Federal Court  Cour fédérale

Date: 20130814

Docket: T-1184-10

Citation: 2013 FC 863

BETWEEN:

FOURNIER PHARMA INC. AND FOURNIER LABORATORIES IRELAND LTD.

Applicants

and

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

Respondents

[*] PUBLIC ASSESSMENT OF COSTS – REASONS
(Confidential Assessment of Costs – Reasons released August 12, 2013)

Bruce Preston - Assessment Officer

[1] By way of Reasons for Judgment and Judgment dated June 15, 2012, the Court dismissed the Application pursuant to the *Patent Medicine (Notice Of Compliance) Regulations*. The Court also held that "Sandoz Canada Inc. is entitled to costs in accordance with these reasons". At paragraph 152 of the Reasons for Judgment, the Court held: "Sandoz is entitled to its reasonable

[*] Further to the request of counsel of Sandoz Canada Inc., the Reasons issued August 12, 2013 are deemed to be confidential and the Public Reasons reflect the redactions viewed necessary in order to protect confidential information.

costs. If the parties are unable to agree on an amount, they may advise the Court and further directions will issue".

[2] The parties informed the Court that they were not able to reach an agreement on the costs awarded to Sandoz Canada Inc. (Sandoz) and on July 3, 2012, the Court issued a Direction for the exchange of Written Submissions on Costs. On September 25, 2012, the Court issued one set of Reasons for Order and Order concerning costs on this file and on file T-991-10. At page 6 of the Reasons for Order and Order, the Court rendered the following Order (the Costs Order):

> **THIS COURT ORDERS THAT** in each application, Sandoz in entitled to its costs assessed as follows:
>
> a. Its costs assessed at the upper end of Column III and then reduced by one-third;
>
> b. Costs of 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;
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> c. 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;
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> d. Costs under Item 8 of the Tariff shall not be increased for the preparation for the cross-examination of Dr. Muzzio;
>
> e. Costs for out of Province travel to be assessed in economy class, for a single hotel room, and food, excluding entertainment and alcohol expenses;
>
> f. No costs are awarded for the consolidation motion; and
>
> g. Sandoz is awarded interest on the costs awarded at the rate of 2% from June 15, 2012.

[3] Further to the Costs Order, counsel for Sandoz filed a Bill of Costs to be assessed. Pursuant to the Directions issued January 18, 2013, March 8, 2013 and April 2, 2013, the parties filed Affidavits and Written Submissions. The hearing for the assessments of costs on files T-1184-10, T-991-10 and T-1051-10 was held on May 22, 2013.

[4] At the commencement of the hearing, counsel for Fournier Pharma Inc. and Fournier Laboratories Ireland Ltd. (Fournier) addressed two over-arching issues; the entitlement of Sandoz to costs of motions where no costs have been awarded by the Court and the one-third reduction to be applied after the costs of Sandoz have been assessed. I will commence by addressing the one-third reduction first.

[5] At the hearing, counsel for both parties made extensive submissions concerning the validity and infringement arguments made before the Court at the PMNOC hearing and concerning the costs submissions made to the Court prior to the Costs Order being rendered. Although I have considered these submissions, I am not going to review them as, once the Costs Order was rendered, the task in applying the one-third reduction is centered in the wording of the Costs Order.

[6] In Sandoz' Reply Written Submissions on Costs filed May 17, 2013, counsel submits that the one-third reduction, by virtue of its place in the Costs Order and the Written Reasons, clearly indicates that the one-third reduction applies only to costs that are to be assessed on a scale, for example, the upper end of Column III. Then, at paragraph 9, counsel submits;

> If Justice Zinn had intended to reduce all the costs including disbursements, he would have done so in a separate paragraph of the Costs Order, to encompass all costs claimed by Sandoz. The placement of the one-third deduction in the same paragraph as

> counsel fees is indicative of Justice Zinn's intention to restrict the deduction to counsel fees. As such, the Assessment Officer does not have the discretion to reduce the disbursements claimed by Sandoz in direct contradiction to Justice Zinn's Order.

[7] At the hearing, counsel for Fournier submitted that the one-third reduction applies to the costs as indicated in the Costs Order, which includes disbursements and counsel fees. In support of this contention, counsel referred to paragraph 5 on page 3 of the Reasons for Order and Order rendered September 25, 2012, which states:

> 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 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.

At the hearing of the assessment, counsel for Fournier contended that the phrase "costs otherwise payable to Sandoz" includes counsel fees and disbursements. Further, at paragraph 9 of Fournier's Responding Costs Submissions, counsel argues:

> Sandoz' interpretation of the Costs Order erroneously equates "costs" with "counsel fees". It is without a doubt that "counsel fees" and "disbursements" are distinct and discrete items of "costs" as addressed by Tariff B. A clear reading of the above quoted paragraph (paragraph 5 of the Reasons for Order on Costs) indicates that the one-third reduction applies to the "costs otherwise payable to Sandoz". This is particularly so given the quoted paragraph is under the sub-heading, "Level of Award of Costs". As a result, Sandoz' total costs award must be reduced by one-third.
>
> (Parenthesis added)

Concerning this point, at the hearing of the assessment, counsel for Fournier submitted that as contemplated by Tariff B, the costs referred to at paragraph 1 of the Costs Order, include counsel fees and disbursements. Counsel for Fournier also referred to the Judgment in *Adir v Apotex*, 2008 FC 1070, in support of the contention that any reduction should be applied to the total amount of

disbursements and counsel fees. In Fournier's Responding Costs Submissions, counsel argues that in citing *Adir* in the Costs Order, and specifically quoting the Court's observation, that an award of costs may be reduced in cases of divided success, it is clear that Justice Zinn was ordering a one-third reduction of Sandoz' total costs award. Referring to the Costs Order, the final submission of counsel for Fournier was that the Court has explicitly allowed the seven items as enumerated in the Order and that, outside the seven items enumerated, there is no authority for any costs to be allowed to Sandoz, either counsel fees or disbursements. Counsel contended that the Costs Order is not just a Direction but supersedes the award that was granted to Sandoz in the original Judgment and that if paragraph one of the Costs Order were to read "counsel fees assessed at the upper end of Column III and then reduced by one-third", as suggested by counsel for Sandoz, the effect would be that Sandoz would not be entitled to any disbursements. Counsel explained that the reason for this is that the reference to costs, which they argue include counsel fees and disbursements, in paragraph 1 of the Costs Order is the only place where disbursements could be included in the Costs Order as the other paragraphs specifically address counsel fees and interest.

