Federal Court  Cour fédérale

Date: 20220819

Dockets: T-1699-18
T-1700-18
T-1702-18

Citation: 2022 FC 1215

Docket: T-1699-18

BETWEEN:

ANTON VASILEVICH ZHUK

Applicant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF HEALTH, THE ATTORNEY GENERAL OF CANADA

Respondent

Docket: T-1700-18

AND BETWEEN

SKYELAR PHILLIP POLLACK

Applicant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF HEALTH, THE ATTORNEY GENERAL OF CANADA

Respondent

Docket: T-1702-18

AND BETWEEN:

BRIAN EDWARD JAMES WATSON

Applicant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF HEALTH, THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ASSESSMENT

GARNET MORGAN, Assessment Officer

I. Background

[1] This is an assessment of costs pursuant to the Reasons for Order and Order of the Federal Court dated February 5, 2021, wherein the Court ordered the following at paragraph 1:

> 1. The Applicants are awarded their costs of the application for judicial review including the taxation before me the quantum of which is to be assessed by an Assessment Officer, which assessment shall be carried out in accordance with these Reasons.

[2] Further to the Court's decision, costs will be assessed in accordance with Rule 407 of the *Federal Courts Rules*, SOR/98-106 *(FCR)*, which states:

> 407. Assessment according to Tariff B - Unless the Court orders otherwise, party-and-party costs shall be assessed in accordance with column III of the table to Tariff B.

[3] On February 11, 2021, the Applicants filed Bills of Costs for files T-1699-18, T-1700-18 and T-1702-18, which initiated the Applicants' requests for assessments of costs to be conducted by an Assessment Officer.

[4] On May 21, 2021, a direction was issued to the parties regarding the conduct and filing of additional documents for the assessment of costs. The court record shows that the Applicants filed Written Submissions and a Book of Authorities on June 21, 2021; the Respondent filed Submissions on Costs and a Book of Authorities on July 21, 2021; and the Applicants filed Reply Written Submissions On Costs and a Book of Authorities on August 5, 2021.

II. Preliminary Issue

A. *Can separate Bills of Costs be assessed for files T-1699-18, T-1700-18 and T-1702-18?*

[5] At paragraphs 11 and 17 to 24 of the Respondent's Submissions on Costs, it is submitted that the judicial review proceedings for files T-1699-18, T-1700-18 and T-1702-18 were consolidated together and that the Applicants are only entitled to claim one set of costs. The Respondent submitted that the Applicants have filed three separate Bills of Costs with the Items for assessable services claimed at the maximum number of units under Column III of Tariff B of the *FCR* for each file, which would amount to a tripling of costs. In reply, at paragraphs 7 to 12 of the Applicants' Reply Written Submissions On Costs it is submitted that "[a]lthough

Prothonotary Alto made an Order stating that the JR Applications should be consolidated, they instead proceeded as separate matters that were being heard together." The Applicants' submitted that the judicial review applications were not amended and merged into a single pleading and that separate affidavits were filed for each of the Applicants.

[6] In support of their positions, the Applicants and the Respondent both cited the following decisions: *Bayer Inc. v Teva Canada Ltd.*, 2019 FC 191, and *Venngo Inc. v Concierge Connection Inc. (c.o.b. Perkopolis)*, 2016 FCA 209, which provide some clarification regarding the meaning of consolidated proceedings. In addition to the decisions cited by the parties, in *Halifax Regional Municipality v Canada (Public Works and Government Services)*, 2008 FC 1159, at paragraph 10, the Court stated the following regarding the objectives of consolidation:

> 10. The guiding principles of avoiding multiplicity of proceedings and the promotion of expeditious and inexpensive determination of proceedings govern consolidation motions.
>
> > The policy objectives underlying consolidation are the avoidance of a multiplicity of proceedings and the promotion of expeditious and inexpensive determination of those proceedings. John E. *Canning Ltd. v. Tripap Inc*., [1999] F.C.J. No. 715 at paragraph 27. In deciding whether to consolidate proceedings the Court will consider whether there are common parties, common legal and factual issues, similar causes of action, parallel evidence and the likelihood that the outcome of one case will resolve the other case. *Eli Lilly and Co. v. Apotex Inc.* (1994), 55 C.P.R. (3d) 429 and *Canning, supra.* In addition, proceedings should not be consolidated if one of the parties would be prejudiced. *Eli Lilly, supra*.
> >
> > *Global Restaurant Operations of Ireland Ltd. v Boston Pizza Royalties Limited Partnership*, 2005 FC 317 at para. 11

[7] My review of the *Baye*r, *Venngo* and *Halifax* decisions found that the underlying theme with these decisions is that multiple court proceedings with a commonality of issue(s) may benefit from a consolidation of these proceedings, which will allow for savings of time, effort and financial resources. The aforementioned decisions have been helpful in explaining the framework for consolidated proceedings but these decisions did not illuminate how assessments of costs for consolidated files should be conducted by an Assessment Officer. In addition, my review of the decisions in conjunction with the *FCR*, did not reveal that an individual party is absolutely precluded from filing a separate Bill of Costs because they are part of a consolidated proceeding. In *Novopharm Ltd. v AstraZeneca AB*, 2006 FC 678, at paragraphs 18, 19 and 20, the Assessment Officer stated the following regarding assessments of costs for multiple proceedings:

> 18. […] The AstraZeneca Respondent submits, with the exception of Item 1 (Preparation and filing of originating documents, other than a Notice of Appeal, and application records.), that it is clear that a litigant may assess separate costs for each proceeding unless there are services common to all and therefore, in that situation, multiple indemnifications would be inappropriate. The AstraZeneca Respondent submits, with regards to the assessable services such as appearance on a motion, preparation for cross-examination and attendance at a conference, that there was a single service with respect to both files. The AstraZeneca Respondent supports this submission by making reference to *Caricline Ventures Ltd. v. ZZTY Holdings Limited and Azim Zone Inc*.,[2000] F.C.J. No. 1524, 2000 FCT 1134 (TO) at paragraph 21:
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> > Consistent with the observation of the trial Judge in paragraph [10] of his May 15, 2002 directions for costs, I do not think that these matters were particularly complex or that they raised novel issues of law. Importance as a factor in costs is relative and should not be discounted simply because litigation may be significant only for its particular parties. My impression, based on the record and the unfolding before me of this assessment of costs, including a teleconference in advance to set

> parameters for the exchange of materials, is that these litigants may have had general difficulties in dealing with one another in turn possibly inducing higher costs than normal. Regardless, the practice is that, unless the Court specifically **restricts** a successful litigant to a single set of costs for multiple proceedings, such as in *Bertha L'Hirondelle et al. v. Her Majesty the Queen*, [2002] F.C.J. No. 1426, 2002 FCA 367, that litigant may assess separate costs for each proceeding unless there are services common to all and clearly inappropriate, as here for trial preparation and appearance, for multiple indemnification. I agree that the record establishes difficulties on the part of the Defendants (which I do not attribute to their counsel) in moving this litigation forward. Therefore, I allowed fee items as presented except where I felt adjustments were warranted. There is no principle of costs mandating the mid-point of ranges in the absence of an express direction of the Court to do so.
>
> [Emphasis added] *(Emphasis was added in the original decision.)*

19. The AstraZeneca Respondent refers to the Order of the Federal Court dated June 12, 2001 regarding these "separate" applications of the Novopharm Applicant during the first hearing of these proceedings:

> ...counsel for both parties argued the applications together upon the records filed in each proceeding. Most of the evidence was identical. As the matters were argued together, I am issuing one set of reasons applicable to both proceedings.

The AstraZeneca Respondent submits that this statement by the Federal Court supports their submission that there is no justification for including costs for both files with the exception of Item 1 (Preparation and filing of originating documents, other than a notice of appeal to the Federal Court of Appeal, and application records) which I have mentioned above in paragraph [18].

20. I have reviewed the Court files in these proceedings and I am of the opinion that a number of the assessable services that have been claimed were common to both proceedings which is a consideration that is expressed in *Caricline Ventures Ltd.*,

> *supra* above. In addition, I have noted the submissions of the AstraZeneca Respondent regarding the Order of the Federal Court dated June 21, 2001 and further noted that during the second hearing these applications were, in fact, heard together and argued on almost identical evidence. However, these proceedings did involve voluminous evidence and authorities which, pursuant to the Federal Courts Rules, had to be filed in each proceeding. In addition, for the assessable services that were common to both proceedings, I must avoid duplication and over-payment where only one set of costs is appropriate. For these reasons, unless I determine specific exceptions for certain costs or where specifically ordered by the Court in its decision dated January 21, 2003, the Novopharm Applicant's request for costs entitlements for both files is allowed.

[8] Also, in *Aird v Country Park Village Properties (Mainland) Ltd.*, 2005 FC 1170, at paragraph 22, the Assessment Officer stated that following regarding multiple claims for assessable services when there are a multiple Plaintiffs:

> 22. Item 7 may be claimed more than once as a function of the circumstances: see Early Recovered Resources Inc. v. Gulf Log Salvage Co-Operative Assn., [2001] F.C.J. No. 1666 (A.O.). If each Plaintiff had asserted a cause of action via discrete proceedings, as was their right, each could have claimed an individual item 7, as well as other items. The grouping of discrete causes of action in a single proceeding has precluded, to the Defendant's benefit, multiple claims for services such as item 14, ie. meaning only one counsel at trial on behalf of 123 Plaintiffs. However, the Defendant must concede that the circumstances here may warrant multiple claims for given items as a function of the discrete interests of Plaintiffs. I think that the discovery process is a typical example because, although the submissions at the hearing of the trial may have represented certain common interests of litigants joining together to challenge the Defendant's conduct via a single Statement of Claim, the genesis of each cause of action may have been rooted in dissimilar facts. I allow the 3.5 units claimed for each of 123 Plaintiffs.

