

Federal Court



Cour fédérale

Date: 20230315

Docket: T-896-15

Citation: 2023 FC 347

BETWEEN:

**GEORGETOWN RAIL EQUIPMENT
COMPANY**

Plaintiff

and

TETRA TECH EBA INC.

Defendant

REASONS FOR ASSESSMENT

GARNET MORGAN, Assessment Officer

I. Introduction

[1] This assessment of costs is pursuant to an Order and Reasons of the Federal Court dated December 23, 2020 (2020 FC 1188), wherein the Court stated the following at paragraphs 1 and 2 of the Reasons:

[1] This order concerns the costs and disbursements payable to Tetra Tech EBA Inc [Tetra Tech] by Georgetown Rail Equipment Company [Georgetown] as a result of the Federal Court of

Appeal's judgment in *Tetra Tech EBA Inc v Georgetown Rail Equipment Company*, 2019 FCA 203 [*Tetra*].

[2] For the reasons that follow, Tetra Tech's fees shall be assessed in accordance with Column V of Tariff B. Tetra Tech shall be reimbursed for only those disbursements that are shown to be reasonable and necessary.

II. Background

[2] To provide greater context and clarity, I am including some passages from various decisions contained in the related Federal Court (T-896-15), and Federal Court of Appeal (A-69-18) court files, which will help to explain the origin of this assessment of costs and some of the terminology and procedural steps that will be referred to throughout these Reasons.

[3] In the Court's Bifurcation Order (T-896-15) dated May 30, 2016, explanations were provided for the terms "liability phase", and "quantification issues", which were the two determinative halves for this bifurcated action proceeding. Although, the Bifurcation Order only refers to a liability phase, the parties' costs documents often referred to the second determinative half of this proceeding, as being the "quantification phase", "remedies phase", or "remedies stage." Below is an excerpt from the Court's Bifurcation Order dated May 30, 2016, from paragraphs 1 to 3, with explanations for the terms "liability phase" and "quantification issues":

[1] In this Order:

[...]

c). "Liability Phase" means discovery and all other steps up to and including a trial or other determination of all the Liability Issues, including any appeals.

d). "Quantification Issues" means:

- (i). the quantum of the Plaintiff's damages, if any, arising from any infringement by Tetra Tech of the Patents and the quantum of reasonable compensation, if any, to which the Plaintiff is entitled;
- (ii). the quantum of Tetra Tech's profits, if any, arising from any infringement by Tetra Tech of the Patents; and
- (iii). the extent of infringement, if any, of the Patents.

[2] The Quantification Issues in this action shall be determined separately from, and only after the Liability Phase, if necessary, depending upon the outcome of the Liability Phase. For greater certainty, during the Liability Phase there shall be no further documentary or other discovery on matters solely relating to the Quantification Issues.

[3] If it is necessary, depending upon the outcome of the Liability Phase, to proceed to a determination of the Quantification Issues, the procedure to be followed for the determination of the Quantification Issues, including whether such determination shall be by way of further trial or reference, shall be as directed by the Liability Phase trial judge, and either party may bring a motion for such directions after judgment following the trial in the Liability Phase. Such a motion for directions may be brought regardless of whether the judgment is being appealed.

[4] Concerning the origin of this assessment of costs, the Federal Court of Appeal's Reasons for Judgment (A-69-18) dated July 9, 2019 (2019 FCA 203), provides some clarification at paragraphs 10 and 134:

3. The decision of the Federal Court

[10] For reasons indexed as 2018 FC 70, the Federal Court found that the patents were not invalid on the ground of obviousness. The Federal Court went on to find that the essential elements of each patent were present in the 3-D TAS so that Tetra's sale of the system to CN Rail and its support of the system infringed both patents. The Federal Court made no finding about remedy because, pursuant to a bifurcation order, only issues relating to liability were before the Federal Court.

[...]

7. Conclusion and costs

[134] For these reasons, I would allow the appeal and set aside the judgment of the Federal Court. Pronouncing the judgment that ought to have been pronounced, I would dismiss Georgetown's claim for infringement and allow Tetra's counterclaim in part. I would declare Canadian Letters Patent 2,572,082 and claims 7, 11 and 18 of Canadian Letters Patent 2,766,249 to be invalid. I would remit to the Federal Court for redetermination in accordance with these reasons the issues of the validity of the remaining claims of Canadian Letters Patent 2,766,249. As Tetra has been substantially successful on appeal I would award it its costs in the Federal Court.

[5] Prior to the issuance of the Federal Court of Appeal's Judgment, and Reasons for Judgment dated July 9, 2019, the Federal Court had partially dealt with the issue of the Plaintiff's costs for the liability phase trial (liability trial), wherein the Court's Order (T-896-15) dated March 28, 2018, stated the following:

[1] On January 31, 2018, this Court issued its Public Judgment and Reasons in *Georgetown Rail Equipment Company v Rail Radar Inc*, 2018 FC 70 [*Georgetown Rail*]. The Court held that Canadian Patents 2,572,082 and 2,766,249 owned by Georgetown Rail Equipment Company [Georgetown] are valid and have been infringed by Tetra Tech EBA Inc [Tetra].

[2] On May 30, 2016, Prothonotary Kevin Aalto ordered that the action be bifurcated. This Court's decision in *Georgetown Rail* concerns only the question of liability. Subject to any settlement between the parties, the question of remedy falls to be determined at a future reference on damages or an accounting of profits.

[3] Georgetown seeks costs for the liability phase of the action. However, Georgetown says that the precise quantum of costs cannot be determined at this time. Georgetown states that it made a settlement offer to Tetra on September 29, 2017, the details of which remain confidential. Whether the amount of this offer is greater or less than the remedy ultimately obtained, and whether Georgetown is entitled to increased costs pursuant to Rule 420 of the *Federal Courts Rules*, SOR/98-106, will not be known until the reference on damages or profits is completed.

[4] Tetra appealed this Court's decision in *Georgetown Rail* on February 22, 2018. The appeal is pending and no hearing date has been set.

[5] Tetra asks that any determination of costs in the liability phase be deferred until the appeal is decided and the reference on remedies is completed. Georgetown opposes this request, but has said little to support its position beyond noting that it will seek additional costs following the reference if the ultimate award is greater than the settlement offer.

[6] A pending appeal is not sufficient grounds upon which to defer an award of costs (*Gillan v Mount St Vincent University*, 2007 NSSC 249 at paras 2-4). However, a Court's inability to fully quantify costs until the proceedings have reached their conclusion may be grounds to defer.

[7] In *Aplouin Imports Ltd v Global Diaper Services Inc*, 2013 ONSC 5170 [*Aplouin Imports*], the Ontario Superior Court deferred a determination of costs due to ongoing uncertainty regarding liability and the quantum of the plaintiff's eventual recovery. The Court noted that further litigation was anticipated to address a number of outstanding issues, and concluded that it was logical to defer any decision on costs until there was greater clarity "as to where and at what amount the liability for costs should fall" (*Aplouin Imports* at para 6).

[8] Similar considerations apply here. It is logical to defer any decision on costs in the liability phase until there is greater clarity regarding the apportionment of costs and their quantum. Georgetown has not suggested that it will suffer prejudice if the determination of costs is deferred until the conclusion of the reference.

THEREFORE THIS COURT ORDERS that, subject to any settlement between the parties, the determination of costs in *Georgetown Rail* is deferred until the completion of the reference on damages or an accounting of profits.

[6] The Court's Order dated March 28, 2018, clarifies that the determination of the Plaintiff's costs in relation to the liability trial was "deferred until the completion of the reference on damages or an accounting of profits" and that the action proceeding in the Federal Court

continued to be litigated concurrently with the interlocutory appeal proceeding in the Federal Court of Appeal. When the Federal Court of Appeal issued its Judgment, and Reasons for Judgment dated July 9, 2019, setting aside the Federal Court's Public Judgment and Reasons dated January 31, 2018 (2018 FC 70), and pronouncing a new judgment in favour of the Defendant, it now meant that costs were to be determined for the Defendant instead of the Plaintiff for the liability trial. The Federal Court of Appeal's judgment also meant that the remedies phase for the Federal Court proceeding that was being litigated concurrently with the interlocutory appeal proceeding ceased to continue so that the unresolved liability trial matters highlighted by the Federal Court of Appeal could be dealt with in a remanded hearing in the Federal Court, which was held on December 3, 2019. Concerning the issue of costs for the remanded hearing, the Court's Judgment and Reasons (T-896-15) dated January 17, 2020 (2020 FC 64), at paragraph 59, stated "[i]n keeping with the agreement of the parties, because success is divided there is no award of costs." Therefore, there are no additional costs to be assessed in relation to the remanded hearing in this assessment of costs.

[7] Following the conclusion of the remanded hearing, the Defendant filed a letter dated September 15, 2020, seeking the Court's assistance with the resolution of the Defendant's pending costs in relation to the liability trial. The Court obliged this request, which led to the issuance of the Court's Order and Reasons (T-896-15) dated December 23, 2020, which was the catalyst for the filing of the Defendant's Bill of Costs on June 22, 2021, and this assessment of costs.

III. Assessment of Costs - documentation and hearing

[8] The Defendant filed a Bill of Costs on June 22, 2021, which initiated the Defendant's request for an assessment of costs. The Assessment Officer (O. Di Mavindi), who was assigned to this file, issued a direction to the parties on June 29, 2021, regarding the conduct and filing of additional documents for this assessment of costs, which was heard by videoconference on August 26, 2021. The court record (hard copy file and computerized version) shows that the following documents were filed by the parties for this assessment of costs:

- a) On July 21, 2021, the Defendant filed a Book of Authorities, and a costs record (5 vol.) containing an Affidavit of Bentley Gaikis, sworn on July 21, 2021; an Affidavit of Bob Sotiriadis, sworn on July 21, 2021; and Submissions for Costs Assessment.
- b) On August 11, 2021, the Plaintiff filed a Book of Authorities, and a costs record (1 vol.) containing an Affidavit of Lori-Anne DeBorba, sworn on August 11, 2021; and Responding Costs Submissions.
- c) On August 18, 2021, the Defendant filed a costs record (1 vol.) containing Reply Submissions for Costs Assessment and additional authorities.

IV. Preliminary Issues

A. *Assignment of a different Assessment Officer*

[9] The Assessment Officer (O. Di Mavindi) who presided over the assessment of costs hearing on August 26, 2021, vacated her position before a decision had been rendered for this assessment of costs. On August 31, 2022, I issued a direction to the parties advising that I had assumed carriage of this file and inquired about any concerns the parties may have with the assignment of a different Assessment Officer. I noted the following in my direction regarding my ability to conduct this assessment of costs:

I am prepared to assess the costs for this file based on the written material submitted by the parties, in conjunction with the Zoom audio recording and transcript of the assessment of costs hearing

and the court record. I will also note that I was an observer at the assessment of costs hearing, so I have some previous familiarity with this file.

