

Federal Court



Cour fédérale

**Date: 20141106**

**Docket: T-1395-07**

**Citation: 2014 FC 1049**

**BETWEEN:**

**LUNDBECK CANADA INC.**

**Applicant**

**and**

**THE MINISTER OF HEALTH AND COBALT  
PHARMACEUTICALS INC.**

**Respondents**

**REASONS FOR ASSESSMENT OF COSTS**

**JOHANNE PARENT, Assessment Officer**

[1] On February 12, 2009, the Court granted the Application by Lundbeck Canada Inc.

[Lundbeck] pursuant to the *Patented Medicines (Notice of Compliance) Regulations* for an order in accordance with Section 6(1) thereof prohibiting the Minister of Health from issuing a Patented Medicines (Notice of Compliance) [PM (NOC)] to the Respondent Cobalt Pharmaceuticals Inc. [Cobalt] in respect of 5 mg., 10 mg., 15 mg. and 20 mg. escitalopram tablets until after the expiration of Canadian Patent No. 1,339,452. The Court also dismissed

Lundbeck's interlocutory Motion to adduce new evidence, the whole with costs, save that no costs were ordered in favour or against the Minister of Health.

[2] It is worthy to note that the PM (NOC) Application in this file was heard in conjunction with the applications in Court files T-372-07 (*Lundbeck Canada Inc. v The Minister of Health and Genpharm ULC*) and T-991-07 (*Lundbeck Canada Inc. v The Minister of Health and Apotex Inc.*). The Court explains at paragraph 19 of the Reasons for Order (2009 FC 146) that although these applications were heard consecutively in December 2008; they were distinct and were never joined. In fact, Lundbeck obtained a protective order in each proceeding which had the effect of keeping the three files separate and distinct. However, the Court further specified that considering the degree of commonality of the three files, only one set of Reasons was issued.

[3] Upon receipt of the Bill of Costs, a conference call was held with counsel for Lundbeck and counsel for Cobalt to determine the timetable for the cross-examinations and exchange of written materials. Written directions ensued. Further to the cross-examination and the filing of the parties written representations, a Notice of Appointment was issued. The hearing of the assessment of costs took place in Toronto, Ontario on June 4, 2014 with counsel for Lundbeck and Cobalt making representations. At hearing, counsel for Lundbeck filed a Re-Amended Bill of Costs, detailing a claim of \$69,815.20 in assessable services and \$182,601.65 in disbursements. At the beginning of the hearing, counsel for Lundbeck, referring to paragraphs 3 b), c) and e) of the Affidavit of Christian Leblanc sworn July 5, 2013 [the Leblanc Affidavit], further reviewed the amounts claimed. Despite these changes, the document attached to the Re-Amended Bill of Costs, to substantiate the disbursements claimed, showed a total of \$284,142.63

with \$120,245.63 for the experts and \$163,897.00 for all other disbursements. On August 13, 2014, counsel for Lundbeck submitted a further amended document with regard to disbursements only, reflecting a total amount claimed of \$182,596.48 (\$119,410.45 in expert fees and \$63,186.06 for all other disbursements).

I. Lundbeck's arguments

[4] The Leblanc Affidavit states that Lundbeck is a pharmaceutical company focusing on the treatment of disorders of the central nervous system and is the owner of Canadian Patent No. 1,339,452 entitled *Enantiomers of Citalopram and Derivatives Thereof*. It further specifies that Escitalopram is the S-enantiomer of the racemic drug citalopram, a product that accounts for a substantial share of Lundbeck's revenue in Canada. Further to receiving the Notice of Allegation from Cobalt in respect of *escitalopram*, Lundbeck filed an application for an order in accordance with Section 6(1) of the *PM (NOC) Regulations*. The evidence in support of the Application was composed of the Affidavits of Klaus B. Bøgesø, Klaus Gundertofle, Christian K-Jensen, Stewart Montgomery, Brian Clark, Steven Davies, Marie Gagné and Peter Davies.

[5] At the hearing of the assessment, counsel for Lundbeck argued that the amounts claimed are reasonable when the overall substance of the file, the intensity of the work required in a relative short timeframe and the difficulty of dividing the invoices, considering that the work on the three files was done concomitantly, are taken into consideration.

[6] In fact, as each of the generic companies (Genpharm/Mylan, Apotex and Cobalt) contested the *PM (NOC) Regulations* applications, it is submitted that the end results was that Lundbeck had to pay legal fees and disbursements to make their case in the three files, not one over or before the other. It was also submitted that the work required was intense for all team members on these proceedings as Lundbeck had much to lose. Counsel further asserted that although the Notice of Compliance procedure in this file was dealt with concomitantly with Court files T-372-07 and T-991-07 and that the expert witnesses were practically the same for each file, the Leblanc Affidavit specifies that adjustments had to be made as the expert witnesses had to consider a different angle for each file as the Respondents' evidence was different from one to the other with regard to the particularities of each generic. However, considering the nature of the protective orders in each file, the nature and extent of these adjustments cannot be disclosed. It was also contended that in consideration of the fact that the files were all related and that the work of the experts was done simultaneously on all files, most of the cross-examinations on the three files took place during the same period of time (April to September 2008), having counsel travelling to different countries/cities to deal with the cross-examinations of the same expert witnesses, resulting in an overlap of the experts' invoices, the travel costs for experts and counsel, etc. In light of the above, counsel for Lundbeck explained that when it was not possible to confirm to which file the work invoiced on a particular file related, he split the invoice between the three files while considering the different allegations for each generic and taking into consideration that the experts worked on the three files concomitantly and prepared their invoices for the three files in a "holistic manner". It was submitted that Cobalt cannot argue that the evidence was identical and as a result request a discount for being the third file. With regard to the hearing of this Application, it is contended that while the hearing in the other two files

each lasted five days, the hearing in this file only lasted three days in consideration of the Court having already heard some of the technical and scientific arguments in the two other files.

[7] Counsel for Lundbeck further contended that they had attempted to negotiate the Bill of Costs with Cobalt, to no avail. Counsel submitted that because Cobalt did not respond to their communication and costs negotiation settlement attempts, Lundbeck did not file its Bill of Costs until six months after the Supreme Court of Canada decision. It was further argued that Lundbeck's conduct in filing their Bill of Costs when they did, did not unnecessarily lengthen the duration of the proceeding, or cause supplementary expenses and that paragraph 400(3)(i) of the Rules refers to the main matter before the Court, not the costs assessment. Counsel for Lundbeck added that the different bills of costs previously sent to Cobalt's counsel were submitted as drafts with the intent of negotiating a settlement. Those were privileged documents presented for negotiation and should not form part of Cobalt's materials in this assessment of costs. Counsel further stated that the bills of costs regarding the files involving Apotex and Genpharm/Mylan were settled and that these settlement negotiations were to remain confidential.

[8] In discussing the complexity and amount of work required on this file, counsel for Lundbeck submitted that the upper end of Column III of Tariff B should be allowed throughout as it is justified by the numerous and particularly complex, legal and scientific questions requiring testimony from renowned experts. Paragraph 22 of the Leblanc's Affidavit expands:

22. The evidence was complex and voluminous. The issues involved included *inter alia*:

a) Whether the claims of the '452 patent, which cover escitalopram, methods for the preparation of escitalopram and pharmaceuticals composition containing escitalopram, are infringed or not;

- b) Whether the patent is invalid because anticipated, obvious, insufficient, and ambiguous or whether the claims are broader than the invention;
- c) In particular, whether the ingestion of citalopram inevitably results in escitalopram;
- d) Whether the methods for resolving enantiomers, including chiral columns, diastereomeric salts, covalently bound diastereomers, diol cyclization as well as the two reactions schemes described in the patent were well known and in common use at the relevant date;
- e) Whether the prior art discloses the superior benefits of escitalopram;
- f) Whether the '452 patent is a selection patent;
- g) Whether section 53 of the *Patent Act* has been breached.

[9] Counsel argued that in the three files, the respondents alleged that the “escitalopram” patent at issue was a selection patent while Lundbeck asserted that it was not. As per the Leblanc Affidavit, the other arguments raised by the Notice of Allegation and responded to by Lundbeck in this matter revolved around the anticipation and obviousness of escitalopram, the ambiguity of the patent, the insufficiency of its disclosure and the anticipation of the molecule. Lundbeck was successful before the Federal Court and the Federal Court of Appeal while Cobalt’s application for leave to appeal to the Supreme Court was denied. In light of the decision in *Interactive Sports Technologies Inc. v Canada (Attorney General)*, 2012 FCA 78, counsel submitted that with no further directions from the Court, the assessment officer cannot depart from Column III of Tariff B. However, counsel inferred that the costs in this matter are justified at the upper end of Column III due to the fact that in another matter before this Court, involving Lundbeck and Apotex, regarding the validity of the escitalopram patent, the Court directed that costs were awarded at the upper end of Column IV.

[10] With regard to the sufficiency of evidence that payments on the invoices were tendered, counsel argued that the evidence in the Leblanc Affidavit presents all the invoices and affirms

that they have been paid. It is contended that saying otherwise would be maintaining that Lundbeck did not pay its bills. Counsel for Lundbeck argued that “Tariff B requires that disbursements be supported by satisfactory evidence” and that all evidence does not need the proof of a receipt from the payee. As per *F-C Research Institute Ltd. v Canada*, 95 DTC 5583 (*F-C Research*), *Carlile v Canada*, 97 DTC 5284 (*Carlile*) and *Teledyne Industries v Lido Industries*, (1981) 56 C.P.R. (2d) 93 (*Teledyne*), it was contended that the assessment officer can accept affidavit evidence that the amounts were incurred and paid. Counsel further argued that the discretion of the assessment officer should concentrate on finding what is more or less probative: the fact that it is not specifically mentioned that an invoice has been paid does not mean that it has not been paid. Counsel submitted that the invoices are attached to the Leblanc Affidavit, the amounts are reasonable and have most likely been paid by Lundbeck. Counsel concluded that believing the contrary would lead to an absurd result. The assessment officer does not need an absolute proof but a satisfactory proof to set in motion the necessary discretion to determine what was reasonable and necessary in the circumstances. Referring to the decision in *Merck & Co. v Canada (Minister of Health)*, 2007 FC 312 (*Merck*) at paragraph 69, counsel for Lundbeck finally contended that as in that case, the assessment officer can allow disbursements even when the affidavit in support of the bill of costs does not contain specific details.

## II. Cobalt’s arguments

[11] In response, counsel for Cobalt corroborated that Cobalt was the third generic company to pursue a Notice of Compliance for escitalopram and that the hearing of this third PM (NOC) Application took place in December 2008 after the hearings in Court files T-372-07 and T-991-07. During the assessment hearing, it was contended that, as a result of going last, an important

part of the work done in Court files T-372-07 and T-991-07 reduced the work on this file with the most work having been done on the first file. Counsel for Cobalt argued that there is insufficient documentation in the record making it “really difficult to find out what is a fair amount that Cobalt should pay given the lack of details”. However, she added that Cobalt should not be subsidizing Genpharm/Mylan or Apotex. It was argued that the fact that Lundbeck chose “what they called a holistic approach” with the work on the three files being completed at the same time and billed together, did not prevent Lundbeck from keeping adequate documentation separating the three files and that Cobalt should not be penalized for Lundbeck’s way of proceeding. In Cobalt’s Responding Record and verbal arguments, it was submitted that the work on the three files was done simultaneously, that the cross-examinations on the three files took place around the same time in the summer and early fall of 2008, that the evidence of Lundbeck’s witnesses was substantially the same in each of the three files, and that “considerably less work was done on the Cobalt file when the documents are just looked at on their face”. Counsel asserted that when questioned on the issue whether Lundbeck filed affidavits from the same fact and expert witnesses in the three files, Christian Leblanc, in cross-examination on his Affidavit, stated that he was “not sure if there was some slight differences” and that he would have to verify the other files, keeping in mind the protective orders issued by the Court. Counsel submitted that when asked if the evidence of the witnesses was substantially the same, Mr. Leblanc added that it was “difficult to qualify, but I would say substantially the same but there were some adjustments to be made in each file”. Considering the language used in the cross-examination of Mr. Leblanc, counsel for Cobalt submitted that the evidence put by the witnesses was the same or very similar with only some adjustments needing to be made and that in consideration of the protective orders, Cobalt was not informed concerning the nature of



these adjustments. Counsel for Cobalt contended that considering the protective orders in place, it is Lundbeck's burden to substantiate the quantum of costs and document the required information.

