

**Date: 20070705**

**Docket: T-1532-05**

**Citation: 2007 FC 708**

**Winnipeg, Manitoba, July 5, 2007**

**PRESENT: The Honourable Mr. Justice Hughes**

**BETWEEN:**

**ELI LILLY CANADA INC.**

**Applicant**

**and**

**NOVOPHARM LIMITED and  
THE MINISTER OF HEALTH**

**Respondents**

**ELI LILLY AND COMPANY LIMITED**

**Respondent/Patentee**

**REASONS FOR JUDGMENT AND JUDGMENT AS TO COSTS**

**HUGHES J.**

[1] These Reasons and Judgment are directed to the issue of costs which was left to be spoken to following my decision in this proceeding dated June 5, 2007. Counsel for the Applicant and the Respondent Novopharm have provided written submissions as directed by that decision.

[2] Consideration must be given to the following issues:

1. Level of Costs

2. Various Grounds Raised as to Invalidity
3. Experts
4. Motions
5. Number of Counsel at Trial and at Examinations
6. Effect of the First (abandoned) NOC

## 1. **Level**

[3] Applicants say that Column I or II of the Tariff is inappropriate for taxation of costs, the Respondent Novopharm wants at or near a solicitor-client level. Each accuse the other of abuse and overzealousness.

[4] This was hard fought piece of litigation. The legal issues were complex. The facts were many and detailed. There was procedural manoeuvring on each side.

[5] Column IV at the middle is the appropriate level for taxation of costs.

## 2. **Various Grounds Raised as to Invalidity**

[6] Novopharm was successful in the result, on one ground alleged as to invalidity, namely sufficiency. Other grounds including anticipation, obviousness, double patenting and section 53 were dealt with by Justice Gauthier in her decision in another proceeding involving the same patent released only a few weeks before the hearing of this matter. Novopharm's counsel cannot be faulted for pursuing these matters before trial. However, when it came to argument at trial the time could have been shortened by reference to Justice Gauthier's decision.

[7] Further, at trial Novopharm largely abandoned argument as to the dog study save for reliance on its factum. The argument as to section 53, given the evidence, was sufficiently weak that it should not have been made.

[8] Taking all of this into consideration, I will allow Novopharm to tax three trial days and eighty percent of its pre-trial costs not otherwise dealt with by a judge or prothonotary hearing motions in this case. Included in pre-trial costs is time spent in examination and cross-examination of witnesses and preparation for the same.

### **3. Experts**

[9] In my reasons of June 5, 2007 I allowed Novopharm to tax costs of five only of its expert witnesses. It could choose which five. I see no reason for change in that regard.

[10] As to fees charged by such experts they should be reasonable and be the lesser of actual fees charged or the rate that was charged by Novopharm's senior counsel for services for the same period of time as spent by the experts. Expert rates should not get out of hand. Disbursements must be reasonable and not extravagant.

### **4. Motions**

[11] Where a motion has been disposed of with an Order as to costs, that Order prevails and, unless otherwise stated in such Order, costs are at the Column III level. Where costs have been left to disposition at trial, they will be awarded at the middle of Column IV.

**5. Number of Counsel at Trial and at Examination**

[12] Novopharm had one senior counsel and two junior counsel gowned at trial. All three made substantive arguments to the Court. Eli Lilly had one senior counsel and three junior counsel gowned. Only senior counsel made substantive argument. I allow Novopharm to tax costs for one senior counsel and two junior counsel at trial but, as previously stated, for only three days of trial.

[13] On examination of Novopharm witnesses I will allow for the attendance of one counsel only. The rate is that of senior counsel. In conducting cross-examination of Eli Lilly witnesses I allow for one senior counsel and, if in attendance, one junior counsel.

**6. Effect of the First (Abandoned) NOA**

[14] This matter has been dealt with in the disposition of costs in the first NOA. While Eli Lilly argues that Novopharm may have achieved a strategic advantage, this is not a matter for consideration of costs in these proceedings.

**JUDGMENT**

I hereby adjudge that Novopharm's entitled to tax its costs in these proceedings in accordance with these Reasons and those of June 5, 2007.

"Roger T. Hughes"

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-1532-05

**STYLE OF CAUSE:** **ELI LILLY CANADA INC. v.  
NOVOPHARM LIMITED and THE MINISTER OF  
HEALTH and ELI LILLY AND COMPANY  
LIMITED**

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** May 14, 2007 to May 17, 2007  
May 22, 2007 to May 23, 2007

**REASONS FOR JUDGMENT  
AS TO COSTS:** Hughes, J

**DATED:** July 5, 2007

**APPEARANCES:**

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