[10] In response to the direction, the Defendant filed a letter dated September 9, 2022, advising that there were “no concerns”; and the Plaintiff filed a letter dated September 13, 2022, advising of their “consent”, with my assuming carriage of this assessment of costs. Further to the parties’ responses, I will proceed with my assessment of the Defendant’s costs.

B. *Assessable Services - level of costs under Column V of Tariff B of the Federal Courts Rules [FCR]*

[11] At paragraphs 8 and 9 of the Defendant’s Submissions for Costs Assessment, the Defendant submitted the following regarding the Court’s award of costs contained in the Order and Reasons dated December 23, 2020:

[8] The Costs Judgment did not specify at which range of Column V should Tetra Tech’s fees be assessed. As a result, the Court armed the assessment officer with the discretion to assess costs within the full range of Column V. Tetra Tech submits that assessment under the high end of Column V is appropriate in this case.

[9] In assessing costs, an assessment officer may consider the factors referred to in Rule 400(3) to determine the appropriate amount of costs. Tetra Tech submits that the Rule 400(3) factors warrant an assessment of costs at the top of Column V. Further, an assessment of costs at the top of Column V is consistent with Georgetown’s 2018 costs submissions which claimed that their costs for the liability phase should have been assessed at an amount no less than the top of Column V. Also, the Court has noted that the Tariff is generally inadequate in intellectual property litigation which further warrants awarding costs at the top of Column V.

[12] Concerning the overall level of costs for this assessment of costs, the Court stated the following at paragraphs 27 to 29 of the Order and Reasons dated December 23, 2020:

[27] In its costs submissions dated March 1, 2018, filed following this Court’s decision in *Georgetown #1*, Tetra Tech took the position that a lump sum costs award was not appropriate, and “costs should be awarded based on the applicable standard set out in Rule 407; that is, the mid-point of Column III”. Tetra Tech distinguished the present case from the circumstances in which the FCA approved a lump sum costs award in *Nova*:

Nova was “an extremely complex patent case involving much expert testimony,” noting “22 allegations of invalidity, 33 days of discovery, 32 days of trial, written submission exceeding 700 pages, and the closing argument lasting three days.” It is based on these considerations, that the trial judge concluded that an increased award of costs was justified. This is far from the present situation.

[28] Tetra Tech has had two opportunities to provide the Court and the Plaintiff with a detailed record and sufficient information on which to base a lump sum costs award, but is either unwilling or unable to do so. Having regard to Tetra Tech’s position following this Court’s decision in *Georgetown #1* that these proceedings were significantly less complex than those at issue in *Nova*, and that costs should be assessed in accordance with Tariff B, I accept that this is a reasonable approach to determining costs in this case.

[29] *Georgetown* proposes that Tetra Tech’s fees be assessed in accordance with Column V of Tariff B, and that it be reimbursed for only those disbursements that are shown to be reasonable and necessary. An Order will be issued accordingly.

[13] In the Defendant’s Bill of Costs submitted for this assessment of costs, all of the claims for assessable services have been claimed at the highest end of Column V; and the Plaintiff has responded by reducing most of the Defendant’s claims to the mid-point of Column V (Defendant’s Submissions for Costs Assessment, paras 14 to 18; Plaintiff’s Responding Costs Submissions, paras 16, 18 to 20 and DeBorba Affidavit, exhibit B; and Defendant’s Reply

Submissions for Costs Assessment, paras 3 to 7). Further to the parties' current positions on costs, my review of the parties' 2018 costs submissions, which were for the Court's consideration, revealed that the parties have had differing positions on the level of costs that should be applied in relation to the liability trial, depending on whether costs were owed or costs were payable (Plaintiff's costs submissions dated Feb. 15, 2018, paras 30, 31, 37, 38; and Defendant's costs submissions dated March 1, 2018, paras 2, 3).

[14] Concerning the Defendant's 2018 costs submissions, it is noted that these submissions were filed by a different counsel of record and that the current counsel of record may have a new perspective on the level of costs to be applied in relation to the liability trial (Defendant's Submissions for Costs Assessment, paras 4, 5). Although this has been noted, the court record does reflect that the Defendant had once argued that "costs should be awarded based on the applicable standard set out in Rule 407; that is, the mid-point of Column III" and that this was referred to in the Court's Order and Reasons dated December 23, 2020, at paragraph 27, just before reaching a conclusion on costs at paragraph 29.

[15] In support of the Defendant's claims for costs at the highest end of Column V, *Allergan Inc v Sandoz Canada Inc*, 2021 FC 186 [*Allergan*], was cited, wherein the Court stated the following at paragraphs 25 and 26, regarding the inadequacies of Tariff B to sufficiently compensate some intellectual property proceedings:

[25] The "default" level of costs in this Court is the mid-point of Column III in Tariff B: Rule 407; *Sanofi-Aventis Canada Inc v Novopharm Limited*, 2009 FC 1139 at para 4 [*Sanofi-Novopharm FC*], aff'd 2012 FCA 265; *Apotex v Sanofi-Aventis*, 2012 FC 318 at para 5 [*Apotex v Sanofi-Aventis*]; *Dennis v Canada*, 2017 FC 1011 at para 8; *Bernard v Professional Institute of the Public Service of*

Canada, 2020 FCA 211 at para 38. Column III is intended to provide partial indemnification (as opposed to substantial or full indemnification) for "cases of average or usual complexity": *Thibodeau*, above, at para 21; *Novopharm Ltd v Eli Lilly and Co*, 2010 FC 1154 at para 5 [*Novopharm v Eli Lilly*].

[26] In recognition of the particular attributes of intellectual property proceedings, it is common for increased costs to be awarded in those proceedings: see, e.g., *Conorzio*, above, at para 6; *Lainco Inc c Commission scolaire des Bois-Francs*, 2018 FC 186 at para 8(c). Those particular attributes include greater than average complexity, sophisticated parties, legal bills far in excess of what is contemplated by Column III of Tariff B, and "giving parties an incentive to litigate efficiently": *Seedlings Life Science Ventures, LLC v Pfizer Canada ULC*, 2020 FC 505 at para 4 [*Seedlings*]. For cases that involve drug patent disputes and a cost award fixed by reference to the tariff, the high end of Column IV is often considered to be reasonable and appropriate: *Sanofi-Novopharm FC*, above, at para 13, aff'd 2012 FCA 265; *Novopharm v Eli Lilly*, above, at para 7; *Apotex v Sanofi-Aventis*, above. See also Federal Court of Appeal and Federal Court Rules Committee, *Review of the Rules on Costs: Discussion Paper*, October 5, 2015, at page 8.

[16] In *Allergan*, the Court stated that the default level of costs in the Federal Court is "the mid-point of Column III in Tariff B" and that increased costs for intellectual property proceedings may be justified based on particular attributes for these types of proceedings, such as "greater than average complexity, sophisticated parties," and "legal bills far in excess of what is contemplated by Column III of Tariff B" (*Allergan*, para 26). My review of the Order and Reasons dated December 23, 2020, indicates that the Court considered the attributes for this file, such as complexity and the quantum of costs requested by the Defendant and ultimately awarded increased costs under Column V without any specific instructions to the Assessment Officer regarding the specific range of units to apply within Column V (Order and Reasons dated December 23, 2020, paras 10, 12, 22, 27 to 29). The Court's costs decision for this file can be distinguished from *Eurocopter v Bell Helicopter Textron Canada Ltée*, 2012 FC 842

[*Eurocopter*], which was cited by the Defendant, wherein for that file, the Court awarded increased costs under Column IV but also stipulated that these costs “shall be assessed only at the upper end of column IV of Tariff B” (*Eurocopter*, para 22).

[17] Further to my consideration of the aforementioned facts, I do not find that sufficient justification has been presented by the Defendant to compel me to make a blanket allowance for all of the Defendant’s claims for assessable services at the highest end of Column V. In *Starlight v Canada*, [2001] FCJ No 1376 [*Starlight*], at paragraph 7, the Assessment Officer stated the following regarding assessing each assessable service based on its own circumstances:

[7] The structure of the Tariff embodies partial indemnity by a listing of discrete services of counsel in the course of litigation, not necessarily exhaustive. The Rules are designed to crystallize the pertinent issues and eliminate extraneous issues. For example, the pleading and discovery stages may involve a complex framing and synthesizing of issues leaving relatively straightforward issues for trial. Therefore, each item is assessable in its own circumstances and it is not necessary to use the same point throughout in the range for items as they occur in the litigation. If items are a function of a number of hours, the same unit value need not be allowed for each hour particularly if the characteristics of the hearing vary throughout its duration. In this bill of costs, the lower end of the range for item 5 and the upper end of the range for item 6 are possible results. Some items with limited ranges, such as item 14, required general distinctions between an upper and lower assignment in the range for the service rendered.

[18] Utilizing the *Starlight* and *Eurocopter* decisions as guidelines, and pursuant to Court’s Order and Reasons dated December 23, 2020, I will assess the Defendant’s claims for assessable services individually to determine the quantum of costs to allow for each claim. For my assessment of each claim, I will consider the full range of units available under Column V, in conjunction with the factors listed under Rule 400(3) of the FCR, which I am able to consider as

an Assessment Officer pursuant to Rule 409 of the FCR. My assessment of each claim will also include a review of the parties' costs documents, the court record, and any relevant rules, statutes, and jurisprudence that may be applicable for a particular claim.

C. *Assessable Services - second counsel fees and travel by counsel*

[19] The Defendant's Bill of Costs has claims submitted under Items 8, 9, 13(a), 13(b) and 14(a) for second counsel fees, and claims submitted under Item 24 for travel by counsel. At paragraph 39 of the Defendant's Submissions for Costs Assessment the following was submitted regarding second counsel fees:

[39] The Court's lack of direction regarding second counsel is due to Tetra Tech seeking a lump sum award in its costs submissions and not a result of the Court determining that the inclusion of fees for second counsel services is not appropriate in this proceeding. The recent trend towards awarding lump sum costs in the Court has changed the landscape from old case law where costs submissions were based on the Tariff and it appears Justice Fothergill never turned his mind to how many counsel should be awarded under the Tariff calculations. If the Assessment Officer finds she lacks jurisdiction to award second counsel, Tetra Tech seeks leave to file a motion pursuant to Rule 397 seeking direction from Justice Fothergill with respect to second counsel.

