

Federal Court



Cour fédérale

Date: 20130607

Docket: T-689-11

Citation: 2013 FC 621

Ottawa, Ontario, June 7, 2013

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

ELI LILLY CANADA INC.

Applicant

and

**TEVA CANADA LIMITED AND
THE MINISTER OF HEALTH**

Respondents

and

**ELI LILLY AND COMPANY AND TAKEDA
PHARMACEUTICAL COMPANY LIMITED**

**Respondent
Patentees**

SUPPLEMENTARY REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Eli Lilly Canada Inc. (Lilly), seeks an Order for costs in connection with the Court's earlier dismissal of the its Patented Medicines (Notice of Compliance) (NOC) application

on the ground of mootness. In my previous decision, I found that the application was moot because Teva Canada Limited (Teva) had withdrawn its Notice of Allegation (NOA).

[2] I am satisfied that Lilly is entitled to an award of costs because Teva affectively triggered this application by filing a NOA: see *Eli Lilly Canada Inc. v Novopharm*, 2006 FC 781, [2006] FCJ no 1002. Lilly's claim to counsel fees of \$18,803.00 and disbursements of \$84,422.00 is, however, excessive.

[3] This matter was resolved in its early stages and before any exchange of expert evidence. An award under Column IV is, therefore, not justified. Costs under Column III and reasonable disbursements up to the point of the withdrawal of Teva's NOA are appropriate subject to an offset of \$2,000.00 for Teva's costs of successfully defending Lilly's motion for a prohibition Order.

[4] Notwithstanding the early withdrawal of Teva's NOA, it was prudent for Lilly to have retained expert witnesses in advance of receiving Teva's evidence. The time frames that apply to NOC proceedings are tight and some anticipatory work with experts is to be expected. However, I have nothing before me to justify a claim to expert fees and expenses approaching \$80,000.00. I have no idea how expert costs of that magnitude could reasonably be generated before any reports were written. I also have no explanation for why advance meetings with an expert witness in London and Ottawa were considered necessary. I will allow \$12,500.00 for expert costs including related disbursements.

JUDGMENT

THIS COURT'S JUDGMENT is that Lilly will have its costs of this application under Column III and its reasonable disbursements up to the point of the withdrawal of Teva's Notice of Allegation. This figure shall be reduced by \$2,000.00 representing Teva's costs of successfully defending Lilly's motion for a prohibition Order.

THIS COURT'S FURTHER JUDGMENT is that Lilly is entitled to recover \$12,500.00 for its disbursements in connection with the retention of expert witnesses in this proceeding.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-689-11

STYLE OF CAUSE: ELI LILLY CANADA INC. v TEVA CANADA LIMITED ET AL

PLACE OF HEARING: Ottawa, ON

DATE OF HEARING: January 8, 2013

REASONS FOR JUDGMENT: BARNES J.

DATED: June 7, 2013

APPEARANCES:

Anthony Creber and
Livia Aumand

FOR THE APPLICANT AND
RESPONDENT PATENTEES
ELI LILLY CANADA INC.

Jonathan Stainsby

FOR THE RESPONDENT
TEVA CANADA LIMITED

Christopher VanBarr

FOR THE RESPONDENT PATENTEES
TAKEDA PHARMACEUTICAL COMPANY
LIMITED

SOLICITORS OF RECORD:

Gowling Lafleur Henderson LLP
Ottawa, ON

FOR THE APPLICANT AND
RESPONDENT PATENTEES
ELI LILLY CANADA INC.

Heenan Blaikie LLP
Toronto, ON

FOR THE RESPONDENT
TEVA CANADA LIMITED

William F. Pentney
Deputy Attorney General of Canada
Toronto, ON

FOR THE RESPONDENT
THE MINISTER OF HEALTH

Gowling Lafleur Henderson LLP
Ottawa, ON

FOR THE RESPONDENT PATENTEES
TAKEDA PHARMACEUTICAL COMPANY
LIMITED