PLAYING FOR TIME, OR PAYING FOR TIME? – THE DANGER OF DELAY IN LITIGATION

Posted on March 11, 2015

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On June 18, 1997 Eli Lilly sued Apotex for infringement of several of its patents on the antibiotic cefaclor. It was to be the beginning of a very long fight. There is a school of thought among litigators that delay tends to favour the defendant. In a corporate setting management may change over time, and a new manager may be more willing to settle a case on favourable terms than the one who authorized the proceeding since the new manager is less likely to have a personal interest in the case.

Mr. Justice Zinn's decision in *Eli Lilly and Company v Apotex Inc.* 2015 FC 1254 may cause defendants to reconsider whether delay is still a winning strategy. At common law interest could be awarded as a component of damages in a limited number of cases. This was considered unfair, and legislation was passed beginning in the 1970s in several provinces and at the Federal level giving the courts the power to award prejudgment interest calculated as simple interest at a statutory rate. A 2002 decision of the Supreme Court of Canada had held that compound interest might be awarded if the claim for interest was based on some right other than the statutory provision.

Justice Zinn also noted an earlier decision of the Federal Court dealing with postjudgment interest where Mr. Justice Hughes observed that a party should not be encouraged not to pay a judgment simply because it is cheaper to let the interest accumulate. Justice Hughes consequently set the postjudgment interest rate at 4.5% compounded annually which approximated a three year mortgage rate at the time. Justice Zinn felt the same principle should apply to prejudgment interest so that a party would not be encouraged to delay and prolong the litigation because it was cheaper and more rewarding than paying the plaintiff.

Justice Zinn determined that the award of damages was being made under s. 55(1) of the *Patent Act*, and that Apotex was accordingly responsible under that section for "all damage sustained" by Lilly by reason of the infringement of its patents. Since Lilly was entitled to damages calculated with reference to the profits it would have made on the sales that Apotex made, it followed that it had lost the opportunity to invest those profits to earn further income. In Justice Zinn's view, compound prejudgment interest was appropriate to compensate Lilly for this element of the damage it had sustained. He concluded on the basis of the earlier Supreme Court of Canada decision that he had the authority to award compound interest since it was being awarded under s. 55

of the Patent Act and not under the prejudgment interest legislation.

The damages alone were substantial; some $31 million. However, given the 18 years it had taken for the damages to be assessed, the interest compounded annually came to more than $75 million, making Apotex responsible for paying a total of more than $106 million plus costs. Not surprisingly Apotex has filed a notice of appeal.

The case has broader application than patent damages. Other Federal intellectual property statutes including the *Copyright* Act, the *Industrial Design Act* and the *Trademarks Act* have provisions empowering the court to grant relief, including damages. More importantly it suggests that courts may be willing to apply the earlier Supreme Court of Canada decision more generally. In any case, delay is not always a winning strategy for a defendant.

by Peter Wells

A Cautionary Note