

Date: 20090427

Docket: A-336-08

Citation: 2009 FCA 130

BETWEEN:

APOTEX INC.

Appellant

and

LUNDBECK CANADA INC.

Respondent

and

THE MINISTER OF HEALTH

Respondent

and

H. LUNDBECK A/S

Respondent/Patentee

ASSESSMENT OF COSTS - REASONS

Johanne Parent
Assessment Officer

[1] By way of order dated September 15, 2008, the Court allowed with costs the appeal of a decision of the Federal Court. The lower Court's decision was from an appeal of a decision of Prothonotary Morneau in which he had dismissed the respondent Lundbeck's motion to strike an affidavit, plus paragraphs and exhibits to three other affidavits referring to that affidavit. In the same decision, the Court of Appeal also dismissed with costs the respondent Lundbeck's cross-appeal. A

timetable for written disposition of the assessment of the appellant's bill of costs was issued on December 2, 2008. The assessment of the bill of costs will now proceed, taking into consideration the parties' written submissions. The Minister of Health took no position and has not participated in this proceeding.

[2] Considering the specifics of the file along with the factors listed in subsection 400(3) of the *Federal Courts Rules*, more specifically the appellant's success on the majority of elements brought in the appeal and cross-appeal, the relative complexity and importance of the issues regarding the evidence to be brought forward on the main application, I am of the opinion that Apotex's request for mid-level of Column III is justified.

[3] Items 17 (preparation, filing and service of notice of appeal), 18 (preparation of appeal book) and 25 (services after judgment) are not contested and allowed as claimed.

[4] In keeping with article 2(2) of Tariff B: "On an assessment, an assessment officer shall not allocate to a service a number of units that includes a fraction", Item 19 (memorandum of fact and law) will be allowed at five units regardless of the five and one half units claimed.

[5] For that same reason, the 2.5 units claimed under Item 22 for the attendance of first counsel at the hearing before the Court of Appeal on September 15, 2008, will be allowed 2 units for the 1.1 hours claimed. Taking into consideration that the Court did not provide any directions allowing fees

for second counsel, the claim for second counsel is disallowed: see *Nature's Path Foods Inc. v. Country Fresh Enterprises*, 2007 FC 116.

[6] Item 27(a) claimed for the preparation of the Bill of Costs is allowed as claimed but under Item 26.

[7] The disbursements incurred by the appellant are substantiated in the affidavit of David Lederman and the appellant's written representations filed in support of the bill of costs. The respondents Lundbeck Canada Inc. and H. Lundbeck A/S conceded in their written arguments that most of the items claimed were not in dispute. On the questioned disbursements they claim that despite a specific request made to the appellant's counsel, they were not provided with the necessary documentation to support the bill of costs.

[8] Rule 1(4) of Tariff B states that "No disbursements, others than fees paid to the Registry, shall be assessed or allowed under this Tariff unless it is reasonable and it is established by affidavit or by the solicitor appearing on the assessment that the disbursement was made or is payable to the party." The succinct affidavit in support of the bill of costs does not fully substantiate all costs incurred in this case and provides less than absolute proof. In *Abbott Laboratories v. Canada (Minister of Health)* 2008 FC 693, Senior Assessment Officer Stinson stated:

However, that is not to suggest that litigants can get by without any evidence by relying on the discretion and experience of the assessment officer. The proof here was less than absolute, but I think there is sufficient material in the respective records of the Federal Court and the Federal Court of Appeal for me to gauge the effort and associated costs required to reasonably and adequately litigate Apotex's position. A lack of details makes it difficult to confirm whether the most efficient

approach was indeed used or that there were no errors in instructions, as for example occurred in Halford, requiring remedial work. A paucity of evidence for the circumstances underlying each expenditure make it difficult for the respondent on the assessment of costs and the assessment officer to be satisfied that each expenditure was incurred further to reasonable necessity. The less that evidence is available, the more that the assessing party is bound up in the assessment officer's discretion, the exercise of which should be conservative, with a view to the sense of austerity which should pervade costs, to preclude prejudice to the payer of costs. However, real expenditures are needed to advance litigation: a result of zero dollars at assessment would be absurd.

Having regard to the above, it is now left to me to establish reasonableness and necessity on all challenged disbursements on the face of the evidence on file.