[9] Utilizing the *Novopharm* and *Aird* decisions as guidelines, I find it reasonable that the Applicants submitted separate Bills of Costs for files T-1699-18, T-1700-18 and T-1702-18. In

addition, my review of the Court's Reasons for Order and Order dated February 5, 2021, did not reveal that the Court's decision precluded separate Bills of Costs from being assessed for each of the Applicants. Therefore, I have determined that it was satisfactory for the Applicants to submit separate Bills of Costs to be assessed for costs. This having been determined, in my role as an Assessment Officer, it is my responsibility to ensure that there is not an over-payment of costs by the Respondent to the Applicants because separate Bills of Costs were filed for the three consolidated files.

[10] Concerning the quantum of costs for files T-1699-18, T-1700-18 and T-1702-18, my review of the court records for the aforementioned files shows that each Applicant submitted a letter dated November 2, 2018, to the Court requesting that the files be joined together and noted that the Respondent had consented to this request. The last paragraph in the Applicants' letters, which is the same on each file, states the following:

> The applicants respectfully submit that an Order for the consolidation, trial together or trial in tandem of the four applications would provide significant judicial economy, reduce the risk of inconsistent findings, and lower legal costs for all parties involved.

[11] Further to the Applicants' letters dated November 2, 2018, on November 7, 2018, the Court ordered that:

> 1. The judicial review applications in T-1699-18, T-1700-18, T-1701-18 and T-1702-18 shall be consolidated and be continued under Court File. No. T-1699-18.

[12] Although the Court did not order that the Notices of Application should be merged together, the Court did order that the files should be consolidated, which was an option

consented to by the parties. My review of the court records for files T-1699-18, T-1700-18 and T-1702-18 shows that after the Court's Order dated November 7, 2018, was issued to the parties that all of the activity and documents filed for the three files only occurred on file T-1699-18. Therefore, for files T-1700-18 and T-1702-18, costs will only be assessed up to the Court's Order dated November 7, 2018, which is in keeping with the *Novopharm* decision. For the assessment of costs for file T-1699-18, I will utilize the *Aird* decision as a guideline, to determine the quantum of costs to be allowed based on the parameters of a specific Item in Tariff B, the facts pertaining to a particular claim, and depending on any applicable jurisprudence that may take precedence.

[13] Further to my review of the court records for files T-1699-18, T-1700-18 and T-1702-18, I have determined that each Applicant is eligible to claim Item 1 for the "[p]reparation and filing of originating documents" for the filing of the Notices of Application, and also Item 26 for the "[a]ssessment of costs", in addition to any related disbursements for each of these Items. Also, each Applicant is eligible to claim the disbursement for the process serving of the Consents that were filed on November 1, 2018, which were related to the filing of supporting affidavits. The remaining Items and disbursements claimed by the Applicants will be assessed on file T-1699-18, as it was the lead file for the all of the consolidated proceedings and any costs incurred subsequent to the Court's Order dated November 7, 2018, should only be assessed on that file.

III. Assessable Services

[14] Further to my determination earlier in these Reasons that some of the Applicants' claims for files T-1700-18 and T-1702-18 can be assessed separately for costs, my review of the Applicants' Bills of Costs in conjunction with the court record found that Items 1 and 26 can be assessed for costs. The remaining claims submitted under Items 4, 7, 8, 9, 13(a), 15, and 27, are all for services that were performed subsequent to the consolidation of files T-1699-18, T-1700-18 and T-1702-18, and therefore these claims will be assessed for costs on the lead file T-1699-18, which will encompass the costs for files T-1700-18 and T-1702-18.

A. *Item 1 – Preparation and filing of originating documents, other than a notice of appeal to the Federal Court of Appeal, and application records.*

(1) T-1699-18, T-1700-18 and T-1702-18

[15] The separate Bills of Costs submitted for files T-1699-18, T-1700-18 and T-1702-18, each have 7 units claimed for Item 1. At paragraph 10 of the Applicants' Submissions on Costs it is submitted "that the maximum number of units under Column III of Tariff B should be awarded to the Applicants", as the judicial review proceedings were lengthy and complicated. In response, at paragraph 19 of the Respondent's Submissions on Costs it is submitted that "[t]he Notices of Application were nearly identical, asserting the same errors and requesting the same relief, with only the Applicant's name, address and medical condition being different." In reply, at paragraph 10 of the Applicants' Reply Written Submissions On Costs it is submitted that "[t]he notices of application filed by the Applicants were not amended and merged into a single pleading."

[16] As stated earlier in these Reasons, I have determined that the Applicants are entitled to claim separate costs for the Notices of Application, as the consolidation of files T-1699-18, T-1700-18 and T-1702-18, occurred after the separate Notices of Application had been filed with the court registry. Concerning the quantum of costs for each of the Notices of Application, I reviewed the factors in awarding costs that are listed under Rule 400(3) of the *FCR*, and when I considered factors such as; (a) the result of the proceeding; (c) the importance and complexity of issues; and (g) the amount of work performed; the court record reflects that the Applicants were successful in having their applications for judicial review granted; that the issues argued were of significant importance and of moderate to high complexity; and that a significant amount of work was done by the Applicants for the preparation of the Notices of Application. Further to my review of the aforementioned factors, I am in agreement with the Respondent that the majority of the text in the Notices of Application are identical. This being noted, I do not find that the similarity of the Notices of Application negates costs being allowed for Item 1 for files T-1700-18 and T-1702-18. Having considered the aforementioned facts, I have determined that the filing of the Notices of Application were necessary and that it is reasonable to allow 4 units each for Item 1 for files T-1700-18 and T-1702-18.

