Date: 20071009

Docket: T-884-03

Citation: 2007 FC 1035

BETWEEN:

MERCK & CO., INC. and
MERCK FROSST CANADA & CO.

Applicants

and

APOTEX INC. and THE MINISTER OF HEALTH

Respondents

REASONS FOR ORDER

GIBSON J.

INTRODUCTION

[1] These reasons follow the hearing at Toronto on the 10th of September, 2007 of a motion under Rule 414 of the *Federal Courts Rules*,[1] (the "*Rules*") for a review of the award of costs on the underlying application in respect of a Notice of Allegation from the Respondent Apotex Inc. ("Apotex") to Merck Frosst Canada & Co. pursuant to the *Patented*

[1] SOR/98-106.

Medicines (Notice of Compliance) Regulations[2]. In these reasons, the Applicants are referred to collectively as "Merck".

[2] Rule 414 reads as follows:

414. A party who is dissatisfied with an assessment of an assessment officer who is not a judge may, within 10 days after the assessment, serve and file a notice of motion to request that a judge of the Federal Court review the award of costs.	414.La partie qui n'est pas d'accord avec la taxation d'un officier taxateur, autre qu'un juge, peut demander à un juge de la Cour fédérale de la réviser en signifiant et déposant une requête à cet effet dans les 10 jours suivant la taxation.

BACKGROUND

[3] The underlying application was heard by my colleague Justice Mosley over three (3) days in April of 2005. Justice Mosley dismissed the application with costs in favour of the Respondent Apotex. In his reasons[3], Justice Mosley wrote with respect to costs:

> Apotex submits that while Merck was entitled to initiate its application, the fact that three jurisdictions have already considered the matter is relevant to the question of costs, particularly after the decision of the U.S. Circuit Court of Appeal came down in January of this year. Apotex suggests this should justify an increase in the scale from column three to column five as most of the preparation for the hearing took place following that decision. I do not agree that this should be a relevant consideration or that there is any reason to grant an increase in the scale. A cost award in this court should not depend on the outcome of foreign proceedings.
>
> Apotex is entitled to its costs, to be calculated on the ordinary scale. There will be no order as to costs either in favour of or against the respondent Minister of Health.

For obvious reasons, the Minister of Health took no part in this review.

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[2] SOR/93-133.
[3] (2005), 41 C.P.R. (4th) 35.

[4] Under cover of an affidavit of Andrew Brodkin, a partner at the firm Goodmans LLP, solicitors for Apotex, sworn the 7th of March, 2006, Apotex served and filed a Bill of Costs for fees and disbursements totalling $831,900.50. Mr. Brodkin attested:

> At bar, the parties were litigating over Apotex's access to the Canadian market in respect of its alendronate product. At the pertinent time, annual sales of alendronate generated approximately $130,000,000.00 a year in Canada.
>
> Accordingly, given the extraordinary amount at issues, [sic] the costs incurred by Apotex in responding to the proceedings were reasonable, and further, are costs that Merck ought reasonably to have expected Apotex to incur in order to adequately respond to these matters.

Before the Court, counsel for Merck urged that market size, and therefore the economics underlying the litigation, is simply not a relevant consideration on a costs assessment. I disagree. *Rule* 400(3) provides that, in exercising its discretion as to costs, the Court may consider a wide range of enumerated factors including "any other matter that it considers relevant." I regard market size as such a factor that should reasonably have led the Applicants herein to expect the underlying application to be pursued by Apotex with determination, leading to the incurring of substantial costs.

[5] The costs application was heard by assessment officer G.C. Robinson (the "assessment officer") over a period of two (2) days. On the 22nd of March, 2007, he issued a Certificate of Assessment assessing and allowing Apotex' costs in the amount of $605,575.78 "…for assessable services and disbursements which includes applicable GST, payable by the Merck Applicants to the Apotex Respondent." In support of his Certificate of Assessment, Officer Robinson issued extensive reasons.

[6] It is the assessment officer's award of costs that is here under review at the initiative of Merck. The grounds for review cited by Merck in its Notice of Motion are extensive and summarize the argument presented before the Court on the hearing of this review. They are set out in full in Annex I to these reasons.

GENERAL PRINCIPLES

[7] The standard of review on a review by the Court of an assessment by an assessment officer is well settled. In *Belemare v. Canada (Attorney General)*[4], Justice Desjardins, for the Court, wrote at paragraph 3:

> The applicable standard of review [in a matter such as that here before the Court] is not in dispute. In *Wilson v. Canada*…Dawson J., stated it in the following way:
>
> > "The Court's jurisdiction to intervene in the decision of an assessment officer <u>does not allow the Court to substitute its own view on the facts for that of the assessment officer</u>. As noted by Joyal, J., in *Harbour Brick Co. v. Canada*…, <u>intervention is limited to cases where an error in principle has occurred, or to where the amount assessed can be shown to be so unreasonable that an error in principle must have been the cause."</u>
> >
> > [emphasis in the original, citations omitted]

Thus, the standard of review to be applied to a decision of an assessment officer is twofold: first, whether the assessment officer committed an error in principle; and second, whether the amount assessed is so unreasonable that an error in principle must have been the cause.

[8] Counsel for Merck urged before the Court that, in reviewing disbursements for experts' fees, which, on the facts of this matter, represent a very substantial portion of

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[4] (2004), 327 N.R. 179 (F.C.A.).

Apotex' disbursements, a principle which he described as the "benchmark or band principle" can be derived from the authorities.

[9] In *IBM Canada Ltd. v. Xerox of Canada Ltd.*[5], the Court had before it affidavits from three (3) attorneys in the United States addressing essentially the same issue. The Court noted that an analysis of the deponents' statements of account revealed a "…wide disparity between the hours spent in legal research and in the hourly rates charged in the research…". Justice Urie, for the Federal Court of Canada, Appeal Division, wrote:

> …The sole question thus remaining to be settled in this appeal is whether or not the District Administrator proceeded on a wrong principle in allowing the disbursements made for the affidavits to which reference has previously been made without regard to the wide differences in the amount of the fees paid or, put [in] another way to allow such disbursements simply because those were the amounts in fact paid, apparently without question, by the respondents.
>
> In my opinion, the District Administrator erred in two ways. Firstly, while apparently accepting the essentiality of the affidavits, he did not examine the quality of the proof submitted to him in support of the submission that each disbursement itself was justified in the sense that it was one which could be chargeable to an adverse party as being reasonable, on a taxation of a party and party bill of costs. The nature of the proof submitted to him in this case falls substantially short of that which should be submitted to justify or explain the necessity for the considerable variations in expenditure of time and fees charged (in one case four lawyers were involved each with different billing rates).
>
> Secondly, on the face of the inadequate proof here submitted it was clear that the legal problem with which each deponent was confronted was identical, the only differences being in the ascertainment of how the United States federal courts in each of several districts applied the same provisions of the United States Code. Notwithstanding this the taxing officer allowed widely different sums for their respective opinions. In my view, since there was a common denominator in the nature of the opinions sought, as a matter of principle there ought to be at least some relationship between the fees allowed in payment for them, if fairness is to be accorded the adverse party liable for the payment. …

[5] [1977] 1 F.C. 181 (F.C.A.).

[10] Counsel for Merck urged that this principle of application of a benchmark or band is directly applicable here, in particular with respect to Apotex' expert Dr. Robert Langer, even though his expertise was different from that of other experts relied upon by Apotex.