The Defendant did not provide any initial submissions regarding the claims for travel by counsel.

[20] In response, the Plaintiff submitted that the Defendant's claims for second counsel fees and travel by counsel should be disallowed, as there are no Court directions allowing these costs, and that the time has expired for the Defendant to submit a motion for reconsideration pursuant to Rule 397 of the FCR. The Plaintiff cited the decisions *Janssen Inc v Teva Canada Ltd*, 2012 FC 48, at paragraph 40 [*Janssen*]; *Merck & Co v Canada (Minister of Health)*, 2007 FC 312, at

paragraph 9; and *Bayer AG v Novopharm Ltd*, 2009 FC 1230, at paragraph 8; wherein claims for second counsel fees and travel by counsel were disallowed due to an absence of a Court decision or the absence of a specific provision in Tariff B for an allowance of the claim (Plaintiff's Responding Costs Submissions, paras 9 to 11, 50, 52).

[21] In reply, at paragraph 9 of the Defendant's Reply Submissions for Costs Assessment the following was submitted regarding second counsel fees and travel by counsel:

[9] Tetra Tech did not file a motion pursuant to Rule 397 within 10 days of the Costs Judgment or a motion pursuant to Rule 403 within 30 days of the Costs Judgment, as it did not anticipate Georgetown would oppose the assessment of services that it previously argued should be assessed. Should the Assessment Officer find she lacks jurisdiction to award amounts for second counsel and counsel travel services, Tetra Tech requests an opportunity to seek leave to file a motion pursuant to Rule 397 seeking direction from Justice Fothergill regarding second counsel and counsel travel services.

[22] As a preliminary matter at the beginning of the assessment of costs hearing held on August 26, 2021, the parties' positions regarding second counsel fees and travel by counsel were discussed, and the Assessment Officer (O. Di Mavindi) advised the parties that she was of the opinion that she did not have the authority to assess costs for second counsel fees and travel by counsel in the absence of a Court direction or decision specifically awarding these costs. Subsequent to this discussion, the parties argued the remaining issues for the assessment of costs, and at the conclusion of the hearing the Defendant undertook to seek some instructions on the filing of a motion and endeavoured to advise the Assessment Officer and the Plaintiff forthwith. Later that same day, the Defendant sent an e-mail to the Assessment Officer and the Plaintiff advising the following:

We are writing to let you know that we will not be seeking leave to file a motion for further direction from Justice Fothergill regarding the second counsel and counsel travel services.

(Defendant's e-mail dated August 26, 2021, 5:31 p.m.)

[23] Further to my review of the aforementioned facts, I am in agreement with the position that was held by the Assessment Officer (O. Di Mavindi), that in the absence of a Court direction or decision specifically awarding second counsel fees and travel by counsel as an assessable service, I do not have the authority to assess these costs. My review of the assessable services listed in Tariff B that specifically mention second counsel fees or travel by counsel (Items 14(b), 22(b) and 24), all indicate that costs can only be assessed with a direction from the Court, or at the Court's discretion. In *Capra v Canada (Attorney General)*, 2009 FC 916 [*Capra*], at paragraphs 8 and 9, which was cited by the Plaintiff, the Assessment Officer stated the following regarding claims submitted under Item 14(b) for second counsel fees:

[8] In *Balisky v. Canada (Minister of Natural Resources)*, 2004 FCA 123, [2004] F.C.J. No. 536, at paragraph 6 the assessment officer states:

Rule 400(1), which vests full discretionary power in the Court over awards of costs, means that orders and judgments must contain visible directions that costs have been awarded. Given the Federal Courts Act, ss. 3 and 5(1) defining the Court and Rule 2 of the Federal Court Rules, 1998 defining an assessment officer, the absence of that exercise of prior discretion by the Court leaves me without jurisdiction under Rule 405 to assess costs.

[9] Item 14(b) includes the provision "where Court directs". As an assessment officer is not a member of the Court, and there being no direction or order of the Court concerning second counsel on file, I am without jurisdiction to allow the amount claimed under Item 14(b).

[24] Concerning Item 22(b), in *Coca-Cola Ltd v Pardhan (cob as Universal Exporters)*, 2006 FC 45 [*Coca-Cola*], at paragraph 20, the Assessment Officer stated the following regarding Item 22(b) and Court directions:

[20] [...] In my opinion, the key phrase in Item 22(b) of Tariff B of the Federal Courts Rules is "...where the Court directs..." I have reviewed the material in the Court record and have determined that no such direction exist, therefore, this assessable service is disallowed for each of the appeal proceedings.

[25] Concerning Item 24, in *Marshall v Canada*, 2006 FC 1017 [*Marshall*], at paragraph 6, the Assessment Officer stated the following regarding claims for travel by counsel:

[6] The *Federal Courts Act* sections 4 and 5.1(1) defining the Federal Court, and Rule 2 of the *Federal Courts Rules* defining an assessment officer, mean that the terms "Court" (as used in item 24 of Column III of Tariff B for the time of counsel to travel to a venue) and "assessment officer" refer to separate and distinct entities. The Court did not exercise visible direction here for the travel fees of counsel to attend examinations for discovery and therefore I do not have the jurisdiction to allow anything for item 24. That restriction does not apply to the associated travel disbursements, for which I retain jurisdiction under Rule 405. That is, counsel fees and disbursements are distinct and discrete items of costs addressed by different portions of the Tariff, i.e. items 1 to 28 in the TABLE in Tariff B address counsel fees and Tariff B1 addresses disbursements. Accordingly, item 24 addresses counsel fees, but not disbursements. The discretion reserved to the Court to authorize assessment officers to address item 24, or even item 14(b) for second counsel, is exercised distinct from the discretion vested in me by Rule 405 and Tariff B1. There is no implied caveat impeding me from allowance of travel disbursements for counsel in the absence of an item 24 direction from the Court for fees for the time of counsel to travel to and from a hearing venue. [...]

[26] In addition, in *Fournier Pharma Inc v Canada (Minister of Health)*, 2013 FC 862 [*Fournier*], at paragraph 31, which was cited by the Plaintiff, the Assessment Officer stated the following regarding claims submitted under Item 13(b) for second counsel fees:

[32] Having reviewed the Costs Order, I agree with Fournier that the Costs Order makes no provision for second counsel for preparation for hearing. Further, Item 13(b) in the Table to Tariff B makes no provision for second counsel. Given that there is nothing granting me the jurisdiction to exercise discretion for second counsel under Item 13(b), I find that I lack the authority to allow a claim for second counsel. Therefore, Sandoz' claim for second counsel under Item 13(b) is not allowed.

[27] Concerning the duty of an Assessment Officer, the Court stated the following in *Pelletier v Canada (Attorney General)*, 2006 FCA 418 [*Pelletier*], at paragraph 7:

[7] [...] Under section 405, an assessment officer "assesses" costs, which assumes that costs have been awarded. Section 406 provides that an officer does this at the request of "a party who is entitled to costs", which again presupposes that an order for costs was made in favour of that party. Under section 407, the officer assesses the costs in accordance with column III of the table to Tariff B "unless the Court orders otherwise." Section 409 provides that "[i]n assessing costs, an assessment officer may consider the factors referred to in subsection 400(3)." In short, the duty of an assessment officer is to assess costs, not award them. An officer cannot go beyond, or contradict, the order that the judge has made. [...]

[28] Upon my review of the parties' costs documents in conjunction with the court record and the FCR, and utilizing the *Capra*, *Coca-Cola*, *Marshall*, and *Fournier* decisions as guidelines, and also having considered the decisions cited by the Plaintiff in paragraph 21 of these Reasons; I find that I do not have the authority to assess the Defendant's claims for second counsel fees and travel by counsel as an assessable service. As the Court stated in the *Pelletier* decision, my role as an Assessment Officer is only "to assess costs, not award them." In the absence of a Court direction or decision specifically awarding second counsel fees or travel by counsel as an assessable service, or alternatively any jurisprudence from the Defendant to support the allowance of these costs in the absence of a Court direction or decision, I find that I do not have

the authority to assess these types of costs autonomously. Therefore, I have determined that the Defendant's claims for second counsel fees and travel by counsel as an assessable service must be disallowed as they pertain to the facts for this particular file. The amounts disallowed are 229 units for second counsel fees and 27 units for travel by counsel for a cumulative amount of \$40,320.00, which is inclusive of GST.

V. Assessable Services

[29] The Defendant has claimed 1005 units for assessable services, for a total amount of \$158,287.50, which is inclusive of GST. Further to my disallowance of the Defendant's claims for second counsel fees and travel by counsel as an assessable service, there are 749 units for assessable services remaining to be assessed. These remaining claims are for a total amount of \$117,967.50, which is inclusive of GST.

A. *Item 2 – Preparation and filing of all defences, replies, counterclaims or respondents' records and materials.*

[30] The Defendant has claimed 13 units for the preparation of a Statement of Defence filed on July 16, 2015. The Defendant did not provide any specific submissions regarding this particular claim. The Plaintiff also did not provide any specific submissions regarding Item 2 but in the Bill of Costs provided by the Plaintiff, the suggested number of units for Item 2 was reduced to 10 units with a note stating that the Defendant's Statement of Defence was 6 pages long (DeBorba Affidavit, exhibits B and E). My assessment of this particular claim took into consideration that the Defendant's Statement of Defence was filed in response to the Plaintiff's Statement of Claim filed on May 29, 2015, which was an intellectual property matter of

moderate complexity. It is noted that the Plaintiff's Statement of Claim was 18 pages long with several issues to be reviewed and responded to by the Defendant. I have reviewed the factors in awarding costs that are listed under Rule 400(3), and having considered factors such as; "(a) the result of the proceeding;" "(c) the importance and complexity of the issues;" and "(g) the amount of work;" the court record reflects that the Defendant was the successful party in the action proceeding; that the issues argued were of significant importance and of moderate complexity; and that a moderately high amount of work was performed by the Defendant to review and respond to the Statement of Claim. Therefore, I find it reasonable for the Defendant to be allowed costs at a level slightly higher than the mid-point of Column V, and will allow 11 units for Item 2.