[17] For file T-1699-18, I reviewed the entirety of the court record for documents pertaining to the underlying application for judicial review, including the Notice of Application, the Application Record filed on December 16, 2019, which is three volumes, and the Supplementary Application Record filed on June 8, 2020, which is one volume. Further to my review, I have determined that the services performed for this file were necessary and considering that the

Application Records pertained to three different files, it is reasonable to allow 7 units for Item 1 for file T-1699-18.

B. *Item 4 – Preparation and filing of an uncontested motion, including all materials.*

(1) T-1699-18

[18] The Bill of Costs submitted for file T-1699-18 has 4 units claimed for Item 4 for the "[p]reparation and filing of an uncontested motion, including all materials – March 18, 2018." At paragraphs 26 and 27 of the Respondent's Submissions on Costs, it is submitted that the date of the motion in the Applicants' Bill of Costs predates the filing of the Notices of Application for the judicial review proceedings. This having been noted by the Respondent, it is also submitted that if the claim is related to one of the Applicants' informal motion requests that the Court's Order dated November 7, 2018, and the Court's direction dated March 18, 2020, were both silent with respect to costs. The Respondent cited the decisions, *Buschau v Rogers Communications Inc*., 2012 FCA 100, at paragraph 29, and *Ruckpaul v Canada*, 2004 FC 618, at paragraphs 3 and 4, regarding Court decisions being silent on costs. In reply, at paragraphs 16 and 18 of the Applicants' Reply Written Submissions On Costs, the following was submitted:

> 16. At paragraph 4 of its written submissions, the Respondent argues that the Applicants should not be entitled to item B4. The Applicants' Bill of Costs contains a typo: item B4 should read March 18, 2020, as opposed to March 18, 2018, and refers to an informal request to file a Supplementary Record pursuant to R. 312 (c) of the *Federal Court [sic] Rules*.
>
> […]
>
> 18. It is respectfully submitted *Buschau* and *Ruckpaul* can be readily disguised from the instant case. Unlike the cases cited by the Respondent, the [sic] was no formal Order made in connection

> with the Applicants' informal request. Instead, Prothonotary Aalto issued an oral direction on March 18, 2020. It is trite to say that the issue of costs could not have been granted by way of an oral direction. It is respectfully submitted that nothing in Prothonotary Aalto's direction suggests that the Applicants' are barred from seeking their costs of the uncontested motion.

[19] Further to my review of the parties' submissions and the *Buschau* and *Ruckpaul* decisions, my review of the court record did not reveal that are any formal or informal motions for which the Court awarded costs to the Applicants. In *Tursunbayev v Canada*, 2019 FC 457, at paragraphs 39 and 40, the Court stated the following regarding motions and costs:

> 39. As the Defendants point out, apart from the Court's order of November 24, 2016 and the eventual supplementary costs order of March 6, 2017, which the Defendants have satisfied, all of my orders in these proceedings have either expressly awarded no costs or have been silent as to costs. This is because in the instances now raised before me the Plaintiff did not seek costs (either in writing or orally) so that costs were not an issue I was asked to address. As I understand the jurisprudence of this Court, I cannot now re-visit my earlier orders that were silent as to costs. In *Sauve v Canada*, 2015 FC 181, Justice Barnes had the following to say on point:
>
> > [5] I am also concerned about the Defendants' claims to costs in connection with a variety of motions that were filed by one or the other dating back as far as 2007.
> >
> > [6] Almost all of the early motions in this proceeding were concluded by Orders where no award of costs was made. It is not open to the Court to revisit those matters and to award costs where none were ordered at the time: see *Exeter v Canada*, 2013 FCA 134 at para 14.
>
> 40. When it comes to Rule 401, the case law is to the effect that, notwithstanding the broad discretion I have, I cannot award costs where they were not requested. This general principle was confirmed by the Federal Court of Appeal in *Exeter v Canada (Attorney General)*, 2013 FCA 134:
>
> > [12] The general principle is that a court may not award costs when costs were not requested: see, for

> example, *Balogun v. Canada*, 2005 FCA 350. To award costs in these circumstances would be a breach of the duty of fairness because it would subject the party against whom they are awarded to a liability when the party had had no notice or an opportunity to respond: see, for example, *Nova Scotia (Minister of Community Services) v. Elliott (Guardian ad litem of)* (1995), 141 N.S.R. (2d) 346 (N.S.S.C.) at para. 5.

[20] Further to my review of the parties' costs documents, in conjunction with the court record, and the *FCR*, and utilizing the *Buschau*, *Ruckpaul* and *Tursunbayev* decisions as guidelines, I have determined that I do not have the authority to allow the Applicants' claim for Item 4, as there are no Court decisions specifically awarding costs for any formal or informal motions on this file to the Applicants. I have considered the Applicants' argument that there is nothing in the Court's direction dated March 18, 2020, that suggests "that the Applicants' are barred from seeking their costs of the uncontested motion" but conversely, the Applicants did not provide any evidence or jurisprudence supporting their position that the Court's direction entitles them to costs. Therefore, I have determined that in the absence of any supporting jurisprudence from the Applicants, that I do not have the authority to allow any costs under Item 4, and must disallow this claim.

