

Federal Court



Cour fédérale

Date: 20221110

**Dockets: T-10-22
T-130-22**

Citation: 2022 FC 1538

Ottawa, Ontario, November 10, 2022

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

**ABBVIE CORPORATION and
ABBVIE BIOTECHNOLOGY LTD.**

Applicants

and

**THE MINISTER OF HEALTH and
JAMP PHARMA CORPORATION**

Respondents

ORDER AND REASONS

I. Overview

[1] JAMP Pharma Corporation [JAMP] has brought a motion in writing pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106 [Rules], for an award of costs or, alternatively, an Order pursuant to Rules 400 and 403 providing directions to the assessment officer respecting

the amount and allocation of costs. In *AbbVie Corporation v Canada (Health)*, 2022 FC 1209 [AbbVie], this Court dismissed two applications for judicial review brought on behalf of AbbVie Corporation and AbbVie Biotechnology Ltd [collectively AbbVie], with costs payable to both the Minister of Health [Minister] and JAMP.

[2] AbbVie challenged two decisions of the Minister made pursuant to the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133 [*PM(NOC) Regulations*]. The Court held that the Minister reasonably found JAMP not to be a “second person” under s 5(1) of the *PM(NOC) Regulations* in respect of its new drug submission for SIMLANDI, a biosimilar of Abbvie’s HUMIRA. The Minister’s decision to issue a Notice of Compliance for JAMP’s SIMLANDI was therefore reasonable.

[3] The Minister takes no position on JAMP’s motion for directions respecting costs.

[4] For the reasons that follow, the assessment officer is directed to award JAMP costs, including reasonable disbursements, in accordance with the high end of Column IV of Tariff B of the Rules.

II. Positions of the Parties

A. *JAMP*

[5] JAMP says that it incurred \$171,656.40 in legal fees and \$1,462.76 in disbursements (both inclusive of taxes) to respond to AbbVie's applications. JAMP requests a lump sum award in the amount of \$70,125.32, calculated as follows:

- (a) \$68,662.56 in legal fees, representing 40% recovery of actual fees; and
- (b) \$1,462.76 in disbursements, representing 100% recovery.

[6] JAMP submits that a lump sum award equivalent to 40% of its actual fees is appropriate in light of the complexity of the applications, JAMP's success on all issues, and AbbVie's sophistication as a litigant. JAMP says that AbbVie sought to introduce as evidence a supplementary record containing a product monograph for HUMIRA only two days before the hearing, even though it could have been submitted much earlier. This forced JAMP to rapidly prepare a response while also preparing for the hearing.

[7] According to JAMP, where the nature of the case is such that the parties are justified in expending a significant amount of legal fees, Tariff B of the Rules does not provide a level of indemnification sufficient to further the purposes of costs awards (citing *Bauer Hockey Ltd v Sport Maska Inc (CCM Hockey)*, 2020 FC 862 [*Bauer Hockey*] at paras 10-11; *Nova Chemicals Corporation v Dow Chemical Company*, 2017 FCA 25 [*Nova*] at para 13).

[8] JAMP submits that lump sum awards are appropriate and common in "complex litigation conducted by sophisticated parties" (citing *Seedlings Life Science Ventures v Pfizer Canada ULC*, 2020 FC 505 [*Seedlings*] at para 4; *Nova* at paras 13, 16; *Sport Maska Inc v Bauer Hockey*

Ltd, 2019 FCA 204 at para 50). Lump sum awards are not limited to actions, and have been considered and awarded in applications for judicial review (citing *Catalyst Pharmaceuticals, Inc v Canada (Attorney General)*, 2021 FC 505 [*Catalyst Pharmaceuticals*] at paras 198-202; *Ultima Foods Inc v Canada (Attorney General)*, 2013 FC 238 [*Ultima Foods*] at paras 23-26; *Whalen v Ford McMurray No 468 First Nation*, 2019 FC 1119 [*Whalen*] at para 35).

[9] In *Allergan Inc v Sandoz Canada Inc*, 2021 FC 186 [*Allergan*], Chief Justice Paul Crampton observed that lump sum awards “should begin at the mid-point of the 25-50% range, plus reasonable disbursements” (at para 32).