B. *Item 3 – Amendment of documents, where the amendment is necessitated by a new or amended originating document, pleading, notice or affidavit of another party.*

[31] The Defendant has claimed 8 units for the preparation and filing of the Re-Amended Statement of Defence on July 20, 2017, that was in response to the Plaintiff's Fresh as Amended Statement of Claim filed on June 20, 2017. The Defendant did not provide any specific submissions regarding this particular claim. The Plaintiff also did not provide any specific submissions regarding Item 3 but in the Bill of Costs provided by the Plaintiff, the suggested number of units for Item 3 was reduced to 6 units with a note stating that the Defendant's Re-Amended Statement of Defence only had minor amendments to paragraphs 4 and 5 (DeBorba Affidavit, exhibits B and G). Similar to Item 2, I have taken into consideration the factors listed under Rule 400(3), and I find the factors for Item 3 to be similar to Item 2, with the exception that only a moderate amount of work was required for the preparation of the Re-Amended

Statement of Defence. Therefore, I find it reasonable to allow costs at the mid-point of Column V, and will allow 6 units for Item 3.

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

[32] The Defendant has claimed 6 units for the preparation and filing of documents related to the Defendant’s motion to amend the Statement of Defence, which was filed on July 16, 2015. At paragraph 25 of the Plaintiff’s Responding Costs Submissions, it is submitted that no costs were awarded for this motion. At paragraph 10 of the Defendant’s Reply Submissions for Costs Assessment it is conceded that this particular motion was granted without costs and the claim for Item 4 was withdrawn. My review of the court record found that this particular motion was filed on April 29, 2016, and that the related Court Order dated May 26, 2016, stated that the Defendant’s motion was granted, “[t]he whole without costs.” Therefore, no costs are allowed for Item 4.

D. *Item 5 – Preparation and filing of a contested motion, including materials and responses thereto.*

[33] The Defendant has submitted multiple claims under Item 5 for documents related to the preparation and filing of costs documents, and the preparation of charts for refusals motions.

(1) Costs documents

[34] Concerning the Defendant’s claims for the preparation and filing of costs documents, 11 units are claimed for the preparation and filing of costs submissions on March 2, 2018; and 11

units are claimed for the preparation and filing of costs submissions and affidavits on September 15, 2020, and December 11, 2020. The Defendant has submitted that these claims should have been entered under Item 15 in the Bill of Costs, which is for “written argument, where requested or permitted by the Court” and cited *Aird v Country Park Village Properties (Mainland) Ltd.*, 2005 FC 1170, at paragraphs 31 to 34, to support the Defendant’s request to amend these claims (Defendant’s Submissions for Costs Assessment, paras 32, 33).

[35] In response, the Plaintiff submitted that no costs should be allowed for the Defendant’s costs documents as the Court’s Orders (dated March 28, 2018, and December 23, 2020) are silent with respect to costs and cited *Quinn v Canada (Attorney General)*, 2021 FC 470 [*Quinn*], at paragraphs 22 and 23, to support this argument. In addition, the Plaintiff submitted that the Defendant unilaterally filed costs submissions almost nine months after the remanded hearing decision was issued on January 17, 2020, and that these submissions should be assessed under Item 26. If any costs are allowed for the Defendant’s 2020 costs submissions, the Plaintiff requests that no more than 5 units be allowed (Plaintiff’s Responding Costs Submissions, paras 27, 28, 30, 37, 38).

[36] In reply, the Defendant submitted that “Item 15 provides recovery for the preparation and filing of written arguments, where requested or permitted by the Court.” The Defendant submitted that “Item 15 does not require the written arguments to be directed or ordered by the Court” for costs to be claimed, and that an award of costs in relation to a trial or hearing “encompasses fees related to costs submissions,” and cited *AstraZeneca AB v Apotex Inc*, 2009 FC 822 [*AstraZeneca*], at paragraph 40, wherein similar costs were allowed by an Assessment

Officer. It was also submitted that the Defendant's 2020 costs submissions "should be viewed as an extension of the liability trial", and that Item 26 is not the appropriate Item, as this claim is pertaining to the work performed prior to an assessment of costs being requested (Defendant's Reply Submissions for Costs Assessment, paras 11, 13, 15, 16).

[37] First, I will consider the Defendant's request to amend the Item number for the claims for costs documents that were entered under Item 5 instead of Item 15 in the Bill of Costs filed on June 22, 2021. In *Mitchell v Canada (Minister of National Revenue - M.N.R.)*, 2003 FCA 386 [*Mitchell*], at paragraph 12, the Assessment Officer stated the following regarding the positive application of costs provisions:

[12] The Appellants are correct that the wording for item 27 does not generally fetter discretion. However, that discretion, as for other items in bills of costs, is still fettered by reasonable necessity and the limits of an award of costs. Consistent with Rule 3, and with my sentiment in *Feherguard Products Ltd. v. Rocky's of B.C. Leisure Ltd.*, [1994] F.C.J. No. 2012 (A.O.), at para. 10 that the "best way to administer the scheme of costs in litigation is to choose positive applications of its provisions as opposed to narrower and negative ones", application of discretion should be part of a reasoned process to achieve a result on assessment which is equitable for both sides. [...]

[38] Utilizing the *Mitchell* decision as a guideline, I have determined that allowing the amendment of the Defendant's claims from Item 5 to Item 15 will allow for a positive application of the costs provisions instead of a narrower one. I find that the Defendant provided the Plaintiff with sufficient notice to respond to the Item amendment, as the change was requested in the Defendant's initial written submissions filed on July 21, 2021. I also find that the Plaintiff had an opportunity to respond to these claims being assessed under Item 15 instead of Item 5, in the Plaintiff's responding submissions filed on August 11, 2021. Therefore, there is

no prejudice to the Plaintiff by allowing Defendant's request for the Item amendment. I will now consider whether the Defendant is entitled to any costs for these claims under Item 15.

[39] The Plaintiff has correctly argued that there are no Court decisions specifically awarding costs for the Defendant's costs documents claimed under Item 15. I am in agreement with the Defendant's argument though, that a Court decision awarding costs in relation to a trial or hearing can encompass costs submissions, depending on the facts pertaining to a particular file. For the assessment of claims under Item 15, there does need to be a Court decision awarding costs, which is consistent with the *Quinn* decision cited by the Plaintiff, and there should be some substantiation on the court record to support that the Court "requested or permitted" the documents being claimed under Item 15.

[40] For the first claim, my review of the Court's Public Judgment and Reasons dated January 31, 2018, which was related to the Plaintiff's award of costs for the liability trial, found that at paragraph 7 of the Judgment that the Court permitted the parties to file costs submissions, if the parties were unable to agree on the costs payable. I therefore find that based on the aforementioned facts, the Defendant's responding costs submissions filed on March 2, 2018, qualifies for assessment under Item 15.

[41] For the second claim, my review of the court record shows that the Defendant's moving party costs documents were filed in relation to the Federal Court of Appeal's Judgment, and Reasons for Judgment dated July 9, 2019, which set aside the Federal Court's Public Judgment and Reasons dated January 31, 2018, and awarded costs to the Defendant. The claims submitted

by the Defendant for the preparation and filing of costs submissions and affidavits on September 15, 2020, and December 11, 2020, were related to the Federal Court of Appeal's judgment that awarded costs to the Defendant, and I did not find that there were any time limits restricting when or if costs submissions could be filed. The court record reflects that the Court permitted the receipt of the Defendant's costs submissions filed on September 15, 2020, by issuing a direction to the parties on November 20, 2020, allowing for additional documents to be filed by the parties for the determination of costs. I therefore find that based on the aforementioned facts, the Defendant's costs documents filed on September 15, 2020, and December 11, 2020, qualify for assessment under Item 15.

[42] Concerning the quantum of costs for each of the aforementioned claims, I found that the Court relied on the Defendant's costs documents to render decisions on costs (dated March 28, 2018, and December 23, 2020), and that the services performed by the Defendant involved a moderate amount of work and complexity. Therefore, I have determined that it is reasonable to allow 8 units for the first claim and 9 units for the second claim, for a total of 17 units, which will be allowed under Item 15, instead of Item 5.

(2) Charts

[43] Concerning the Defendant's claims for the preparation of charts, 11 units are claimed twice for moving charts in relation to the examinations of G. Grissom and D. Mesher during the remedies phase. The Defendant submitted that the parties agreed to exchange their moving and responding charts for their refusals motions before requesting that the Court schedule them for a hearing. The Defendant submitted that shortly after the parties requested that the motions be

scheduled, the interlocutory appeal proceeding in the Federal Court of Appeal concluded and that the judgment made “the parties’ motions to compel unnecessary and the charts for the motions to compel were never filed with the Court.” Although no documents were filed in relation to the refusals motions (motions to compel), the Defendant has requested that costs still be allowed for the work that was performed, or alternatively if costs cannot be assessed under Item 5, that 5 units be allowed for each claim under Item 27 (Defendant’s Submissions for Costs Assessment, paras 24 to 27).

[44] In response, the Plaintiff submitted that no motions were filed by either party and that “[c]onsequently, no orders exist awarding costs relating to refusals motions and Tetra Tech is not entitled to claim costs for the moving charts”, and cited *Canada (Minister of Human Resources Development) v Uzoni*, 2006 FCA 344 [*Uzoni*], at paragraph 4, in support of this argument. The Plaintiff also submitted that costs should not be allowed under Item 27, as an Assessment Officer’s discretion is “fettered by reasonable necessity and limits of award of costs”, and cited *Mitchell (supra)*, at paragraph 12, in support of this argument (Plaintiff’s Responding Costs Submissions, paras 29 to 32).

[45] In reply, the Defendant submitted that “Item 5 does not only apply to motions that have been disposed of on their merits by an order and can be awarded whether or not the motions proceeded to determination by the Court.” The Defendant also submitted that the Plaintiff’s positions on Items 5 and 27 are contradictory because “[i]f item 5 only applies to motions that have been disposed of by an order, item 27 would still cover motions that were not disposed of by on [sic] order” (Defendant’s Reply Submissions for Costs Assessment, para 19).

[46] As acknowledged by the parties, my review of the court record did not reveal that costs were specifically awarded to any party in relation to the unfiled refusals motions. In the *Uzoni* decision cited by the Plaintiff, the Assessment Officer stated the following regarding Court decisions that are silent with respect to costs, at paragraph 4:

[4] The Respondent has requested 4 units for its item 4 (Preparation and filing of an uncontested motion, including all materials for late filing of Notice of Appearance). I have reviewed the Order of the Federal Court of Appeal dated March 22, 2005, in which the Court granted the Respondent's motion for an extension of time to file its Notice of Appearance. However, the same Order of the Federal Court of Appeal made no reference whatsoever to the issue of costs associated with the Respondent's motion. It is a well established principle that costs are at the respective Court's discretion and where an order is silent with respect to costs, it implies there is no visible exercise of the respective Court's discretion under Rule 400(1). Reference may also be made to a relevant passage in Mark M. Orkin, Q.C., *The Law of Costs* (2nd Ed.), 2004, paragraph 105.7:

... Similarly if judgment is given for a party without any order being made as to costs, no costs can be assessed by either party; so that when a matter is disposed of on a motion or at a trial with no mention of costs, it is as though the judge had said that he "saw fit to make no order as to costs"...