[11] In *Apotex Inc. v. Syntex Pharmaceuticals International Ltd. et al.*[6], Justice Reed wrote at paragraphs 20 and 21 of her reasons:

> …
> In addition, while the amounts paid by the plaintiff to Drs. Robinson, De Luca and Carstensen were in the same "ball park", Dr. Langer's charges appear to be outrageous. Dr. Langer is pre-eminent in his field and he is an excellent witness – he presents his evidence with confidence and with great simplicity, without becoming obviously adversarial. He was the plaintiff's main expert witness at the trial. At the same time, the costs for which a defendant will be required to indemnify an opposing party are the reasonable expenses of the litigation. If a party chooses to hire a "Cadillac" of experts, the unsuccessful opposing party will not be responsible to compensate for extravagance; …
>
> I am not prepared to instruct the assessment officer in the manner the plaintiff seeks. In the context of the present case, four experts were excessive. Three could be justified (two as witnesses and one as an advisor). The fact that the defendants used only one expert witness is not significant. This could accord with a decision by the defendants not to defend the action vigorously at trial. It could result from difficulty finding experts to support the defendants' position. Only reasonable and properly documented experts' fees should be allowed. In addition, I consider an hourly or daily rate above that charged by Dr. Robinson to be excessive.
> …
>
> [citation omitted]

The Dr. Langer to whom Justice Reed refers is the same Dr. Langer who provided an expert affidavit on behalf of Apotex in this matter.

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[6] (1999), 2 C.P.R. (4th) 368 (F.C.T.D.).

[12] The benchmark or band principle is again reflected in a recent decision of Madam Justice Snider in *Laboratoires Servier v. Apotex Inc.*[7] where she wrote at paragraphs 16 and 17 of her reasons:

> …The Plaintiffs also questioned the expert fee for David Matthew (the UK expert).
>
> In my view, the Defendants may have gone beyond a reasonable level in retaining their experts for these motions. The Defendants should, therefore, bear some of the costs of those experts. The expert fee paid to David Matthew was $97,907.58 CAD… . I agree with the Plaintiffs that this expert fee is disproportionately high in comparison to the expert fee paid to Aidan Hollis, Stephen Cole, Phillip Williams and Des Threlfall. The Plaintiffs should not have to pay for the Defendants' "Cadillac" expert. …
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> …
>
> [emphasis added]

[13] For the foregoing conclusion, Justice Snider cites the quotation from Justice Reed above.

[14] I will return to the benchmark or band principle in what follows regarding Apotex' claim for disbursements in respect of experts.

GROUNDS FOR REVIEW OF THE COSTS AWARD

[15] In what follows, I will, with some exceptions, follow the order of the items disputed by the Applicants, as quoted in Annex I to these reasons.

The Expert Disbursements

[16] Merck relied on the affidavits of two (2) experts in the hearing of the underlying application that took place before Justice Mosley. By contrast, Apotex relied on the

[7] 2007 FC 344, March 30, 2007.

affidavits of seven (7) experts although the expertise of one, and perhaps two, of the Apotex "experts" was questionable.[8]

[17] Justice Mosley commented on the expert evidence before him in the following paragraphs of his reasons:

> [40] At the outset of the hearing of this application, Merck renewed a motion to strike Apotex affidavits. An initial motion to strike the Tassone, Weissburg and Mazess affidavits was decided by Prothonotary Lafrenière on June 21, 2004. He ruled that the relief sought was premature, in the absence of special circumstances, and that evidentiary determinations should be left to the applications judge. The motion was dismissed without prejudice to Merck to seek leave to file reply evidence. Leave to file reply evidence was granted in a further order by the Prothonotary on July 13, 2004 resulting in the filing of the Devlin affidavit described above.
>
> [41] Merck filed a fresh motion on April 6, 2005 seeking to have struck, in addition to the three affidavits addressed in the June 2004 motion, the affidavits of Drs. Langer and Mayersohn. I gave an oral ruling on the motion before proceeding to hear the merits of the application.
>
> [42] Merck argued that the impugned affidavit evidence should not be admitted primarily on the grounds that:
>
> > 1. the Apotex affiants were not properly qualified to give opinion evidence in the several areas of knowledge to which they deposed.
> > 2. The evidence given was not relevant to the determination of the issues that are before the court in this NOC proceeding.
>
> [43] Applying the principles enunciated by the Supreme Court of Canada in *R. v. Mohan*… [1994] 2 S.C.R. 9 at para. 17, namely: (a) relevance; (b) necessity in assisting the trier of fact; (c) the absence of any exclusionary rule; and (d) a properly qualified expert, I concluded that the opinion evidence proffered by Apotex was admissible.
>
> [44] Relevance is a threshold requirement for any evidence. Logically relevant evidence may be excluded if its probative value is overborne by its prejudicial effect, if the time required is not commensurate with its value or if it can influence the trier of fact out of proportion to its reliability (*Mohan* at para. 18).
>
> [45] Expert evidence, to be necessary, must likely be outside the experience and knowledge of a judge or jury and must be assessed in light of its potential to distort the fact-finding process. Necessity should

[8] See paragraph 37 of Justice Mosley's reasons for a brief summary of the qualifications of each of the "expert" affiants.

not be judged by too strict a standard. Expert evidence can be excluded if it falls afoul of an exclusionary rule of evidence separate and apart from the opinion rule itself, such as the hearsay rule (*Mohan* at paras. 21-23).

[46] There are no specific credentials that potential experts must have in order to be admitted as experts by the Court. Opinion evidence may be given by a witness "who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify" (*Mohan* at para. 27). This echoes statements by the court in *R. v. Marquard*,… [1993] 4 S.C.R. 223 at para. 35, citing *R. v. Beland*,… [1987] 2 S.C.R. 398 at para 16, holding that "[t]he only requirement…is that the expert witness possesses special knowledge and experience going beyond that of the trier of fact".

[47] As Sopinka, Lederman and Bryant state in *The Law of Evidence in Canada* (1992) at 536-7,

> The admissibility of [expert] evidence does not depend upon the means by which that skill was acquired. As long as the court is satisfied that the witness is sufficiently experienced in the subject matter at issue, the court will not be concerned with whether his or her skill was derived from specific studies or by practical training, although that may affect the weight to be given to the evidence.

[48] With respect to Drs. Langer and Mayersohn, Merck did not object to these affidavits when it brought its earlier motion. It contends that the weakness of their qualifications relevant to the issues in this proceeding only became apparent on cross-examination. Merck now objects to the reception of their evidence as they are not medical doctors and argues that the issues upon which they were asked to provide expert opinions, as characterized by Merck, relate solely to the medical fields of gastroenterology and endocrinology.

[49] I do not agree with Merck's contention that these two witnesses were asked to comment on matters beyond their expertise. Dr. Langer's relevant and very impressive qualifications are as an expert with respect to pharmaceutical technology involving the formulation of drugs, including bisphosphonate drugs. His opinion is tendered with respect to formulation issues and thus does not exceed his expertise in pharmaceutics.

[50] Dr. Mayersohn's qualifications are as an expert in pharmacokinetics, biopharmaceutics and pharmaceutics. His testimony about the equivalence of 70 and 80 mg of alendronate due to the low bioavailability of the drug was never questioned on cross-examination. Apotex objected to Merck questioning this evidence in oral argument as contravening the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L.). I was satisfied the evidence was highly relevant, uncontradicted and admissible.

[51] Dr. Mazess's affidavit primarily describes events surrounding the publication of his views on alendronate in the newsletter *Lunar News* produced by the corporation he had founded to

manufacture and distribute bone densitometry equipment used in the diagnosis and treatment of skeletal disease. Merck objects to Dr. Mazess's being permitted to comment on the evidence of Drs. Papapoulos and Fennerty as he is not a physician. It also objects to the relevance of his testimony about meetings and correspondence between Dr. Mazess and Merck representatives concerning dosing regimens for bisphosphonates. Finally, it submits that his writings in *Lunar News* speak for themselves and he should not be explaining their meaning.