[10] In the alternative, if costs are to be determined in accordance with Tariff B, then JAMP asks that they be awarded at the upper end of Column V. JAMP has prepared a draft Bill of Costs with legal fees in the amount of \$44,772 and disbursements in the amount of \$1,462.76. This produces a total award of \$46,234.76 inclusive of all fees, disbursements, and taxes.

[11] JAMP says it is entitled to 100% reimbursement of disbursements. JAMP maintains that the sums it seeks to recover were all reasonable and necessary. In particular, JAMP says its photocopying and printing charges of \$841.51,47 were reasonable given the size of the application records and the amount of material filed by the parties (citing *Diversified Products Corp v Tye-Sil Corp* (1990), 34 CPR (3d) 267 at 275 (FCTD)).

[12] JAMP also seeks post-judgment interest and the costs of this motion.

B. *AbbVie*

[13] *AbbVie* argues that JAMP's fees should be assessed at the mid range of Column III of Tariff B, for a total amount of \$7,069.28. *AbbVie* says that the Tariff is the default mechanism and usual benchmark for allowable costs in this Court.

[14] *AbbVie* asserts that JAMP's reliance on precedents arising from complex and protracted intellectual property litigation as support for a lump sum costs award is misplaced. While the dispute in this case concerned intellectual property rights, the applications themselves were routine and turned solely on the interpretation of "another drug" in s 5 of the *PM(NOC) Regulations*. The applications were not particularly complex and required only a hearing of a day and a half, with no cross-examinations or contested motions.

[15] *AbbVie* argues that the three decisions JAMP cites in support of the proposition that lump sum costs are available in applications for judicial review can all be distinguished. In *Catalyst Pharmaceuticals*, this Court refused to award lump sum costs in an application of judicial review. In *Ultima Foods*, lump sum costs were awarded because the application was unusually complex and required many additional steps prior to hearing. In *Whalen*, this Court awarded lump sum costs in a case concerning First Nations governance due to an imbalance in the parties' resources, a consideration that does not arise here.

[16] According to *AbbVie*, recent applications for judicial review involving commercial parties have resulted in costs awards calculated in accordance with the mid range of Column III

of the Tariff (citing *Vidéotron Ltd v Technologies Konek Inc*, 2022 FC 733 at para 6; *Telus Communications Inc v Vidéotron Ltée*, 2022 FC 726 at para 170; *Miller Thomson LLP v Hilton Worldwide Holding LLP*, 2020 FCA 134 at para 163). Much more complex applications under the *PM(NOC) Regulations* have produced costs awards at the upper end of Column IV (citing *Eli Lilly Canada Inc v Apotex Inc*, 2015 FC 1165 at para 5).

[17] AbbVie denies that its supplementary record increased JAMP's costs. The record contained only the original product monograph for HUMIRA. JAMP agreed to its admission during the hearing of the application, and there is no Tariff item for responding to an uncontested motion.

[18] AbbVie also maintains that JAMP's draft Bill of Costs includes items that are not recoverable, and should be reduced accordingly. For example, AbbVie argues that JAMP should not be awarded costs for filing two separate records when it prepared a single record for both applications. Nor should it be permitted to recover costs for three counsel.

[19] In the alternative, AbbVie says that JAMP's request for 40% of its actual fees is unjustifiably elevated. The norm for lump sum costs in intellectual property disputes is 25% to 33% of actual fees. The assessment usually begins at the lower end of the range, and may then be augmented depending on the Court's consideration of the factors listed in Rule 400(3) (citing *Apotex Inc v Shire LLC*, 2021 FCA 54 at para 22 [*Shire*]; *Seedlings* at para 22; *Bauer Hockey* at para 14).

[20] More generally, AbbVie says the legal fees claimed by JAMP are excessive and unreasonable, and its disbursements are excessive and unsupported by explanations or invoices.

[21] Abbvie also opposes JAMP's request for its costs of this motion. Given JAMP's unreasonable and excessive demands, AbbVie says it should be granted its costs of this motion.

III. Analysis

[22] The awarding of costs, including quantum, is a matter falling within the Court's discretion (Rule 400(1); *Canada (Attorney General) v Rapiscan Systems Inc*, 2015 FCA 97 at para 10).