Similarly, I rely on *Kibale v. Canada (Secretary of State)*, [1991] F.C.J. No. 15, [1991] 2 F.C. D-9 which reflects the same sentiment:

If an order is silent as to costs, no costs are awarded.

With these points in mind, it is my opinion that the Respondent is not entitled to the costs associated with its extension of time motion and I disallow the 4 units requested for this assessable service.

[47] The *Uzoni* decision illuminates that a Court decision must explicitly award costs for a motion, for costs to be assessed. This decision is supported by a more recent decision of the

Court in *Tursunbayev v Canada (Minister of Public Safety and Emergency Preparedness)*, 2019 FC 457 [*Tursunbayev*], at paragraph 39, wherein the Court discusses the issue of decisions that are silent on costs, and concurred that costs cannot be allowed. Utilizing the *Uzoni* and *Tursunbayev* decisions as guidelines, I have determined that the Defendant's claims for Item 5 must be disallowed, as there is an absence of a Court decision awarding costs in relation to the unfiled refusals motions to the Defendant. This having been determined, I have considered the Defendant's request for costs outside of the parameters of Item 5, in conjunction with the court record and Rules 370, 402 and 411 of the FCR, and I find that there may be circumstances whereby a party could possibly be indemnified for the preparation of a motion that was not disposed of by the Court and that was not abandoned by the moving party, depending on the facts pertaining to a particular file.

[48] For this particular file, the Federal Court of Appeal's reversal of the Federal Court's judgment for the liability trial meant that the remedies phase of the Federal Court proceeding that was being litigated concurrently ceased to continue. My review of the facts for this particular file supports the allowance of some indemnification for the work performed by the Defendant in relation to the unfiled refusals motions, which became impertinent due to the Federal Court of Appeal's Judgment, and Reasons for Judgment dated July 9, 2019. In *Carlile v Canada (Minister of National Revenue - M.N.R.)*, [1997] F.C.J. No. 885 [*Carlile*], at paragraph 26, the Assessment Officer stated the following regarding not penalizing successful litigants with a denial of costs when it is apparent that real costs were incurred:

[26] Taxing Officers are often faced with less than exhaustive proof and must be careful, while ensuring that unsuccessful litigants are not burdened with unnecessary or unreasonable costs, to not penalize successful litigants by denial of indemnification

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

[49] In addition, Rule 3 of the FCR, states the following:

General principle

3. These Rules shall be interpreted and applied

(a) so as to secure the just, most expeditious and least expensive outcome of every proceeding; and

(b) with consideration being given to the principle of proportionality, including consideration of the proceeding's complexity, the importance of the issues involved and the amount in dispute.

Principe général

3 Les présentes règles sont interprétées et appliquées:

a) de façon à permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible;

b) compte tenu du principe de proportionnalité, notamment de la complexité de l'instance ainsi que de l'importance des questions et de la somme en litige.

[50] Utilizing the *Carlile* and *Mitchell* (*supra*) decisions, and Rule 3 as guidelines, I have determined that assessing the Defendant's claims for the work performed in relation to the

unfiled refusals motions under Item 27 is an acceptable alternative to assessing the claims under Item 5 and will allow for a positive application of the costs provisions instead of a narrower one, as “a result of zero dollars at taxation would be absurd.” I have considered the factors listed under Rule 400(3), such as, (a), (g), “(b) the amounts claimed and the amounts recovered;” and “(o) any other matter that it considers relevant;” and I have determined that it is reasonable to allow 4 units for each claim under Item 27 for the work performed by the Defendant in relation to the unfiled refusals motions for a total of 8 units.

[51] The cumulative total of units allowed for Items 15 and 27 is 25 units.

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

[52] The Defendant has submitted multiple claims under Items 7, 8 and 9 for the reviewing and preparing of affidavits of documents, and the preparation for, and attendance at examinations for discovery. Concerning Item 7, the Plaintiff submitted that the Defendant’s claims for the amending of affidavits of documents should be disallowed as “case law states that it is the aggregate event of discovery that should be reimbursed rather than each event in that process” (*Janssen (supra)*, para 19). The Plaintiff submitted that if any costs are allowed for the amended and supplemental affidavits of documents that no more than 10 units should be allowed in total. For the remaining claims submitted under Item 7, the Bill of Costs provided by the Plaintiff suggests 8 units for each claim. It was also noted that there may be a duplicate claim submitted for the preparation of the Defendant’s Supplemental Affidavit of Documents (May 29, 2019),

which should be disallowed (Plaintiff's Responding Costs Submissions, paras 55 to 57, DeBorba Affidavit, exhibit B).

[53] In reply, the Defendant submitted that the Plaintiff's position in the past was that amended and supplemental affidavits of documents "should be included in an assessment of Tetra Tech's costs." The Defendant submitted that if these claims cannot be allowed under Item 7, that 5 units per claim be allowed under Item 27, and cited *Dewji & Gheciu Consultants Inc. v A&A Consultants & Felicia Bilc*, [1999] FCJ No 1263 [*Dewji*], at paragraphs 3 and 4, to support the allowance of these claims (Defendant's Reply Submissions for Costs Assessment, paras 20, 21).

[54] Concerning Items 8 and 9, the Plaintiff's submissions focused on the ineligibility of the Defendant to claim second counsel fees but in the Bill of Costs provided by the Plaintiff, the suggested number of units for Item 8 was reduced to 9 units per claim, and for Item 9 the suggested number of units was reduced to 3 units per claim to be multiplied by the duration of each examination (DeBorba Affidavit, exhibit B). The Defendant's Reply Submissions for Costs Assessment also focused on the Plaintiff's arguments regarding the ineligibility of the Defendant to claim second counsel fees for Items 8 and 9.

[55] I have reviewed the *Janssen* decision cited by the Plaintiff, and I agree with the Assessment Officer's position that the aggregation of services qualifying under Item 7 has been the established standard for assessing these claims. This being noted, on occasion, there may be facts and circumstances pertaining to a particular file, that could support multiple claims being

assessed under Item 7 (*Guest Tek Interactive Entertainment Ltd v Nomadix, Inc*, 2021 FC 28, at paragraphs 29 to 32). For this particular file, I find that multiple claims can be submitted under Item 7 to reflect the bifurcation of this file and the amount of work performed. I have reviewed the parties' submissions and affidavits of documents, and I find it reasonable to allow two aggregate claims for the review of the Plaintiff's affidavits of documents, and for the preparation of the Defendant's affidavits of documents for the liability phase and for the remedies phase at the high end of Column V based on the amount of work required for the review, and preparation of affidavits of documents, including any amendments, supplementations, and related services that were required. For the quantum of costs, having considered the aforementioned facts, I find it reasonable to allow 40 units (4 claims at 10 units each) for Item 7.

[56] Concerning the Defendant's request for additional costs to be assessed under Item 27, I have reviewed the *Dewji* decision, and I did not find that the facts for this particular file fully aligned with the Assessment Officer's reasons in *Dewji*, wherein costs were allowed under Item 27 for additional work performed. In *Dewji*, costs were allowed under Item 27 for the filing of a second affidavit of documents after the new counsel of record for the opposing party "presented a second, completely new, affidavit." In *Dewji*, the opposing party changed their counsel of record, who then filed a completely new affidavit of documents, which required additional work to be performed by the party awarded costs. For this particular file, the Defendant's preparation of a supplemental affidavit of documents was the result of the Defendant changing its own counsel of record on March 19, 2019 (Defendant's Reply Submissions for Costs Assessment, para 21). Having considered these differing facts, I do not find it reasonable to require the Plaintiff to indemnify the Defendant for added costs directly related to the Defendant's unilateral

decision to change its counsel of record. I find that my allowance of two aggregate claims under each of the liability and remedies phases will reasonably compensate the Defendant for the work performed under Item 7. Therefore, the Defendant's request for additional costs under Item 27 is disallowed.

[57] For Items 8 and 9, I have reviewed the factors in awarding costs that are listed under Rule 400(3), such as (a), (c), and (g); and the court record reflects that the issues that were reviewed and examined were of significant importance and of moderate complexity; and that the work performed in relation to examinations can be time consuming, as highlighted in *Apotex Inc. v Merck & Co*, 2004 FC 1133, at paragraph 12. I therefore find it reasonable to allow a cumulative total of 40 units (4 claims at 10 units each) for Item 8. For Item 9, I find it reasonable to allow 4 units per claim, to be multiplied by the duration of the four examinations (3.9 hr, 6.5 hr, 8.9 hr and 8.2 hr) for a cumulative total of 110 units.

[58] The cumulative total of units allowed for Items 7, 8, and 9 is 190 units.

F. *Item 10 – Preparation for conference, including memorandum; Item 11 – Attendance at conference, per hour.*

[59] The Defendant has submitted multiple claims under Items 10 and 11 for the preparation for, and the attendance at case management [CMC], pre-trial [PTC], and trial management [TMC] conferences. In response, the Plaintiff submitted that all of the CMCs varied in duration from 9 to 30 minutes, and that the Defendant submitting all of the claims for Items 10 and 11 at the highest end of Column V is excessive. It is suggested that the Defendant's claims be

“allowed at the mid-low-range of Column V” (Plaintiff’s Responding Costs Submissions, paras 58 to 60). In reply, the Defendant submitted that the Plaintiff had argued in its 2020 Bill of Costs that the five CMCs “should be assessed at the mid-range” but is now stating that they should be assessed at “the bottom of Column V.” The Defendant requests that all of the claims “be assessed at the top of Column V for the reasons outlined above and in its original written submissions for the costs assessment” (Defendant’s Reply Submissions for Costs Assessment, paras 24, 25). The parties did not provide any specific submissions regarding the PTC and TMC.

[60] Further to the parties’ submissions, I do not find that the duration of a CMC, PTC and or TMC necessarily denotes the complexity or the amount of work performed in relation to it. Consequently, I will assess each CMC, PTC and TMC on its own merit below.