[8] Concerning the one-third reduction to costs, counsel for Sandoz submitted that Assessment Officers, in conducting assessments of costs, are bound by the Judgment of the Court and not the Reasons of the Court and that in this particular proceeding the award of counsel fees and disbursement is found in the Judgment, not in the Costs Order. Counsel contended that paragraph 1 of the subsequent Reasons for Order and Order dated September 25, 2012, makes it clear that the Costs Order only deals with the eight issues in dispute between the parties, those issues enumerated in the Costs Order. Counsel continue by submitting that counsel for Fournier could have raised any issue but they chose to only raise those eight and; therefore, the Costs Order does not set the limits

for all costs but has the effect of fencing in those eight issues. Counsel submitted that the Costs Order has no effect on the other costs claimed. Counsel for Sandoz continued by arguing that in *See You In-Canadian Athletes Fund Corp v Canadian Olympic Committee*, 2009 FC 908, at paragraph 7, it was held that without a clear Direction of the Court, an Assessment Officer is without jurisdiction to reduce the costs awarded. Counsel submitted that paragraph 1 of the Costs Order is clear that the reduction of costs is only applicable to the counsel fees claimed. Counsel for Sandoz then refers to *Sanofi-Aventis Canada Inc v Apotex Inc*, 2009 FC 1138, at paragraph 27 where it held that the overall award of costs was reduced. Counsel argued that this direction clearly specifies that the overall award of costs was to be reduced; there is no ambiguity as to whether the reduction is to be applied to the counsel fees alone. Counsel then referred to *Adir* (*Supra*) at paragraph 28, which states:

> One hopes that, in light of these reasons, the parties could now come to agreement on costs. However, in the event that this is not possible, the assessment officer is to allow 90% of Servier's taxed costs and disbursements, at the upper end of Column IV and in accordance with the directions set out in these reasons.

Counsel continued by contending that at page 12 of *Adir* (*supra*), the Court, in paragraph 1 of the Judgment, awards costs throughout against the Defendants and, at paragraph 2, clearly states that the "total award is then to be reduced by 10%". Counsel argues that although the Court cited the *Adir* decision in the present Costs Order, when rendering the Costs Order the Court chose not to follow it. The Court did not provide for the reduction in a separate paragraph but, in the same paragraph states: "costs assessed at the upper end of Column III and then reduced by one-third", which is clear that the one-third reduction applies to only those costs assessed pursuant to the scale in Tariff B. Counsel then argued that if this is not the situation, if the Order is ambiguous, an Assessment Officer does not have the jurisdiction to make any other deduction. Sandoz next

submission concerning the one-third reduction was that, if Fournier is correct, it would negate the need for Assessment Officers. Counsel argued that, to agree with Fournier would mean that unless the Court provides detailed directions as to costs as in *Janssen-Ortho Inc v Novopharm Ltd*, 2006 FC 1333, a trial judge would need to enunciate every single disbursement that a party could be entitled to on an assessment of costs. Finally, at paragraph 14 of Sandoz Reply Written Submissions on Costs, counsel submits:

> Where a judge has held that a party is entitled to its costs, reasonable disbursements are automatically recoverable even if the judge did not make any specific references to disbursements. Sandoz' entitlement to its disbursements originates from Justice Zinn's judgment in *Fournier Pharma Inc. v Canada (Minister of Health)*, 2012 FC 741, which stated that Sandoz was entitled to its costs. Justice Zinn's Costs Order provided that disbursements for travel be assessed in economy class *etc.* but otherwise Justice Zinn's Costs Order does not address or alter Sandoz' right to reimbursement for its disbursements. Fournier's allegation that Sandoz is not entitled to any of its disbursements because Justice Zinn made no reference to the word "disbursements" in the Costs Order is fundamentally flawed, because Sandoz' entitlement to the disbursements had already been established prior to the Costs Order.

[9] Upon completion of their submissions concerning the one-third reduction in costs, counsel for both parties were asked for submissions concerning the phrase "Sandoz is entitled to its costs assessed as follows", found in the preamble to the Costs Order.

[10] In response, counsel for Fournier submitted that the phrase is an indication by the Court that the Costs Order supersedes the award of costs to Sandoz in the Judgment and that Sandoz is entitled to costs assessed according to the Costs Order. Counsel for Fournier argued that this is in keeping with Fournier's position concerning the one-third reduction, that Sandoz' costs, not just legal fees, but the total costs should be reduced by one-third. Counsel for Fournier further submitted that at times one does not always perfectly state our words the way one would in retrospect but that when

you look at the overall intent of the Court, it is clear that the reduction by one-third can only be addressing the total costs award.

[11] In Sandoz' response, counsel submitted that grammatically the preamble was seen as boilerplate since it did not form part of the operative section of the Costs Order and that it did not supersede the award of costs in the Judgment. In support of this, Counsel for Sandoz referred to paragraph 3 of the Reasons for Order on Costs, which states: "The Court has already determined that Sandoz is entitled to its costs; accordingly, the submission that it should receive nothing is rejected". Counsel suggested that the Court is reiterating that costs have already been awarded so the Costs Order cannot supersede the award. Counsel for Sandoz submitted that the Costs Order merely fenced in the costs in dispute between the parties. Concerning Fournier's contention that one does not always perfectly state words as one would in retrospect, counsel for Sandoz argued that if the Court had intended to separate the reduction of one-third from the scaling of counsel fees, the insertion of a comma by the Court would support Fournier's position, but the Court continues through stating "costs assessed at the upper end of Column III and then reduced by one-third".