[12] It is Cobalt's position that costs should be reduced considering that Lundbeck does not deny that the evidence was substantially the same, cannot substantiate the amounts and, in light of the protective orders, cannot answer specific questions to clarify these issues. In response to the disbursements claimed, counsel for Cobalt referred in her Representations in Response to subsection 1(4) of Tariff B of the Rules. At paragraph 122, she indicated:

122. In this case, counsel for Lundbeck admitted that it is claiming not those amounts that were paid or are payable by its client but amounts that it has picked and chose based on a mandate and its "client's advice". Counsel for Lundbeck further admitted that it has not provided a full record of the disbursements it claims.

[13] Counsel for Cobalt argued per *IBM Canada Ltd. v Xerox of Canada Ltd.*, [1976] FCJ No. 124 that an assessment officer should not accept an affidavit at face value, but examine the quality of the proof submitted. Referring to the cross-examination of C. Leblanc, she contended that with the exception of certain amounts, the proof that the disbursements claimed were actually paid or are payable is missing from Lundbeck's evidence. She claimed that it is particularly important since, according to the Leblanc Affidavit, all work on the three files (Cobalt, Genpharm/Mylen and Apotex) was done simultaneously and "no attempt was made at the time to keep disbursements separate". Per *Advance Magazine Publishers Inc. v Farleyco Marketing Inc.*, [2010] FCJ No. 844 and *Hoffman-La Roche Ltd. v Apotex Inc.* [2013] FCJ No. 1370, she argued that "the less evidence a party claiming costs provides, the more it is dependent on 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". Counsel for Cobalt specified that they do not dispute the jurisprudence that says that receipts need not be attached for every single item "if you have an affidavit from a lawyer who sets out the fact that amounts have been paid". She further pointed out that the Leblanc Affidavit states that expenses have been incurred, but that there is no mention in the Affidavit that the client has been charged or that the amounts have been paid. Counsel submitted that paragraph 3 of the Leblanc Affidavit states: "I attach the following exhibits to this affidavit in support of the amended bill of costs" and that this statement is followed by a list of the exhibits attaching receipts and invoices. She further contended that paragraph 3 g) and subsequent of the Affidavit mentions: "Receipts showing expenses incurred by counsel for Lundbeck..." While paragraph 3 m) and n) specify "...expenses billed to Lundbeck..." She argued that exhibit 15 to the Affidavit introduces a report compiling all disbursements incurred by the law firm in the course of this matter and that further to a review of the individual listings, the report contains numerous claims that do not relate to Cobalt. Counsel argued that there is no evidence showing that these disbursements specifically relate to Cobalt and questioned whether the "matter" referred to in the Affidavit is a reference to the "escitalopram matter". She further contended that the breakdown of these numbers should have been done in the Leblanc Affidavit and not given by counsel during the cross-examination of Mr. Leblanc or during the assessment hearing. Counsel for Cobalt further argued that considering the lack of evidence and the amounts that Lundbeck have already recovered from Genpharm/Mylan and Apotex, Cobalt should not be prejudiced and have to pay costs incurred in the Genpharm/Mylan and Apotex matters. She argued that to the extent that evidence is not provided that the specific costs and disbursements relate to Cobalt, they do not.

[14] In response to the argument that Cobalt ignored Lundbeck's settlement proposals on costs, counsel for Cobalt contended that there is no evidence on record of unreturned telephone calls and all written correspondences had been responded to, making it inappropriate for Lundbeck to infer that all other parties except Cobalt agreed to negotiate. Counsel added that Cobalt had no knowledge of the amount of costs demanded by, or paid to Lundbeck in the two other files. On the persistence in advancing the Bill of Costs, Cobalt referred to the decision in *Urbandale Realty Corp. v Canada*, 2008 FCA 167, at paragraph 21. It was further argued in their Written Representations that Lundbeck's counsel sent Cobalt different versions of their bills of costs on January 19, 2010, March 16, 2012, April 16, 2013 and July 5, 2013, reducing the costs claimed each time. From Cobalt's standpoint, these documents were not confidential or without prejudice since they were not indicated as such or were not subject to an agreement of confidentiality between the parties. Counsel concluded that at paragraph 150 of the Reasons for Order, the Court held that Lundbeck was entitled to one set of costs in each of the three applications, not specifying if they have to be equal and it is Cobalt's position that the assessment officer, in accordance with Rule 400(1) and the decision in *Shotclose v Stoney First Nation*, 2011 FC 1051, who has full discretionary powers to sort out the amounts claimed.

### III. Decision

[15] Upon my reading of paragraph 6 of the Reasons for Order in this Court file (2009 FC 146), the main issues before the Court were the validity of the patent and whether or not the Minister should be prohibited from issuing a Notice of Compliance to Cobalt, or the other respondents. These proceedings did not serve to determine the issue of infringement. Relying on the factors set in rule 400(3) of the *Federal Courts Rules*, counsel for Cobalt argues that this

litigation was not complex, a repeat of the litigations with regards to the two other generic companies involved with escitalopram. On the other hand, counsel for Lundbeck claims that the three files were important and involved complex PM (NOC) proceedings that raised complex legal and factual issues and that this file was of significant importance, hence the claim at the upper-end of Column III for all taxable services. Both parties agree that the assessment officer may consider the factors set at Rule 400(3) of the *Federal Courts Rules* to assess costs. The Court granted Lundbeck's PM (NOC) Applications with costs on each file. Lundbeck having not moved the Court for specific directions to the assessment officer (Rule 403), the assessment officer in assessing Lundbeck's costs can only exercise her discretion using the number of units imposed under Column III of the Table to Tariff B while referring to Rule 409 which allows the assessment officer to consider the factors listed at Rule 400(3).

[16] The premise behind Lundbeck's argument for claiming the maximum number of units for each service demanded under Tariff B is that they were completely successful in the conduct of the litigations before the Federal Court and the Federal Court of Appeal. Reading the Courts' decisions in both Courts as well as the documents on file and counsel's arguments, there is no doubt that this matter was extremely important to all parties involved and raised some complex scientific issues. However, I am of the opinion that, although the validity of the Patent was attacked on several fronts, this was not the most complex of patent cases. On the other hand, upon reviewing the file, along with the cross-examinations, it is obvious that this matter required a significant amount of work but it did not exceed that of an average patent proceeding.

[17] Counsel for Cobalt raised the issue of apportionment of liability (Rule 403(d)) insisting that the amount of work required and relevant to the Cobalt file was diminished when one considers that Cobalt was the third of three consecutive PM(NOC) cases prepared and argued with respect to escitalopram. On that issue, Lundbeck's arguments and the evidence (Affidavit of Christian Leblanc) were not successful in convincing me that the work performed in the Cobalt file was a great deal different from the work in the Apotex and Genpharm/Mylan cases. Counsel for Cobalt further argued that some or all of the costs claimed against Cobalt in the Bill of Costs have already been covered by Apotex and Genpharm/Mylan. She contended, referring to the cross-examination of C. Leblanc and Lundbeck's arguments regarding the "slight differences" between the expert witnesses' reports in the three files, that the privilege attached to the costs settlements between Lundbeck and Apotex, and Genpharm/Mylan should be waived from the Protective Orders issued on these files to prevent Lundbeck from being overcompensated (*Dos Santos v Sun Life Assurance Co. of Canada*, 2005 BCCA 4 at paras. 37 & 39 (*Dos Santos*)). Counsel for Lundbeck argued the legitimacy of the Protective Order on file, adding further in his Written Representations that "settlement agreements are privileged and thus are neither admissible as evidence nor relevant to the present matter and, consequently, no adverse inference can be drawn by the assessment officer in that respect".

[18] I am mindful that settlement agreements are usually covered by solicitor-client privilege. In addition, the Protective Orders signed by the Court in Court files T-1395-07, T-372-07 and T-991-07 along with my reading of paragraph 24 of the Protective Order in this Court file, lead me to understand that the Order remains in effect as it reads that the "provisions of this Order shall continue after the final disposition of these proceedings and this Court shall retain jurisdiction to

deal with any issues relating to this Order, including without limitation, its enforcement". The Court further adds at paragraph 25:

The terms and conditions of the use of Confidential Information and the maintenance of the confidentiality thereof during any hearing of this proceeding shall be matters in the discretion of the Court seized of this matter.

[19] Considering the wording of the Protective Orders found in the three files, I am of the view that the exception to costs settlement negotiations "privilege" in this Court file as well as in T-372-07 and T-991-07 would have needed to be recognized by the Court as the assessment officer, not being a Court member, is powerless regarding the disclosure of any of the information regarding these files. Referring back to the decision in *Dos Santos* (supra) and the exception to the "blanket privilege" regarding settlement, I recognize that full disclosure on settlement negotiations could have been relevant. However, I am not convinced, had the Court been moved to subtract the settlement negotiations from the realm of the Protective Orders in Court files T-372-07 and T-991-07, that it was absolutely necessary in the circumstances of this case.

[20] Determining the reasonableness of the services and disbursements claimed in Lundbeck's Bill of Costs will involve the exercise of a substantial degree of discretion. In *Merck & Co. v Apotex Inc.*, 2008 FCA 371, the Federal Court of Appeal plainly pointed out the considerable discretion vested with assessment officers:

[14] In view of the limited material available to assessment officers, determining what expenses are "reasonable" is often likely to do no more than rough justice between the parties and inevitably involves the exercise of a substantial degree of discretion on the part of assessment officers. Like officers in other recent cases, the Assessment Officer in this complex case,

involving very large sums of money, gave full reasons on the basis of a careful consideration of the evidence before him and the general principles of the applicable law.

[21] In this matter, I am mindful that some duplication in the provision of legal services involving the Genpharm/Mylan and Apotex files was certainly inevitable. During his cross-examination on Affidavit, C. Leblanc, when questioned about the substantial similarity of the witnesses evidence on the three files, stated at page 14 that it was “difficult to qualify, but I would say substantially the same but there was some adjustments to be made in each file”. Although, I share Cobalt’s concern regarding repetitive work and possible duplication from one matter to the other, I am of the opinion that Lundbeck’s counsel could not assume the experts’ work and positions on each matter and of the specifics that could be transplanted from one file to the other. The Court in the Reasons for Order suggests that substantial case preparation was required for all three matters and while the Court addresses similar findings in his assessment of Canadian Patent No. 1,339,452 not being a selective patent, it also dealt with allegations and other issues, justified or not, that were not common to each. Considering that the applications on these files were served and filed a few months apart from each other while the hearings proceeded a few weeks apart, I agree with counsel for Lundbeck that in consideration of the short and very similar timeframe of these proceedings, it is almost impossible to know which of the three files were dealt with first, second or third and to which extent it should be considered a factor to take into consideration as I clearly do not think that one generic company should assume the burden for the two others. This being said, the allegations argued in each PM (NOC) applications were not put in evidence before me and considering the timeframe of the three files, I am satisfied that the cross-examinations and the hearing related to the Cobalt file progressing within the same timeframe or a few weeks after the Genpharm/Mylan and Apotex matters did

necessitate a thorough preparation on behalf of counsel for Lundbeck. Therefore, the issue of the allocation of the costs claimed with regards to the three files will explicitly be dealt with when assessing the specific services and disbursements on this matter. The Court awarded separate costs on each file and absent clear evidence; references to the other files in this costs assessment should be limited to circumstances when the services noticeably overlapped.

[22] As far as the matter of costs is concerned, I do not believe that Lundbeck's conduct in this Court file resulted in unnecessarily lengthening the proceedings. At the outset, the Federal Courts Act or Rules do not set any timeframe for the filing of a party's bill of costs. Further, I do not believe that for Lundbeck to have waited for the Supreme Court of Canada decision on the leave to appeal from the Federal Court of Appeal decision constitutes the type of conduct that unnecessarily lengthened the proceedings. The filing of Lundbeck's initial Bill of Costs four years after the Federal Court decision but months after the Supreme Court of Canada decision on the leave to appeal is not what I would consider a long delay. Further, I find no ill conduct in the manner Lundbeck proposed the opposing party amended bills of costs all through the process. I rather see that as a negotiation tactic between counsel and I do not think that in the case at bar, it severally impaired the process or unnecessarily lengthen the process. Therefore, Lundbeck's decision to proceed with their Bill of Costs four and a half years after the Federal Court issued its decision should not have any impact on the costs assessment.