C. *Item 7 – Discovery of documents, including listing, affidavit and inspection; Item 8 – Preparation for an examination, including examinations for discovery, on affidavits, and in aid of execution; and Item 9 – Attending on examinations, per hour.*

(1) T-1699-18

[21] The Applicants have claimed 5 units for Items 7 and 8, and 12 units for Item 9. At paragraphs 21, 22, 25 and 28 of the Respondent's Submissions on Costs it is submitted that the Applicants have claimed the maximum number of units for all of the Items, which are excessive amounts for the cross-examination of Michael McGuire. The Respondent submitted that the Affidavit of Michael McGuire, sworn on December 17, 2018, was not complex and was only 12 pages in length, for which "the first 6 pages were devoted to the governing legislation, regulations and how Health Canada assesses applications for Registration Certificates" and that "[t]he remaining 6 pages contained information about the Applicants' applications for Registration Certificates — information which was known to the Applicants and their Counsel." The Respondent submitted that no costs should be allowed to the Applicants for Item 7 as "they are not entitled to claim costs for "discovery" in an application for judicial review" and that the costs for Items 8 and 9, should be allowed "at the mid-range of Column III." In reply, at paragraph 6 of the Applicants' Reply Written Submissions On Costs it is submitted that the Respondent's assertion that the judicial review proceedings were not complex is incorrect and that the Respondent's "concessions were only made at the tail end of the litigation, after all of the necessary steps in this proceeding" were completed.

[22] Further to the parties' submissions, my review of the court record did not reveal that there were any discoveries of the parties' documents, as specified in Rules 222 to 233 of the *FCR*. On occasion, discovery of documents can occur in judicial review proceedings but my review of the court record did not reveal that any Affidavits of Documents were served and filed by any of the parties. Therefore, I have determined the Applicants' claim for Item 7 must be disallowed, as the

court record did not reveal that the discovery of documents occurred nor were any specific submissions or evidence provided by the Applicants to support this particular claim.

[23] Concerning the Applicants' claims for Items 8 and 9, at paragraph 22 of the Reasons for Order and Order dated February 5, 2021, the Court stated the following:

> [22] The crux of the costs issue in this matter lies in the quantum of costs requested by the Applicants. I appreciate cross-examinations took place, and I find they were useful and should be allowed although the quantum will be for the assessment to decide. Had the Respondent advised the Applicants of the case to meet, cross-examination would not have been necessary.

[24] Further to the Respondent's submissions, my review of the court record, and more specifically the Affidavit of Michael McGuire, sworn on December 17, 2018, confirmed that there are 12 pages of text in the affidavit, as submitted by the Respondent, but also that the affidavit has 15 exhibits attached from letters "A" to "O" and that the affidavit is 102 pages in length. I have also taken into the consideration the Court's observation found at the paragraph 22 of the Reasons for Order and Order that if "the Respondent advised the Applicants of the case to meet, cross-examination would not have been necessary." When I consider the factors listed under Rule 400(3) of the *FCR*, such as; (a) the result of the proceeding; (g) the amount of work performed by the Applicants; (i) any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding; and (k) whether any step in the proceeding was (i) improper, vexatious or unnecessary, or (ii) taken through negligence, mistake or excessive caution; the court record reflects that the Applicants successfully argued their position before the Court; that additional services needed to be performed by the Applicants, which lengthened the proceeding; and that if the Respondent had "advised the Applicants of the case to meet, cross-

examination would not have been necessary." Therefore, having considered all of the aforementioned factors, I find that the services performed by the Applicants for Items 8 and 9 were necessary and that it is reasonable for these claims to be allowed as is, at the high-end of Column III of Tariff B. Specifically, 5 units are allowed for Item 8 and 12 units are allowed for Item 9.

D. *Item 13 – Counsel fee: (a) preparation for trial or hearing, whether or not the trial or hearing proceeds, including correspondence, preparation of witnesses, issuance of subpoenas and other services not otherwise particularized in this Tariff; and; (b) preparation for trial or hearing, per day in Court after the first day.*

(1) T-1699-18

[25] The Applicants have claimed 5 units for Item 13(a) for the preparation for the judicial review hearing that was scheduled to begin on October 14, 2020. At paragraph 23 of the Respondent's Submissions on Costs it is submitted that the Applicants "should only be entitled to one set of costs towards to [sic] lower end of Column III for this item." The Applicants' reply submissions did not specifically address the Respondent's submissions for Item 13(a) but at paragraph 13 of the Applicants' Reply Written Submissions On Costs the following was submitted regarding the Court's decision and the conclusion of the judicial review proceeding:

> 13. […] As described above, Justice Brown held that the Respondent's failure to adhere to the rules of natural justice is a factor to be considered in this assessment. It is respectfully submitted that so should be the fact that the Respondent has chosen to drag the Applicants through a lengthy proceeding instead of conceding that the JR Applications ought to be granted at the outset of the litigation.