[12] To summarize the submissions of counsel for both parties, Sandoz submitted that paragraph 1 of the Costs Order means that only the legal fees, hereafter referred to as assessable services, should be reduced by one-third and Fournier submitted that all costs, assessable services and disbursements, should be reduced by one-third.

[13] Upon reviewing Tariff B of the *Federal Courts Rules*, it appears that there are three terms used to describe the subject matter of assessments of costs: assessable costs, assessable services and

disbursements. From Tariff B 2(1), it is clear that assessable costs are calculated by multiplying the number of units for each assessable service found in the Table to Tariff B by the unit value and adding the assessable disbursements allowed by the Assessment Officer. In other words, assessable costs include both assessable services and disbursements. At no point does Tariff B refer to assessable costs as being synonymous with either assessable services or disbursements alone.

[14] Using the above framework, I must determine the plain meaning of the phrase: "costs assessed at the upper end of Column III and then reduced by one-third" as found in paragraph 1 of the Costs Order. Counsel for Sandoz has submitted that the grammatical construction of this phrase clearly suggests that the word "costs" is referring to assessable services due to the reference to Column III immediately thereafter. Although at first glance it appears that this may be correct, when framed in the use of the term "assessable costs" as found in Tariff B, I find that the specific word "costs", as used by the Court, refers to both assessable services and disbursement.

[15] In addition, counsel for Sandoz has argued that if the Court intended the reduction to be applied to the overall costs, the Costs Order would have clearly and explicitly stated so as was done in *Adir* (*supra*) and *Sanofi-Aventis* (*supra*). Once again, I find that in using the term "costs" instead of "assessable services" or "disbursements", the Court clearly directed that the reduction should be applied to the overall costs, including assessable services and disbursements. I also find that paragraph 5 of the Reasons for Order, attached to the Costs Order, as set out at paragraph 6 above, supports this finding. In the Reasons, the Court states: "I am of the view that it is just to reduce the costs otherwise payable to Sandoz". In this phrase the Court is clearly using the term "costs" in a manner consistent with Tariff B to mean assessable services and disbursements, otherwise awarded

in the Judgment dated June 15, 2012. This is supported by the fact that there is no modifier to limit the reference to costs to either assessable services or disbursements. Further, when taking the Reasons as a whole, there is nothing to indicate that the Court intended anything different and there is no evidence that the use of the term costs in the Reasons does not accord with the use of the term costs in the Costs Order. If this were not the case, there would be no provision for any disbursements, since the Costs Order makes no other provision for the assessment of the disbursements, other than the reference to costs in paragraph 1.

[16] Further, I do not agree with counsel for Fournier that the preamble to the Costs Order suggests that the Costs Order supersedes the award of costs in the Judgment. I also do not agree with counsel for Sandoz, that the preamble is a "boilerplate" which does not form part of the operative section of the Costs Order, nor do I agree with counsel for Sandoz that the phrase merely fences in the costs in dispute between the parties. However, I do find that the preamble "Sandoz is entitled to its costs assessed as follows" grammatically contains the award of costs made in the Judgment and encompasses all of the costs allowable. Therefore, the only costs Sandoz is entitled to are those allowed pursuant to the Costs Order. By extension, to be consistent with the preamble to the Costs Order and the Judgment which awarded Sandoz' costs; paragraph 1 of the Costs Order must logically encompass all costs, that is, all assessable services and disbursements.

[17] Therefore, for the above reasons, I find that the Court's reference to costs in paragraph 1 of the Costs Order is a reference to both assessable services and disbursements and, consequentially, pursuant to paragraph 1 of the Costs Order, Sandoz' costs will be assessed and then the total assessed costs, inclusive of assessable services and disbursements, will be reduced by one-third.

Assessable Services

[18] The second overarching issue raised at the hearing was the approach to be taken when assessing the costs of interlocutory motions. In Sandoz' Reply Written Representations, commencing at paragraph 19, counsel submits:

> 19. In Part "F" of the written reasons for the Costs Order, Justice Zinn dealt with the costs of interlocutory motions and he stated that "No party is awarded costs of the consolidation motion." Also, Justice Zinn specifically wrote in the Costs Order that "No costs are awarded for the consolidation motion". Since Justice Zinn did not disallow costs of other motions, Sandoz is entitled to such costs. To interpret otherwise would render Justice Zinn's specific decision regarding the consolidation motion redundant.
>
> 20. Where the disposition of an interlocutory motion is silent with respect to costs, it is appropriate to award costs in the cause. As the entirely successful party in this proceeding, Sandoz is entitled to costs of the motions other than the consolidation motion, the only motion for which Justice Zinn specifically disallowed costs,

In support of this contention, Counsel referred to *Letourneau v Clearbrook Iron Works Ltd*, 2004 FC 1626 at paragraph 8.

[19] At the hearing of the assessment, counsel for Sandoz argued that in situations when Fournier brought a motion and Sandoz was compelled to respond, if the order is silent as to costs and even if Fournier was successful, Sandoz should be entitled to costs as costs in the cause to the successful party on the PMNOC Application. Concerning the Protective Order dated October 6, 2010, counsel for Sandoz contended that, although the Order is silent as to costs, in the normal course, protective orders are a necessary step in proceedings of this type. Counsel argued that in other proceedings with protective orders the Court awarded costs; therefore, Sandoz should be allowed its costs in the cause for the Protective Order in this proceeding.

[20] At the hearing of the assessment, counsel for Fournier submitted that there is not an issue when the Court awarded costs and when there is an order which specifically states "without costs". However, in circumstances where Sandoz has claimed costs for motions which were disposed of by an order silent as to costs, counsel for Fournier argues that no costs may be allowed on the assessment.