[23] In assessing disbursements, the assessment officer's role is to determine if costs were incurred, and once this has been established, whether the costs were reasonable and necessary. Section 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.” This rule is unambiguous: only the fact that disbursements were made or are payable can be established by way of affidavit or by solicitors appearing, not their reasonableness. It is once the assessment officer is satisfied that the costs were incurred, that can be determined their reasonableness and necessity.

[24] As pointed out at the beginning of these Reasons and by counsel for Cobalt in her representations, the amounts claimed in Lundbeck’s original and re-amended Bills of Costs vary substantially. With regard to disbursements, counsel further pointed out in her Written Representations:

16. In the Amended Bill of Costs dated July 5, 2013 and the Leblanc Affidavit, counsel for Lundbeck set out the amounts it claims for disbursements as 14 separate Items. However, on cross-examination, counsel for Lundbeck acknowledged that in many instances, the amounts claimed in its Amended Bill of Costs do not match the amounts documented in the Exhibits to the Leblanc Affidavit. Counsel for Lundbeck indicated that in instances where it has not provided any documentary evidence in support of a claimed amount, it is not, in fact, claiming that amount.

It can also be read from the transcript of the examination of Christian Leblanc on his Affidavit at pages 20-21:

Mrs. Heather E.A. Watts

Q. Ok, and we just talked about briefly before, some of the documents in this list are included in the affidavit and some aren’t.

A. Uh-huh.

Q. So am I correct in assuming that the total that you get at the end, where you said it’s 285, I believe.

281.

Me Hilal Elayoubi

231

Mrs. Heather E.A. Watts

Q. \$235,601.79. And then the amount you're claiming is less than that, \$194,705.

A. \$194,705.92, it's gonna change with the corrections that Me Elayoubi did.

Q. Sure

A. ...but roughly yes.

Q. Ok, so am I right in assuming that in this chart, where there's a document that's not attached in the affidavit that's a document the amount for which you're not including in the total?

A. Yes

And at pages 67-68:

Mrs. Heather E.A. Watts

Q. Ok, and I think I asked you this before but I just want to be sure of the answer. So to the extent that there are documents listed in here that are not included in the affidavit, those are amounts that you're not claiming, is that correct? So for example, where we see the fourth entry down to B, Alain Leclerc, that document does not appear in any of the exhibits, so is that an amount that's not being claimed?

A. Yes

Q. That's correct?

A. Yes, that's correct.

[25] The *prima facie* evidence of the disbursements incurred in this matter as presented in the Leblanc Affidavit was challenged by counsel for Cobalt during the cross-examination of Mr. Leblanc held on December 17, 2013. The lack of sufficient and accurate details as pointed out by counsel for Cobalt makes it more complicated to secure the absolute proof sought out. In support of their contention regarding quality and insufficiency of the evidence, counsel for Cobalt referred to *IBM Canada Ltd. v Xerox of Canada Ltd.*, [1976] F.C.J. No. 124, *Advance Magazine Publishers Inc. v Farleyco Marketing Inc.*, 2010 FCA 143 and *Hoffman-La Roche Ltd. v Apotex Inc.*, 2013 FC 1265.

[26] In reply, counsel for Lundbeck referred to *F-C Research (supra)*, *Carlile (supra)* and *Teledyne (supra)*. The assessment officer concerned with the lack of sufficiency of evidence to justify the expenditures stated in *F-C Research*:

**12** In my opinion, the simple delineation of expenditures generally described in a Bill and supported only by the scant statement that they were reasonable and necessary fails to provide sufficient information upon which a taxing officer can discharge the responsibility of being satisfied that the costs claimed were essential to the conduct of the proceedings, that they were prudently incurred, or that the quantity or rate applied, as the case may be, was reasonable in the circumstances. In arriving at that conclusion, I am guided as well by the principles established by this Court in *Alladin Industries Inc. v. Canadian Thermos Products Ltd.* [1973] F.C. 942, 12 C.P.R. (2d) 24 (T.D.); *Red Owl Foods (Alta.) Ltd. v. Red Owl Stores Inc.* (1971) 12 C.P.R. (2d) 266 (Fed. T.D.); *Teledyne Industries v. Lido Industries* (1981) 56 C.P.R. (2d) 93; and *Diversified Products Corporation v. Tye-Sil Corporation Limited*, Court file no. T-1565-85, unreported, November 22, 1990, the Honourable Mr. Justice Teitelbaum, from which decisions I derive that, firstly, it would be improper not to question disbursements, even, I would add, in the absence of any apparent opposition on the part of other interested parties. Secondly, disbursements must be supported by evidence which satisfactorily demonstrates that the costs claimed meet the twofold test of reasonableness and necessity. The Defendants have fallen well short of that challenge in the present taxation and the disbursements claimed under Tariff B 3 must therefore be disallowed.

[27] In *Carlile*, the assessment officer notes that work had clearly been done but the assignment of appropriate quantum for indemnification was made difficult, if not impossible considering the lack of proper proof explaining all the entries. He further added:

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.

Of note the comment about the standard of proof and the subjective role of the assessment officer in making sure that the claiming party is appropriately reimbursed for the expenses incurred while the opposing party is not burdened with inappropriate expenses.

[28] The Court decision in *Teledyne* confirms the authority of the assessment officer while further stating that not all expenditures need to be supported by a receipt:

**23** In the taxation of a party-and-party bill of costs acceptance without inquiry of the propriety of a disbursement is wrong in principle and should be reviewed: vide *IBM v. Xerox*, supra at p. 186. Of course, all disbursements, even when properly expended, should be proved to the satisfaction of the Taxing Officer. But it does not follow that all items of expenditure should rigorously be supported by a receipt from the payee. There are other ways to prove that a bill has been paid. In my view, the prothonotary was perfectly right in allowing those costs as they were obviously incurred, and properly so, in connection with the various examinations for discovery. The entire amount is therefore taxable.

[29] In *Abbott Laboratories v Canada*, 2008 FC 693 (*Abbott-2*), the assessment officer summarized the position faced by assessment officers in circumstances like this one:

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.

[30] I am mindful that the demands of this scale of litigation can interfere with a precise monitoring of costs and disbursements and that Lundbeck's counsel in trying to keep track of the invoices did not always take the necessary steps to substantiate the disbursements incurred in relation to Cobalt. Nevertheless, counsel for Lundbeck had the responsibility for proof. Like my predecessors, I consider zero dollars at taxation an absurd result when, as in this matter, it is obvious that expenses were incurred. However, assessing reasonableness becomes challenging when faced with evidence of the type before me given the entrenched and divergent views of counsel on the record. The Leblanc Affidavit and exhibits attached could certainly have provided more specific and accurate information and in consideration of the authorities previously cited and the cross-examination and arguments before me, it does not necessarily establish an absolute

right to indemnification of the amounts presented. Lundbeck made the choice in pursuing the PM (NOC) applications on the three files (Cobalt, Genpharm/Mylen and Apotex) concomitantly or as it was referred to “in a holistic way”. It is my view that Lundbeck’s choice to not consistently keep separate documentation for each file should not penalize Cobalt. However, in consideration of the evidence presented regarding the expenditures claimed, it is obvious from the Court file and the parties’ arguments that several cross-examinations took place and although sometimes imprecise, invoices were submitted by Lundbeck to show work performed by experts in this matter.

[31] In conformity with Section 1(4) of Tariff B, the assessment officer, upon assessing the disbursements claimed, must ensure once the expenses have been proven that they meet the threshold of necessity and reasonableness. As set in *Engine & Leasing Co. v Atlantic Towing Ltd* (93 FTR 181), there is no automatic recovery for expert costs:

I should observe at the outset that we are dealing with party-and-party costs. It is well established that parties cannot recover all their costs under that kind of award. Also, compensation of an expert witness during trial at the hourly rate allowed for preparation may be found to be too generous. Further, there is no foundation for the notion that counsel may incur any expert witness costs for which, in the event of success, they will be fully compensated.

[32] In the circumstances of this matter, I find the comments made in *Abbott-2 (supra)* to be useful:

[70] I still hold to my view, often expressed further to my approach in *Carlile* (decided May 8, 1997) and the sentiment of Lord Justice Russell in *Re Eastwood (deceased)*, [1974] 3 All.E.R. 603 at 608, that assessment of costs is "rough justice, in the sense of being compounded of much sensible approximation," that discretion may be applied to sort out a reasonable result for costs

equitable for both sides. I think that my view is reinforced by the editorial comments (see: The Honourable James J. Carthy, W.A. Derry Millar & Jeffrey G. Gowan, *Ontario Annual Practice 2005-2006* (Aurora, Ont: Canada Law Book, 2005)) for Rules 57 and 58 to the effect that an assessment of costs is more of an art form than an application of rules and principles as a function of the general weight and feel of the file and issues, and of the judgment and experience of the assessment officer faced with the difficult task of balancing the effect of what could be several subjective and objective factors.

[33] The Federal Court of Appeal also commented on the subject of "rough justice" in *Merck & Co. v Apotex Inc.* 2008 FCA 371:

**14** In view of the limited material available to assessment officers, determining what expenses are "reasonable" is often likely to do no more than rough justice between the parties and inevitably involves the exercise of a substantial degree of discretion on the part of assessment officers. Like officers in other recent cases, the Assessment Officer in this complex case, involving very large sums of money, gave full reasons on the basis of a careful consideration of the evidence before him and the general principles of the applicable law.

[34] The "rough justice" approach is not to suggest that parties need not provide sufficient evidence, and to only rely on the discretion and experience of the assessment officer. I see the role of the assessment officer, while faced with less than exhaustive evidence, and as real disbursements were incurred, to ensure that the successful party is not denied reasonable indemnification while the unsuccessful litigant is not burdened with unreasonable costs. In the case at bar, counsel for Cobalt claimed that the Leblanc Affidavit did not establish that the amounts claimed as per invoices attached were duly billed to the client or paid. I agree with counsel's argument. However, section 1(4) of Tariff B establishes 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” and I am of the position that both the Leblanc Affidavit along with counsel’s written representations and arguments presented at the assessment hearing establish as per Section 1(4), that disbursements were incurred. Keeping this in mind and the decision in *Teledyne (supra)* at paragraph 23, I will therefore review all invoices submitted to ensure the appropriateness and reasonableness of the disbursements claimed.

#### IV. Assessable Services

[35] Under Item 1 of Tariff B of the *Federal Courts Rules*, Lundbeck claims fourteen units as assessable services for the preparation and filing of the Notice of Application and the Applicant’s Record. Item 1 of Tariff B reads:

|   |   |
|---|---|
| Preparation and filing of originating documents, other than a notice of appeal to the Federal Court of Appeal, and application records. | Préparation et dépôt des actes introductifs d’instance, autres que les avis d’appel, et des dossiers de demande |
|---|---|

[36] The practice is that item 1, aside from exceptional circumstances, is a global allowance allocated regardless of the amount of work involved for the preparation and filing of the originating document and the application record inclusive of the affidavits filed in support of the application (see: *Montréal (Ville) c Administration portuaire de Montréal*, 2012 CF 221, *Dell Inc. v 9153-3141 Québec Inc.*, 2007 FC 1070, *Novopharm Ltd v AstraZeneca AB*, 2006 FC 678 and *Kassam v Queen*, 2005 FCA 169). Having not been made aware of any exceptional circumstances, seven units will be allowed for the preparation and filing of the originating document and the application record, inclusive of the affidavits.



[37] The claim made under Item 5 for the preparation and filing of a contested Motion for leave to file a memorandum of fact and law of more than 30 pages will be allowed three units. On top of not being a very complex motion, it was similarly presented in Court file T-991-07 for which costs had also been awarded. For the attendance on that Motion (Item 6), the maximum number of units is claimed by Lundbeck. Counsel for Cobalt claims that this motion was decided on the basis of written representations. The Abstracts of Hearing found in the Court Record in this Court file and Court file T-991-07 indicates that the Motion was presented before the Court on October 6, 2008. For one thing, I note that only the applicant was represented on that day while a letter from Cobalt's counsel dated October 1, 2008 points out that Cobalt would not be represented at the hearing, asking for its Motion Record to be put before the Court. In consideration of the above and the lesser complexity of that Motion, one unit multiplied by 0.5 hour will be allowed for the appearance of counsel on that Motion.