A. *Should lump sum costs be awarded?*

[23] A lump sum award is specifically contemplated in Rule 400(4), and may serve to promote the objective of the Rules of securing "the just, most expeditious and least expensive determination" of proceedings (Rule 3; *Nova* at para 11). A lump sum award may be particularly appropriate in complex matters where a precise calculation of costs would be unnecessarily complicated and burdensome. Nevertheless, the burden is on the party seeking increased costs to demonstrate why its particular circumstances warrant an increased award (*Nova* at paras 12-13).

[24] I am not persuaded that a lump sum award of costs is warranted in this case. While the applications raised complex questions of statutory interpretation in relation to the *PM(NOC)*

Regulations, the procedural steps preceding the short hearing were largely consistent with what one would expect in applications for judicial review.

[25] A precise calculation of costs will not be unnecessarily complicated and burdensome, as evidenced by the parties' draft Bills of Costs. Disputes regarding the availability of particular items under the Tariff and reasonable disbursements may be quickly and efficiently resolved by the assessment officer.

B. *Should costs be awarded under the Tariff*

[26] A successful party that has had to incur the costs of a proceeding has the right to be compensated within the limits prescribed by the Rules.

[27] In determining an award of costs, the Court is guided by the considerations found in Rule 400(3). The principal considerations that inform the assessment of costs in this proceeding are:

- (a) the result of the proceeding;
- (b) the importance and complexity of the issues;
- (c) the amount of work; and
- (d) any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding.

[28] JAMP was wholly successful in its responses to AbbVie's applications, and is therefore entitled to costs.

[29] JAMP relies on a number of cases where this Court awarded costs at the high end of Column V in complex patent litigation. However, this case was less complex than many intellectual property disputes. I agree with AbbVie that both applications ultimately turned on a question of statutory interpretation. The parties largely reiterated arguments they had previously made to the Minister. The outcome of T-10-22 effectively determined the outcome of T-130-22.

[30] In *Shire*, Justice Donald Rennie remarked that the upper range of Column IV of the Tariff is "routinely chosen in intellectual property litigation" (at para 11, citing *Leuthold v Canadian Broadcasting Corporation*, 2012 FC 1257 at para 92 and *Eurocopter v Bell Helicopter Textron Canada Limitée*, 2012 FC 842 at para 22).

[31] In *Allergan*, Chief Justice Paul Crampton recognized that in cases involving patent disputes (particularly in the pharmaceutical context), "the high end of Column IV is often considered to be reasonable and appropriate" (at para 26, citing *Sanofi-Aventis Canada Inc v Novopharm Limited*, 2009 FC 1139, aff'd 2012 FCA 265; *Novopharm Limited v Eli Lilly and Company*, 2010 FC 1154; *Apotex Inc v Sanofi-Aventis*, 2012 FC 318; Federal Court of Appeal and Federal Court Rules Committee, *Review of the Rules on Costs: Discussion Paper*, October 5, 2015 at page 8).

[32] I therefore consider the high end of Column IV to be the appropriate benchmark for costs in this case.

IV. Conclusion

[33] Directions will be provided to the assessment officer to award costs and reasonable disbursements to JAMP against AbbVie in accordance with the high end of Column IV of Tariff B of the Rules. This includes JAMP's costs of this motion.

ORDER

THIS COURT ORDERS that:

1. The motion for directions is granted with costs.
2. Directions are hereby provided to the assessment officer to award costs and reasonable disbursements to JAMP against AbbVie in accordance with the high end of Column IV of Tariff B of the *Federal Courts Rules*.

“Simon Fothergill”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKETS: T-10-22
T-130-22

STYLE OF CAUSE: ABBVIE CORPORATION AND ABBVIE
BIOTECHNOLOGY LTD v THE MINISTER OF
HEALTH AND JAMP PHARMA CORPORATION

**MOTION IN WRITING PURSUANT TO RULE 369 OF THE *FEDERAL COURTS*
*RULES***

ORDER AND REASONS: FOTHERGILL J.

DATED: NOVEMBER 10, 2022

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