[21] In support of this, at paragraph 16 of Fournier's Responding Costs Submissions, counsel submits:

> "The discretion described in Rule 400(1) must be a visible allowance by way of an order or judgment." Parties are only entitled to fees for motions when established by order. Where said order is silent as to costs, none shall be awarded.

Counsel for Fournier refers to *Canadian Environmental Law Assn v Canada(Minister of the Environment)*, 2001 FCA 233 at paragraph 33, *GRK Fasteners Inc v Canada (Attorney General)*, 2011 FC 1027 at paragraph 18 and *Carr v Canada*, 2009 FC 1196 at paragraph 4 in support of their contention.

[22] Counsel for Fournier further submitted that Sandoz, in asking that orders silent as to costs be treated as orders awarding costs in the cause, is asking that the actual Order of the Court be changed. Concerning the Protective Order, counsel for Fournier argued that the Order, as signed, was a draft order submitted to the Court on the consent of both parties. Counsel submitted that it was Fournier's understanding there was to be no award of costs in the Protective Order because the order was made on consent.

[23] Concerning the Protective Order, by way of rebuttal, counsel for Sandoz submitted that if Fournier understood that there would be no costs, it was Fournier's responsibility to ensure that there was a provision that no costs were to be awarded.

[24] Concerning, Sandoz argument, that where an order is silent as to costs it should be taken that the Court has awarded costs in the cause, the decision counsel referred to in support of this contention, *Letourneau* (*supra*), was a decision of Prothonotary Hargrave concerning costs on a motion. As Prothonotary Hargrave was a member of the Court, he was able to exercise his discretion, under Rule 400(1), and award costs in the cause. On the other hand, pursuant to Rules 4, 5.1(1) and 2 of the *Federal Courts Rules,* Assessment Officers are not members of the Court and do not have the necessary authority to award costs under Rule 400(1). Further, in both *Canadian Environmental Law Assn* (*supra*) and *Carr* (*supra*), the Assessment Officers have relied on other jurisprudence to reach the conclusion that unless the Court awards costs of a motion, no costs may be allowed by an Assessment Officer. Concerning the Protective Order, in keeping with the existing case law, I find that the intentions of the parties are not relevant at this point as the Court made no award of costs in the Protective Order. For the above reasons, I find that Sandoz is not entitled to the costs of any motions for which the Orders of the Court, disposing of the motions, are silent as to costs.

[25] I have reviewed the Amended Bill of Costs of Sandoz and the Orders of the Court disposing of the motions claimed and, in keeping with the above reasons, I find that the claims for the Protective Order, Elan's Motion for leave to amend the style of cause and the Motion to compel the re-attendance of Dr. Muzzio are not allowed. The only other motion for which costs were claimed is

the Motion to strike the Affidavits of Dr. Muzzio. At the hearing of the assessment, counsel for Sandoz withdrew the claim for the appearance of Christopher Tan, second counsel, at the hearing of the Motion to strike. As the Orders relating to the Motion to strike awarded costs in the cause, and as Fournier did not oppose the amounts claimed under Item 5 and Item 6, the amounts claimed for that Motion, other than the claim for Mr. Tan, mentioned above, are allowed as presented in the Bill of Costs.

[26] The next group of assessable services in dispute are the amounts claimed under Items 10 and 11 to the Table in Tariff B, for the preparation and attendance at case management conferences. At the hearing of the assessment, counsel for Fournier submitted that for the Case Management Conferences held September 14, 2010, January 10, 2011, January 16, 2012 and March 14, 2012, the issues discussed at the conferences related to more than this file (T-1184-10) and that the amounts claimed for preparation and attendance should be allocated between files T-991-10, T-1051-10 and T-1184-10, as the case may be.

[27] By way of rebuttal, counsel for Sandoz argued that the issues on each file were distinct. However, counsel took no issue with splitting the amount claimed for attendance between the files. On the other hand, counsel for Sandoz argued that claiming the time for preparation for each file was reasonable since the issues on each file were distinct and all required separate preparation.

[28] I have reviewed the court record for each file and, as submitted by counsel for Fournier, it appears that the Case Management Conferences held September 14, 2010, January 10, 2011, January 16, 2012 and March 14, 2012 were common to files T-991-10, T-1051-10 and T-1184-10.

On the other hand, Sandoz has submitted that they take no issue with splitting the amount claimed for attendance. Further, counsel for Fournier has not presented any evidence to counter Sandoz' claim that each file required distinct preparation time. Under these circumstances, I find that Sandoz' claims under Item 10 for preparation are reasonable and necessary and are allowed as claimed. However, I find that the claims under Item 11 are excessive in that there was only one attendance encompassing files T-991-10, T-1051-10 and T-1184-10. Therefore, as Item 11 was allowed in file T-991-10 for the Case Management Conferences held September 14, 2010, January 10, 2011, January 16, 2012 and March 14, 2012, any claims under Item 11 for case management conferences on these dates in this file (T-1184-10) are not allowed. Finally, the amounts claimed for preparation and attendance at the Case Management Conferences held; September 7, 2010, September 12, 2011 and October 17, 2011, were not contested by Fournier and are allowed as presented.

[29] At the hearing of the assessment, counsel for Sandoz agreed to withdraw the amounts claimed under Item 13(a), preparation for hearing for Mary McMillan, as this amount was not provided for in the Costs Order. As the amounts claimed under Item 13(a) for Warren Sprigings were not contested, they are allowed as presented in the Bill of Costs.

[30] Concerning Sandoz claim under Item 13(b), preparation for hearing per day in Court after the first day, for second counsel Mary McMillan, at paragraph 36 of Fournier's Responding Costs Submissions, counsel contend that the Costs Order awarded second counsel for the hearing but made no provision for second counsel for preparation for the hearing under Item 13 (b).