[38] Seven units are claimed by Lundbeck under Item 5 for their Motion for leave to file further evidence. From my reading of the Court Record, I note in the Order of February 12, 2009 that the Court dismissed Lundbeck's interlocutory motion to adduce new evidence. Giving the fact that the Motion was dismissed and that the Court did not specifically indicate that the costs of that Motion were awarded to Lundbeck, said costs will not be allowed.

[39] Under Item 7 (discovery of documents, including listing, affidavit and inspection), Lundbeck claims the maximum number of units for the discovery of documents annexed to the Notice of Allegation and for the preparation of the affidavits of Dr. Klaus Peter Bøgesø, Dr. Brian Clark, Peter J. Davies, Dr. Stephen G. Davies, Dr. Marie Gagné, Dr. Klaus Gundertofte,

Christian Kjerulf-Jensen and Dr. Stuart Montgomery. Referring to the decision in *Abbott Laboratories Ltd. v Canada*, 2009 FC 399 (*Abbott*), counsel for Cobalt alleges that the multiple claims for the preparation and filing of expert affidavits should be disallowed under the Tariff as it covers for the preparation of “all respondents’ records or materials” as one activity. The decision in *Abbott* refers to Item 2 of Tariff B with regard to the preparation and filing of the respondents’ materials. In the case at bar, Lundbeck being the Applicant, Item 1 should apply to the preparation and filing of the application record, inclusive of the affidavits. Considering my reasoning above regarding Item 1 and the fact that the maximum number of units have already been allowed under this Item, the units claimed under Item 7 will not be allowed. Furthermore, Item 7 is found in Tariff B under sub-heading “C. Discovery and Examinations” that oversees the communication/discovery of documents as per Rules 222 and ss of the *Federal Courts Rules*. I cannot find any proof of discovery of documents in this matter within the meaning of these Rules (see: *Corporation Xprima.com c IXL Marketing Inc.*, 2011 CF 624 and *Nesathurai v Canada*, 2008 FC 1014).

[40] Under Item 8, Lundbeck has submitted seven claims at five units each for the preparation for cross-examinations on the affidavits of their witnesses and expert-witnesses, namely Christian Kjerulf-Jensen, Dr. Stuart Anthony Montgomery, Dr. Klaus Peter Bøgesø, Dr. Brian J. Clark, Dr. Klaus Gundertofte, Peter J. Davies and Dr. Stephen G. Davies. In their representations, Cobalt suggests that two units should be allowed per request. Although I consider that the cross-examination of one’s own client does necessitate preparation and an active role on behalf of counsel, I am not convinced that the maximum number of units claimed is warranted. Three units will be allowed under Item 8 for each of Lundbeck’s affiants.

[41] The maximum number of units is further claimed under Item 8 for the preparation of the cross-examinations of Cobalt's expert witnesses Dr. Peter T. Kissinger, Dr. Roger Newton, Dr. Robert Cooke and Dr. Athanasios Stengos. Counsel for Cobalt argues in her Written Representations that two units should be allowed per affiant. I disagree. The preparation for the cross-examinations of the opposing party's expert witnesses requires more effort than the preparation of one's own witness. Being an expert in law does not make a lawyer an expert in science and in consideration of the relative complexity of the scientific arguments made, four units will be allowed for each of Cobalt's affiants.

[42] With respect to Item 9 (attendance on examination per hour), and consistent with my reasoning on Item 8, I allow one unit per hour for the cross-examinations of Lundbeck's witnesses and expert-witnesses and two units for the cross-examinations of Cobalt's expert witnesses when it is unambiguous that the cross-examinations were attended and/or conducted by counsel.

[43] In the course of her arguments, counsel for Cobalt confirmed the number of hours the cross-examinations of Dr. Stuart Anthony Montgomery, Dr. Brian J. Clark, Peter J. Davies, Dr. Stephen G. Davies and Dr. Roger Newton lasted, to be the same as the ones claimed in the Bill of Costs. The number of hours for those will be allowed as claimed. On the other hand, arguments were raised regarding the exact duration of the cross-examinations of Christian Kjerulf-Jensen, Dr. Klaus Peter Bøgesø, Dr. Klaus Guntertofte, Dr. Peter T. Kissinger, Dr. Robert Cooke and Dr. Athanasios Stengos. Lundbeck claims in its Bill of Costs seven hours in duration for the cross-examination of Christian Kjerulf-Jensen on July 3, 2008 while Cobalt's counsel in a

chart attached to her representations suggests that it lasted five hours (9:30 to 14:30). The Leblanc Affidavit merely affirms that Christian Kjerulf-Jensen's cross-examination took place in London, U.K. between July 4, 2008 and July 22, 2008. Additional information that could have helped clarify the exact duration is not made available in the materials submitted. With regards to the cross-examination of Dr. Klaus Peter Bøgesø, Lundbeck claims in its Bill of Costs five hours on July 14, 2008 while Cobalt's counsel specifies in her representations that the cross-examination took place on that day from 9:30 to 13:00. The Leblanc Affidavit affirms that Dr. Bøgesø was cross-examined by Cobalt in London, U.K. on July 14, 2008 with no further specifications. The cross-examination of Dr. Klaus Guntertofte is claimed by Lundbeck in its Bill of Costs to have lasted seven hours on July 22, 2008 while Cobalt's counsel specifies in her representations that the cross-examination took place on that day from 9:10 to 12:08. The Leblanc Affidavit affirms that Dr. Guntertofte was cross-examined in London, U.K. on July 22, 2008 with no further precision concerning time. The Leblanc Affidavit reports that the cross-examination of Dr. Peter T. Kissinger, claimed by Lundbeck in its Bill of Costs to have lasted seven hours, took place in Indianapolis, USA on June 11, 2008 with no further precision. Cobalt's counsel in the chart attached to her representations states that the cross-examination took place on that day from 10:00 to 15:49. With regards to the cross-examination of Dr. Robert Cooke, Lundbeck claims in its Bill of Costs seven hours on August 26, 2008 while Cobalt's counsel specifies in her representations that the cross-examination took place on that day from 9:15 to 12:15. The Leblanc Affidavit affirms that Dr. Cooke was cross-examined in Toronto on August 26, 2008 with no further specifications. The cross-examination of Dr. Athanasios Stengos is claimed by Lundbeck in its Bill of Costs to have lasted seven hours on October 8, 2008 while Cobalt's counsel specifies in her representations that the cross-examination took place on that day from 9:44 to 13:22. The Leblanc Affidavit affirms that

Dr. Stengos was cross-examined in Toronto on October 8, 2008 with no further precision concerning time.

[44] I note the discrepancies between the time frames provided in Lundbeck's Bill of Costs and the chart attached to Cobalt's representations regarding the duration of the cross-examinations of Christian Kjerulf-Jensen, Dr. Klaus Peter Bøgesø, Dr. Klaus Guntertofte, Dr. Peter T. Kissinger, Dr. Robert Cooke and Dr. Athanasios Stengos. It is further noted that the Bill of Costs was not sworn in as an exhibit to the Leblanc Affidavit and that the duration of the above noted cross-examinations do not form part of his Affidavit. Similarly, the chart attached to Cobalt's representations was not introduced in evidence via an affidavit but by the solicitor appearing on the assessment. I see the role of the assessment officer, while faced with less than exhaustive proof, and as real services had been provided, to ensure that the successful party is not denied reasonable indemnification while the unsuccessful litigant is not burdened with unreasonable costs. However, parties need to provide sufficient evidence, and not only rely on the discretion and experience of the assessment officer to reach a reasonable conclusion. In the case at bar, consideration needs to be given to the fact that the information provided by both parties was not corroborated by affidavit. Counsel for Cobalt submitted specifics regarding the duration of all cross-examinations in both her written representations and oral arguments, agreeing on five proposed durations by Lundbeck and disagreeing on six. The substantiations provided by counsel for Cobalt indeed undermine the credibility of the claims found in the Bill of Costs under Item 9. Gauging the credibility of the information before me, I note that the numbers provided in the Bill of Costs do not originate from a disinterested third-party and that said data were rather determined within the law firm while the Leblanc Affidavit and representations made

by Lundbeck's counsel did not present the underlying needed information. I therefore consider that the document prepared by counsel for Cobalt coupled with her unchallenged representations before me establish and serve to prove the duration of the cross-examinations of Christian Kjerulf-Jensen, Dr. Klaus Peter Bøgesø, Dr. Klaus Guntertofte, Dr. Peter T. Kissinger, Dr. Robert Cooke and Dr. Athanasios Stengos. In consideration of the above, the durations of the cross-examinations provided by Cobalt will serve to multiply the number of units previously awarded.

[45] Lundbeck claims six units for the preparation for the pre-hearing conference (Item 10) held on November 3, 2008. In response, counsel for Cobalt contends that a total of three units should be allowed for the preparation with only one unit allowed towards this Court file as the teleconference encompassed three files: T-372-07, T-991-07 and T-1395-07. From my reading of the Abstract of Hearing for that day, I note that the discussions between the parties and the Court were about the consolidation of the three files. In the Law of Costs (2nd edition, Volume 1, 44th rel. 2014 at par 209-5), Orkin points out that the Court may apportion costs against several parties, but the assessment officer should avoid doing so as far as possible. In *Milliken & Co. v Interface Flooring Systems (Canada) Inc.*, 2003 FC 1258, the assessment officer mentions at paragraph 10 that: "The Rules and Tariff do not use the term "apportionment", but I think that Rule 400(1) and 6(a) likely and collectively allow for that concept". He further notes at paragraph 33 that: "As noted above, the apportionment of costs as an approach in a bill of costs, to address work done relative to various awards of costs, is acceptable, but I must keep in mind that these awards were made independent of one another. That is, I am not necessarily bound to apply apportionment". Taking into account the specifics of this matter, I consider that it is

indicated that apportionment of costs be applied regarding the services covered under Items 10 and 11 of Tariff B. Consequently, and having not been informed that the discussions of November 3, 2008 required significant preparation or were of a particular complexity, three units will be allowed and divided by three. As a result, one unit will be allowed under Item 10 in this Court file. Item 11 (attendance at conference) for the teleconference held on November 3, 2008 will be allowed two units divided by three, multiplied by its duration (0.5 hour) for a total of 0.33 unit/hour.

[46] Five units are demanded under Item 13(a) for counsel fee concerning preparation for trial. With no further arguments, counsel for Cobalt indicates in her representations that two units should be allowed. As discussed previously, Lundbeck's counsel dealt at hearing with similar issues in two other files. However, I am of the opinion that they still had to prepare for the issues raised by Cobalt in this file, this within a very short timeframe from the other files and, although this was not the most complex of patent cases, they had to ready themselves for the hearing on December 16, 2008. Four units will therefore be allowed. Under Item 13(b), Lundbeck claimed 15 units (3 units X 5 days) for the preparation for trial, per day in Court after the first day. Counsel for Cobalt contends that the hearing lasted three days, not five and therefore, one unit for each of the two days should be allowed. Under Column III of Tariff B, the range for this Item is 2-3 units. As mentioned above, the hearing in this Court file lasted three days, not five and considering the reasoning in this paragraph and the fact that the hearing did not require the preparation of any witnesses, the two days preparation will be multiplied by two units.

[47] In its Bill of Costs, Lundbeck claims under Item 14(a) (counsel fee per hour in Court) 63 units/hours while counsel for Cobalt contends that 42 units/hours should be allowed. Both parties agree on the number of hours in Court but disagree on the number of units. The available range of units under this Item is fairly narrow (2-3) and considering the complexity of patent proceeding and the legal and scientific questions raised along with the required amount of work for counsel at hearing, allowing two units per hour does not seem appropriate. The sixty-three units claimed will be allowed.

[48] Fifty-five units are claimed for travel by counsel to attend examinations in London, U.K., Indianapolis, U.S.A. Ottawa and Toronto (11 cross-examinations in total). As discussed by counsel for Cobalt in her Written Representations, explicit directions from the Court must be provided for Item 24 to be recoverable. In accordance with the decisions in *Abbott (supra)* and *Merck (supra)*, the units claimed will not be allowed as the wording of Item 24 calls for explicit directions from the Court and the fact that I cannot locate in the Court file, nor was I referred to any direction regarding travel.

[49] Regarding the claim made under Item 26 (assessment of costs), Cobalt's counsel contends that two units should be allowed while Lundbeck claims the maximum number of units. I hold a different view from counsel for Cobalt as I believe that the work performed by Lundbeck's counsel on this assessment of costs warrants more than two units. Before presenting themselves for the hearing of the costs assessment, counsel filed the Bill of Costs, the Affidavit of Christian Leblanc, attended his cross-examination, as well as filed Written Representations in Reply along with a Book of Authorities. Five units will therefore be allowed under Item 26.