[26] Further to my review of the parties' submissions, I reviewed the Court's Reasons for Order and Order dated February 5, 2021, and I found paragraph 24 of the decision to be of particular relevance for this claim:

> [24] That said, the Assessment Officer shall be bound by my findings as follows: (1) the Applicants achieved substantial success in having their applications for judicial review granted and the matters remanded for reconsideration. That is virtually all one could ask for in a case like this; (2) the issue of whether the property at issue contained one or two units was of obvious importance to the parties; it was a show-stopper and resulted in the final rejection of the applications by all three Applicants; (3) that the Respondent conceded it failed to adhere to the rules of natural justice. Had she adhered to the rules of natural justice, this proceeding would have been avoided: letting the parties know the case against them is certainly not a new concept; it is ancient and well imbedded in administrative law and should not have been disregarded.

[27] I find that the Court's observations that had the Respondent "adhered to the rules of natural justice, this proceeding would have been avoided" and "that the Respondent conceded it failed to adhere to the rules of natural justice" to be of particular importance, as the services performed by the Applicants for this consolidated proceeding could have been avoided. When I consider the factors listed under Rule 400(3) of the *FCR*, such as; (a) the result of the proceeding; (g) the amount of work performed by the Applicants; (i) any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding; and (k) whether any step in the proceeding was (i) improper, vexatious or unnecessary, or (ii) taken through negligence, mistake or excessive caution; the court record reflects that the Applicants successfully argued their position before the Court; that additional services needed to be performed by the Applicants, which lengthened the proceeding; and that if the Respondent had "adhered to the rules of natural justice, this proceeding would have been avoided." Therefore,

having considered all of the aforementioned factors, I find that the services performed by the Applicants for Item 13(a) were necessary and that it is reasonable for this claim to be allowed as is, at the high-end of Column III of Tariff B. Specifically, 5 units are allowed for Item 13(a).

E. *Item 15 – Preparation and filing of written argument, where requested or permitted by the Court; and Item 27 – Such other services as may be allowed by the assessment officer or ordered by the Court.*

(1) T-1699-18

[28] The Applicants have claimed 7 units for Item 15 and 3 units for Item 27 for the taxation dealt with by the Court. Concerning Item 27, the Applicants' Bill of Costs states that it is for the "[t]axation before Justice Brown (as per the February 5, 2021 Order)." Concerning the claim for Item 15, it was not specified in the Applicants' costs documents, which document(s) this claim pertains to. Nor did the Respondent's submissions help to illuminate which document(s) Item 15 pertains to. In *Biovail Pharmaceuticals Canada v Canada (Minister of National Health and Welfare)*, [2009] FCJ No 858, at paragraph 27, the Assessment Officer stated the following regarding Item 15:

> 27. Fee item 15 (written argument where requested or permitted by the Court) falls under the subheading E. Trial or Hearing. Such written argument usually occurs shortly after a hearing, but on occasion has been requested shortly before a hearing. It is not the memorandum of fact and law included in the respondent's materials under fee item 2. As the Court did not request such written argument, I disallow the fee item 15 claim in each matter.

[29] Further to my review of the court record, Tariff B, and utilizing the *Biovail* decision as a guideline, I find that the Court's direction dated October 15, 2020, which allowed the parties to

file documents pertaining to a timeline and costs, which was issued to the parties subsequent to the Court's final decision dated September 24, 2020, meets the requirements for Item 15. I also find that the Applicants' claim for Item 15 overlaps with the claim made for Item 27, therefore the Applicants' claim for Item 27 is disallowed. I am in agreement with the Respondent's submissions made at paragraph 24 of the Respondent's Submissions on Costs that the Applicants are only entitled to one set of costs for Item 15 but I am not in agreement that the costs should be allowed at the mid-range of Column III. I have reviewed the Applicants' Memorandum On Costs and Book of Authorities filed on November 12, 2020, and I have considered the Court's directions to the Assessment Officer found at paragraphs 24 to 27 of the Reasons for Order and Order dated February 5, 2021, along with the factors listed in Rule 400(3) of the *FCR*, and I find that the Applicants' services were necessary as it helped to set the parameters for this assessment of costs and that it is reasonable to allow 7 units for Item 15.

F. *Item 26 – Assessment of costs.*

(1) T-1699-18, T-1700-18 and T-1702-18

[30] The Applicants have claimed 6 units for each file for Item 26 for services performed in relation to the assessments of costs for files T-1699-18, T-1700-18 and T-1702-18. Further to my determination earlier in these Reasons that the costs for files T-1700-18 and T-1702-18 could be assessed separately up to the Court's Order dated November 7, 2018, I also find that the Applicants are entitled to claim costs for the services performed for the separate assessments of costs as well. Further to my review of the parties' costs documents in conjunction with the court record, Tariff B and Rule 400(3) of the *FCR*, I have determined that the services performed by

the Applicants were necessary and that it is reasonable to allow 2 units each for files T-1700-18 and T-1702-18. Having considered that the services performed for T-1699-18 applies to the majority of the claims for the three consolidated files, I have determined that it is reasonable to allow 5 units for file T-1699-18 for Item 26.