[31] Sandoz only submission concerning the claim for second counsel under Item 13(b) was that preparation is an essential and integral part of the hearing and that it was necessary for second counsel to prepare for the hearing.

[32] Having reviewed the Costs Order, I agree with Fournier that the Costs Order makes no provision for second counsel for preparation for hearing. Further, Item 13(b) in the Table to Tariff B makes no provision for second counsel. Given that there is nothing granting me the jurisdiction to exercise discretion for second counsel under Item 13(b), I find that I lack the authority to allow a claim for second counsel. Therefore, Sandoz' claim for second counsel under Item 13(b) is not allowed. As the amounts claimed under Item 13(b) for Warren Sprigings were not contested, they are allowed as presented in the Amended Bill of Costs.

[33] At the hearing of the assessment, counsel for Sandoz was informed that the amounts claimed for the discontinuance of the Notices of Appeal in files A-101-12, A-102-12 and A-103-12 could not be allowed on this assessment as they were not Federal Court matters. Counsel for Sandoz was also informed that this decision was without prejudice and that Sandoz was able to file Bills of Costs in the appropriate files and claim the costs of those discontinuances separately.

[34] Concerning travel fees (Item 24), at paragraph 41 of Fournier's Responding Costs Submissions, counsel contends:

> Sandoz has claimed fees for visiting experts numerous times. However, Sandoz has failed to establish the necessity or reasonableness of multiple meetings with their expert affiants. Based on the principles of reasonableness and partial indemnity, Fournier should not be forced to bear the expense for the convenience of Sandoz' counsel taking numerous trips to visit their experts. Fournier

> submits a more fair and reasonable approach would be to limit the assessment of Sandoz' travel fees such that one counsel be entitled to one general meeting with an expert, and then once more for defending that expert's cross-examination.

[35] At paragraph 30 of Sandoz' Reply Written Submissions, counsel argues:

> Justice Zinn ordered that Sandoz was entitled to costs for out of province travel as assessed in economy class, for a single hotel room, and food, excluding entertainment and alcohol expenses. Sandoz' Amended Bill of Costs has been prepared in accordance with the Costs Order. All the visits to the experts were reasonable and necessary for the proceeding as it progressed through different stages. Fournier's allegation that visits to experts were often with two counsel present is unfounded. The assessment of costs is not to be taken from a position of hindsight. In any event, Justice Zinn did not limit the number of trips to visit the experts or restrict the travel fees to "visits to witnesses" only.

[36] In support of the contention that an assessment of costs should not be taken from a position of hindsight, counsel for Sandoz referred to *Bayer AG v Novopharm Ltd*, 2009 FC 1230 at paragraph 41, which held that the appropriate test is whether, in the circumstances existing at the time a litigant's solicitor made the decision to incur an expenditure, it represented a prudent and reasonable representation of the client.

[37] At the assessment hearing, counsel for Sandoz submitted that travel by counsel under Item 24 for meetings with Dr. Lobenberg and Dr. Genck were being withdrawn as they were not expert witnesses. Finally counsel submitted that Fournier has presented no evidence to support their contention that multiple trips to meet with experts were not warranted.

[38] Concerning travel, at paragraph 12 of the Reasons attached to the Costs Order, the Court indicates that Sandoz seeks costs to travel outside Ontario to attend cross-examinations and meet

with witnesses. Then at paragraph 5 of the Costs Order, the Court states: "Costs for out of Province travel to be assessed in economy class, for a single hotel room, and food, excluding entertainment and alcohol expenses". At no point in either the Reasons or the Costs Order does the Court limit the number of trips allowable. Further, as suggested by counsel for Sandoz, it has been frequently held that an assessment of costs is not to be taken from a position of hindsight. Considering this, I can find no reason to second guess the approach taken by counsel for Sandoz in the advancement of the proceeding. Further, as submitted by counsel for Sandoz, Fournier has presented no evidence to support their contention that multiple trips to meet with experts were not warranted. Therefore, after removing the amounts claimed for travel to meet with Dr. Lobenberg and Dr. Genck, I find that the remaining amounts claimed under Item 24 are reasonable and necessary for the advancement of the proceeding and are allowed as presented in the Amended Bill of Costs.

[39] Concerning Item 25 and Item 26, counsel for Sandoz withdrew the claim for second counsel, Mary McMillan, for both of these Items. As the amounts claimed for Warren Sprigings were not contested, they are allowed as presented in the Bill of Costs.

[40] As all other assessable services claimed were not contested by Fournier, the amounts claimed for Item 2, Item 8, Item 9, Item 14, Item 19 and Item 28 are allowed as presented in the Bill of Costs.

Disbursements

[41] At the assessment hearing, the first disbursements raised by counsel for Fournier were the fees paid to consultants Joseph Bogardus, Wayne Genck, Raimar Lobenberg and Charles Yeung

(the consultants), who were not called as expert witnesses. Counsel submitted that paragraph 21 in the Affidavit of Warren Sprigings, was the first indication that Fournier had that Sandoz had contracted consultants other than their expert witnesses. Counsel argued that there is no evidence that the consultants added any value other than to provide advice on the preparation of Sandoz' case and that the consultants were not qualified as experts by the Court. Counsel argued that Sandoz should not be allowed to recover the costs of the consultants as the services provided are part of the normal overhead costs of the litigation process. In support of this, counsel referred to *Sanofi-Aventis Canada Inc v Apotex Inc*, 2009 FC 1138, at paragraph 19 and *Bristol-Myers Squibb Canada Co v Apotex Inc*, 2009 FC 137, at paragraph 192. Counsel further contended that Sandoz had already retained expert witnesses and the costs of the extra consultants should not be borne by Fournier. Finally, counsel for Fournier submitted that the case law submitted by Sandoz, *Buddy L. Consultants Ltd v Her Majesty the Queen*, 2000 D.T.C. 2157, is a tax case which is factually distinct from the present PMNOC case.