[9] The appellant claims \$6,318.25 for photocopies. They submit that the volume of photocopies significantly increased with the issues raised in the cross-appeal and their responsibility to prepare the multi-volume joint book of authorities. The respondents submit that the volume of photocopies is in part attributable to the appellant and that the photocopying costs at the rate of \$0.25 per page are not supported by any evidence of actual costs. In support, they refer to the decision of the Court in *Janssen-Ortho Inc. v. Novopharm Ltd.* 2006 FC 1333 in which Mr. Justice Hughes stated:

Photocopying is allowed, where indicated in these Reasons, at the lesser of the actual charge or \$0.25 per page. I am mindful that law firms may have set up in-house copy centres, possibly as separate entities. In this regard, the comments of this Court in *Diversified Products Corp. v. Tye-Sil Corp.*, [1990] F.C.J. No. 1056 (QL) are appropriate in stating that the sum of \$0.25 per page is not simply an amount that can be charged without more. When an in-house service is used, the assessment officer must be advised as to the actual costs. The Court said:

1. With respect, I cannot agree with the reasoning of the Taxing Officer. The item of photocopies is an allowable disbursement only if it is essential to the

conduct of the action. Therefore, this is intended to reimburse a party for the actual out-of-pocket cost of the photocopy. The \$0.25 charge by the office of Plaintiffs' counsel is an arbitrary charge and does not reflect the actual cost of the photocopy. A law office is not in the business of making a profit on its photocopy equipment. It must charge the actual cost and the party claiming such disbursements has the burden to satisfy the Taxing Officer as to the actual cost of the essential photocopies.

I do not dispute that photocopy costs were essential to the conduct of this matter but with the exception of the concise appellant's affidavit, the only evidence supporting the claim for photocopies is found in the Court file. I am not convinced that all of the photocopies claimed by the appellant were essential to the conduct of this matter. It is obvious that actual photocopy expenses were necessary. I have examined the material in the Court file and in light of the jurisprudence mentioned above and my calculations, I have reduced the amount claimed to \$3,460.00 as a reasonable disbursement for photocopy expenses and all associated costs applicable to photocopies.

[10] The respondents submit that the facsimiles claim of \$30.74 be denied based on the arguments made with regard to the photocopy claim. Considering the established fact that counsel for the appellant was located in Toronto and counsel for the respondents in Montreal, it is most likely that facsimile charges were incurred, to either share material between the parties or file documents with the Court. That said, I am not convinced that all material faxed was associated with proceedings for which costs have been awarded. Considering the vagueness of the evidence on this disbursement, I allow \$20.00.

[11] The respondents submit that the disbursement claimed for file retrieval should not be allowed. They argue that they cannot be held responsible for the appellant's lack of space on-site to keep the material of the case. I do not consider file retrieval an assessable cost since this expense was not critical to the outcome of this matter. Although, this expense is specifically attributable to a particular client, it is for the convenience of its solicitor of record and is therefore disallowed.

[12] The appellant claims \$1,287.38 in computer searches to prepare for the appeal and cross-appeal. It was submitted that this was necessary to address all developments of the law on the numerous issues raised by this matter. With regard to the Joint Book of authorities prepared by the appellant, the respondents submit that all the electronic versions of the case law to be included on their behalf were submitted electronically. Consequently, Apotex did not have to incur any costs with respect to the respondents' authorities and as such, should not be allowed to claim them. Apotex did not submit any details to assist in determining the relevance and reasonableness of the computer time charges. On this issue, I share my colleague's views in *Englander v. Telus Communications Inc.* 2004 FC 276:

A result of nil dollars at assessment would be absurd given that I think the Respondent's counsel had an obligation to carry out research for the assistance of the Court in resolution of the issues. However, the Applicant is not obligated to pay for the costs of irrelevant research.

I have had the opportunity to examine the authorities submitted to the Court. Other than the number of cases submitted in the Joint Book of authorities, not much relevant information can be retrieved from Mr. Lederman's affidavit and the written submissions on this matter. Considering the

involvement of the respondents in the preparation of the Joint Book of authorities and the paucity of information, I am not clear on the relevancy or the specific amount of research done. Therefore, I allow the reduced amount of \$750.00 for computer searches.

[13] The disbursements claimed for the deliveries/courier (\$185.94), the Court fees (\$50.00), the process server/agent fees (\$363.50) as substantiated in counsel's representations, were all charges necessary to the conduct of this matter, are not contested and will therefore be allowed.

[14] The Bill of Costs is allowed at \$6,293.44 plus GST (\$314.67) for a total amount of \$6608.11.

Toronto, Ontario
April 27, 2009

“Johanne Parent”
Assessment Officer

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET: A-336-08

STYLE OF CAUSE: APOTEX INC. v. LUNDBECK CANADA INC. and THE
MINISTER OF HEALTH and H. LUNDBECK A/S

**ASSESSMENT OF COSTS IN WRITING WITHOUT PERSONAL APPEARANCE OF
THE PARTIES**

PLACE OF ASSESSMENT: TORONTO, ONTARIO

REASONS FOR ASSESSMENT OF COSTS: JOHANNE PARENT

DATED: APRIL 27, 2009

REPRESENTATIONS:

Daniel Cappe FOR THE APPELLANT

Chloé Latulippe FOR THE RESPONDENTS Lundbeck
Canada Inc. and H. Lundbeck A/S

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Montréal, QC Inc. and H. Lundbeck A/S