[50] The units claimed under Item 25 (services after judgement) and Item 27 (such other services as may be allowed by the assessment officer) for the requisition for hearing, are not contested, considered reasonable and will be allowed as claimed.

V. Disbursements

A. *Expert Fees*

(1) Stuart A. Montgomery

[51] As per arguments at the hearing of the costs assessment, the Amended Bill of Costs shows a claim of \$46,145.00 for the services of Professor Stewart A. Montgomery MD. This amount varies from the evidence in the Leblanc Affidavit where the amount of \$61,307.04 is being claimed.

[52] In response to this claim, counsel for Cobalt refers to the legal test for allowing expert fees as disbursements found at paragraph 81 of the decision in *AlliedSignal Inc. v DuPont Canada Inc.*, [1998] F.C.J. No. 625:

- (1) The hiring of an expert must, in the circumstances existing at the time, be prudent and reasonable representation of the client;
- (2) The hiring of an expert must not constitute a blank cheque for an award;
- (3) What reliance was placed on the expert's testimony by the trial judge?

[53] Counsel for Cobalt contends in her Written Representations that the Court's Reasons for Order of February 12, 2009 do not make any reference to Stuart A. Montgomery while his fees

and disbursements are the highest of all experts claimed by Lundbeck. Referring to *Northeast Marine Services Ltd. v Atlantic Pilotage Authority*, [1994] F.C.J. No. 1294 (*Northeast Marine*), she contends that the costs claimed should be reduced considering that no information as to hourly rate or number of hours worked were provided on the invoices. As per *Janssen-Ortho Inc. v Novopharm Inc.*, 2006 FC 1333 (*Janssen-Ortho*), she argues that “expert fees for appearances should be charged at the lesser of fees actually charged and those daily fees of senior counsel, and that fees for preparation should be capped at one half that amount”. In light of that decision, she further submits that the Court “has observed that expert fees have become extravagant and thus while a party is free to engage a person for expert services and pay whatever fee is negotiated, that fee should not become simply allowable on an assessment”. As per *Apotex Inc. v Syntex Pharmaceuticals International Ltd.*, [1999] F.C.J. No. 1465 (*Apotex*) and *Janssen-Ortho (supra)*, she contends that it is a long-standing principle that the losing party is required to indemnify the winning party only for the reasonable expenses of litigation. Counsel for Cobalt argues that because no specific evidence has been provided regarding Dr Montgomery, his hourly rate should be benchmarked to that of Lundbeck’s most reasonable expert witness (Peter Davies) for a total amount payable of \$2,400 considering the only hours documented that can unequivocally be linked to his preparing to give evidence or giving evidence in the Cobalt file are the hours worked on July 3 and 4, 2008.

[54] Regarding the invoices substantiating Dr Montgomery’s claim, counsel for Cobalt contends that Invoice No.1769 should be disregarded as Lundbeck did not provide “payment request” documents as well as currency conversion or proof that it was ever charged to Lundbeck or paid by its counsel as only appears on the invoice, an inscription dividing the total amount in

three parts between three different docket numbers. She further contends that no evidence of actual payment made from a bank, like for the two other invoices, has been submitted. On this subject, she argues that the documentation exists as it was submitted for some invoices while for others there is no proof that the invoices have ever been paid. With regard to that same invoice, it is claimed that there is no indication that it relates to Cobalt as the work itemized on this invoice relates to Mylan and Apotex for work done between July and October 2007 and that Lundbeck did not serve and file its evidence in the Cobalt file until October 2007. From Cobalt's point of view, it is submitted that if Dr Montgomery worked on the three files between July and October and in consideration of the filing of his affidavits in the two other matters, "he would have done the lion's share of his work between July and September, when the first two affidavits were filed". It is further contended that the claim of \$46,145 is a simple addition of one third of two invoices (Nos. 1769 and 1851) and 40% of Invoice No.1860. With regards to the disbursements charged by Dr Montgomery, counsel claims that they should be disallowed considering that he was only cross-examined once, in London where he resides and that nothing concerning the Cobalt file took place in Toronto, Montreal or Paris and that the other witnesses mentioned on the invoices were testifying either in the Mylan or Apotex files. On the subject of the other files involved, counsel for Cobalt argues in her Written Representations that Lundbeck did not take into consideration the fact that by the time Dr Montgomery swore his affidavit and appeared for cross-examination in the Cobalt file, "he was doing so for the third time and recycling all of the same points he had already made in the Mylan and Apotex files". It is further claimed that Lundbeck did not provide any evidence on the proportion of the fees and disbursements that have already been recovered from Apotex or Mylan. It is Cobalt's position that only portions of invoices Nos. 1851 and 1860 should be considered as they specifically relate to Cobalt.

Regarding the travel expenses claimed i.e. trains, taxis, airfare etc., it is contended that there is no information on the invoices specifying to which file or to which meeting they relate to and nothing can be taken from the invoices that relate specifically to Cobalt or whether they have already been recovered from Apotex or Mylan. It is submitted that Lundbeck should have properly documented the three files expenses and requested from Dr Montgomery more detailed invoices. Regarding Invoice No. 1860 and the issue whether amounts expended by a witness in order to assist counsel with opposing cross-examinations are recoverable, counsel for Cobalt relies on two cases to submit that these amounts are not recoverable (*Aerlinite Eireann Teoranta v Canada*, [1993] F.C.J. No. 1462 at paragraph 22 and *Janssen-Ortho (supra)* at paragraph 25.

[55] In reply, counsel for Lundbeck contends in his Written Representations that as per *Fournier Pharma Inc. v Canada (Minister of Health)*, 2009 FC 1004 and *Pfizer Canada Inc. v Canada (Minister of Health)*, 2010 FC 1238 (*Pfizer*), the work of experts in PM (NOC) proceedings is fully recoverable with regard to their assistance to counsel in case preparation in addition to the work on their reports and oral testimony, as long as such work remains necessary and reasonable in the circumstances. On that point, counsel further referred during the assessment hearing to paragraph 29 of *Biovail Corporation v Canada (Minister of National Health and Welfare) et al.* 2007 FC 767 and *Adir v Apotex Inc.*, 2008 FC 1070, para. 21 (*Adir*). As per *MK Plastics Corp. v Plasticair Inc.*, 2007 FC 1029 (*MK Plastics*) and *Sanofi-Aventis Canada Inc. v Pharmascience Inc.*, 2008 FC 782 (*Sanofi-Aventis*). It was further argued that “the test for disbursements for experts is not function of hindsight, but whether at the time the expenses were incurred, it was prudent and reasonable both in terms of leading and responding to expert evidence, and providing technical assistance for counsel’s preparation and conduct”. With

regard to the Court's rejection or silence regarding the evidence of an expert witness, it is contended that there should be no automatic reduction of the account as per *Canada v Meyer*, [1988] F.C.J. No. 482 and *Carruthers v Canada*, [1982] F.C.J. No. 235. Counsel for Lundbeck in his Written Representations contends that Dr Montgomery resides in the UK and that the affidavit he swore is related to the treatment of depression, its diagnosis, the mode of action of various antidepressants, particularly escitalopram and its superiority compared to other drugs. It is argued that whether escitalopram was superior to citalopram was initially raised by Cobalt with regard to the validity of the selection patent. In the eventuality that the Court would have concluded that the Canadian Patent No. 1,339,452 was a selection patent, it is argued by Lundbeck that Dr. Montgomery's expert evidence would have served to prove the superiority of escitalopram. Despite the fact that the Court concluded that the No. 1,339,452 Patent was not a selection patent and did not address Dr. Montgomery's affidavit in his decision, it is argued that it was prudent and reasonable to incur expenses for his services at the time the expenses were made. It is further mentioned in counsel's representations that Dr Montgomery was cross-examined by Cobalt in London, UK, on July 4, 2008 and assisted counsel in reviewing prior art documents, the affidavits filed by Cobalt, particularly Dr. Robert Cooke's for whom he attended cross-examination in Toronto on August 26, 2008. At hearing, counsel argued that the invoices were already reduced from \$61,307 to \$46,145 to be a fraction of his total claim and to only reimburse \$2,400 would be unreasonable and not supported by the jurisprudence. It is further argued that the qualifications of Dr. Montgomery cannot be compared to the expertise given by Peter Davies, a former examiner for the Canadian Patent Office. Referring to the invoices submitted in support of the disbursements, counsel for Lundbeck argues that Invoice No. 1769 as submitted constitutes sufficient proof that the amount of \$5,235.19 CAN has been paid to Dr.

Montgomery for work done until October 2007, which is the date his affidavit was filed.

Referring to Invoice No. 1851, counsel contends that it was reasonable to divide it in three equal parts as it clearly refers to Dr. Montgomery dealing with the Cobalt file on July 3 and 4, for a third of the time invoiced. With regard to Dr. Montgomery dealing with the Cobalt matter in Toronto, it is submitted that Dr. Montgomery was needed in Toronto during the cross-examination of Dr. Cooke on August 26, 2008. Regarding Invoice No. 1860, counsel for Lundbeck submits that four of the ten days invoiced have been charged to this file as they concern the preparation of Dr. Cooke's cross-examination that took place in Toronto August 24 to 27, 2008.

[56] As argued by counsel for Lundbeck at the hearing of the assessment and considering that it was not proven otherwise, I have no reason to doubt that Dr. Montgomery is a worldwide expert in clinical psychiatry. The pertinence of his affidavit was tied to the Court's conclusion regarding the Canadian Patent No. 1,339,452, being a selection patent or not. Contrary to the decision in *Northeast Marine (supra)*, in which it was stated that the lack of precise information made it impossible for the client to know what he was paying for, I consider that the work performed by Dr. Montgomery was unambiguous and costs cannot be reduced on this argument alone. Furthermore, considering the Court's findings, I understand that it was necessary for Lundbeck to prepare Dr. Montgomery's expertise at the time it did. Over the years, the jurisprudence on assessment of costs made clear that the reasonableness and necessity for the need of an expert cannot be determined with the benefit of hindsight (*Sanofi-Aventis (supra)* and *MK Plastics (supra)*). In light of the evidence before me, I am satisfied that it was reasonable for Lundbeck to have filed the affidavit of Dr. Montgomery. I appreciate that Dr. Montgomery filed

affidavits in Court files T-1395-07, T-372-07 and T-991-07 and billed Lundbeck's counsel making no clear distinction between each file. Looking over the invoices to support the reimbursement of his expenses, I further note that the invoices submitted fall short of giving specifications regarding the number of hours worked along with specifics regarding the work performed but for sweeping statements such as: "review of documents meetings re affidavit signatures July-October 2007". However, taking into consideration the global amounts claimed for Dr. Montgomery's work, minus the expenses along with his consultancy honorarium as per Invoice No.1769 (£1500 per day), I can determine a probable number of hours worked along with the hourly rate. On that subject, counsel for Cobalt suggests that Dr. Montgomery's hourly rate be benchmarked to Lundbeck's most reasonable expert witness, Mr. Peter Davies (\$200/hour). I do not believe that experts' fees can be benchmarked to the "most reasonable" or most inexpensive expert witness on file. Experts on a matter are not all called to testify on the same issues and can compare with difficulty. From the uncontested evidence, I note that Dr. Montgomery is a worldwide expert in clinical psychiatry while Mr. Peter Davies, as per the Court's Reasons for Order at paragraph 147 "spent 37 years with the Canadian Patent Office culminating in his appointment as Chairman of the Patent Appeal Board". In consideration of their entirely different fields of expertise, comparing their work and fees does not help in assessing the reasonableness of Dr. Montgomery's fees. I am therefore not ready to reduce his costs on that basis. To assess experts fees in this Court file, a comparison of experts with similar backgrounds along with the fees allowed for their expert testimony in different Court cases would have been of assistance. From the evidence on file, I further note that the hourly rate for Dr. Stephen Davies, the second most expensive expert called by Lundbeck to be £300 per hour. Dr. Davies, as per the Court's Reasons for Order is among other things the Chairman of Chemistry at the University of Oxford.