(1) Case management conferences

(a) *CMC held on May 27, 2016*

[61] For the CMC held on May 27, 2016, the abstract of hearing, which is a computerized hearing details report created by the Court Registrar in attendance at a hearing, has this CMC documented as being 12 minutes in duration, which matches with the Defendant’s Bill of Costs. The court record shows that this CMC was regarding the proposed schedule of procedural steps for this file, which was consented to by the parties (Plaintiff’s letter dated April 22, 2016). The negotiation of procedural steps for a file may not be complex in nature but it can involve a lot of back-and-forth communication between the parties to reach an agreement. I therefore find it reasonable to allow costs somewhere between the mid-point to high end of Column V for Item

10 and at the mid-point for Item 11, as the issues dealt with at the CMC were consented to by the parties. This being found, 10 units are allowed for Item 10 and 0.6 units (3 units multiplied by 0.2 hr) are allowed for Item 11 for the CMC held on May 27, 2016.

(b) *CMC held on November 22, 2016*

[62] For the CMC held on November 22, 2016, the abstract of hearing has this CMC documented as being 15 minutes in duration, which matches with the Defendant's Bill of Costs. The court record shows that this CMC was requested by the Plaintiff to discuss the scheduling of refusals motions (Plaintiff's letter dated September 23, 2016). The court record did not reveal that the Court requested any additional material from the parties prior to the CMC being held. In the absence of any specific submissions from the parties, it is difficult to determine what preparation was required for this particular CMC. This being noted, I find the scheduling of hearings to be of low complexity and a minimal amount of work is involved. This being found, 7 units are allowed for Item 10 and 0.6 units (2 units multiplied by 0.3 hr) are allowed for Item 11 for the CMC held on November 22, 2016.

(c) *CMC held on July 27, 2018*

[63] For the CMC held on July 27, 2018, the abstract of hearing has this CMC documented as being 30 minutes in duration, which matches with the Defendant's Bill of Costs. The court record shows that this CMC was regarding the scheduling of additional procedural steps for this file. As I noted for the CMC held on May 27, 2016, the negotiation of procedural steps for a file may not be complex in nature but it can involve a lot of back-and-forth communication between

the parties to reach an agreement. It is noted though that the parties did not reach an agreement before this particular CMC was held (Plaintiff's letter dated July 20, 2018, with letters dated June 29 and July 5, 2018 attached). Having considered the facts in relation to this particular CMC, I find it reasonable to allow costs somewhere between the mid-point to high end of Column V for both Items 10 and 11. This being found, 10 units are allowed for Item 10 and 2 units (4 units multiplied by 0.5 hr) are allowed for Item 11 for the CMC held on July 27, 2018.

(d) *CMC held on August 24, 2018*

[64] For the CMC held on August 24, 2018, the abstract of hearing has this CMC documented as being 9 minutes in duration, which matches with the Defendant's Bill of Costs. The court record shows that this CMC was a follow-up conference to the CMC held on July 27, 2018. The court record did not reveal that the parties had to prepare anything for the Court prior to this CMC being held, and that the CMC was for the Court to provide potential dates for the scheduling of the reference for this file. As a result, I find it reasonable to allow the costs for this CMC at the low end of Column V. This being found, 7 units are allowed for Item 10 and 0.4 units (2 units multiplied by 0.2 hr) are allowed for Item 11 for the CMC held on August 24, 2018.

(e) *CMC held on December 20, 2018*

[65] For the CMC held on December 20, 2018, the abstract of hearing has this CMC documented as being 20 minutes in duration, which matches with the Defendant's Bill of Costs. The court record shows that this CMC was requested by the Plaintiff to discuss the conduct for

the forthcoming reference for damages or profits (Plaintiff's letter dated December 5, 2018). The court record did not reveal that the Court requested any additional material from the parties prior to the CMC being held. In the absence of any specific submissions from the parties, it is difficult to determine what preparation was required for this particular CMC. This being noted, I find that the discussion regarding the conduct of the reference to be very important, as it was meant to be the determinative hearing for the remedies phase. Further to my consideration of the aforementioned facts, I find this CMC to be of moderate to high complexity for the hearing and that a moderate amount of preparation may have been required to research reference hearings. Therefore, I find it reasonable to allow 9 units for Item 10 and 1.6 units (4 units multiplied by 0.4 hr) for Item 11 for the CMC held on December 20, 2018.

(2) Pre-trial conference

[66] Concerning the PTC held on August 1, 2017, the abstract of hearing has the PTC documented as being 50 minutes in duration, which matches with the Defendant's Bill of Costs. It is noted that the assigned Court Registrar's computer entry has a clerical oversight, wherein the PTC was entered as a CMC. My review of the court record has confirmed that the hearing on August 1, 2017, was a PTC, and that it was originally scheduled for 3 hours. This hearing was scheduled by a direction of the Court dated July 17, 2017, which was further to a joint request of the parties for the PTC (Defendant's letter dated July 5, 2017). The parties were required to serve and file their materials by July 27, 2017, with the Defendant filing a Pre-Trial Conference Memorandum on July 27, 2017. Rules 257 to 268 of the FCR set out the scope and requirements for PTCs, with the possibility of a settlement or a trial date being fixed as possible outcomes. Having reviewed the rules governing PTCs, it is apparent that a substantial amount of work is

performed prior to a PTC being held, and that the PTC itself can be quite layered with the variety of issues that could be discussed. Although, PTCs may not necessarily be complex in nature, I find that the amount of work involved can substantiate costs being allowed at the higher end of a column in Tariff B. Therefore, further to my consideration of the aforementioned facts, I find it reasonable to allow 11 units for Item 10 and 4.5 units (5 units multiplied by 0.9 hr) for Item 11 for the PTC held on August 1, 2017.

(3) Trial management conference

[67] Concerning the TMC held on October 23, 2017, the abstract of hearing has the TMC documented as being 39 minutes in duration, which matches with the Defendant's Bill of Costs. This hearing was scheduled by a direction of the Court dated September 13, 2017, which was further to the PTC held on August 1, 2017. The TMC was scheduled for 1 hour and my review of the court record did not reveal that the parties had to prepare any material for the Court prior to the TMC being held. This being noted, the Plaintiff filed a letter dated October 16, 2017, with agenda items for the TMC pursuant to Rule 270 of the FCR, with items such as the requirements for audio-visual equipment and the scheduling of witnesses on the agenda. The court record did not reveal that the Defendant filed a response to this letter. Although the Plaintiff's letter had several agenda items to discuss, I did not find the items to be complex in nature, and that the items listed would require a moderate amount of work from the Defendant to provide responses at the TMC. Therefore, I find it reasonable to allow 9 units for Item 10 and 2.1 units (3 units multiplied by 0.7 hr) for Item 11 for the TMC held on October 23, 2017.

[68] The cumulative total of units allowed for Items 10 and 11 is 74.8 units.

G. *Item 12 – Notice to admit facts or admission of facts; notice for production at hearing or trial or reply thereto.*

[69] The Defendant has submitted two claims under Item 12 for 5 units each, for the review and response to a Request to Admit, and also for the preparation of an Agreed Statement of Facts. The Defendant did not provide any specific submissions regarding these particular claims. The Plaintiff also did not provide any specific submissions regarding Item 12 but in the Bill of Costs provided by the Plaintiff, the suggested number of units for both claims was reduced to 3 units each (DeBorba Affidavit, exhibit B). In *Merck & Co v Apotex Inc*, 2008 FC 371 [*Merck #2*], at paragraph 14, the Court stated the following regarding the issue of an Assessment Officer having limited material available for assessing costs:

[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.

[70] In the absence of any specific submissions from the Defendant to justify the claims for Item 12 being submitted at the highest end of Column V, and utilizing the *Merck #2* and *Carlile (supra)* decisions as guidelines, I find it reasonable to allow 3 units for each claim, for a cumulative total of 6 units.

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

[71] The Defendant has submitted two claims under Item 13(a) for 11 units each, for the initial preparation by first counsel for the bifurcated trial hearings, for the liability and remedies phases. One claim was also submitted under Item 13(b) for the daily preparation for the liability trial, after the first day of the trial had commenced. The parties' submissions focused on the trial for the remedies phase. Concerning the remedies trial (or reference), the Defendant submitted that although a hearing date was not scheduled during remedies phase, the wording for Item 13(a) still permits for costs to be claimed whether or not the hearing proceeds. The Defendant submitted that there was correspondence with the Court and the Plaintiff regarding the scheduling of the remedies trial and that the amount of work performed by the Defendant "is not reflected by the Tariff item lines." The Defendant also requested that if costs cannot be assessed under Item 13(a) for the remedies trial that costs be assessed under Item 27 instead (Defendant's Submissions for Costs Assessment, paras 28 to 31).

[72] In response, the Plaintiff submitted that the remedies trial "was set to take place many months after the Federal Court of Appeal released its Judgment reversing the trial decision with respect to the liability phase." The Plaintiff requested that costs not be assessed for this claim because the "remedies phase never went beyond the first round of discoveries" and that the Defendant has not submitted any evidence regarding "what preparation work was done for the remedies trial" (Plaintiff's Responding Costs Submissions paras 40 to 43). In addition, the Plaintiff stated the following at paragraph 42 of the Plaintiff's Responding Costs Submissions, regarding a stay not being requested by the Defendant:

[42] An appeal from an order does not result in an automatic stay of a proceeding. Tetra Tech had to bring a motion before the court if it wanted the quantification phase stayed pursuant to Section 50 of the *Federal Courts Act*. Georgetown was fully

entitled to proceed with the remedies stage. Tetra Tech has made claims under various Items of Tariff B regarding the remedies phase and should not be entitled to overclaim for Items that are not applicable. [...]

[73] In reply, the Defendant reiterated that there was communication with the Court and the Plaintiff regarding dates for the remedies trial, and that the Defendant also corresponded with accounting experts for the trial (Defendant's Reply Submissions for Costs Assessment, para 23).