G. *Total amount allowed for the Respondent's assessable services.*

[31] For file T-1699-18, a total of 41 units have been allowed for the Applicants' assessable services for a total dollar amount of $6,949.50, inclusive of taxes.

[32] For file T-1700-18, a total of 6 units have been allowed for the Applicant's assessable services for a total dollar amount of $1,017.00, inclusive of taxes.

[33] For file T-1702-18, a total of 6 units have been allowed for the Applicant's assessable services for a total dollar amount of $1,017.00, inclusive of taxes.

IV. Disbursements

[34] Further to my determination earlier in these Reasons that some of the Applicants' claims submitted for files T-1700-18 and T-1702-18, can be assessed separately for costs, my review of the Applicants' Bills of Costs in conjunction with the court record found that the court fees for the filing of the Notices of Application and the related process server fees can be assessed for costs, as well as the process serving of the Consents that were filed on November 1, 2018. The remaining claims submitted for court fees, process serving, printing fees and court reporting, are

all for services that were performed subsequent to the consolidation of files T-1699-18, T-1700-18 and T-1702-18, and therefore the costs assessed on the lead file T-1699-18, will encompass the costs for the disbursements for the other two consolidated files.

A. *Preliminary Issue.*

[35] Concerning the Respondent's submissions found at paragraph 31 of the Respondent's Submissions on Costs that the Applicants' claims for process serving are unreasonable and should be disallowed because the Federal Court's e-filing system was available for the duration of the proceedings; my review of Rules 71 to 74 of the *FCR*, which provide the requirements for the filing of documents with the court registry did not reveal that there is an imperative requirement that documents be filed electronically by a party. The electronic filing of documents is an option that a party may choose but they are not compelled to do so by the *FCR*. An exception would be a Court direction or decision instructing a party to file their documents electronically. My review of the court record did not reveal that the Court made such a direction or decision for these particular files, therefore I find that it was open to the Applicants to choose the manner by which they would file their documents with the court registry, in accordance with the *FCR*.

B. *Notices of Application and Consent - court fees and process serving.*

(1) T-1699-18, T-1700-18 and T-1702-18

[36] The separate Bills of Costs submitted for files T-1699-18, T-1700-18 and T-1702-18, each have $50.00 claimed for the filing fees paid for the Notices of Application filed on September 21, 2018, and $50.85 is claimed for the process serving of these documents. In addition, $28.25 is claimed for each file for the process serving of the Consents that were filed on November 1, 2018, which were related to the service and filing of supporting affidavits. Further to my review of the court record, Tariff B, and the invoices attached as Exhibit "A" to the Affidavit of Michael McGuire, sworn on December 17, 2018, I have determined that all of these claims can be allowed as claimed by the Applicants for files T-1699-18, T-1700-18 and T-1702-18. I did not find that any of these claims required my intervention, as I found the disbursements to be necessary and the amounts claimed are reasonable. Therefore, a total of $129.10 is allowed for each file for the aforementioned disbursements.

C. *Requisition for Hearing filed on January 24, 2020 - court fees and processing serving; Consent filed November 1, 2018 – process serving; Supplementary Application Record filed on June 8, 2020 - printing fees; Court Reporter and transcript related to the cross-examination of Mark McGuire on September 4, 2019.*

(1) T-1699-18

[37] I have reviewed the Applicants' assessment of costs documents in conjunction with the court record, the *FCR* and any relevant jurisprudence and I have determined that the Applicants' disbursements related to the Applicants' Requisition for Hearing; the Applicants' Supplementary Application Record; and court reporter services can be allowed as claimed. I did not find that any of these claims required my intervention, as I found the disbursements to be necessary and the

amounts claimed are reasonable. Therefore, these disbursements are allowed for a total amount of $1,898.00.

[38] The Applicants' remaining claims for have some issues to look into and as a result, they will be assessed in more detail below.

D. *Motion Record (consent motion) filed on November 2, 2018 – printing fees; Application Record filed on December 16, 2019 - printing and binding fees.*

[39] Further to my determination earlier in these Reasons that I do not have the authority to allow the Applicants' claim for Item 4, as there are no Court decisions specifically awarding costs for any formal or informal motions to the Applicants, I have determined that the corresponding disbursements for printing fees must also be disallowed.

[40] Concerning the Respondent's submissions found at paragraph 30 of the Respondent's Submissions on Costs that the Applicants' invoice dated December 17, 2019, for the printing and binding of the Applicants' Application Record should be disallowed, my review of the court record supports the allowance of this claim. The Respondent's have submitted that it is unclear why the Applicants' invoices dated December 16, 2019 and December 17, 2019, have different amounts for the printing and binding of the same document. The Applicants' reply submissions did not address this issue. This being noted, my review of the December 16, 2019, invoice and the hard copy of the Applicants' Application Record, shows that the number of pages are the same and that the invoice is for four copies of the Application Record that is three volumes, which accounts for the twelve binding coils. The invoice dated December 17, 2019, has six less

pages charged than the hard copy of the Application Record, and it is for one copy of the Application Record, which accounts for the three binding coils. While it is unclear why six less pages were charged on the December 17, 2019, invoice, I do not find that this discrepancy is enough grounds to disallow the Applicants' claim for printing. The invoices account for five copies of the Applicants' Application Record being printed and bound, which aligns with the three copies that were required by the court registry, and also accounts for one copy for each of the parties. In *Carlile v. Canada*, [1997] F.C.J. No. 885, at paragraph 26, the Assessment Officer stated the following regarding having limited material for assessments of costs:

> 26. […] Taxing Officers are often faced with less than exhaustive proof and must be careful, while ensuring that unsuccessful litigants are not burdened with unnecessary or unreasonable costs, to not penalize successful litigants by denial of indemnification when it is apparent that real costs were indeed incurred. This presumes a subjective role for the Taxing Officer in the process of taxation. My Reasons dated November 2, 1994, in T-1422-90: Youssef Hanna Dableh v. Ontario Hydro cite, [1994] F.C.J. No. 1810, at page 4, a series of Reasons for Taxation shaping the approach to taxation of costs. Dableh was appealed but the appeal was dismissed with Reasons by the Associate Chief Justice dated April 7, 1995, [1995] F.C.J. No. 551. I have considered disbursements in these Bills of Costs in a manner consistent with these various decisions. Further, Phipson On Evidence, Fourteenth Edition (London: Sweet & Maxwell, 1990) at page 78, paragraph 4-38 states that the "standard of proof required in civil cases is generally expressed as proof on the balance of probabilities". Accordingly, the onset of taxation should not generate a leap upwards to some absolute threshold. If the proof is less than absolute for the full amount claimed and the Taxing Officer, faced with uncontradicted evidence, albeit scanty, that real dollars were indeed expended to drive the litigation, the Taxing Officer has not properly discharged a quasi-judicial function by taxing at zero dollars as the only alternative to the full amount. Litigation such as this does not unfold solely due to the charitable donations of disinterested third persons. On a balance of probabilities, a result of zero dollars at taxation would be absurd. […]

[41] Further to my review of the facts pertaining to the printing and binding of the Applicants' Application Record, and utilizing the *Carlile* decision as a guideline, I have determined that the balance of facts support the allowance of the Applicants' claims. I did not find the discrepancies with the two invoices to be that egregious to suggest that something untoward may have occurred, other than possibly human error in the counting of pages. I find that the preparation of the Applicant's Application Record was necessary for the judicial review proceeding to move forward and the amounts claimed for printing and binding are reasonable. Therefore, these disbursements are allowed as claimed for a total amount of $918.81.

E. *Total amount allowed for the Respondent's disbursements.*

[42] For file T-1699-18, the total amount allowed for the Applicants' disbursements is $2,945.91.

[43] For file T-1700-18, the total amount allowed for the Applicant's disbursements is $129.10.

[44] For file T-1702-18, the total amount allowed for the Applicant's disbursements is $129.10.

V. Conclusion

[45] For the above Reasons, the Applicants' Bill of Costs for file T-1699-18 is assessed and allowed in the total amount of $9,895.41, payable by the Respondent to the Applicants. The

assessed and allowed costs for file T-1699-18 also includes some costs for the other consolidated files T-1700-18 and T-1702-18.

[46] For file T-1700-18, the Applicant's Bill of Costs, is assessed and allowed in the total amount of $1,146.10, payable by the Respondent to the Applicant. The assessed and allowed costs for file T-1699-18 also includes some costs for the consolidated file T-1700-18.

[47] For file T-1702-18, the Applicant's Bill of Costs is assessed and allowed in the total amount of $1,146.10, payable by the Respondent to the Applicant. The assessed and allowed costs for file T-1699-18 also includes some costs for the consolidated file T-1702-18.

[48] Separate Certificates of Assessment for files T-1699-18, T-1700-18 and T-1702-18 will also be issued.

"Garnet Morgan"
Assessment Officer

Toronto, Ontario
August 19, 2022

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-1699-18, T, 1700-18 AND T-1702-18
DOCKET:	T-1699-18
STYLE OF CAUSE:	ANTON VASILEVICH ZHUK v HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF HEALTH, THE ATTORNEY GENERAL OF CANADA
AND DOCKET:	T-1700-18
STYLE OF CAUSE:	SKYELAR PHILLIP POLLACK v HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF HEALTH, THE ATTORNEY GENERAL OF CANADA
AND DOCKET:	T-1702-18
STYLE OF CAUSE:	BRIAN EDWARD JAMES WATSON v HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF HEALTH, THE ATTORNEY GENERAL OF CANADA

MATTER CONSIDERED AT TORONTO, ONTARIO WITHOUT PERSONAL APPEARANCE OF THE PARTIES

REASONS FOR ASSESSMENT BY:	GARNET MORGAN, Assessment Officer
DATED:	AUGUST 19, 2022

WRITTEN SUBMISSIONS BY:

Arkadi Bouchelev	FOR THE APPLICANTS
Wendy Wright	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Bouchelev Law Professional Corporation Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada	FOR THE RESPONDENT

Toronto, Ontario