As I am not referred to hourly rates for work of other experts with similar backgrounds, I am left to draw a parallel between these experts' rates. Counsel for Cobalt also suggested as per *Janssen-Ortho (supra)*, that Dr. Montgomery's hourly rate should not be simply allowed but specifically capped to senior counsel's fees attending at trial. This approach consisting of not paying experts a higher rate than the senior counsel on file has been applied once in *Janssen-Ortho* and although it might be quite tempting, the variation in legal fees across the country needs to be considered as this approach may be seen as disproportionately benefiting parties represented by counsel in larger municipalities and it should be applied with careful consideration.

[57] In *Apotex (supra)*, the Court stated that "the costs for which a defendant will be required to indemnify a losing party are the reasonable expenses of the litigation" and in *Allied Signal Inc. v Dupont Canada Inc.*, 81 CPR (3d) 129 and *Janssen-Ortho (supra)*, the Court added that "It might be reasonable for a party to put forward the best expert but unreasonable to pass along all the costs to the unsuccessful party". On account of these decisions, I will now attempt to review each invoice. Invoice No.1769 refers to the "review of documents meetings re affidavit signatures July – October 2007". Dr. Montgomery's affidavit was filed in this Court file in October 2007 while as per representations; he filed affidavits in the two other files in July and September 2007. As mentioned earlier in these Reasons, the Court did not apportion costs between the three files and there was no request for directions to the assessment officer submitted to the Court on either file. On apportionment of costs among similar proceedings addressing the same pharmaceutical, the Court in *Eli Lilly Canada Inc. v Novopharm*, 2006 FC 781 held that experts cannot charge twice for the same work and costs cannot be recovered several times in each different file. In the case at bar, it is not in evidence before me that Lundbeck has charged multiple times for the work of



Dr. Montgomery or that costs have already been recovered fully in the two other files. A conclusion of the sort would lead me to put in doubt the evidence and representations presented by counsel for Lundbeck and the affiant Leblanc, both solicitors and officers of the Court (Section 11(3) of the *Federal Courts Act*). As per Cobalt's arguments and Leblanc's cross-examination, I am prepared to infer that the affidavits filed in each file might have been quite similar especially when one considers that the three matters before the Court were so akin that the Court decided to hear them concomitantly and deliver his decision on the three files in one set of Reasons for Order. However, having not been referred to the affidavits in the two other files but considering the manner in which the files proceeded, I accept that the costs of the work performed on the affidavits filed by the expert Montgomery a few months apart from each other in each file should be shared equally. I note that the amounts on the invoice are in Pounds Sterling and that I have not been provided with the official currency conversion for the date the invoice was made. I have therefore reviewed the currency conversion for that date making use of the currency converter employed by the parties throughout this matter and allow the amount of \$4,969.75 regarding Invoice No.1769. Invoice No.1860 asks for a total amount of £18,000 as honorarium for "preparation advice meetings Toronto 17-20/8 re cross-examination Dr. Hollis Apotex, Toronto 24-27/8 re Dr Cook, London 17-18/9 Dr Jenner". Counsel for Cobalt argues that only the charges in relation with Dr Cooke's cross-examination pertain to the Cobalt file. However, it is claimed that those fees and disbursements should all be disallowed as they relate to Dr Montgomery attending the cross-examination of Dr. Cooke and do not concern his preparation to give or giving his own evidence. I will allow a fraction of the time Dr. Montgomery prepared advice meetings and attended cross-examination (4 days) as well as the reasonable expenses incurred on those days as I am of the opinion in the circumstances of this

file that the expenses linked to experts assisting counsel with opposing cross-examinations in a proceeding dealing with advanced organic chemistry exceeds the legal expertise of counsel. On that point, I go along with the Courts' decisions in *Pfizer (supra)* and *Adir (supra)* at paragraph 21:

**21** I am not prepared to limit the reimbursement of the experts as requested by Apotex. In my view, any assistance provided by an expert related to his or her area of expertise is justifiable. That would include assisting counsel in reviewing and understanding the expert reports from the other side and preparing for cross-examination. Until we have a trial process that allows experts to openly question each other on their reports, lawyers must be involved. And, the only meaningful way counsel can be prepared to act as such middlemen is to have the experts' assistance. Recovery of the reasonable fees charged by the experts who then appeared at trial to provide this service is appropriate.

[58] The expenses claimed in Invoice No.1860 with regards to Dr. Montgomery's travel to Toronto are loosely substantiated, raising questions regarding the reasonability of the two different charges for air fare. The second air fare claimed will therefore be disallowed. Invoice No.1860 will be allowed £7,200 in fees plus £3,720.96 in disbursements for a total amount in Canadian dollar of \$21,881.13 in consideration of the unchallenged currency converter attached to the invoice. Lastly, counsel for Lundbeck argues that Invoice No.1851 should be divided in three equal parts while counsel for Cobalt contends that only two out of the seven days claimed are allowable as they relate to the cross-examination of Dr. Montgomery and that all disbursements should be disallowed considering that the event concerning Cobalt took place in London, England where Dr. Montgomery resides. I agree with counsel for Cobalt and the amount of £6,142.86 (or \$11,794.29 according to currency converter submitted) will be allowed for Invoice No.1851.

(2) Peter Davies

[59] The Leblanc Affidavit presents invoices setting out fees and disbursements for Mr. Peter Davies in the amount of \$10,272.45. Both the Leblanc Affidavit and Lundbeck's Written Representations on costs specify that he is a former Senior Patent Examiner and former Chair of the Patent Appeal Board. Two invoices are provided to substantiate his claim: Invoice No.323 (23/11/2007) detailing 16.75 hours(as per attached sheet) in *Lundbeck v Cobalt* and Invoice No.361 (12/11/2008) indicating 58 hours (as per attached sheet) plus \$1,252.90 in travel fees in the matters of *Lundbeck v Cobalt* and *Lundbeck v Apotex*. At the hearing of the costs assessment, counsel for Lundbeck acknowledged that the "attached sheets" were not submitted and ignoring the reasons why these details were not appended or why the information was blackened on invoice No.361. He, however, contended that said invoice clearly indicated that half of the amount had been charged towards the Cobalt file and the other half towards Apotex.

[60] Counsel for Cobalt argues in her Written Representations that both invoices should be reduced by 66% as the affidavit of Peter Davies was a repeat of the ones filed in the two other matters. With regards to Invoice No. 361, it is argued that there is no evidence that half of the amounts claimed relate to Cobalt as the breakdown of the 58 hours worked plus travel expenses had been redacted from the document and the details said to be attached to the invoice were not provided. It is contended that Peter Davies swore affidavits in the two other files before he filed his affidavit concerning Cobalt and therefore, only recycled the same points made, inferring that the majority of the time charged on this invoice relate to the Apotex file. Specifically concerning Invoice No.323, counsel for Cobalt further contended at the hearing of the assessment that they

did not have a problem with that invoice as it relates to Cobalt and only Cobalt and the hours set out on the invoice.

[61] The Court discusses the involvement of Peter Davies in the Lundbeck matter at paragraph 147 of the Reasons for Order. With regard to Invoice No.323, I am satisfied that it relates to the preparation of Mr. Davies' affidavit in the Cobalt file. It will be allowed as claimed. Similar to the sentiment expressed and outlined above, I accept that the work performed on the affidavits filed by Peter Davies a few months apart in each file should be shared equally. With regard to the proportion of the work performed on each the Cobalt and Apotex files, I note that the invoice does not contain specific details in that regard. However, work had undoubtedly been performed and although the invoice does not contain absolute and detailed evidence, I am satisfied that Lundbeck incurred the expenses as evidenced in the Leblanc Affidavit and cross-examination. Relying on the sentiment in *Abbott-2* at paragraph 70 (previously cited), I exercise my discretion and allow Invoice No.361 as claimed.

(3) Stephen Davies

[62] In the last amendment to the Bill of Costs presented by Lundbeck, the amount of \$41,525.40 is claimed as per the exhibit attached to the Leblanc Affidavit to be Invoice No.6 dated May 6, 2009 in the amount of £64,031.75. The Leblanc Affidavit further specifies that Stephen Davies is the Chairman of Chemistry at the University of Oxford (UK) and that he swore an affidavit concerning the "synthesis of resolution of escitalopram as an enantiomer of citalopram". At the hearing of the assessment, counsel for Lundbeck specified that Dr. Davies has an envious reputation and his expertise is frequently sought by pharmaceutical companies in

North America and Europe. Considering that Dr. Davies decided to submit only one invoice for the three files, counsel for Lundbeck, instead of dividing it in three equal parts, did the exercise of extracting the elements related to Cobalt. At the hearing of the assessment, counsel therefore proceeded to explain the approach he took to divide Dr. Davies' invoice. In the Leblanc Affidavit is also stated that Dr. Davies assisted during the cross-examination of Dr. Newton, expert for Cobalt, and that he was cross-examined in Vancouver due to the availability of counsels for both parties and his own availability as he was in Vancouver for professional matters. It is counsel for Lundbeck, then attending cross-examinations of experts in the Apotex matter, who would have flown from London (UK) to Vancouver.

[63] In her Written Representations in reply, counsel for Cobalt contends that the amount of \$38,490.33 for fees and disbursements was claimed in the Bill of Costs dated July 5, 2013 and that at the cross-examination of Leblanc, counsel for Lundbeck attempted to increase the amount to what is currently claimed. It is argued that the invoice raises issues due to its lack of details as it appears to cover all amounts invoiced in connection with Apotex, Genpharm/Mylan and Cobalt. The Representations further mention that Dr Davies worked first on preparing affidavits for the Mylan and Apotex files (August and September 2007) and worked on the Cobalt matter prior to filing his affidavit on October 25, 2007. On September 25, 2008, his cross-examination took place in Vancouver where he was already travelling to attend the cross-examination of Dr. Keana in the Apotex matter on September 24, 2008. Based on the dates and descriptions on the invoice, it is argued that the majority of his fees and disbursements in this matter are related to Mylan and Apotex and the expenses related to Cobalt should be those dated around October 25, 2007 when his only affidavit related to Cobalt was filed and September 24, 2008 when he was

cross-examined. In support of her contention, counsel for Cobalt attached to the representations an appendix reviewing all the amounts claimed on the invoice. Referring to the involvement of counsel for Lundbeck in the Leblanc cross-examination regarding the manner in which the amounts were broken down through the invoice, counsel for Cobalt argues that the Leblanc Affidavit did not provide such breakdown while it is Leblanc who swore the Affidavit. With regard to Dr. Davies' expertise, it is further contended that the expertise of the different witnesses has been addressed by the Court in the Reasons for Order, this being the only evidence as to how well known Dr. Davies is. In her Written Representations, counsel referred to Dr. Davies' hourly rate (£300) and asked that his fees be benchmarked to the fees claimed for Peter Davies, Lundbeck's most reasonable expert witness. Later, in argument before me, counsel contended that the issue of benchmarking Dr. Davies' fees was not as important if the actual amount that was worked on the Cobalt file is taken into consideration. Referring to Dr. Davies' disbursement, counsel for Cobalt contended that the only amounts reimbursable regards his travel to Vancouver to attend cross-examination, which should further be divided in two considering that he was also in Vancouver for the cross-examination of a witness for Apotex.

[64] In rebuttal, counsel for Lundbeck contends that there is no evidence to support the argument that Dr. Davies was cross-examined in Vancouver because of Dr. Keana's cross-examination. It is also argued that it was more convenient and less expensive for Cobalt to cross-examine Dr. Davies in Vancouver instead of London (UK). Regarding the benchmarking of Dr. Davies' hourly rate to the one of Peter Davies, it is argued that their field of expertise cannot compare and the benchmarking contention is provided when the harmonization of the experts' fees cannot be rationalized considering their very different expertise and lastly, it is argued that

Dr. Davies hourly rate is within the standards for PM (NOC) proceedings. At the hearing of the assessment, counsel contended that Dr Davies' fees were reasonable, adding that Cobalt did not provide any costs comparative for experts with the same expertise as Dr. Davies. Discussing the annex provided by Cobalt's counsel, it was lastly contended that those allegations are hypothesis and are not supported by any evidence.