[52] Dr. Mazess, through his academic and business careers, has gained considerable knowledge about bone diseases, particularly osteoporosis. While he is not qualified to treat patients, that does not preclude him, in my view, from commenting on treatment regimes for bone disorders. It is apparent from the record that his utterances in the *Lunar News* carried considerable weight in the pharmaceutical and clinical worlds. Drs Papapoulos and Fennerty comment at length on his writings in their evidence. There was ample reason, in my view, to think that Dr. Mazess' comments on their evidence would be helpful in determining the issues in this matter.

[53] With regard to Dr. Mazess' evidence about correspondence and meetings with Merck staff, I was satisfied that it was relevant and admissible. Merck is correct that, as possible prior art references, his writings in *Lunar News* must speak for themselves. However, I was also satisfied that he could properly give evidence as to the background and context of those writings. Accordingly, his evidence was admissible subject to argument about its weight.

[54] The Weissburg affidavit does not contain expert opinion evidence but rather describes events and hearsay statements made by others. Apotex relies upon those statements not for their truth but for the fact they were made. As determined by the Supreme Court of Canada in *R. v. Khan*,… [1990] 2 S.C.R. 531 and subsequently applied to civil cases by a number of courts, hearsay is not inadmissible if found to be credible and reliable:… I allowed this evidence for the limited purpose of establishing that certain events occurred and statements were made and not for the truth of the contents of those statements.

[55] Attached to the Tassone affidavit are copies of documents filed by the defendant in the U.S. District Court proceedings. Apotex' object in submitting this material was, in part, to refute Drs. Papapoulos' and Fennerty's evidence that the prior art references included in the NOA would not have been relied upon to demonstrate the safety of high doses of alendronate in osteoporosis patients. Included in the Tassone material is Merck's submission to the United States Federal Drug Administration ("FDA") for approval of the 70 mg dosage of FOSAMAX®, which indicates that Merck relied upon the same prior art references to show that a dose of that size would be safe and effective.

…

[64] Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation: *Whitehouse v. Jordan* [1981] 1 All ER 267 (H.L.) at 276. I had little difficulty coming to the

> conclusion in reading the evidence in this case that where there was a conflict between the evidence of the Merck witnesses and the Apotex witnesses, I preferred the latter. While Dr. Papapoulos is eminently well qualified in his field, I found his evidence, as it was characterized by Justice Jacob in the UK proceedings, to be "rigid" and "extreme" when he was confronted on cross-examination with prior art references inconsistent with Merck's position. As for Dr. Fennerty, it was apparent from his truculence in answering questions on cross-examination that he had crossed the line between independence and advocacy. I accorded little weight to his evidence.
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> …
>
> [110] As indicated above, I preferred the Apotex witnesses' evidence. …
>
> [some citations omitted]

Thus, Justice Mosley found the expert evidence proffered by Apotex to be admissible and to be preferable to that of Merck's expert witnesses in circumstances where there was a conflict between the two sides. Merck's expert witnesses Compston, Mazess, Weissburg, Mayersohn and Markowitz, according to the material that was before the assessment officer and the Court, expended an average of sixty-three (63) hours to provide their evidence and were compensated at hourly rates between $354.00 and $781.00 for an average rate of $484.00. By contrast, Dr. Langer, together with his associate Dr. Lipp, claimed to have devoted over four hundred fifty (450) hours to the preparation of Dr. Langer's expert affidavit and billed at the rate of $1,389.00 per hour for Dr. Langer and $266.24 for Dr. Lipp. Not surprisingly, counsel for Merck took particular exception to Apotex' disbursement claim for Dr. Langer and his associate.

[18] In the Annex hereto, counsel for Merck comments in a general way on the award by the assessment officer in respect of expert disbursements in paragraph 8, subparagraphs 9(i) to (iii) and paragraph 15.

[19] In general, in both written submissions provided to the Court and counsel's submissions at hearing before me, Merck alleges that witness fee disbursements claimed by Apotex are unsupported and are not reasonable. In summary, at paragraph 47 of counsel's written submissions, the following appears:

> In the present case, the Assessment Officer allowed Apotex to recover more than $410,000 for the fees of <u>seven witnesses and one non-witness</u> without properly considering the reasonableness of any of those disbursements. In addition, the Assessment Officer erroneously relied on the Apotex Counsel's affidavit and failed to address the considerable overlap in the evidence filed by Apotex. As such, the Applicants submit that the Costs Award in respect of the witness fee disbursements should be set aside.
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> [emphasis in original]

[20] The assessment officer wrote at paragraph 65 of his reasons:

> [65] The Apotex Respondent has claimed $26,217.14 for the expert fees of Juliet Compston, $16,612.42 for the expert fees of Richard Mazess, $37,214.62 for the expert fees of David Markowitz and $64,027.27 for the expert fees of Michael Mayersohn. I have corrected the invoice total for David Markowitz to $38,214.62 since it appears to me that the Apotex Respondent has made a simple addition error. The Merck Applicants have raised a concern that the invoice amounts for Michael Mayersohn do not match the total invoice amount the Apotex Respondent is claiming for this specific disbursement which, it submits, justifies a reduction of these specific expert fees. Within Tab 2 of the Affidavit of Andrew R. Brodkin, sworn March 7, 2006, I found a law firm invoice from Ivor M. Hughes dated June 9, 2004 which contained a disbursement amount of $23,772.20 in Canadian dollars for "Professional Fees (Michael Mayersohn)." As mentioned by the Apotex Respondent in paragraph 58 of its Reply Submissions, "the invoices provided by Apotex were those in its possession at the time that the supporting material could be delivered to the Applicants in respect of this assessment." In my opinion, this is a reasonable explanation and I exercise my discretion and accepted [sic] these submissions of the Apotex Respondent. In addition, I have corrected and reduced the invoice total for to [sic] Michael Mayersohn to $63,997.27 since it appears to me that the Apotex Respondent has made an addition error when totalling all of the associated invoices.

[21] I will now turn to a consideration of the witness fee disbursements in respect of each of Apotex' expert affiants.

Dr. David Weissburg

[22] In his reasons in support of his assessment of costs, the assessment officer wrote at paragraphs 63 and 64:

> [63] The Apotex Respondent has claimed $28,236.46 for the expert fees of Dr. David Weissburg. I repeat some of the Merck Applicants' concerns raised above in paragraph [16] that the Affidavit of David Weissburg, sworn May 12, 2004, was only five pages in length. The Merck Applicants also refer to the Reasons for Order and Order dated May 26, 2005 in this proceeding which noted that the "affidavit does not contain expert opinion but rather describes events and hearsay statements made by others." In addition, the Merck Applicants submit that the Dr. Weissburg invoices do not contain many details regarding the "consulting time" spent by this specific expert. The Merck Applicants submit in paragraph 89 of its [sic] Written Submissions of the Applicants that this "type" of "bald statement" is insufficient evidence to justify costs for expert fees" and refers [sic] to *AlliedSignal*, *supra*, at paragraph 47 which states:
>
>> [47]…It is the requirement that sufficient or reasonable proof be lead to satisfy the Taxing Officer that expenses were incurred. It all becomes then a question of degree of evidence. A [bald] statement of the kind singled out by Mr. Justice Teitelbaum in the Diversified case and also found in the F-C Research Institute case, would not be sufficient to satisfy a Taxing Officer. Likewise, absolute and detailed evidence is not an indispensable requirement for an award to be made. As my colleague Stinson, Taxing Officer, said on numerous occasions the more thorough and complete the evidence is, the less the result will be bound up into the Taxing Officer's discretion, but that does not mean a Taxing Officer is refrained from resorting to his discretion to make an award in the absence of cogent evidence.
>
> [64] As determined in paragraph [18] above, the Federal Court allowed the Affidavit of David Weissburg to be filed for limited purposes notwithstanding the fact that the Merck Applicants filed motions to have this and several other Apotex Respondent's affidavits struck from the file. The invoices from David Weissburg contained in Exhibit C to the Affidavit of Andrew R. Brodkin, sworn on March 7, 2006, indicate a number of time periods (i.e.:- "14FEB04 - 31MAY04"), specific hours for each time

> period that David Weissburg claimed he had worked on this proceeding and, also included, were a number of expenses [sic] amounts within these invoices. Although the invoices do not contain "absolute and detailed evidence" as described above in *AlliedSignal*, *supra*, outlined in this paragraph, I am satisfied that the Apotex Respondent incurred these expenses. For these reasons and relying on the sentiment expressed in *Dableh*, supra, outlined above in paragraph [62], I exercise my discretion and allow the $28,236.46 plus associated GST for this disbursement.