(1) Remedies trial

(a) *Item 13(a)*

[74] I have reviewed the parties' submissions regarding the trial for the remedies phase in conjunction with the court record and I find that there are sufficient grounds for the allowance of some costs for this particular claim. I do agree with the Plaintiff that the Defendant could have filed a motion pursuant to subsection 50(1) of the *Federal Courts Act*, R.S.C., 1985, c. F-7, for the Federal Court proceeding to be stayed until the interlocutory appeal proceeding in the Federal Court of Appeal had been dealt with. This being noted, my review of subsection 50(1), did not indicate that the Plaintiff was precluded from making a similar request for a stay of proceeding. This option was available to both parties. The Plaintiff "was fully entitled to proceed with the remedies stage" but I also find that both parties had the potential risk of additional costs because the Federal Court proceeding continued to be litigated concurrently with the Federal Court of Appeal proceeding. I have reviewed the court records in the Federal Court (T-896-15) and the Federal Court of Appeal (A-69-18) and they did not reveal any Court decisions that restricted the Defendant from claiming costs related to the unscheduled remedies trial. In *Bernard v*

Professional Institute of the Public Service of Canada, 2020 FCA 152 [*Bernard*], at paragraph 24, I stated the following regarding a similar situation with an unscheduled judicial review hearing:

[24] Further to the concerns raised in the Applicant's submissions though, there should be some parameters associated with assessing Item 13(a), especially in a situation where no hearing was actually scheduled and a party submits a claim under Item 13(a) for pre-hearing work. After a Requisition for Hearing has been filed and based on a party's submissions and evidence of the pre-hearing work performed on a particular file, it may support an allowance of costs by an Assessment Officer. This being said, my review of the Respondent's costs material did not fully illuminate the pre-hearing work that was done by the Respondent, which was not already claimed under Item 2 and Item 5 (assessed under Item 27). More detailed submissions and evidence, such as an itemized listing of counsel's billable hours with the specific tasks performed would have been helpful in assessing Item 13(a).

[75] Having considered the aforementioned facts for this particular file, and also having considered my position in *Bernard*, I have determined that the Defendant is entitled to some indemnification for the work performed in relation to the unscheduled remedies trial. I have reviewed the Defendant's counsels' work logs for professional services rendered and they reflect that some services were performed in relation to the remedies trial (Gaikis Affidavit, exhibit A, and Sotiriadis Affidavit, exhibit L). As the remedies trial had not been scheduled yet and the hearing date may have been several months away, and the parties were still performing the full breadth of pre-hearing services required for the remedies trial to proceed, I do not find it reasonable to allow costs at the highest end (11 units) of Column V for this particular claim. Therefore, further to my consideration of the aforementioned facts, I have determined that it is reasonable to allow 5 units for the Defendant's claim for Item 13(a) in relation to the remedies trial.

(2) Liability trial

(a) *Item 13(a)*

[76] Further to my review of the parties' costs documents in conjunction with the court record, and considering my previous assessment for Item 13(a) for the remedies trial, I find it reasonable to allow the Defendant's claim for the liability trial as requested at 11 units. When I considered the factors listed under Rule 400(3), such as (a), (c), and (g); the court record reflects that the Defendant was the successful party and was awarded costs under Column V; that the issues argued were of significant importance and of moderate complexity; and that a substantial amount of preparation was done by the Defendant to prepare for the liability trial (Sotiriadis Affidavit, exhibit A). Therefore, 11 units are allowed for the Defendant's claim for Item 13(a) for the liability trial.

(b) *Item 13(b)*

[77] Concerning the Defendant's claim of 48 units for Item 13(b), for the daily preparation by first counsel for the liability trial after the first day of the hearing commenced, the Defendant did not provide any specific submissions regarding this particular claim. The Plaintiff also did not provide any specific submissions regarding Item 13(b) but in the Bill of Costs provided by the Plaintiff, the suggested number of units for Item 13(b) was reduced to 36 units (DeBorba Affidavit, exhibit B). Further to my review of the court record and utilizing the *Merck #2 (supra)* and *Carlile (supra)* decisions as guidelines, and also having considered my assessment for Item 13(a) for the liability trial, I find it reasonable to allow the Defendant's costs for the daily

preparation for the liability trial after the first day of the hearing commenced at the mid-point of Column V, for most of the days. For my assessment of Item 13(a), I recognized that a significant amount of work was done by the Defendant prior to the beginning of the liability trial, which supported costs at the highest end of Column V. This being recognized, I am not sure if this level of preparation was required once the trial had commenced. Some specific submissions from the Defendant for Item 13(b) would have been of great assistance for the assessment of this claim. I have reviewed the particulars for the liability trial, such as the number of witnesses called, documents and exhibits filed, and requests from the Court at the hearing, and it appears that there was a moderate amount of daily preparation required by the Defendant for the first 5 days of the trial (Abstract of Hearing; Sotiriadis Affidavit, exhibit A). Concerning the last day of the trial, the Defendant has provided evidence showing that a significant amount of work was performed in relation to the preparation and filing of closing arguments (Sotiriadis Affidavit, exhibits A and Q). Therefore, having considered the aforementioned facts, I find it reasonable to allow 38 units (6 units multiplied by 5 days, and 8 units multiplied by 1 day) for Item 13(b) for the liability trial.

[78] The cumulative total of units allowed for Items 13(a) and 13(b) is 54 units.

I. *Item 14 – Counsel fee: (a) to first counsel, per hour in Court; and (b) to second counsel, where Court directs, 50% of the amount calculated under paragraph (a).*

[79] The Defendant has submitted 217.5 units (5 units multiplied by 43.5 hr) for first counsel's attendance at the liability trial held from November 20 to 27, 2017, and on December 4, 2017. The Defendant did not provide any specific submissions regarding this particular claim.

The Plaintiff also did not provide any specific submissions regarding Item 14(a) but in the Bill of Costs provided by the Plaintiff, the suggested number of units for Item 14(a) was reduced to 174 units (4 units multiplied by 43.5 hr) (DeBorba Affidavit, exhibit B). Further to my review of the court record and utilizing the *Merck #2 (supra)* and *Carlile (supra)* decisions as guidelines, and also having considered my assessments for Items 13(a) and 13(b) for the liability trial, I find it reasonable to allow the costs for Item 14(a) at a level slightly higher than the mid-point of Column V, as suggested by the Plaintiff, for the first 5 days of the trial. For the last day of the trial, I find it reasonable to allow the costs at the highest end of Column V for the Defendant's closing arguments. Therefore 180.9 units (4 units multiplied by 36.6 hr, and 5 units multiplied by 6.9 hr) are allowed for the Defendant's claim for Item 14(a) for first counsel's appearance at the liability trial.

J. *Item 15 – Preparation and filing of written argument, where requested or permitted by the Court.*

[80] The Defendant has claimed 11 units for the preparation and filing of closing arguments in relation to the liability trial, as noted in the Defendant's Bill of Costs. The Defendant did not provide any specific submissions regarding this particular claim. The Plaintiff also did not provide any specific submissions regarding Item 15 but in the Bill of Costs provided by the Plaintiff, the suggested number of units for Item 15 was reduced to 8 units (DeBorba Affidavit, exhibit B). I have reviewed the transcripts of hearing for the liability trial and my review of the daily transcript for December 4, 2017, showed that both parties did a substantial amount of work for their closing arguments, including the filing of hard copies of their arguments (Sotiriadis Affidavit, exhibit Q). In addition, my review of the Defendant's counsel's work logs for

professional services rendered reflected that several days of work were performed to prepare the closing arguments (Sotiriadis Affidavit, exhibit A). Similar to my consideration of the Rule 400(3) factors for Item 13(a) for the liability trial, I find that the closing arguments required a substantial amount of work by the Defendant in a condensed amount of time. Having considered the aforementioned facts, I find it reasonable to allow the Defendant's claim as submitted at 11 units.

K. *Item 25 – Services after judgment not otherwise specified.*

[81] The Defendant has submitted four claims of 1 unit each for services performed after the conclusion of the liability trial, for client and opposing counsel communications, the review of documents for confidentiality, and the preparation of a draft decision, as noted in the Defendant's Bill of Costs. The Defendant did not provide any specific submissions regarding these particular claims. In response, the Plaintiff submitted that these claims are not being contested and in the Bill of Costs provided by the Plaintiff, the suggested number of units for these claims are echoed at 1 unit each (Plaintiff's Responding Costs Submissions, para 61, and DeBorba Affidavit, exhibit B). In *Halford v Seed Hawk Inc.*, 2006 FC 422 [*Halford*], at paragraph 131, the Assessment Officer stated the following regarding services provided after judgment:

[131] [...] I routinely allow item 25, notwithstanding the absence of evidence, unless I think that responsible counsel did not, in fact, review the judgment and explain associated implications to the client. [...]

[82] Further to my review of the court record, the Defendant's counsels' work logs for professional services rendered (Sotiriadis Affidavit, exhibit L), and utilizing the *Halford* decision

as a guideline, I have found sufficient evidence to support the allowance of the Defendant's four claims. Therefore, 4 units (4 claims at 1 unit each) are allowed as requested for Item 25.

L. *Item 26 – Assessment of costs.*

[83] The Defendant has submitted a claim of 10 units for the preparation for, and attendance at the assessment of costs hearing on August 26, 2021, as noted in the Defendant's Bill of Costs. The Defendant did not provide any specific submissions regarding this particular claim. The Plaintiff also did not provide any specific submissions regarding the claim for Item 26 but in the Bill of Costs provided by the Plaintiff, the suggested number of units was reduced to 8 units (DeBorba Affidavit, exhibit B). For my review of this claim, I took into consideration the size and complexity of this file, the numerous amount of claims that were made, the fact that almost all of the claims were contested by the Plaintiff, and the amount of documentation provided by the Defendant. I find that the Defendant performed a substantial amount of work for this assessment of costs in preparing documents and also for the attendance at the videoconference hearing on August 26, 2021, which was 2 hours in duration. Having considered the aforementioned facts, I have determined that it is reasonable to allow 10 units for the Defendant's claim for Item 26.

M. *Item 27 – Such other services as may be allowed by the assessment officer or ordered by the Court.*

[84] The Defendant has submitted three claims of 5 units each for services performed in relation to the preparation of a Demand for Particulars (Liability Phase), Read-ins (Liability Phase), and an Agreed Statement of Issues (Remedies Phase). The Defendant only provided

specific submissions regarding the Agreed Statement of Issues (Remedies Phase), which the Defendant states “was approved and filed by the Court on December 20, 2018” (Defendant’s Submissions for Costs Assessment, para 35). The Plaintiff did not provide any specific submissions regarding the claims for Item 27 but in the Bill of Costs provided by the Plaintiff, the suggested number of units for these claims is 3 units each.

[85] Further to my review of the Agreed Statement of Issues (Remedies Phase), I find it reasonable to allow 3 units for this claim. This particular document was prepared by the Plaintiff but it is noted that it was filed with the consent of the parties, which would imply that there was some communication between the parties. The 3 units accounts for the review and communication conducted by the Defendant to reach a consensus with the Plaintiff. Concerning the claims for the Demand for Particulars (Liability Phase), and the Read-ins (Liability Phase), some specific submissions from the Defendant would have been of assistance in the assessment of these claims. Further to my review of the court record and utilizing the *Merck #2 (supra)* and *Carlile (supra)* decisions as guidelines, and considering that costs for the preparation for the liability trial were already allowed, I find it reasonable to allow 3 units each for the remaining two claims.