[42] In reply, counsel for Sandoz argued that the Affidavit of Warren Sprigings presented evidence concerning the consultants and counsel for Fournier did not cross-examine on that evidence, therefore this evidence is to be taken as factually true. Counsel contends that the same is true concerning the consultants' qualifications; counsel could have cross-examined Mr. Sprigings. Counsel further contended that the subject matter of the PMNOC was complex and necessitated the use of consultants. Concerning the decision in *Buddy Consultants* (*supra*), counsel argued that the Court allowed a consultant and there should be no distinction between PMNOC and tax matters; they are both complex in their own manner. Counsel submitted that due to this complexity, the fees of the consultants should not be considered overhead as there was a requirement for this particular

case. Counsel further contended that the fees charged by the consultants were considerably less than those charged by the expert witnesses; therefore, it is much more cost effective to contract the consultants and Sandoz should not be penalized for taking a cost effective approach. Concerning *Sanofi-Aventis* (*supra*) and *Bristol-Myers* (*supra*), counsel for Sandoz argued that these were both decisions of the Court, which we do not have in the present matter and there is no general contention that non-testifying experts are excluded from assessments. Counsel argued that in this matter the Court did not make a restriction and, absent a clear direction, an Assessment Officer does not have the discretion to limit this type of reasonable claim.

[43] At paragraph 21 of the Affidavit of Warren Sprigings, Sandoz' evidence concerning the consultants, it is suggested that the consultants assisted in defending Fournier's application and; provided advice on preparing Fournier's case and responding to the Affidavit of Muzzio, provided advice in preparing Fournier's case regarding non-infringement and provided Sandoz and its counsel with searching services related, inter alia, to the prior art and publications written by the affiant. Although Sandoz has suggested that the services of the consultants were necessary, I find that these are not services for which Fournier should be responsible for reimbursing since the services could have been provided by the experts, the expense of which Fournier is responsible to reimburse under the award of costs. Further, although the Court has not provided directions concerning consultants in this particular matter, I find that this does not limit my discretion in reaching a determination concerning consultant fees. On the other hand, I find that I am not bound by the decisions in *Sanofi-Aventis* (*supra*) and *Bristol-Myers* (*supra*). However, I do find them instructive, specifically at paragraph 192 of *Bristol-Meyers*, which makes a distinction between experts who "attested affidavits" and "experts or others who may have been retained by Apotex or

by these named experts to assist them" (emphasis added). In that decision, the Court did not allow costs for experts retained to assist, which is the situation with the present consultants. Concerning the decision in *Buddy Consultants* (*supra*), at the middle of paragraph 14 it states:

> … The Respondent submitted that it was decided not to call Mr. Groeneveld as a witness because another witness could serve the purpose.

[44] Further, a thorough review of the *Buddy Consultants* decision reveals that in allowing the costs of the consultant it was reasoned that there were costs associated with providing information to the Respondent to determine what evidence could be elicited from the witness. In the present proceeding, there is no evidence that Sandoz ever intended to call the consultants as witnesses. If such evidence was present, the facts in *Buddy Consultants* may have assisted in determining whether the disbursements for the services of the consultants should be allowed. However, absent evidence that Sandoz intended to call the consultants as witnesses, I find the fact situation to be more in line with *Bristol-Myers* as the consultants were contracted to provide assistance. Therefore, in keeping with the decision in *Bristol-Meyers*, the costs associated with contracting the consultants are not allowed.

[45] Concerning photocopies, at the hearing, counsel for Fournier submitted that the proof of the photocopies claimed is not precise and based on the hearsay evidence of Deborah Zak who, on cross-examination confirmed that the amounts claimed were provided by a bookkeeper and that she did not actually review the invoices that had been submitted to Sandoz or independently verify the amounts claimed and that some of the copies were for internal use by counsel. Counsel further argued that Sandoz has provided no evidence concerning what the photocopies were required for or a description of the charges. In support of the contention that photocopies are only allowable if they

are essential to the conduct of the action, counsel for Fournier referred to *Diversified Products Corp v Tye-Sil Corp*, [1990] F.C.J. No. 1056. Counsel also referred to *Advance Magazine Publishers Inc v Farleyco Marketing Inc*, 2010 FCA 143, in support of the contention that the less evidence available, the more the assessing party is bound in the Assessment Officer's discretion, "the exercise of which should be conservative with a view to the sense of austerity". Finally, at paragraph 57 of Fournier's Responding Costs Submissions, counsel argues for an allowance of $7,271.30 based upon the procedural steps taken in the Application and the approximate number of pages of documents received. In support of this, counsel refers to paragraph 12 of the Affidavit of Sonia Atwell.

[46] At the hearing, counsel for Sandoz referred to paragraph 26 of the Affidavit of Deborah Zak and submitted that photocopies are billed separately by each file number at a rate of $0.25 per copy and are tracked by way of commonly used automated technology for counting copies. Concerning Fournier's suggestion that the evidence is hearsay, counsel suggested that the evidence was admissible as it related to a regular business record and that in order to meet Fournier's standard Ms. Zak would have had to witness the production of each photocopy, which is unreasonable to expect. Concerning the allowance found at paragraph 12 of the Affidavit of Sonia Atwell, counsel for Sandoz contended that, on cross-examination, Ms. Atwell confirmed that the count was based on an estimation of documents served on Fournier and did not include Authorities, motion materials or documents, such as the compendia produced in Court. Counsel also argued that Ms. Atwell, on cross-examination, confirmed that not all of the exhibits to the affidavits were counted as she had not scanned them. Counsel argued that there is a requirement for seven copies of each record filed; three copies for the Court, a copy of Fournier, two copies for themselves and a copy for the expert.

Finally, referring to *Diversified Products* (*supra*), counsel submitted that a charge of $0.25 per page was accepted and still twenty-three years later Sandoz is claiming $0.25 per page.