The reference in the foregoing quotation to "*AlliedSignal*" is to *AlliedSignal Inc. v. Dupont Canada Inc. et al.*[9]. The reference to "*Dableh*" is to *Dableh v. Ontario Hydro*[10].

[23] Despite the urgings of counsel for Merck that the assessment officer erred in principle in allowing this disbursement by failing to properly consider the reasonableness of this expense and by allowing Apotex to recover this disbursement in the absence of proper evidence of reasonableness, I reach a different conclusion. The assessment officer's determination to allow the disbursement in respect of the claim by Dr. Weissburg accords with the principles governing the exercise of his discretion and certainly was not so unreasonable "…that an error in principle must have been the cause."

Dr. Michael Mayersohn

[24] For ease of reference, I repeat here Justice Mosley's comments at paragraph 50 of his reasons:

> [50] Dr. Mayersohn's qualifications are as an expert in pharmacokinetics, biopharmaceutics and pharmaceutics. His testimony about the equivalence of 70 and 80 mg of alendronate due to the low bioavailability of the drug was never questioned on cross-examination. Apotex objected to Merck questioning this evidence in oral argument as

[9] (1998), 81 C.P.R. (3d) 129 (F.C.T.D.).
[10] [1994] F.C.J. No. 1810, November 2, 1994.

> contravening the rule in *Browne v. Dunn*… . I was satisfied the evidence was highly relevant, uncontradicted and admissible.
>
> [citation omitted, emphasis]

[25] Counsel for Merck urged that the assessment officer erred in principle in accepting the disbursement claim in respect of Dr. Mayersohn which, he alleged, was partially unsupported by invoices. The assessment officer responded to this concern on behalf of Merck by noting that he had uncovered an invoice, not previously identified, that is referred to in the quotation in paragraph 20 above. While the invoice discovered does not amount to a complete response to counsel's submission, it is a very substantial response and it is entirely possible that the difference remaining might be attributable to conversion rates between Canadian and U.S. currencies.

[26] I am satisfied that the assessment officer made no error of principle or erred in the assessment of the disbursement in respect of Dr. Mayersohn such that the assessment is so unreasonable that an error in principle must have been the cause.

Professor Compston, Dr. Mazess and Dr. Markowitz

[27] The assessment officer allowed Apotex to recover disbursements of $26,217.14 in respect of Professor Compston, $16,612.42 in respect of Dr. Mazess and $38,214.62 in respect of Dr. Markowitz. He concluded at paragraph 67 of his reasons:

> …
> Although the Merck Applicants have raised a number of novel arguments regarding the lack of reasonableness of the Apotex Respondent's expert fees, I have given them little weight. I have preferred to rely on the fact that the Federal Court has allowed specific evidence of the Apotex Respondent to be filed and its stated reliance on that evidence as outlined

> within paragraph 64 [earlier quoted here] of the Reasons for Order and Order dated May 26, 2005 in this proceeding… .

[28] Once again I conclude that the assessment officer's determinations in this regard were entirely open to him in the exercise of his discretion.

Franco A. Tassone

[29] Mr. Tassone and his role are described in paragraph 37 of Justice Mosley's reasons as:

> …an employee of Parcels Inc., the copy service for the United States District Court for the District of Delaware. He was asked to obtain copies of publicly available documents from the U.S. trial in *Merck & Co., Inc. v. Teva Pharmaceuticals USA, Inc.*, *supra* and attached them to his affidavit.

As such, it is hard to conclude that he qualified as an expert.

[30] The assessment officer wrote at paragraph 51 of his reasons:

> The Apotex Respondent has claimed $3,501.53 in its Bill of Costs associated with the expert fees of Franco Tassone in addition to the assessable counsel fees which I determined and allowed in paragraphs [13] to [15] above. The Merck Applicants submit in paragraph 100 of its [sic] Written Submissions that "expert fees are not recoverable where the trial judge finds the report to be "unnecessary or the contents useless." In support of this submission, the Merck Applicants refer to *John A. Carruthers v. The Queen*,… which states:
>
>> …In cases in which experts are called by both parties and they give conflicting opinions, the Court has to choose the opinion of one of the experts as preferable to the other, unless the Court chooses to reject both opinions and substitute its own based on the evidence, but the fact that one expert's report is rejected, or not accepted in full, would not justify non-payment of his fees for the preparation of same, unless the Court finds that the requisitioning of such a report was entirely unnecessary or the contents useless. …
>
> Since the Federal Court ruled that most of the evidence attached to the Affidavit of Frank Tassone was "unnecessary" and that "most of it was inadmissible," it is my opinion that the Apotex Respondent should not be

> entitled to claim these expert fees in their entirety. For these reasons and considering the proposition expressed in *Grace M. Carlile*, *supra*, that "a result of zero dollars would be absurd", I exercise my discretion and allow a reduced amount of $500.00 for the associated expert fees of Frank Tassone.
>
> [citation omitted]

[31] The assessment officer himself noted in paragraph [12] of his reasons that, at paragraphs [60] and [61] of his reasons, Justice Mosley found that it was improper for Apotex to use the Tassone affidavit to submit evidence, that Apotex made no real effort to explain how most of the material annexed to that affidavit would be relevant and admissible and that it was unnecessary and excessive to "dump" the U.S. Trial evidence into the record by the use of the Tassone affidavit. He ruled that most of the material under cover of the Tassone affidavit was inadmissible and he strongly discouraged "any repetition of this practice".

[32] In light of Justice Mosley's comments I consider the assessment officer's reliance on *Carlile v. Canada (Minister of National Revenue)*[11] in this context, a decision of a fellow assessment officer, to be ill-founded and the resulting amount allowed for the disbursement to Mr. Tassone to be so unreasonable that an error in principle must have been the cause. In the result, I would reduce the assessed costs by $500.00 to nil on this account.

Dr. Robert S. Langer and his associate Dr. Michael Lipp

[33] Dr. Lipp was unknown to Justice Mosley and his role in support of Dr. Langer was equally unknown to Justice Mosley and indeed to counsel for Merck until Apotex' Bill of Costs was delivered. He filed no expert affidavit. Inevitably, he was not cross-examined.

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[11] [1997] F.C.J. No. 885, May 8, 1997.

[34] As earlier noted in these reasons, the claimed hours by Dr. Langer toward the preparation of his affidavit far exceeded the claimed hours of any other of Apotex' experts and were exceeded only by the claimed hours of his associate Dr. Lipp. Further, Dr.

Langer's claimed an hourly rate that far exceeded that of any other of Apotex' experts while, by contrast, Dr. Lipp's claimed rate was lower than any of the rates of those who themselves filed expert affidavits.

