

Federal Court



Cour fédérale

**Date: 20151015**

**Docket: T-1599-13**

**Citation: 2015 FC 1167**

**Ottawa, Ontario, October 15, 2015**

**PRESENT: The Honourable Madam Justice Gleason**

**BETWEEN:**

**ELI LILLY CANADA INC.**

**Applicant**

**and**

**APOTEX INC. AND  
THE MINISTER OF HEALTH**

**Respondents**

**and**

**ICOS CORPORATION**

**Respondent Patentee**

**ORDER AND REASONS**

[1] In my Judgment of August 26, 2015 in this matter, I dismissed the prohibition application of the applicant, Eli Lilly Canada Inc. [Lilly], determined that costs would follow the event,

remitted the issue of the quantification of the costs of the respondent, Apotex Inc. [Apotex] to the parties and retained jurisdiction to make a costs award in the event that the parties were unable to agree on the quantum of costs. They have been unable to so agree. Lilly suggests that Apotex's costs should be fixed at \$20,275.39 or, in the alternative, that the Court provide directions with the following guidance:

- (a) Costs are to be fixed at the mid-level of Column IV of Tariff B;
- (b) Reasonable fees shall include an allowance for:
  - i. two counsel at the hearing;
  - ii. two counsel in conducting cross-examinations; and
  - iii. one counsel in defending cross-examinations;
- (c) Apotex's costs incurred after February 23, 2015 or March 20, 2015 are to be eliminated or alternatively reduced by 25%;
- (d) Apotex's costs are to be reduced by:
  - i. 25% for raising a number of allegations that were not pursued at the hearing; and
  - ii. 33% for making unfounded and speculative allegations that are akin to fraud; and
- (e) Apotex is entitled to only those disbursements that are found to be payable, necessary for the conduct of the application and reasonable.

[2] Apotex submits that my costs award should mirror that in Court File T-1598-13 and contests that its costs should be reduced for any of the reasons advanced by Lilly.

[3] I concur with Apotex and for the reasons set out in my Order of October 15, 2015 in Court File T-1598-13 determine that the same parameters should apply to the calculation of costs in this file and accordingly so award.

**ORDER**

**THIS COURT ORDERS that:**

1. Apotex is awarded costs in accordance with the following directions, which neither derogate from nor confirm Apotex's entitlement to fees or disbursements not addressed by the following directions:
  - (a) Costs are to be assessed at the mid-level of Column IV of Tariff B;
  - (b) Counsel fees shall be assessed on the basis of:
    - i. one senior and one junior counsel at the hearing;
    - ii. one senior and one junior counsel in conducting cross-examinations; and
    - iii. one senior counsel for defending cross-examinations;
  - (c) No costs are recoverable for the fees of others, including in-house counsel, articling students or support staff;
  - (d) Apotex is capped at one instance of item 2 of Tariff B;
  - (e) Apotex is capped at one instance of item 24 of Tariff B per trip taken by its counsel to conduct cross-examinations to meet with witnesses;
  - (f) Apotex may claim an amount under item 27 of Tariff B for preparation of the Bill of Costs if it prepares one;
  - (g) Subject to the disbursements being reasonable and necessary in the circumstances, Apotex's disbursements for expert fees shall be capped at the amount charged by senior counsel for similar time involvement;

- (h) Apotex may recover the lesser of \$0.25 per page or the amount actually billed to it for in-house photocopying for all pages produced as part of the materials served and filed, with the exception of the first 1500 pages;
  - (i) The amounts that Apotex may recover as disbursements for airfare for counsel for Apotex for all flights of five hours duration or less are capped at the cost of an economy class ticket, and for flights of a longer duration at the cost of a business class ticket;
  - (j) The amounts that Apotex may recover as disbursements for accommodations for counsel for Apotex are capped at the cost of single hotel rooms; and
  - (k) Apotex may recover for any translation undertaken for purposes of communicating with a witness.
2. In the event the parties are unable to agree on the amounts payable pursuant to the terms of this Order, the matter may be referred to an Assessment Officer.

"Mary J.L. Gleason"  
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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1599-13

**STYLE OF CAUSE:** ELI LILLY CANADA INC. v APOTEX INC. AND THE  
MINISTER OF HEALTH AND ICOS CORPORATION

**WRITTEN SUBMISSIONS  
CONSIDERED AT:** OTTAWA, ONTARIO

**ORDER AND REASONS:** GLEASON J.

**DATED:** OCTOBER 15, 2015

**WRITTEN REPRESENTATIONS BY:**

Adrian Howard

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AND RESPONDENT PATENTEE

Harry B. Radomski  
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