[47] Sandoz has claimed $42,130.66 for photocopying. I have reviewed the evidence of Sandoz presented at paragraph 26 of the Affidavit of Deborah Zak and note that bulk discounts are provided to clients when more than 1,000 copies are required. Further, although I find the information provided at the bottom of the table found in Exhibit Q to the Affidavit of Deborah Zak helpful, I would have preferred to have been presented with more detailed descriptions of the claims for photocopies. On the other hand, because of the technology and records keeping methods used, I do not find the evidence submitted by Sandoz to be inadmissible as hearsay. Further, I have reviewed the materials filed of record and although I find the amount claimed to be excessive, I find the allowance suggested by Fournier to be excessively low considering the volume of material produced in this proceeding. Finally, before reaching a determination of an allowance for photocopying, it is important to note that, at the hearing of the assessment, counsel for Sandoz confirmed that the claim for photocopies included charges for the photocopying of motion materials. As a significant number of the motions claimed have not been allowed on this assessment, this will have an impact on the allowance for photocopying. Therefore, having considered the submissions of counsel and reviewed the materials submitted, including the cross-examination of Sonia Atwell, and having noted the volume of materials filed and deducted materials filed for the motions which have not been allowed on this assessment, and having considered the bulk discount offered to clients, photocopying is allowed at $24,160.00.

[48] The next issue to be contested by Fournier was the fee claimed for Dr. Mayersohn, an expert witness. At the hearing of the assessment, counsel for Fournier referred to paragraph 65 of their Responding Costs Submissions and submitted that Sandoz is claiming a rate that is excessively high for Dr. Mayersohn, totalling $96,076.83 at $800.00 per hour. Counsel also referred to *Janssen-Ortho Inc v Novopharm Ltd*, 2006 FC 1333 at paragraph 43, to support the contention that although a party is free to engage an expert and pay whatever is negotiated, that fee should not be simply allowable on an assessment. Counsel also relied on *Janssen-Ortho* in support of the argument that expert fees should be capped at the hourly rate charged by senior counsel providing services to the party. Counsel also referred to *Janssen-Ortho v Canada (Minister of Health)*, 2010 FC 194 to support the contention that high rates paid to experts are the exception for experts of high stature and not the rule to be followed. Finally counsel argued that in cross-examination Mr. Sprigings confirmed that he charged an hourly rate of $[…] to $[…] per hour, making an acceptable rate for Dr. Mayersohn, $62,886.47.

[49] In reply, counsel for Sandoz submitted that the cases referred to by counsel for Fournier were decisions of judges and no such order capping expert fees was made in this proceeding. Further, counsel submitted that without an order capping expert fees, an Assessment Officer does not have jurisdiction to cap expert fees. Counsel contended that Fournier has not presented any decisions where an Assessment Officer has taken on the jurisdiction to cap expert fees without a direction of the Court. Counsel referred to *See You In-Canadian Athletes Fund Corp* (*supra*) to support the contention that without a clear direction of the Court an Assessment Officer lacks the jurisdiction to reduce costs claimed. Counsel also referred to *Janssen Inc v Teva Canada Limited*,

2012 FC 48, at paragraph 163, as an example of an assessment where the Assessment Officer's jurisdiction to cap expert fees is grounded in a direction of the Court.

[50] Concerning the qualifications of Dr. Mayersohn, counsel for Sandoz referred to page 16 of the Affidavit of Warren Sprigings which contends:

> Dr. Mayersohn is a full Professor of Pharmaceutical Sciences at the University of Arizona and had conducted research involving the examination of oral bioavailability and pharmacokinetic properties of drugs in animals and humans.

[51] Counsel for Sandoz argued that if Fournier is suggesting that the rate for Dr. Mayersohn is unreasonable, counsel for Fournier must establish, through evidence, that it is unreasonable not simply broadly allege that it is unreasonable.

[52] Concerning the benchmarking of expert fees, I find that absent a direction of the Court I am not bound to limit the fees of experts to a level equivalent to the fees charged by senior counsel. On the other hand, I find that Assessment Officers have the jurisdiction to reduce the allowable fees for experts if the evidence warrants a reduction (see *Bayer AG v Novopharm Ltd.* 2009 FC 1230, at paragraph 41) and that fees claimed should not be simply allowable on an assessment.

[53] I have read the Confidential Reasons for Judgment and Judgment dated June 15, 2012 and find that the evidence of Dr. Mayersohn is only relied upon in the section commencing at paragraph 70, titled Bioequivalence and Pharmacokinetic Profile. At the conclusion of this section the Court finds "that bioequivalence established by a 90 % Confidence Interval for AUC and C_{max} of 80%-125% is essential for the invention and claims 1-3. (emphasis added)

[54] At paragraph 78 the Court states:

> Sandoz' second allegation, that the C_{max} is not essential, relies on the Dalton Rule. This rule, according to Dr. Mayersohn's affidavit at paragraph 98 teaches that "if the arithmetic mean for AUC and C_{max} differs less than 10% or les that 5%, an Ordinary Skilled Worker would understand that the 90 % [Confidence Interval] of 80-125% for AUC and $C_{max,}$ respectively, would be met". (emphasis added)

[55] It is clear from the Court's decision concerning bioequivalence that the Court's findings, that both C_{max} and AUC are essential, differed from the findings of Dr. Mayersohn. Given that this is the only time that the Court referred to Dr. Mayersohn's evidence, this could be seen as an indication that the Court found the testimony of the other expert witnesses more instructive. However, absent a clear statement to this effect by the Court, I must consider only the Court's findings concerning this one issue. Had the Court accepted other evidence of Dr. Mayersohn, the Court's findings relating to bioequivalence would not be as prominent. Also, concerning the credibility of Dr. Mayersohn, at paragraph 61 of the Confidential Reasons for Judgment and Judgment, the Court found Fournier's "serious allegations" concerning Sandoz' witnesses, specifically Dr. Mayersohn, "to be without foundation". Given this, I find that the evidence before me does not justify a reduction in the disbursement claimed for Dr. Mayersohn. Therefore, the disbursement claimed for Dr. Mayersohn is allowed as presented in the Bill of Costs.