[35] The assessment officer wrote at some length in his reasons regarding the claim for expert fees for Drs. Langer and Lipp. The relevant paragraphs from the assessment officer's reasons, paragraphs 52 to 62, are set out in full in Annex II to these reasons. It is of note that while the assessment officer notes "…the Merck Applicants' concerns with regard to the number of hours both Dr. Langer and Dr. Lipp spent on preparing one expert affidavit…", the assessment officer essentially does not address this issue. While he reduces Dr, Langer's hourly rate based on the "benchmark or band principle" and on a benchmark other than that advocated by the Applicants, he provides no equivalent analysis and reduction, or reason for rejecting a reduction, in relation to the number of hours devoted to research and development of Dr. Langer's affidavit. The exception to what I have just noted is contained in paragraph [55] of the assessment officer's reasons quoted in Annex II where he rejects the Applicants' proposed reduction of the Langer and Lipp fees to $19,600.00 on the basis that he is "…uncomfortable with this suggestion for the simple reason that the proposal seems to be a very arbitrary method of determining the expert fees…".

[36] With great respect, I conclude that the arbitrary rejection by the assessment officer of a reduction in the number of hours devoted to the production of Dr. Langer's expert affidavit by Dr. Langer himself and Dr. Lipp constitutes an error in principle or an element of his assessment that "…is so unreasonable that an error in principle must have been the cause".

[37] Substituting my discretion for that of the assessment officer, and applying the "benchmark or band principle" to the number of hours claimed in respect of Drs. Langer and Lipp at the hourly rates adopted by the assessment officer, and adopting the benchmark or band proposed by Merck, I conclude that the adjusted disbursement allowed by the assessment officer in respect of Drs. Langer and Lipp should be further reduced from $237,696.00 plus associated GST to $31,785.00. This represents an allocation of (thirty-one) 31 hours to Dr. Langer and thirty-two (32) hours to Dr. Lipp, the approximate ratio of their claimed hours, and representing a total of sixty-three (63) hours, which is the average number of hours claimed for Apotex' other experts, at rates of $695.00 and $320.00 respectively, the rates adopted by the assessment officer. The net reduction of assessable disbursements by reason of this adjustment is, according to my calculations, $205,911.00.

[38] While other bases of adjustment with respect to the disbursement for fees of Drs. Langer and Lipp were urged on behalf of the Applicants, I am satisfied that no reviewable error is evident on the face of the reasons of the assessment officer that would justify further adjustment.

Prior Art Disbursements

[39] Counsel for Merck urged that the assessment officer erred in allowing Apotex to recover $7,205.51 in disbursements related to the collection of prior art. Merck urged that the assessment officer ignored Merck's unchallenged evidence that this was an unreasonable duplication of costs.

[40] The assessment officer summarizes the Applicants' submissions in this regard at paragraph [37] of his reasons and the Apotex response at paragraph [38] of those reasons. In paragraph [39], the assessment officer cites the wording of subsection 1(4) of Tariff B of the *Federal Courts Rules* and concludes in this regard at paragraph [40] of his reasons, as follows:

> [40] In my opinion, it is almost trite to note that the terms and conditions of that settlement [settlement of an earlier proceeding in respect of the drug "Fosamax®"] have not been presented by either party in opposition to or in support of the Apotex Respondent's Bill of Costs. As well, I note that the Apotex Respondent has complied with section 1(4) of Tariff B of the *Federal Courts Rules* and, as I outlined in the first sentence in this paragraph with regards to the terms and conditions of a previous settlement, the evidence was never put before me. For these reasons, I exercise my discretion and allow the $7,205.51 plus GST for this specific disbursement.

[41] I am satisfied that the assessment officer made no reviewable error in deciding as he did in this regard.

Travel Disbursements

[42] At paragraph 26 of his reasons, the assessment officer noted under the heading "*Entitlement to Travel Disbursements*":

> The Apotex Respondent has claimed $81,896.48 in various travel disbursements. The Merck Applicants have objected to this claim as unreasonable. It is my opinion that those same objections were part of

> their submissions in item 14 and item 24, which I have dealt with above within paragraphs [6] to [12] inclusive under the sub-headings of *Entitlement to Counsel Fees for Second and Third Counsel* and *Entitlement to Counsel Fees for Travel*. Basically, the Merck Applicants have submitted that a judicial direction or Order of the Federal Court must be issued before the assessment officer has the authority to allow the disbursements claimed in this proceeding for the travel expenses associated with second and third counsel. For these reasons, the Merck Applicants have submitted that the Apotex Respondent's travel disbursements should be reduced to $35,737.74. I am assuming that the Merck Applicants' reduction for travel costs from $82,896.48 to $35,737.74 was proposed to reflect the costs of the travel costs of a single counsel attending at all of the cross-examinations.

The discrepancy between the amount claimed in the first line of the above quotation and in the third to last line is of no consequence.

[43] After a brief analysis of the positions of the parties on the above, the assessment officer concluded at paragraph 30 of his reasons as follows:

> [30] Regarding the remaining travel disbursements, it is appropriate that I turn to the decision in *Grace M. Carlile v. Her Majesty the Queen*,…:
>
> > …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…: [in] Youssef Hanna Dableh v. Ontario Hydro…[cite]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… . I have considered disbursements in these Bills of Costs in a manner consistent with these various decisions. Further, Phipson on Evidence,…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.
>
> [emphasis added in the assessment officer's reasons]

> For the reasons I have outlined above and considering the sentiment expressed in *Grace M. Carlile, supra*, I exercise my discretion to reduce and allow the remaining travel disbursements of $75,851.89 plus applicable GST. For greater clarification, the total travel costs of $79,881.62, which includes the amount of $4,029.73 in paragraph [30] above, are allowed for all of the disbursements associated with all of the cross-examinations for this proceeding.

[44] Despite the urgings of counsel for Merck that the assessment officer erred in principle in allowing the amount that he did in respect of travel disbursements, I am satisfied that the assessment officer's conclusion accords with the principles governing the exercise of his discretion and certainly was not so unreasonable "…that an error in principle must have been the cause."

Photocopy Disbursements

[45] Apotex claimed $36,647.49 for photocopy disbursements associated with this proceeding. The assessment officer examined this claim at some length in paragraphs [31] to [36] of his reasons. Notwithstanding the voluminous nature of the Court files in this regard, he allowed the claim at $10,000.00 after examining the files in the Toronto Registry where the main file of documents in this matter is located. He based this conclusion on photocopy disbursements for 5,000 pages multiplied by eight (8) copies of all documentation and by a factor of $0.25 per page.

[46] While this issue is raised among those set out in Annex I to these reasons, see paragraph 18 thereof, the issue was not addressed in the Applicants' memorandum and was essentially withdrawn in submissions before me.

[47] I find no basis to interfere with the decision of the assessment officer in this regard.

Other Disbursements

[48] Under this general heading, in an annex to the Applicants' Written Submissions on this review, the Applicants identified the following disbursements:

Item	Amount Claimed	Amount Allowed
Computer searches	$ 731.32	$ 731.32
Computer time charges	$ 3,036.26	$ 3,036.26
Courier/postage	$ 4,066.91	$ 4,066.91
Court Reporter/Transcripts	$11,490.64	$11,490.64
Meetings	$ 3,360.98	$ 3,360.98
Telephone charges	$ 1,890.96	$ 1,890.96
Telecopy charges	$ 676.69	$ 676.69
Total	$25,247.66	$25,247.66

[49] Counsel for the Applicants urged, among other things, that the evidence in support of the foregoing alleged disbursements was simply inadequate to support these amounts as essential to the conduct of this proceeding.