[65] Lundbeck filed the expert's affidavit of Dr. Davies in support of the PM (NOC) Application on October 25, 2007. Dr. Davies was further cross examined on his affidavit in Vancouver on September 25, 2008. Further to qualifying Dr. Davies as an expert in this matter, the Court referred to his evidence all through the Reasons for Order, expressing preference for his evidence as demonstrated at paragraphs 51, 74 and 109. Although, his credentials are not at issue, the manner his billing was submitted for payment is at issue. It would undoubtedly have been most advantageous and of greater assistance if the invoice had shown with the dates, specific details about the client and the work performed. This type of approximate invoice causes great difficulty when one tries to estimate the real costs incurred. The Leblanc Affidavit and counsel's arguments do not offer much assistance. Based on the principles of reasonableness and partial indemnity, I am of the opinion that Cobalt should not have to pay to support the choice Lundbeck's counsel made to not provide the specifics that would have permitted a better assessment. In consideration of the sentiment expressed by the assessment officer at paragraph 70 of *Abbott (supra)* and the less than detailed evidence provided along with counsels' analysis, I have examined Dr Davies invoice carefully and come to the conclusion that the hours claimed to "read affidavit" & "sign affidavit" billed before the filing of his affidavit in the Cobalt matter, as well as a small portion of "reading hours" time and the charges for attending his own cross-

examination, plus his attendance on Dr. Newton cross-examination will be allowed. Considering the evidence before me, the only disbursements allowed are the flight and hotel expenses in connection with the travel to Vancouver to attend his cross-examination. However, to account for the parties' arguments and the details of Dr. Davies' invoice regarding that travel, said disbursements will be divided in two. The total amount claimed for Dr Davies will therefore be reduced to £13,781.91 or \$24,347.21 as per uncontested currency converter.

(4) Brian J. Clark

[66] As per the latest Bill of Costs, the amount of \$21,467.60 is claimed by Lundbeck for the expert fees of Brian J. Clark. The Leblanc Affidavit states that Dr Clarke is a Professor of Pharmaceutical and Biomedical Analysis and Associate Dean for Research and Innovation in the School of Life Sciences and an Academic in the School of Pharmacy at the University of Bradford. Counsel for Lundbeck contends that the charges are reasonable despite the fact that Dr. Clark testified in the Mylan/Genpharm and Apotex cases before the Cobalt matter.

[67] At the hearing of the assessment, counsel for Cobalt confirmed that Dr. Clark's invoice as submitted in the Leblanc Affidavit only relates to the Cobalt matter. It is however argued that of the amount claimed, thirty-four hours and £1,499.83 in disbursements, can be deducted as these fees do not relate to Dr. Clark preparing to give or giving his own evidence, but relate to the preparation and attendance on the cross-examination of Cobalt's expert Dr Kissinger in Indianapolis.



[68] In rebuttal, counsel for Lundbeck contended that with regard to the work involved in the preparation and attendance on the cross-examination of Cobalt's expert witness Kissinger, Dr. Clark's work is clearly detailed in his invoice and the jurisprudence submitted previously specifies that the sheer technical assistance of experts to counsel is justified and recoverable.

[69] In the Reasons for Order, Dr. Clark was qualified to assist the Court as an expert witness. At paragraph 109 of said Reasons, the Court further acknowledged his preference for the evidence of Drs. Davies and Clark. With regard to the reasonability of Dr. Clark's fees and disbursements in relation to the preparation and attendance on Dr Kissinger's cross-examination, I refer to my findings regarding Dr. Montgomery and the decisions in *Pfizer (supra)* and *Adir (supra)*. I recognize upon my reading of the Court's Reasons for Order and the documents on the Court file that Dr. Clark's expertise was most certainly necessary in assisting counsel during the cross-examination of Dr. Kissinger, whose testimony undoubtedly exceeded counsels' legal expertise. Considering that aside from this argument, no objections were raised with regard to the details of the work and disbursements claimed in the invoice, the amount claimed for Dr. Clark will be allowed as claimed.

#### VI. Other Disbursements

[70] In the Leblanc Affidavit, exhibit CL-15 is adduced to be a report compiling all disbursements incurred by the law firm in the course of this matter. This report contains details regarding experts, hotels, meals, stenographers, local transportation and travel transportation for a total of \$235,601.79, plus disbursements for stationary/binding/scan/ photocopies, online search, bailiff/process server, delivery/courier, fax/telephone, overtime and other expenses for a

total of \$45,886.14. Counsel for Cobalt contended at the hearing of the assessment that despite Lundbeck's claim that exhibit 15 compiles all their expenses in the Cobalt matter, the individual listings indicate that some of the elements claimed do not relate to the Cobalt file. Counsel further refers to the Leblanc Affidavit which mentions that exhibit 15 refers to disbursements engaged in the course "of this matter", claiming that they were incurred in the escitalopram matter and that there is no evidence showing that they are solely associated to Cobalt. As stated at the beginning of these Reasons, I note from the latest amendment to the Bill of Costs submitted by Lundbeck that the total amount claimed by Lundbeck with regard to disbursements has been reduced to \$182,596.48 (\$119,410.45 in expert fees and \$63,186.06 for all other disbursements). In the next few pages, decisions will be made for each disbursement claimed taking into consideration the below argument and the evidence before me.

A. *Stenographers*

[71] As per the document showing the disbursements incurred and submitted in August 2014, the amount of \$18,265.68 is claimed as disbursement for stenographers. The invoices supporting this claim are attached to the Leblanc Affidavit. Counsel for Cobalt argues that only \$8,210.62 is documented as having been invoiced and paid by the law firm but that there is no evidence that the amounts claimed were ever charged to Lundbeck. Referring to the transcript of Leblanc's cross-examination, she further argues that the \$9,226.40 charged for the transcript of the hearing of this matter held in December 2008 should be disallowed "because this transcript was taken solely for the benefit of counsel for Lundbeck; no copy of the transcript was ever provided to counsel for Cobalt either during or after the hearing". At the hearing of the assessment, she further contended that as it was a PM (NOC) hearing, no *viva voce* testimony took place and

further, there was no agreement between counsels regarding any daily transcript. Lastly, she argued that Cobalt prepared its appeal of Mr. Justice Harrington's decision in this matter without any transcript as it was not in their possession. In rebuttal, counsel for Lundbeck argued at the hearing of the assessment that the Leblanc Affidavit is proof that the invoices were paid. He further referred to the Court's Reasons for Judgment and Judgment on Directions with respect to Costs in *Apotex Inc. v H. Lundbeck A/S*, 2013 FC 1188. Concerning the evidence on the necessity of the court reporter's notes on the hearing of this matter, counsel argued at the hearing of the assessment that there is no evidence to the contrary and that the Court had access to the transcript.

[72] The stenographers' fees for the transcripts of the cross-examinations of Dr. Kissinger, Drs. Newton, Jensen, Montgomery and Bøgesø, Dr. Stengos, Dr. Cooke and Dr. S. Davies are deemed necessary and their costs appropriately justified and reasonable, they are allowed as claimed for a total amount of \$9,039.28. However, with no further substantiation, I cannot satisfy myself that the transcript of the hearing held December 16, 17 and 18, 2008 was necessary to the pursuit of the matter before this Court. I have read the jurisprudence referred to by counsel but fail to see how it applies to the matter before me as the Court in that decision was dealing with an action for a patent infringement trial with witnesses testifying at trial and not a PM (NOC) Application for which evidence is submitted via affidavit and transcript of cross-examination. Further, in that case, the costs of the daily transcripts of the trial was agreed between the parties and as put by the Court, the transcript was extensively used by counsel and by the Court. From my reading of this Court file, I note that a court reporter was present throughout the hearing. However, I have no evidence that the transcript was made necessary or that the daily transcript

was required or that the parties had agreed to it and I was not given any evidence to justify its use or necessity in the course of this file. The reasonableness and necessity having not been established to justify the costs of said transcript, the amount will therefore be disallowed.

B. *Online searches*

[73] The Leblanc Affidavit attests that the Report regarding online search expenses was billed to Lundbeck for the amount of \$506.06 as compiled by the law firm billing system, using the internal file number “115693.42” for the present proceeding.

[74] In response, counsel for Cobalt alleges that the Report setting out the amounts claimed “was apparently prepared by an assistant at the firm Fasken Martineau by searching a computer system using a client code for the Cobalt file. The client code is not provided...”. Cobalt’s counsel further argues in her Written Representations that this claim should be disallowed for the reason that in order to recover disbursements for legal research, Lundbeck must provide evidence of the relevance and necessity of such research and that the amounts claimed were charged to Lundbeck. Adding further that, “as most firms pay a flat-rate monthly fee, it is also necessary for the asserting party to provide evidence of how the specific charges were calculated, how each charges relate to an issue advanced in the case and to provide proof that the amounts claimed reflect the actual disbursements”. At the hearing of the assessment, counsel referred to paragraphs 124 to 126 of *Truehope National Support Ltd v Canada (Attorney General)*, 2013 FC 1153 (*Truehope*):

**124** From the case law submitted, there appears to be a trend toward limiting or eliminating allowances for on-line computer research. Although Courts have found circumstances when online

research could be seen as part of overhead and not a necessary disbursement to be passed along on a party and party assessment, I find that there are still circumstances when it may be a justifiable claim. As was held in *Aram Systems Ltd v Novatel Inc (supra)*, I consider disbursements for electronic legal research similar to disbursements for photocopying. However, in keeping with *Janssen Inc v Teva (supra)*, I find that there is also a requirement to provide evidence that the research is relevant. Further, considering that the charges for on-line research can mount up, the justification for on-line charges claimed is essential.

**125** With this in mind, and considering the jurisprudence above, I find that, in order to determine whether on-line searches are reasonable and necessary, there is a need for the production of evidence concerning the relevance and necessity of the on-line searches claimed in the Bill of Costs. Further, given the Respondents' evidence that they pay a flat-rate monthly fee, there is a need to provide evidence of how these charges were calculated for this specific matter while ensuring that the amounts claimed in the Bill of Costs are a reflection of the actual disbursements. In light of these requirements, it is important to note that, despite the need for proof, the cost of proving the expenditures for computer research should not exceed the amount claimed (see: *Almecon Industries Ltd. v. Anchartek Ltd.*, [2003] F.C.J. No. 1649). Taking this into consideration, I find that, in the present assessment, the Respondents have not provided the evidence required to justify on-line computer searches.

**126** Concerning the relevance and necessity of the on-line searches claimed by the Respondents, I have reviewed the evidence provided in the Affidavit of Tabitha Potts and the cross-examination of Ms. Potts and find that there is no evidence concerning relevance. The Respondents have provided no evidence concerning what the searches relate to, whether they relate to the Judicial Review or a motion, or whether they relate to the *Charter* challenge or the striking of an affidavit. On cross-examination, Ms. Potts was not able to provide any assistance in determining which searches related to motions and which did not. As evidence of necessity, the Respondents have submitted that 20 volumes of their Application Record consisted of authorities. However, there is no evidence concerning the cost of researching those specific authorities and there is no evidence suggesting which of the on-line searches related to those authorities. It is left to the Assessment Officer to reach a conclusion concerning the relevance and necessity of the searches based on the dates of the searches. This is an impossible task. Without evidence relating to the subject matter being researched, it is impossible to reach a determination

concerning the relevance and necessity of individual searches. Therefore, it is impossible to make a finding of relevance and necessity concerning on-line searches based on nothing more than the volume of authorities filed.

[75] Referring to the cross-examination of Leblanc, counsel for Cobalt infers that there is no information about how the amounts found on the Report were generated and how they are linked to the Cobalt matter. As a result, she argues that the assessment officer in this matter is now left to determine relevance and necessity, given a Table with some dates and codes.

[76] In reply, Lundbeck's counsel argues that the amount claimed is reasonable given the nature and complexity of the proceedings, stating that, as per the Leblanc's Affidavit and cross-examination, the research is linked to the Cobalt file and the result from a request to the law firm accounting department based on the file number related to Cobalt.

[77] As put by counsel for Lundbeck in his Written Representations in Response, it is "trite law that reasonable disbursements associated with computer-assisted research are allowable". However, as discussed in *Cameco Corp. v MCP Altona (The)*, 2013 FC 1263 (*Cameco*) at paragraph 54 and *Truehope (supra)*, in this era where many law firms pay a flat-rate monthly fee for online research, the relevance and necessity of the research need to be clearly justified as the assessment officer needs to be satisfied of the reasonability of the disbursements per section 1(4) of Tariff B of the *Rules*. Even though this matter was of a certain complexity and certainly heavily disputed, the only evidence submitted refers to dates, rates, vendors' names as well as series of numbers that are not corroborated by the internal file number asserted in the Leblanc Affidavit. As in *Truehope*, it is "left to the assessment officer to reach a conclusion concerning

the relevance and necessity of the searches based on the dates of the searches”. I do not find that Lundbeck provided the necessary evidence to justify the amount claimed, nor the justification linking the research done to this matter. As in *Cameco* and *Truehope*, I find it difficult to assess the reasonability of the claim in consideration of the paucity of evidence provided. The amount claimed for online research will therefore be disallowed.