[56] Concerning the claim for online case law search fees, at paragraph 60 in Fournier's Responding Costs Submissions, counsel submits that Sandoz has provided no invoices to support the amount claimed and refers to *Janssen Inc v Teva Canada Limited*, (*supra*), at paragraph 152, in support of the contention that it is necessary to demonstrate the relevance of online searches to the litigation process. Counsel for Fournier concludes by suggesting that an allowance of $2,000.00 is a more reasonable amount.

[57] At paragraph 34 of Sandoz' Reply Written submissions, counsel submits that the amount claimed for online searches is reasonable and necessary in light of the complexity of the issues involved in the proceeding. Further, at Exhibit R of the Affidavit of Deborah Zak, there is evidence presented concerning the disbursement for online searches.

[58] I have reviewed the Affidavit of Deborah Zak and note that there is no evidence concerning the relevance of the online searches to the litigation process. However, it is also noted that the amount charged to Sandoz was only 15 percent of the actual cost incurred. Further, despite the lack of evidence concerning specific subject matters searched, given the nature of the proceeding, I do not find the amount claimed to be unreasonable. Therefore, online computer searches are allowed as claimed at $4,550.97

[59] Concerning disbursements for travel, at paragraph 62 of Fournier's Responding Costs Submissions, counsel submits that their arguments for one trip to meet with expert witnesses prior to cross-examination, as outlined at paragraph 38 above, apply to Sandoz' disbursements. Counsel also submits that any disbursements for second counsel in respect of meetings with experts should be disallowed.

[60] Counsel for Sandoz only submission concerning travel disbursements, other than those made concerning Item 24, is that, as was the case with Item 24, the disbursements for travel to meet with Dr. Lobenberg and Dr. Genck are withdrawn as they were not expert witnesses.

[61] Counsel for Fournier has presented no arguments concerning the specific amounts claimed for travel disbursements. They have also presented no evidence to support their allegation that Sandoz claimed disbursements for two counsel when meeting with experts. However, Sandoz has only claimed for one counsel under Item 24 and a review of the evidence provided by Sandoz would suggest that only one counsel travelled to meet with the experts. Therefore, having deducted the travel disbursements for meetings with Dr. Lobenberg and Dr. Genck, and having concluded, at paragraph 42 above, that the assessable services claimed for all other travel are reasonable and necessary for the advancement of the proceeding, I find that the disbursements relating to travel, except that related to meetings with Dr. Lobenberg and Dr. Genck, as claimed in the Amended Bill of Costs, are reasonable and necessary. It is also noted that in situations when travel also related to filed T-1051-10 and T-991-10, the amount claimed was appropriately distributed among the files. For these reasons, the amounts claimed for travel disbursements are allowed for a total of $21,676.86.

[62] Concerning Sandoz' claim of $2,069.44 for miscellaneous disbursements, at paragraph 69 of Fournier's Responding Costs Submissions, counsel submits that on cross-examination Deborah Zak was unable to produce details on what "miscellaneous" disbursements related to and conceded that no receipts were provided for the expenditures claimed.

[63] At paragraph 35 of Sandoz' Reply Written Submissions, counsel argues that Sandoz provided evidence of the expenditures at paragraph 28 and Exhibit R to the Affidavit of Deborah Zak. Further, counsel refers to *Bayer AG v Novopharm Ltd*, 2009 FC 1230, in support of the

argument that a party should not be expected to incur greater expense to prove costs that the costs intended to be recovered.

[64] Paragraph 28 and Exhibit R to the Affidavit of Deborah Zak refer to miscellaneous expenses for long distance telephone calls, computer case law searches, facsimile charges, transcripts and courier. It is interesting to note that these expenses have been claimed elsewhere in the Bill of Costs and, with the exception of online case law searches; Fournier has not opposed these disbursements. Further, I have been provided with no evidence to indicate that the amounts claimed under miscellaneous disbursements are for expenditures different than those claimed individually. In fact, it appears that the amounts claimed are identical, with the exception of transcripts which do not appear to be included under miscellaneous. Therefore, given the lack of evidence that the amount claimed is a separate claim, the $2,069.44 claimed under miscellaneous is not allowed.

[65] For the above reasons, I find that Sandoz entitlement to costs, prior to the one-third reduction, is $396,939.92. After applying the one-third reduction to assessable services and disbursements, Sandoz is entitled to a total amount of $264,626.93

[66] Therefore, Sandoz' Bill of Costs is assessed and allowed at $264,626.93 plus 2% post judgment interest from June 15, 2012. A Certificate of Assessment will be issued.

"Bruce Preston"
Assessment Officer

Toronto, Ontario
August 14, 2013

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1184-10
STYLE OF CAUSE:	FOURNIER PHARMA INC AND FOURNIER LABORATORIES IRELAND LTD v THE MINISTER OF HEALTH, ALKERMES PHARMA IRELAND LIMITED AND SANDOZ CANADA INC.

ASSESSMENT OF COSTS WITH PERSONAL APPEARANCE OF THE PARTIES

PLACE OF ASSESSMENT:	TORONTO, ONTARIO
PUBLIC REASONS FOR ASSESSMENT OF COSTS:	BRUCE PRESTON
DATED:	AUGUST 14, 2013

APPEARANCES:

Fiona Leger Sanjaya Mendis	FOR THE APPLICANTS
Christopher Tan Mary McMillan	FOR THE RESPONDENT (SANDOZ CANADA INCORPORATED)

SOLICITORS OF RECORD:

McCarthy Tétrault LLP Toronto, ON	FOR THE APPLICANTS
Sprigings Intellectual Property Law Toronto, ON	FOR THE RESPONDENT (SANDOZ CANADA INCORPORATED)