[50] The assessment officer concluded:

> [69]…this proceeding was commenced on May 29, 2003 and a decision was rendered almost two years later. Many of the attached invoices contained within the exhibits to the Affidavit of Andrew R. Brodkin, sworn March 7, 2006, [in support of Apotex' claim for costs] do not contain specific detail regarding these specific disbursements. However, I have considered the factors to advance litigation such as the case at bar which include the various city and country locations for many of its expert witnesses, the efforts required to assemble and forward pertinent information for the experts' respective consideration, the various methods required to have the pertinent material before the experts, researching materials and evidence from various sources, the necessary meetings, preliminary and follow-up telephone…calls and related correspondence. It seems reasonable to me considering the factors that I have outlined that, over the course of two years, the Apotex Respondent would incur significant expenses to advance this litigation above those normally associated with the overhead expenses of its law office. For these reasons, it is my opinion that the disbursement amounts for computer searches, computer time charges, courier/postage, court reporter/transcripts, meetings, telephone charges and telecopy charges appear to be reasonable. For these reasons, I exercise my discretion and allow a total of $25,247.66 plus applicable GST for these specific disbursements.

Based upon the material before the Court and the submissions of counsel at hearing, I find no reviewable error in the foregoing conclusion.

A RECOMMENDATION

[51] In *Stanley M. Smith et al. v. Her Majesty the Queen*[12], in brief reasons relating to "appeals" in two (2) actions from the decision of a Taxing Officer, the then Associate Chief Justice wrote:

> …I should underline here that the proper compensation for expert witnesses is invariably best dealt with by the Trial Judge and wherever possible, appeals from decisions such as these should be returned to the Judge who presided over the trial.

This review of a taxation of costs, though not following a trial, focussed primarily on disbursements for the fees of expert witnesses. I endorse the Associate Chief Justice's

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[12] [1985] 1 C.T.C. 327 (FCTD).

quoted statement in the context of a Patented Medicines Notice Of Compliance proceeding where the presiding judge will invariably develop a stronger familiarity and appreciation with the affidavit evidence and the cross-examination on affidavit evidence of expert witnesses than, for example, I was able to do in this matter. I benefited substantially from the commentary in the reasons of Justice Mosley, who presided over the underlying proceeding, that were directed to his appreciation of the various experts who provided opinion evidence in the matter. However, I remain convinced that a presiding judge could bring substantially greater insight than could a judge such as myself, who approached the review of the taxation of costs with no knowledge of the file.

COSTS

[52] In *Montreal Fast Print (1975) Ltd. v. Polylok Corporation*[13], Justice Cattanach, in the context of an Order as to costs and an "appeal" of that Order, wrote at page 210:

> In accordance with the discretion I have I shall follow the practice as I understand has prevailed in this court and there shall be no award of costs for or against either party upon this review of the certificate of the taxing officer.

[53] I adopt the "practice" endorsed by Justice Cattanach. Finality to litigation should be encouraged. The hearing of this PMNOC proceeding took place over three (3) days. The hearing before the assessment officer took two (2) days. The hearing before me took another full day. In sum, it has taken as long to settle the issue of costs, and I acknowledge

[13] (1984), 1 C.P.R. (3d) 204 (F.C.T.D.).

that that issue may not yet be finally settled, as it took to adjudicate on the substance of the PMNOC. Such should not be the case. The assessment officer evidently laboured long and hard over this assessment. He wrote extensive reasons. What remained to be decided should have been settled between the parties.

[54] There will be no Order as to costs.

CONCLUSION

[55] In accordance with the foregoing reasons, this review of an assessment of costs will be allowed in part in favour of Merck. The Certificate of Assessment issued herein by the assessment officer will be adjusted to reduce the assessment allowed by $206,411.00 with the result that the Apotex Respondent's Bill of Costs will be assessed and allowed in the amount of $384,686.01 for assessable services and disbursements which includes applicable GST, payable by Merck to the Apotex Respondent.

"Frederick E. Gibson"
JUDGE

Ottawa, Ontario
October 9, 2007

ANNEX I

(paragraph [15])

…

Grounds for Review of the Costs Award

The Expert Disbursements

8. In the Costs Award, the Assessment Officer erred in allowing Apotex to recover a total of $411,473.91 in respect of the expert fees incurred by eight Apotex witnesses, some of which were unsupported by the evidence, all of which were unreasonable.

9. The Assessment Officer also committed an error of principle by misapprehending the legal test for determining the "reasonableness" of these fees, and by ignoring the relevant guiding jurisprudence of this Court, including:

    (i) The Assessment Officer ordered Merck to pay Apotex expert fees of $411,473.91, an amount more than 12 times higher than the total counsel fees taxed at the ordinary Tariff rate (as ordered by Justice Mosley). Awarding this amount of expert fees is not only punitive, but unprecedented in a *PM(NOC)* proceeding and tantamount to issuing Apotex a "blank cheque award". This Court has expressed concern with escalating expert fees, and has issued directions that these fees should not exceed those allowed for lead counsel in preparing and arguing the case;

    (ii) The Assessment Officer awarded Apotex its costs for eight experts, even though this Court has declared this to be an "excessive" number

of expert witnesses in a *PM(NOC)* proceeding. Many of these experts were asked to address the same issues resulting in unnecessary duplication in the material filed;

(iii) In awarding Apotex expert fees in the amount of $411,473.91, the Assessment Officer has effectively made a punitive cost award that is entirely unjustified by the decision on the merits. Justice Mosley determined that the key issue at stake in this litigation concerned a therapeutic treatment protocol, namely the once-weekly administration of the 70 mg dose to avoid the side-effects commonly associated with daily doses of FOSAMAX®. Clearly, Justice Mosley recognized that this was not an overly complex case, as he explicitly rejected Apotex's request for costs assessed at column five and awarded costs "on the ordinary scale";

(iv) Many of Apotex's experts, including Dr. Langer, were involved in previous litigation regarding the drug FOSAMAX® and, as such, were already well-acquainted with the prior art and issues at play in this proceeding; and

(v) The Assessment Officer failed to properly consider and weigh the actual "reasonableness" of the expert fees. In particular, he placed inordinate focus on the fact that Apotex's evidence was accepted for filing, and preferred by Justice Mosley, as justification for making the Costs Award.

10. The Assessment Officer erred in allowing Apotex to recover $155,680.00 in respect of the expert fees incurred by Dr. Langer. Dr. Langer's expert fees were more than seven times higher than any of the other expert fees at issue. Merck should not be required to reimburse Apotex for hiring a "Cadillac" expert. The Assessment Officer failed to properly assess the reasonableness of Dr. Langer's fees in view of the fees and hours billed by other experts in the proceeding for comparable work, the role his evidence played with respect to the key issues at stake in the litigation, his involvement in related Canadian litigation, and the inadequate documentation proffered to support the claimed fees.

11. The Assessment Officer further erred in allowing Apotex to recover an additional $82,016.00 in respect of the expert fees incurred by Dr. Langer's assistant, Dr. Lipp. The Assessment Officer failed to properly consider that Dr. Lipp did not file an affidavit in this proceeding, yet charged the second highest amount of expert fees (after Dr. Langer). In fact, the fees incurred by Dr. Lipp in assisting Dr. Langer were anywhere from $20,000.00 to $40,000.00 more than experts who filed comparable affidavit evidence in this proceeding. Further or in the alternative, the Assessment Officer failed to consider the reasonableness of Dr. Lipp's fees in view of the inordinately high amount already being charged by Dr. Langer for the same work product, and the inadequate documents tendered to support the fees claimed.

12. The Assessment Officer also erred in allowing Apotex to recover $28,236.46 in respect of the expert fees incurred by Mr. Weissburg. The Assessment Officer failed to properly consider the reasonableness of these fees in view of the weight this evidence was afforded at trial, and the fees and hours billed by other experts in the

proceeding. He further erred in assessing the reasonableness of these fees on the basis of inadequate evidence.

13. The Assessment Officer further erred in allowing Apotex to recover $63,997.27 in expert fees for Dr. Mayersohn. In so doing, the Assessment Officer erred in assessing fees on the basis of inadequate documents tendered to support the claimed fees.