C. *Stationary, binding, scan, photocopy*

[78] The amount of \$14,564.72 is claimed by Lundbeck for stationary, binding, scan and photocopy. In the Leblanc Affidavit, the claim is supported by what is called in the Affidavit a “Table of disbursements for photocopy, binding and printing expenses billed to Lundbeck at specific dates” as compiled from the law firm billing system.

[79] In argument, counsel for Cobalt alleges in her Written Representations that this item should be disallowed as Lundbeck has claimed photocopying expenses at \$1.50 per page, further adding:

When photocopying is done in-house, it is only recoverable at the actual charge made to the client. Even an amount of \$0.25 per page cannot simply be charged without more evidence. A law firm is not in the business of making a profit on its photocopying equipment. It can only recoup its actual costs and the party claiming has the burden of satisfying the assessment officer that the amount expended was essential to advancing the litigation” (*Janssen-Ortho*, supra, at para.16 and *Diversified Products Corp. v Tye-Sil Corp.*, [1990] F.C.J. No. 1056).

[80] At the hearing of the assessment, she further contended that the charges were not properly documented and no evidence can be found that they were actually charged to the client.

Discussing the decision in *Diversified Products Corp. v Tye-Sil Corp.*, [1990] F.C.J. No. 1056 (*Diversified*), she argues that photocopying at most can be allowed at \$0.25 per page and only be allowable if they are essential to the conduct of the action as the point of photocopying expenses is to reimburse the party for actual out-of-pocket expense. On that note, counsel referred to the photocopy claim for the Compendium Chemistry and submitted that it was not an essential document to the lawsuit like the application, the record and the book of authorities. She concluded her argument by stating that “these amounts are not allowable because they are not properly documented; and in the alternative, we also think that it is fair to say on the case law that the maximum amount chargeable is 25 cents per page”.

[81] In rebuttal, at the hearing of the assessment, counsel for Lundbeck alleged that the total number of pages claimed is justified and although the amount of \$1.50 per page is requested in the Bill of Costs, they are ready to agree to 25 cents per page. It is further alleged that this amount has now been reduced to the strict minimum as the initial claim in the Leblanc Affidavit as generated by the law firm billing system was \$40,000.00 billed to Lundbeck.

[82] At the cross-examination of Leblanc, it was affirmed that this claim was only for photocopies and the chart was prepared by assistants at the law firm for photocopies done internally. The exhibit attached to the Leblanc Affidavit entitled “Applicant’s disbursements for photocopies” specifies the following:

Photocopy charges for the preparation of the Application (21 pages): \$31.50

Photocopy charges for the preparation of the Compendium Chemistry in 4 volumes (520 pages): \$780.00



Photocopy charges for the preparation of the Applicant's Record in 34 volumes (6883 pages): \$10,324.50

Photocopy charges for the preparation of the Book of Authorities (1021 pages): \$1,531.20

Total with taxes of \$14,564.72

The decision in *Diversified (supra)* specifies some parameters with regards to photocopies:

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 \$.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.

In *Janssen-Ortho (supra)*, the Court further states:

In this regard, the comments of this Court in *Diversified Products Corp. v. Tye-Syl 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.

[83] Notwithstanding the very little evidence found in the Leblanc Affidavit, I am of the opinion, referring to the actual Court file, that actual photocopy expenses were necessary in the conduct of this matter. Therefore, charges claimed for the photocopying of the Application, the Applicant's Record and the Applicant's Book of Authorities will be allowed as considered essential to the conduct of the proceedings before the Court. In light of the documents in the Court Record and the jurisprudence mentioned above, I will allow a reduced amount of \$1,900.00 as a reasonable disbursement for photocopy expenses.

D. *Hotel, meals, transportation*

[84] The following amounts are claimed in the Bill of Costs for expenses incurred towards the cross-examinations of several witnesses: hotels (\$23,281.17), meals (\$3,370.29), local transportation (\$843.00) and travel – transportation (\$2,260.15). In the Leblanc Affidavit, these claims are explicitly divided by exhibits attaching invoices for specific witnesses' cross-examinations while the full list of disbursements is found in a different exhibit that gives a short description of the expenses and the amounts claimed by expense category.

[85] At the onset, counsel for Lundbeck argued at the hearing of the assessment that the full list of disbursements was prepared by the law firm, showing amounts that specifically refer to Cobalt while all invoices went through an exercise of reasonableness. Referring to paragraph 69 of the assessment officer's decision in *Merck (supra)*, counsel alleges that, similar to that decision in which the assessment officer allowed several disbursements despite the fact that the evidence might not have been sufficiently detailed, it should be taken into consideration in the case at bar that the matter was complex, involved three different files to be dealt with simultaneously in a short period of time, which required numerous trips. It is further argued that as a consequence of the factors enumerated above, it proved difficult to divide all the invoices appropriately. Counsel further approved that any invoices claiming alcohol should be reduced accordingly.

[86] In response, counsel for Cobalt argued that the expenses of only one counsel should be allowable for work done on the Cobalt matter while second and third counsel fees and

disbursements should not be recoverable as the Court failed to provide directions relating to second counsel. Referring to the decision in *Merck (supra)*, within which the assessment officer had allowed disbursements for second counsel, counsel for Cobalt argues that the decision to allow disbursements for second counsel was based on facts specific to that case. It is also contended that considering Lundbeck's failure to provide proper details of the meal expenses it claims, they should be disallowed to avoid prejudice to Cobalt (*Advance Magazine (supra)* and *Hoffman-Laroche, supra*, at paragraph 29). It is further argued that any amounts claimed for alcohol, movies, entertainment should not be allowed.

[87] In Lundbeck's Written Representations in rebuttal, referring to *Rothmans, Benson & Hedges Inc. v Imperial Tobacco Ltd.* [1993] F.C.J. No. 659, *Adir (supra)* and *Janssen-Ortho (supra)*, counsel contends that in those decisions the Court "awarded fees and disbursements of counsel incurred for meetings with potential witnesses and with experts for the preparation of expert reports and trial testimony, as well as fees and disbursements of counsel incurred for meetings with witnesses examined for discovery, for discovery preparation and for attendance at discovery (including travel disbursements)".

[88] Counsel for Cobalt does not dispute the trips made by Lundbeck's counsel but the fact that two and sometime three counsels traveled for certain cross-examinations. With regard to the assessment of disbursements associated to travel, I am of the same mind the assessment officers were in *Merck (supra)*, *Sissel-Online Ltd. v Sissel Handels GmbH*, 2010 FC 779 at paragraph 17, *Biovail Pharmaceuticals Canada v Canada (Minister of National Health and Welfare)*, 2009 FC 665 at paragraph 28 and *Hoffman-La Roche Ltd. v Apotex Inc.* 2013 FC 1265 at paragraph 54.

The disallowance of Item 24 of the Table to Tariff B of the *Rules* (travel by counsel) for the reason that it necessitates a visible direction by the Court does not preclude the assessment of essential and associated travel disbursements, which might include those of second counsel where relevant. Due to the technical complexity of the work involved in this proceeding, I consider that the use of two counsels for the cross-examinations seemed a prudent and reasonable decision when I review the type of evidence put before the Court and the necessary work of counsel with proficient and very accomplished witnesses. However, nothing in the evidence before me justifies the presence of a third counsel and said claims will be disallowed.

[89] To justify why the accounts were not always appropriately kept, it was suggested in Lundbeck's pleadings that the amount of work required in this PM(NOC) proceeding explains that some of the staff at the law firm got confused due to the amount of paperwork. While I understand that the staff at the law firm might have been overwhelmed, I fail to see how Cobalt should be prejudiced in situation where the receipts do not provide sufficient information to make an informed and reasonable decision. I will therefore review all travel disbursements in consideration of the evidence before me and the parties' entrenched and divergent views in an attempt to assess their reasonableness. Although suggested by Cobalt's counsel, I do not consider that the outcome for Lundbeck's failure to provide proper details of all the meal expenses should result in taxation at zero dollars. I reject the latter as unfair considering that the circumstances of this case clearly necessitated counsels to travel to be present at cross-examinations in order to fill a void in their professional expertise. In accordance with the findings above, the disbursements claimed for the cross-examination of Dr. Kissinger claimed at \$884.53 will be allowed at \$569.88.

[90] On the second claim, the Leblanc Affidavit states that expenses were incurred by Lundbeck's counsel between July 4 and July 22, 2008 for the cross-examinations of Christian K. Jensen, Dr. Montgomery (July 4, 2008 in London, UK), Dr. Klaus Peter Bøgesø (July 14, 2008 in London, UK), Dr. Brian J. Clark, Klaus Guntertofte (July 22, 2008 in London, UK) and Dr. Roger Newton (July 18, 2008 in London, UK) for a total amount of \$22,138.87. In response, counsel for Cobalt argued that with the reduction in the number of counsel in attendance, the removal of the time worked on the Apotex matter and any expenses incurred for alcohol, the total amount should be reduced between \$3,800.00 and \$6,000.00.

[91] The claims, as presented here, do not necessarily establish an absolute right to indemnification of the amounts presented. Further to the review of the evidence before me, the amounts claimed on dates no cross-examinations took place involving Cobalt, will not be allowed. Further, the amounts claimed for alcoholic beverages, in room movies, same day laundry services, valet services or lavish meals with no breakdown concerning what the meals included or who was in attendance will not be allowed. Of note, it has been decided on many occasions (*Janssen-Ortho Inc., supra*, at par. 24 and *Allied Signal Inc., supra*, at par. 111 and *Bayer AG v Novopharm Ltd*, 2009 FC 1230, at paras 77 and 78) that travel and meals for clients are not recoverable. Given the lack of particularity in the evidence provided by Lundbeck and in keeping with the approach in *Merck & Co v Apotex Inc*, 2008 FCA 371 at para.14, I find it reasonable to reduce the amount claimed so as to not reimburse for expenses improperly claimed or not appropriately supported by the evidence. For the above reasons and my findings above, the amount claimed at \$22,138.87 is allowed at \$11,517.64.

[92] The Leblanc Affidavit states that expenses were incurred by Lundbeck's counsel in the amount of \$3,958.84 for the cross-examinations of Dr. S. Davies in Vancouver on September 25, 2008. Considering my findings above regarding third counsel, dates of cross-examination and invoices for meals with no breakdown information, the expenses claimed have been reduced to \$1,483.00. The amounts claimed for the attendance of counsel to the cross-examinations of Dr. Cooke in Toronto on August 26, 2008, Peter Davies in Ottawa on September 9, 2008 and Dr. Stengos in Toronto on October 8, 2008 are contested by Cobalt with regard only to the attendance of second counsel and issues with receipts on the October 8, 2008 travel to Toronto. Considering my findings above and the evidence on file, the amounts are allowed as claimed minus the amount of \$214.47 related to the travel on October 8, 2008 that is not appropriately justified.

[93] The amount of \$94.96 is claimed in the latest amendment to Lundbeck's Bill of Costs for bailiff/process server. It is contested by Cobalt's counsel insofar that there is no evidence the invoices provided and totalling \$95.59 were charged to the client or paid by the law firm. The exhibits attached to the Leblanc Affidavit assert that the invoices concern the service in person of the Notice of Application to the Court and all interested parties. As per Rule 127(1) and in light of Section 1(4) to Tariff B of the *Rules*, I am satisfied that the Leblanc Affidavit establishes that the disbursement was made. The amount of \$94.96 is considered reasonable and is allowed.

[94] The Bill of Costs is allowed for a total amount of \$150,448.46.

"Johanne Parent"  
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Assessment Officer

Toronto, Ontario  
November 6, 2014

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1395-07

**STYLE OF CAUSE:** LUNDBECK CANADA INC. v THE MINISTER OF HEALTH AND COBALT PHARMACEUTICALS INC.

**REASONS FOR ASSESSMENT OF COSTS BY:** JOHANNE PARENT

**DATE OF HEARING:** June 4, 2014

**DATED:** NOVEMBER 6, 2014

**APPEARANCES:**

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Marc-André Nadon

FOR THE APPLICANT

No Appearance

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