

Federal Court



Cour fédérale

Date: 20120925

Citation: 2012 FC 1121

Toronto, Ontario, September 25, 2012

PRESENT: The Honourable Mr. Justice Zinn

Docket: T-991-10

BETWEEN:

**FOURNIER PHARMA INC. AND
LABORATOIRES FOURNIER S.A.**

Applicants

and

**THE MINISTER OF HEALTH AND
SANDOZ CANADA INC.**

Respondents

Docket: T-1184-10

AND BETWEEN:

**FOURNIER PHARMA INC. AND
FOURNIER LABORATORIES IRELAND
LTD.**

Applicants

and

**THE MINISTER OF HEALTH,
ALKERMES PHARMA IRELAND LIMITED
AND SANDOZ CANADA INC.**

Respondents

REASONS FOR ORDER AND ORDER

[1] The respondent (Sandoz) and the applicants (Fournier) have informed the Court that they are unable to agree on the amount of costs which Sandoz was awarded in the Reasons for Judgment which issued in these applications. There are eight issues in dispute.

A. Level of Award of Costs

[2] Sandoz “submits that having regard to the complexity of the legal and factual issues that were at play, an award of costs at the middle of Column IV or, alternatively, the upper end of Column III is justified.” Fournier submits that Sandoz should not be entitled to any costs because of the “clear division of success” or alternatively ought to be reduced to 25% of the assessed total because the majority of the time taken related to issues of validity on which Sandoz was unsuccessful; the applications being determined in its favour on the basis of infringement.

[3] The Court has already determined that Sandoz is entitled to its costs; accordingly, the submission that it should receive nothing is rejected.

[4] Although Sandoz was ultimately successful in the application, it was only successful on the issue of infringement. Much of the evidence before the Court and the time spent in submissions related to issues of invalidity. Although Sandoz failed to establish invalidity, it cannot be said that all of the positions it advanced were frivolous or clearly without merit. Nonetheless, a significant amount of time and expense would have been saved had Sandoz focused its allegations and eliminated or not pursued those that had, at best, a marginal chance of success. I agree with the observation in *Adir v Apotex Inc*, 2008 FC 1070 para 6, that “Where an

otherwise unsuccessful party has persuaded the Court of the merits of its position on discrete issues, the award of costs may be reduced.”

[5] I am of the view that it is just to reduce the costs otherwise payable to Sandoz; however, I am not persuaded that a reduction of 75% as proposed by Fournier is just. Recognizing that an award of costs is to be neither punitive nor extravagant, I find that a reduction of one-third is warranted and more in keeping with the Court’s assessment of issues that had little merit and ought not to have been pursued to hearing.

[6] Typically costs are assessed at the mid-point of Column III of the Tariff; however, numerous judgments of this Court have assessed costs in pharmaceutical litigation at higher levels. Given the complexity of this litigation, I find that the costs are to be assessed at the higher end of Column III.

B. Second Counsel

[7] Fournier agrees that Sandoz is reasonably entitled to have its costs for two counsel, one senior and one junior, at the hearing and when conducting cross-examinations, provided two were present. Sandoz also seeks to be awarded costs for two counsel when defending a cross-examination. I can see no reason to depart from the usual order and am not persuaded that Sandoz ought to be awarded costs for two counsel when defending a cross-examination.

C. Preparation of Affidavits/Memorandum

[8] Sandoz requests ten (10) assessable services for the preparation of each expert affidavit and three (3) services for each non-expert, and ten (10) assessable points for the preparation of its memorandum of fact and law. Sandoz submits that such an increased award is reasonable “considering the length and complexity of the expert reports.” No precedent has been provided by Sandoz where such an order has been made, nor did it provide any support for its statement that “each” affidavit was entitled to the amount under Item 2.

[9] I agree with Fournier that Sandoz is entitled to only one Item 2 claim in each application for the “preparation and filing of all ... respondent’ records and materials [emphasis added].”

[10] Item 19 dealing with the memoranda provides at the middle of Column III that Sandoz is entitled to a range between 4-7 assessable points. Fournier submits that because Sandoz was ordered to file its memoranda in a form that complied with the *Federal Courts Rules*, it should be awarded “a single assessable service in the middle of Column III for 5 units.” In my view, to do so would be punitive.

D. Preparation of Cross-examination

[11] Sandoz asks for preparation time under Item 8 of Tariff B for each day of the cross-examination of Dr. Muzzio because it required a number of days to complete and there was a gap in the cross-examinations of almost 3 months. I agree with Fournier that in patent matters it is expected that substantial time will be spent on preparation and that the item does not distinguish between cross-examinations completed in one day, over several days, or those that involve breaks in time.

E. Travel

[12] Sandoz seeks its costs to travel outside Ontario to attend cross-examinations and meet with witnesses. Fournier agrees “but only on the basis that all travel costs are assessed in economy class, for a single hotel room and exclusive of food, entertainment, and alcohol expenses.” I agree that entertainment and alcohol expenses are not recoverable, however, Sandoz is entitled to recovery of reasonable food expenses.

F. Interlocutory Motions

[13] Sandoz seeks its costs of the consolidation motion which Fournier successfully brought just prior to trial. Fournier submits that it ought to be awarded its costs on that motion to be set off against Sandoz’s award. First, although Sandoz was successful, I am of the view that it is not entitled to be awarded its costs given the lateness of the motion and the ultimate disposition of these applications. On the other hand, neither is Sandoz entitled to the costs of the motion because it ought to have consented to the consolidation motion, particularly given its position that it had not filed contradictory evidence in these two applications. No party is awarded costs of the consolidation motion.

G. Interest

[14] Sandoz seeks interest at 2% from the date of judgment and Fournier offers no opposition to that submission.

ORDER

THIS COURT ORDERS THAT in each application, Sandoz is entitled to its costs assessed as follows:

1. Its costs assessed at the upper end of Column III and then reduced by one-third;
2. Costs for two counsel, one senior and one junior, at the hearing and when conducting a cross-examination, provided two were present, and its costs for one counsel when defending a cross-examination;
3. Costs in each application under Item 2 of the Tariff assessed at seven (7) units for all of the respondent's records and materials filed, and seven (7) units under Item 19 for its memorandum of fact and law;
4. Costs under Item 8 of the Tariff shall not be increased for the preparation for the cross-examination of Dr. Muzzio;
5. Costs for out of Province travel to be assessed in economy class, for a single hotel room, and food, excluding entertainment and alcohol expenses;
6. No costs are awarded for the consolidation motion; and
7. Sandoz is awarded interest on the costs awarded at the rate of 2% from June 15, 2012.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-991-10
STYLE OF CAUSE: FOURNIER PHARMA INC. ET AL v. THE MINISTER OF HEALTH and SANDOZ CANADA INC.
DATES OF HEARING: April 2 to 5, 2012

DOCKET: T-1184-10
STYLE OF CAUSE: FOURNIER PHARMA INC. ET AL v. THE MINISTER OF HEALTH, ALKERMES PHARMA IRELAND LIMITED and SANDOZ CANADA INC.
DATES OF HEARING: March 26 to 29, 2012

PLACE OF HEARING: Toronto, Ontario

REASONS FOR ORDER AND ORDER: ZINN J.

DATED: September 25, 2012

APPEARANCES:

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