14. The Assessment Officer further erred in allowing Apotex to recover a total of $81,044.18 in expert fees for Dr. Compston, Dr. Mazess, and Dr. Markowitz. In so doing, the Assessment Officer failed to consider the involvement, and subsequent accumulated expertise of these witnesses in related litigation in Canada and other jurisdictions.

15. Further or in the alternative, and for all of the reasons above, the amount of expert fees assessed is excessive and unreasonable to the extent that an error of principle was the cause.

The Prior Art Disbursements

16. The Assessment Officer erred in allowing Apotex to recover $7,205.51 in disbursements related to the collection of prior art. The Assessment Officer ignored the Applicants' unchallenged evidence that this was an unreasonable duplication of costs. In so doing, the Assessment Officer committed an error of principle by misapprehending the legal test for considering the evidence of disbursements, including the adequacy of evidence in support of this disbursement. Further or in

the alternative, the amount assessed was so unreasonable that an error of principle was the cause.

The Travel Disbursements

17. The Assessment Officer further erred in assessing travel disbursements for two counsel in the amount of $79,881.62. The Assessment Officer failed to properly assess the reasonableness of this expense for many of the reasons listed in paragraph 9 above, and failed to properly weigh the related fact that Apotex did not obtain a court direction to claim counsel fees for more than one counsel. Further or in the alternative, the amount assessed was so unreasonable that an error of principle was the cause.

The Photocopy Disbursements

18. The Assessment Officer also erred in assessing photocopy disbursements in the amount of $10,000.00 by estimating that eight copies were necessary to satisfy the service, filing and use of documents by the Respondent. The Assessment Officer failed to assess the unreasonableness of this disbursement in view of the evidence provided and by over-estimating the number of copies necessary to satisfy the requirements of the *Federal Court Rules*.

Other Disbursements

19. The Assessment Officer also erred in assessing disbursements for computer searches, computer time charges, courier/postage, court reporter/transcripts,

> meetings, telephone charges and telecopy charges in the amount of $25,247.66 . The Assessment Officer failed to properly assess the reasonableness of these expenses in view of many of the reasons listed in paragraph 9 and committed an error of principle by misapprehending the legal test on evidence of disbursements, including the adequacy of evidence in support of these disbursements as being essential to the conduct of the action. Further or in the alternative, the amount assessed was so unreasonable that an error of principle was the cause.

…

ANNEX II

(paragraph [35])

[52] The Apotex Respondent has claimed $322,512.84 for the expert fees of Dr. Robert Langer. The Merck Applicants submit in paragraph 72 of its Written Submissions that "Apotex has failed to demonstrate the reasonableness of this amount in these proceedings." The Merck Applicants note that Dr. Langer had already filed an expert affidavit in the related Fosamax #1 and should have been familiar with a majority of the prior art. In addition, the Merck Applicants submit that the number of hours that both Dr. Langer and his assistant Michael Lipp spent on this file was 474 hours, or 224 hours and 250 hours respectively, which it submits is approximately four months of full-time work in relation to a single expert affidavit. (Please note that I have corrected the number of hours claimed for Dr. Lipp and the total number of hours claimed since it appears that the Merck Applicants have inadvertently stated an incorrect total). Finally, the Merck Applicants note that the billing rate of Dr. Langer for this proceeding appears to have more than doubled between

the commencement of all four associated Fosamax proceedings (T-568-03, T-884-03, T-1053-03 and T-1106-03) even though they were initiated within three months of each other. The Merck Applicants submit that this is in essence a "blank cheque award" approach to hiring expert "Cadillac" witnesses and refer to *Apotex Inc. v. Syntex Pharmaceuticals International Ltd.* (1999), 2 C.P.R. (4th) 368 (T.D.) at paragraphs 20 to 21 wherein, the Federal Court refers to "outrageous" expert fees, "reasonable expenses of the litigation" and that "the unsuccessful party will not be responsible to compensate for extravagance."

[53] In response to the Merck Applicants submissions that a number of the expert fees are excessive, including those of Dr. Langer and Dr. Lipp as I have outlined above, the Apotex Respondent repeats its submissions regarding the "extraordinary amounts at issue" which it suggests may reach one billion dollars. The Apotex Respondent submits at paragraph 61 of its Reply Submissions that "Apotex sought to engage one of the highest qualified experts in the field." I note that a short summary of some of Dr. Langer's achievements are attached to the Reply Submissions at Tab 3 and I do not dispute that Dr. Langer is well regarded and respected within the world scientific community. In support of its justification to engage the services of Dr. Langer, the Apotex Respondent refers once again to the proposition expressed in *Apotex Inc., supra,* as outlined above in paragraph [33] that it "is not appropriate to apply the test of hindsight (20/20 vision) to determine whether a service was for an extra service or frill not reasonably necessary to defend the client's position." In other words, the Apotex Respondent submits at paragraph 62 of its Reply Submissions, "when assessing costs, the Courts have stressed the importance of not reviewing a party's fees with hindsight."

[54] The Apotex Respondent notes that the Merck Applicants took two full days to cross-examine Dr. Langer on his evidence which it submits favours the significance of his testimony and the complexity of the proceeding. The Apotex Respondent also notes the Merck Applicants' concerns with regard to the number of hours both Dr. Langer and Dr. Lipp spent on preparing one expert affidavit. The Apotex Respondent submits at paragraph 64 of its Reply Submissions that the "Merck argument that Drs. Langer and Lipp ought to have performed their work more efficiently is absurd." The Apotex Respondent submits that the quality of work for this evidence was "performed by some of the most *renowned* [*sic*] experts in the world. For these reasons, the Apotex Respondent submits that the Merck Applicants' submissions regarding the expert fees of Dr. Langer and Dr. Lipp "must be rejected."

[55] It should be noted that the Merck Applicants have suggested a proposed billing formula that uses one of the Apotex Respondent's expert's hourly rate and billable hours as benchmarks to reduce the expert fees of Dr. Langer. When factoring in a suggested reduced hourly rate and a reduced number of hours for Dr. Langer, the Merck Applicants submit that Dr. Langer's expert fees should be reduced to $19,600.00. I am uncomfortable with this suggestion for the simple reason that the proposal seems to be a very arbitrary method of determining the expert fees, so I will not explore or outline this proposal any further.

[56] Exhibit "K" and Exhibit "L" to the Affidavit of Sharon O'Connor, sworn on March 20, 2006, are the respective copies of the Bills of Costs and copies of the three charts

itemizing the Apotex Respondent's expert fees disbursements in relation to the three Fosamax proceedings (T-568-03, T-1053-03 and T-1106-03). During my review of these three charts itemizing the Apotex Respondent's expert fees disbursement amounts, I determined that the amounts of the expert fees disbursements from the three charts matched the amounts of the expert fees disbursements claimed in the respective Bills of Costs which were forwarded to the Merck Applicants for the associated Fosamax proceedings (T-568-03, T-1053-03 and T-1106-03). Initially, I shared the concerns of the Merck Applicants that Dr. Langer's invoices (which also contained the separate invoiced amounts for Dr. Lipp), which are attached to the Affidavit of Andrew R. Brodkin, sworn March 7, 2006, did not match the amounts claimed by the Apotex Respondent. However, within Tab 2 of the Affidavit of Andrew R. Brodkin, sworn March 7, 2006, I found a law firm invoice from Ivor M. Hughes dated February 4, 2004 which contained two disbursement amounts of $19,320.00 and $15,456.00 in Canadian dollars for "Professional Fees (Robert Langer)" and "Professional Fees (Michael Lipp)," respectively. (Please note that Ivor M. Hughes is a barrister and solicitor associated with Apotex Inc. and works with the lead counsel's law firm in patent matters.) When the $19,320.00 is added to the remaining Dr. Langer invoices, the expert fees for this individual actually total $322,242.25 in Canadian dollars. I intend to assess this specific amount regarding the expert fees of Dr. Langer.