[86] The cumulative total of units allowed for Item 27 is 9 units.

N. *Total amount allowed for the Defendant’s assessable services.*

[87] A total of 581.7 units have been allowed for the Defendant’s assessable services for a total amount of \$91,617.75, which is inclusive of GST.

VI. Disbursements

[88] The Defendant has claimed \$69,064.38 for disbursements, which is inclusive of any taxes that may have been paid.

A. *Uncontested disbursements*

[89] The Defendant has submitted claims for disbursements totalling \$43,804.99 for expert fees (liability phase), and for the DLA Piper Canada LLP disbursements in the remedies phase for the following line items: court reporting, travel, meals, litigation software charges, phone calls, and corporate searches (Sotiriadis Affidavit, para 15, and Gaikis Affidavit, para 4). At paragraph 69 of the Plaintiff's Responding Costs Submissions the following was submitted with regards to the aforementioned claims:

[69] For clarity, Georgetown is not contesting the following disbursement items claimed by Tetra Tech: expert fees in the liability phase and DLA Piper Canada LLP disbursements in the remedies phase.

[90] Further to the aforementioned submissions of the Plaintiff, I have reviewed the Defendant's assessment of costs documents in conjunction with the court record, the FCR and any relevant jurisprudence and I have determined that the Defendant's disbursements for expert fees in the liability phase, and the DLA Piper Canada LLP disbursements in the remedies phase can be allowed as claimed. I found these claims to be reasonable and necessary expenses for the type of action proceeding that was being litigated. Therefore, these disbursements are allowed for a total amount of \$43,804.99, which is inclusive of any taxes that may have been paid.

[91] The Defendant's remaining claims for disbursements itemized in the Bill of Costs as Robic Disbursements (Liability Phase), and Robic Disbursements (Remedies Phase) have some issues to look into and as a result, they will be assessed in more detail below.

B. *Robic disbursements (liability phase)*

[92] The Defendant has submitted claims totalling \$23,975.24 for disbursements incurred by the former solicitors of record, Robic LLP, for the following line items: travel, court software, court reporting, printing services, staff overtime, binding, software charges, courier fees, foreign associate fees, currency exchange and phone calls (Sotiriadis Affidavit, para 4).

[93] In response, the Plaintiff submitted that staff overtime is considered office overhead and that the liability trial was conducted electronically, rendering the binding unnecessary. Concerning the travel claims, the Plaintiff submitted that there is an absence of invoices for some of the claims submitted making it "impossible to determine if these travel expenses were reasonable and necessary." The Plaintiff cited *Eli Lilly Canada Inc v Apotex Inc*, 2018 FC 736 [Eli Lilly], at paragraph 138, in support of this argument, wherein the Court stated that travel and accommodations expenses should be based on "economy fares, except for overseas travel", and "standard rooms in business class hotels based on single occupancy." The Plaintiff did not provide any specific submissions regarding the remaining items claimed by the Defendant (Plaintiff's Responding Costs Submissions, paras 64 to 67).

[94] In reply, at paragraph 26 of the Defendant's Reply Submissions for Costs Assessment the following was submitted with regards to the claims for overtime and binding:

[26] Tetra Tech concedes that its disbursements should be reduced by \$1,614.25 on the basis that certain overtime and binding disbursements (\$986.35) are not claimable and certain photocopying and binding disbursements (\$627.90) are related to the appeal.

[95] Concerning the travel claims, the Defendant submitted that all of the travel expenses were reasonably incurred and that all of “counsel’s receipts for the counsel travel expenses that its previous counsel ROBIC could locate in its accounting system” have been provided. The Defendant submitted that the Plaintiff “could have cross-examined Mr. Sotiriadis on his affidavit if it believed any of the counsel travel expenses were not incurred or were unreasonable,” and “[i]n the absence of evidence to the contrary, the prima facie evidence of Tetra Tech should be accepted and Georgetown’s challenge must fail” (Defendant’s Reply Submissions for Costs Assessment, paras 27, 28).

[96] As the Defendant has withdrawn the contested claims for overtime and binding, this leaves the contested claims for travel to be assessed in greater detail. With regards to the travel claims, my review of the Plaintiff’s submissions did not reveal that the Plaintiff questioned the necessity of the Defendant’s travel to the various events claimed by the Defendant. The Plaintiff has questioned the reasonableness of these claims though, due to the absence of invoices. I agree with the Plaintiff that it is problematic that several invoices are missing, as it makes it difficult to ascertain if any of the expenses incurred were excessive in nature or had non-work-related elements included. This being noted, the Defendant has acknowledged that some of the travel expenses claimed do not have corresponding invoices. The Affidavit of Bob Sotiriadis has explanations within the body of the affidavit, and charts and logs attached as exhibits, which do help to fill in the gaps for the missing invoices. In *Abbott Laboratories v Canada (Minister of*

Health), 2008 FC 693 [*Abbott*], at paragraph 63, which was cited by the Defendant, the Assessment Officer stated the following regarding the use of affidavits to support claims for disbursements:

[63] I find that I can rely on *Browne* to conclude here, regardless of the absence of a complete set of invoices (some were produced after the initial evidence), that Mr. Brodtkin, who is an officer of the Court further to s. 11(3) of the *Federal Courts Act*, has established *prima facie* that the costs were incurred and related to the T-1133-02 file. His associate counsel, who appeared before me, confirmed said fact evidence as contemplated by Tariff B1(4). Tariff B1(4) provides that no “disbursement...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 by the party.” I think that, in the absence of significant evidence to the contrary, the fact evidence contemplated in the passage following the term “and” may be accepted *prima facie*. It is not improper for counsel on information and belief to assert opinion evidence that the disbursements were “reasonable”, but the sense of this passage as a whole does not assign to counsel, in place of the assessment officer, the responsibility to decide reasonableness. These words from Tariff B1(4), “shall be assessed or allowed unless it is reasonable”, read with Rule 405 providing that costs “shall be assessed by an assessment officer”, indicate that the weight or deference to be accorded to opinion evidence by counsel of “reasonableness”, as opposed to fact evidence, is different and likely less.

[97] Also, in *Teledyne Industries, Inc et al v Lido Industrial Products Ltd*, [1981] FCJ No 1149 [*Teledyne*], at paragraph 23, the Court stated the following regarding receipts for disbursements:

[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.

[98] Further to my review of the parties' costs documents, and utilizing the *Eli Lilly, Abbott, Teledyne, Merck #2 (supra)*, and *Carlile (supra)* decisions as guidelines, I have determined that although there is an absence of invoices for some of the Defendant's travel claims, as an Assessment Officer, I have an obligation to assess any claims that have been made and not simply disallow them because of an absence of invoices, as "[t]here are other ways to prove that a bill has been paid" (*Teledyne*, para 23). The Plaintiff has not argued that any of the events which necessitated the Defendant's travel were unnecessary, and my review of the court record and the Affidavit of Bob Sotiriadis has substantiated the validity of the claims submitted. Having been satisfied that the events did occur and it being apparent that costs were incurred, I therefore find that the Defendant is entitled to be indemnified for all of the travel claims submitted. As I stated earlier, the absence of invoices for some of the claims has made it difficult to ascertain if any expenses incurred may be excessive in nature, such as flight or hotel upgrades, or if there may be elements within a specific claim that may be non-work related, such as alcohol purchases with meals. This being stated, I have taken note that the aforementioned decisions allowed some costs even though there may have been some irregularities with the claims submitted. Therefore, I have determined that in the absence of more fulsome submissions and/or evidence that it is reasonable to allow 90% of the amount for the claims that are without an invoice for a total amount of \$3,239.37, inclusive of any taxes that may have been paid.

[99] Concerning the remaining claims for travel, court software, court reporting, printing services, software charges, courier fees, foreign associate fees, currency exchange, and phone

calls, I have reviewed the Defendant's costs documents in conjunction with the court record, the FCR and any relevant jurisprudence and I have determined that these disbursements can be allowed as claimed. I found the remaining claims to be reasonable and necessary expenses for the type of action proceeding that was being litigated. Therefore, the remaining claims are allowed for a total amount of \$19,389.59, inclusive of any taxes that may have been paid.

[100] The cumulative total for disbursements allowed for the Robic Disbursements (Liabilities Phase) is \$22,628.96, which is inclusive of any taxes that may have been paid.

C. *Robic disbursements (remedies phase)*

[101] The Defendant has submitted claims totalling \$1,284.15 for disbursements incurred by the former solicitors of record, Robic LLP, for the following line items: photocopying, binding, and court software fees (Sotiriadis Affidavit, para 18). In response, the Plaintiff submitted that the dates provided at exhibit "M" of the Affidavit of Bob Sotiriadis seem to relate to the Joint Book of Authorities filed in the interlocutory appeal proceeding in the Federal Court of Appeal (A-69-18). The Plaintiff submitted that the costs for the interlocutory appeal proceeding were resolved and that the Defendant's costs for photocopying and binding totalling \$627.90 should not be allowed. The Plaintiff did not provide any specific submissions regarding the claim for court software fees (Plaintiff's Responding Costs Submissions, para 68). In reply, the Defendant conceded that some of the costs for photocopying and binding should not be assessed and withdrew these claims, which total \$627.90 (Defendant's Reply Submissions for Costs Assessment, para 26).

[102] Concerning the remaining claims for photocopying and court software fees, I found these claims to be reasonable and necessary for the type of action proceeding that was being litigated. Therefore, the remaining claims are allowed for a total amount of \$656.25, which is inclusive of any taxes that may have been paid.

D. *Total amount allowed for the Defendant's disbursements.*

[103] The total amount allowed for the Defendant's disbursements is \$67,090.20, which is inclusive of taxes that may have been paid.

VII. Conclusion

[104] For the above reasons, the Defendant's Bill of Costs is assessed and allowed in the total amount of \$158,707.95, payable by the Plaintiff, Georgetown Rail Equipment Company, to the Defendant, Tetra Tech EBA Inc. A Certificate of Assessment will also be issued.

"Garnet Morgan"
Assessment Officer

Toronto, Ontario
March 15, 2023

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-896-15

STYLE OF CAUSE: GEORGETOWN RAIL EQUIPMENT COMPANY
v TETRA TECH EBA INC.

PLACE OF HEARING: HEARD BY VIDEOCONFERENCE

DATE OF HEARING: AUGUST 26, 2021

**REASONS FOR ASSESSMENT
BY:** GARNET MORGAN, Assessment Officer

DATED: MARCH 15, 2023

APPEARANCES:

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