

**Date: 20070712**

**Docket: A-66-07**

**Citation: 2007 FCA 256**

**Present: NOËL J.A.**

**BETWEEN:**

**G.D. SEARLE & CO. and PFIZER CANADA INC.**

**Appellants**

**and**

**NOVOPHARM LIMITED and THE MINISTER OF HEALTH**

**Respondents**

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on July 12, 2007.

**REASONS FOR ORDER BY:**

**NOËL J.A.**

**Date: 20070712**

**Docket: A-66-07**

**Citation: 2007 FCA 256**

**Present: NOËL J.A.**

**BETWEEN:**

**G.D. SEARLE & CO. and PFIZER CANADA INC.**

**Appellants**

**and**

**NOVOPHARM LIMITED and THE MINISTER OF HEALTH**

**Respondents**

**REASONS FOR ORDER**

**NOËL J.A.**

[1] By an amended decision dated June 5, 2007, this Court allowed the appellants' appeal "with costs in this Court and in the Federal Court but only insofar as they relate to claims 4 and 8 of the '576 Patent". This award in favour of the appellants was so limited because the other claims which were in issue before the Federal Court were abandoned by the appellants during the trial proceedings.

[2] Given this decision, costs would normally be fixed by the taxing officer by reference to column III of Tariff B of the *Federal Courts Rules*. The appellants now move for a direction that the costs be assessed at the top end of column IV of Tariff B.

[3] In support for this increased costs award, the appellant's rely on the complexity of the issues, the amount of work involved, the respondents' opposition to their effort to expedite the hearing of the appeal, as well as the increased costs which were awarded to the other party by the Trial Judge in the Court below.

[4] In my respectful view, the complexity of the issues in this case is not significantly greater than in other cases under the *Patented Medicines (Notice of Compliance) Regulations*. Furthermore, the amount of work involved was to a great extent attributable to the appellants themselves who pursued their application in the Federal Court with respect to claims 9 to 13 and 16 of the '576 Patent, before abandoning these positions in the course of trial. Indeed, this is why the Trial Judge awarded increased costs in favour of the respondents in the Court below. His reasons expressly refer to the need for counsel to proceed only on the most appropriate points (Trial Reasons, para. 110). This increased award is of no assistance to the appellants.

[5] Turning to the only remaining argument, it cannot be said that the respondents' opposition to the motion to expedite the hearing of the appeal unduly lengthened the duration of the proceedings. The record shows that the matter was set down at the first available date and before the appeal was susceptible of being declared moot.

[6] I see no basis for directing that increased costs be assessed in this case.

[7] The appellants have also asked this Court to provide directions with respect to the assessment of particular costs and disbursements. They have done so without setting out the actual fees or disbursement claimed. As the respondents properly point out, they cannot take a position with respect to any of these items until they know what is actually being claimed. These matters should proceed before a taxing officer and be assessed in the usual manner.

[8] In responding to the appellants' application, the respondents have also sought special directions. With respect to the respondents request for a direction that it not be required to subsidize the appellants' change of solicitor, the taxing officer is directed to disregard the time required for new counsel and members of his firm to acquaint themselves with the matter upon assuming the conduct of the appeal in computing the award of costs payable to the appellants.

[9] With respect to the costs relating to the motion for an interim stay brought by the appellants on the eve of the appellate decision, no order as to costs was made at the time it was disposed of, and there is therefore no basis for decreasing the costs award to the appellants by reason of this motion.

[10] The other directions sought by the respondents need not be given, the Court being satisfied that these matters should be assessed in the usual manner.

[11] The appellants' motion for an increased costs award and for special directions will therefore be dismissed, and a direction will be given in conformity with paragraph 8 of these reasons as requested by the respondents. Given the result, the appellants should bear the costs of this motion.

“Marc Noël”

---

J.A.

“I agree  
J. Edgar Sexton J.A.”

“I agree  
B. Malone J.A.”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-66-07

**STYLE OF CAUSE:** G.D. SEARLE & CO. and PFIZER  
CANADA INC. and NOVOPHARM  
LIMITED and THE MINISTER OF  
HEALTH

**MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES**

**REASONS FOR ORDER BY:** NOËL J.A.

**DATED:** July 12, 2007

**WRITTEN REPRESENTATIONS BY:**

Kamleh Nicola  
John B. Laskin  
and

Robert H.C. MacFarlane  
Christine M. Pallotta

FOR THE APPELLANTS

John F. Rook, Q.C.  
Dino P. Clarizio  
Dominique T. Hussey

FOR THE RESPONDENT  
Novopharm Limited

Eric Peterson

FOR THE RESPONDENT  
The Minister of Health

**SOLICITORS OF RECORD:**

TORYS LLP  
Toronto, Ontario  
and  
BERESKIN & PARR  
Toronto, Ontario

FOR THE APPELLANTS

BENNETT JONES LLP  
Toronto, Ontario

DEPARTMENT OF JUSTICE CANADA  
Ontario Regional Office  
Toronto, Ontario

FOR THE RESPONDENT  
Novopharm Limited

FOR THE RESPONDENT  
The Minister of Health