[57] During my review of the three Bills of Costs associated with the Fosamax proceedings (T-568-03, T-1053-03 and T-1106-03) and the expert fees of Dr. Langer, I estimated and determined that Dr. Langer's per hour rate ranged from a low of $597.00 Canadian dollars to a high of $695.00 Canadian dollars approximately, which took into

consideration the currency conversion rate from U.S. to Canadian dollars at the time that invoice amount was determined. However, in this proceeding, I note that Dr. Langer invoices indicated that he charged approximately $1,230.00 to $1,435.00 Canadian dollars per hour rate for 208 hours and approximately $1,845.00 Canadian dollars per hour rate for 16 hours, which took into consideration the currency conversion rate from U.S. to Canadian dollars at the time that invoice amount was determined. As mentioned in the paragraph immediately above, the Dr. Langer invoices total $322,242.25 in Canadian dollars when the conversion is done from U.S. to Canadian dollars.

[58] I share the concerns of the Merck Applicants that the per hour rate of Dr. Langer for the associated Fosamax proceedings (T-568-03, T-1053-03 and T-1106-03) seem to be at a much lower rate than was invoiced in the case at bar. It is appropriate regarding the issue of Dr. Langer's per hour rate that I refer to the sentiment expressed in *Grace M. Carlile, supra,* that "… 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." The Merck Applicants refer to the sentiment in *AlliedSignal Inc., supra*, as outlined above in paragraph [49] and repeated here in part:

> [77] … a party has the right to hire the expert or experts of its choice to advance the merits of its case, but that does not mean a losing side must, invariably, foot the bill of the expert or experts chosen by the winning side without questioning the fees and disbursements claimed. … The jurisprudence is replete with cases that attack such bills essentially on two fronts; the first, on whether or not the fees being exacted are reasonable and, second, on whether or not the disbursements

> claimed, as otherwise perfectly legitimate items to be included in such a bill, denote a lavish style of living.
> …

[59] It is my opinion that the expert fees claimed for Dr. Langer by the Apotex Respondent in this proceeding are not reasonable when I consider the per hour rate claimed for the associated Fosamax proceedings (T-568-03, T-1053-03 and T-1106-03). Lord Justice Russell in *Re Eastwood (deceased)* (1974) 3 All E.R. 603 at 608 referred to a practical and reasonable approach to the taxation of costs:

> …In our view, the system of direct application to taxation of an independent solicitor's bill to a case as this has relative simplicity greatly to recommend it, and it seems to have worked without it being thought for many years to lead to significant injustice in the field of taxation where justice is in any event rough justice, in the sense of much sensible approximation...

I have taken into consideration the sentiments expressed in *AlliedSignal Inc., supra, Grace M. Carlile, supra,* and *Re Eastwood (deceased), supra* and it is my opinion that a more conservative amount is appropriate for these specific expert fees. Using the maximum per hour rate that I estimated in the associated Fosamax proceedings (T-568-03, T-1053-03 and T-1106-03) of $695.00, I exercise my discretion to reduce and allow the 224 hours invoiced by Dr. Langer at $695.00 for a total of $155,680.00 in Canadian dollars plus associated GST for this specific disbursement.

[60] The Apotex Respondent has claimed $82,016.00 in expert fees for Dr. Lipp's assistance in preparing the Affidavit of Dr. Langer. The Merck Applicants submit at paragraph 80 of the Written Submissions of the Applicants that "Dr. Lipp did not submit an affidavit in this proceeding." Regarding the assistance in the preparation of Dr. Langer's

affidavit, the Merck Applicants, as mentioned above in paragraph [55], submit that "by charging such high hourly rates in addition to billing time for an assistant, Dr. Langer and Dr. Lipp should have accomplished their work in this proceeding far more efficiently." The Merck Applicants point out that Dr. Compston and Dr. Markowitz appear to have accomplished the same work in much less time and their total expert fees are much less than that claimed by Dr. Langer and Dr. Lipp. For these reasons, the Merck Applicants submit that all expert fees related to Dr. Lipp be removed from the Bill of Costs since their proposed reduced amount of $19,600.00 for Dr. Lipp are reasonable and sufficient in the circumstances of this proceeding.

[61] I do not agree with the Merck Applicants' submissions regarding the amount and reasonableness of Dr. Lipp's expert fees. The Apotex Respondent's have referred to *Apotex Inc., supra,* as outlined above in paragraph [33], which the Apotex Respondent submits stands for the proposition whether it is appropriate to apply the test of hindsight to determine whether a charge for disbursements was not reasonably necessary to defend their position. However, I rely on the sentiment expressed in *Dableh v. Ontario Hydro,* [1994] F.C.J. 1810, which may be more on point, wherein the Taxing Officer at paragraph 15 stated:

> [15] It may seem anomalous that one professional in the process i.e. the solicitor; qualifies only for partial indemnification and another professional in the process i.e. the engineer; qualifies for full indemnification but that is the scheme of costs relative to the principle of partial indemnity set up in the Rules and Tariff subject to the authority of Rule 344(1) or other overriding legislation. The test, particularly in the face of a disinterested business relationship without collusion between an expert selling his or her services and a litigant purchasing said services to fill a void in the expertise requisite to success in the litigation, is not to cut experts' accounts down to some lowest common denominator. I have

> evidence here of real invoices apparently received and paid. The test or threshold, for indemnification of disbursements such as these, is not a function of hindsight but whether, in the circumstances existing at the time a litigant's solicitor made the decision to incur the expenditure, it represented prudent and reasonable representation of the client both in terms of leading and responding to Rule 482 expert evidence and of filling the void of technical expertise requisite to the solicitor's preparation and conduct. Austerity must be a factor in costs: I am not suggesting that experts should always be indemnified for the entire period of a trial. Here, Dr. Laithwaite left on the last day of his testimony but was subsequently consulted briefly via long distance telephone. At taxation, Defendant's counsel supplemented the evidence with oral explanation and invited me to infer, from the record, the importance of Dr. Laithwaite and Dr. Lavers both as experts and consultants. The Mills affidavit supporting the Bill of Costs did not address this. My Reasons supra indicate that the uses of experts encompass both Tariff B1(2)(a) and (b) and further that the taxing party faces variable results depending on the proof led. Further, they indicate that, in the absence of sufficiently detailed proof, the result may be necessarily conservative so as to embrace the interests of the respondent at taxation but coincidentally not provide an absurd result for the taxing party.
>
> [Emphasis added]

[62] During my review of the joint invoices of Drs. Lipp and Langer, I noted that there was ample detail of the various types of technical work that Dr. Lipp performed while reviewing expert reports, references and related materials. In addition, I note the ‘Experts Spreadsheet’ as prepared by the Merck Applicants, clearly compares all of the ‘Claimed Rate converted to Canadian dollars (blended in some cases)’ for the medical and technical experts. I further note that Dr. Lipp’s per hour rate is the lowest for any of these specific experts so I consider the use of this expert to be a prudent and reasonable decision by the Apotex Respondent. For these reasons and considering the sentiment expressed in *Dableh,*

supra, as outlined above, I exercise my discretion and allow the disbursements of $82,016.00 plus associated GST for the expert fees of Dr. Lipp.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-884-03
STYLE OF CAUSE:	MERCK & CO., INC. and MERCK FROSST CANADA & CO. Applicants and APOTEX INC. and THE MINISTER OF HEALTH Respondents
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	September 10, 2007
REASONS FOR ORDER:	GIBSON J.
DATED:	October 9, 2007

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