:

> *5. Consideration should first be given to the derivation of the XX% rebate figure. The XX% rebate figure represents the average rebate rate over a 16 month period in the real world. In my view, to simply apply the XX% rate to a shorter period of time (in this case, 5 months commencing upon Novopharm's "but for" NOC date of January 7, 2005 to May 26, 2005, the end date of the damage period) would not be consistent with the Court's disposition that "real world" rebate levels be applied.*

[6] The differences in the approach of Mr. Rosen and Mr. Hamilton result in approximately a ten percent difference in the final numerical result. Mr. Rosen's approach yields the higher number.

[7] I conclude that Mr. Hamilton's approach is the correct one in the present circumstances. I do so for two reasons. First, no party argued before me at the trial of this matter the approach now urged by Mr. Rosen. At the trial, the parties proceeded on the basis that there would be one figure representing rebates in a single generic market and another when another generic entered the market.

[8] The second reason is that Mr. Rosen's approach is based on taking the percentage rebate in a multi-generic market as being a firmly established number and then applying sophisticated calculations to that number. As I expressed in my October Reasons, the whole area of rebates is a

murky one. There is no one correct or absolute figure that can be established. At best, one can approximate what "would have" happened. It is not an area where exactitude or sophisticated calculations have a place. As some judges have said, the approach is more of a "broad axe" approach than that of a "rapier point".

[9] As a result, I determine that the amount of compensation to which Apotex is entitled, including pre-judgment interest to October 10, 2012,, is that as calculated by Mr. Hamilton; namely, $54,168,579.00.

[10] Since the above figure calculates pre-judgment interest up to the date October 10, 2012, the date of my earlier Judgment, Apotex is entitled to post-judgment interest from October 10, 2012 until the date that the above sum is paid. Post-judgment interest is provided for in section 37 of the Federal Courts Act, RSC 1985, c F-7. I am to exercise my discretion as to the rate. While activities at issue in this action have occurred across Canada, much of that activity has occurred in Ontario. Apotex is located in Ontario. I will apply the prevailing Ontario quarterly rate of 3.0% as the post-judgement interest rate and, should the sum in question not be paid forthwith, then adjusted quarterly rates as published by the Civil Policy and Programs Branch of the Ontario Court Services Division shall apply.

COSTS

[11] In my October Reasons, I asked that the parties provide submissions as to costs, which I have now received and reviewed. Accordingly, I provide the following directions as to costs. If the parties are unable to resolve the matter of costs between themselves, and I sincerely hope that they

will, then Apotex is to submit to me by January 15, 2013 a draft bill of costs, together with submissions as to why they and Merck are apart. Merck shall file a response within five (5) days. All submissions are to be five (5) pages or less. I will then resolve the matter of costs.

[12] Costs are awarded to Apotex; provided, however, that if any previous Order assigns costs otherwise, that Order shall prevail. Any costs awarded to Merck by a previous Order shall be offset against costs awarded herein to Apotex. If any Order is silent as to costs, no costs are awarded.

[13] Apotex's costs are awarded on the following basis:

1. At the middle of Column IV for all taxable fees until June 20, 2012;

2. Full indemnity from June 20, 2012 until the opening of trial, September 24, 2012. This shall include:

    - additional fees and disbursements respecting Ms. Bacovsky and Mr. Rosen.
    - preparation for all witnesses called at trial or not that were the subject of subpoenas issued by Merck on and after June 20, 2012, in particular, Cheung, D'Cruz and Cohen;
    - No costs are allowed in respect of Mr. Hollis
    - All fees and disbursements respecting Mr. Royanne

3. Fees for attendance at trial of two senior counsel and one junior counsel at trial at the upper end of Column V, plus fifty (50%) percent. No fees are allowable for other counsel, law clerks or students;

4. Expert witness fees for Ms. Bacovsky and Mr. Rosen shall not exceed the hourly or daily rate charged by Apotex's most senior counsel. Mr. Rosen's fees for services in waiting for "hot tubbing" and after trial shall (after such a cap, if needed) are allowed at fifty (50%) percent of his fees;

5. All reasonable disbursements for travel and accommodation of witnesses;

6. Photocopying at twenty-five ($0.25) cents per page for all documents filed with or provided to the Court and opposing counsel, and for all documents reasonably necessary in pursuing this action;

7. All other fees not provided for shall be at the middle of Column IV;

8. All other disbursements are restricted to those that were reasonably necessary in furtherance of this action.

JUDGMENT

FOR THE REASONS PROVIDED:

THIS COURT'S JUDGMENT is that:

1. The Plaintiff Apotex is entitled to recover from the Respondents Merck, jointly and severally, the sum of $54,168,579.00, together with post-judgment interest after October 10, 2012, calculated at the rate of 3% per annum, not compounded; and, should that sum not be paid forthwith, at the rate as published quarterly by the Civil Policy and Programs Branch of the Ontario Court Services Division; and

2. Apotex is entitled to its costs, unless otherwise agreed upon, having regard to the Reasons provided herein.

"Roger T. Hughes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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