

Date: 20080529

Docket: T-1133-02

Citation: 2008 FC 693

BETWEEN:

**ABBOTT LABORATORIES and
ABBOTT LABORATORIES LIMITED**

Applicants

and

**THE MINISTER OF HEALTH
and APOTEX INC.**

Respondents

ASSESSMENT OF COSTS - REASONS

**Charles E. Stinson
Assessment Officer**

[1] These reasons, filed in this court file (the T-1133-02 file) with a copy also filed in Federal Court of Appeal file A-510-05 (the A-510-05 file), Federal Court file T-1847-03 (the T-1847-03 file), Federal Court of Appeal file A-59-07 (the A-59-07 file) and Federal Court file T-840-05 (the T-840-05 file), apply in each matter (having the identical style of cause) accordingly. Further to the disposition herein of set-off, a copy is filed in Federal Court of Appeal files A-51-04, A-126-06 and A-308-06 also involving these litigants.

[2] The Applicants (Abbott) variously brought applications pursuant to the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133 (the NOC Regulations) for an order prohibiting the Minister of Health from issuing a Notice of Compliance (NOC) for the generic form of clarithromycin (an antibiotic useful for treating respiratory tract infections) made by the Respondent, Apotex Inc. (Apotex) until after the expiry of certain Canadian letters patent. In the T-1133-02 file, the Court dismissed the application with Column III costs. In the A-510-05 file, the Court dismissed Abbott's appeal of the decision in the T-1133-02 file with costs. In the T-1847-03 file, the Court dismissed the application. The parties agreed to mid-level Column IV costs, second counsel fees at the hearing and a single set of travel fees for counsel. In the A-59-07 file, the Court dismissed Abbott's appeal of the decision in the T-1847-03 file with costs. In the T-840-05 file, the Court dismissed the application with mid-point Column IV costs.

[3] Apotex presented a bill of costs for each matter. Abbott presented two bills of costs for an interlocutory application and certain interlocutory appeals to be set off against Apotex's costs. The respective records are voluminous. Consistent with my approach outlined in paragraph 2 of *Halford v. Seed Hawk Inc.*, [2006] F.C.J. No. 629 (A.O.) [*Halford*], my account in these reasons of the respective positions of the parties is at times somewhat summary in nature. It is detailed enough for an understanding of the notion of issues between the parties, but should be read keeping in mind that there are many more nuances and details of those issues in the voluminous record of documents and transcripts, all of which I have read and considered. I have not summarized the able submissions of counsel for counsel fee item 24 (travel time of counsel) and I disallow the various item 24 claims, except where conceded, further to my conclusion in *Marshall v. Canada*, [2006]

F.C.J. No. 1282 at para. 6 (A.O.) [*Marshall*], that there must be a visible direction by the Court to the assessment officer specifically authorizing fees for the time of counsel in transit. Such a direction is not however necessary to assess the associated travel disbursements. The undisputed items of costs are allowed as presented.

I. The T-1133-02 file

Counsel fees (claimed throughout at the mid-point of the available Column III ranges)

Counsel fee items:

- 2** (Respondent's record) claimed at 5.5 units (\$120.00 per unit) for each of 11 affidavits and for the record itself;
- 4** (preparation for Abbott's uncontested motion to file additional affidavits) claimed at 3 units;
- 5** (preparation for Abbott's motion to strike Apotex's reply affidavits) claimed at 5 units;
- 6** (appearance on Abbott's motion to strike) claimed at 2 units per hour;
- 8** (preparation for cross-examination of affidavit) claimed at 3.5 units for each of ten affiants;
- 9** (attendance on cross-examination) claimed at 1.5 units per hour for both first and second counsel for each of nine attendances and for first counsel for a tenth attendance;
- 14(a)** (appearance of first counsel at the hearing) claimed at 2.5 units per hour;
- 14(b)** (appearance of second counsel at the hearing) claimed at one-half of the item 14(a) amount;
- 15** (written argument) claimed at 5 units for each of two compendia and at 5 units for the memorandum dated July 4, 2005;
- 25** (services after judgment not otherwise specified) claimed at 1 unit;
- 26** (assessment of costs) claimed at 4 units; and
- 27** (such other services as the assessment officer may allow) claimed at 2 units for preparation of the bill of costs

Disbursements:

Disbursements for travel (\$11,140.44); expert witnesses James Hendrickson (\$30,616.78), Robert McClelland (\$33,815.43), Michael Cima (\$21,650.00), Stan Brown (\$68,933.84) and Nicholas Taylor (\$71,715.53); telephone (\$990.20); telecopies (\$776.50); photocopies (\$28,117.43); couriers (\$2,198.84); parking/cab/mileage (\$175.76); transcripts (\$16,642.63); process server (\$630.00); agent's fee (\$453.80); prior art (\$2,024.96); computer time (\$2,646.90); file histories (\$1,730.00); Quicklaw (\$3,261.76); LPIC levy (\$50.00) and GST on disbursements (\$17,854.24)

A. Apotex's Position

[4] Apotex argued generally that Abbott vigorously contested every step of these five proceedings involving ten patents in issue. There were difficult and sometimes novel issues such as polymorphism in the T-1133-02 file. Other issues arising in the T-1133-02 file included the sufficiency of the Notice of Allegation, burden of proof, credibility of experts, invalidity, sound prediction and utility. The bill of costs presented at \$369,655.99 is reasonable for the work required of Apotex to prevail in this matter. Andrew R. Brodtkin, one of the lawyers with carriage of these proceedings, has sworn an affidavit on October 5, 2007 (the T-1133-02 Brodtkin affidavit) in support of Apotex's costs. It confirms the complexity of the issues and the volume of the record, i.e. Application Record (six volumes comprising 1,267 pages) and responding Application Record (12 volumes comprising 2,802 pages). The records included 11 and 7 affidavits on behalf of Apotex and Abbott respectively. As well, it confirms the importance to Apotex of this litigation, i.e. access to a Canadian clarithromycin market of about 65 million dollars per year. Given the patent monopoly extending to 2017, the potential market was about \$650 million.

[5] Apotex noted that the T-1133-02 Brodtkin affidavit is the evidence of reasonable necessity contemplated by Tariff B1(4) of the *Federal Courts Rules*, which provides that no "disbursement, other than fees paid to the Registry, shall be assessed or allowed under this Tariff unless it is reasonable and it is established by affidavit or by the solicitor appearing on the assessment that the disbursement was made or is payable by the party." The Court in *Eli Lilly Canada Inc. v. Novopharm Ltd.*, [2006] F.C.J. No. 1002 (F.C. Proth.) [*Eli Lilly* 2006] held that:

...**15** As for disbursements, the affidavit of Nancy Schuurmans establishes that all disbursements set out in the draft bill of costs presented by Lilly were incurred and invoiced to Lilly in the preparation and for the purposes of these proceedings. The charges appear consistent with the record, showing that Lilly has prepared and filed nine affidavits, of which eight were expert affidavits. I therefore find that Lilly has established the reasonableness of these disbursements on a *prima facie* basis. While it is true that Lilly did not file invoices for supporting documents, it did not have to do so to establish a *prima facie* case. Novopharm had the opportunity to cross-examine on Ms. Schuurmans' affidavit and demand production of the supporting documents. It chose not to do so, and the evidence it tendered in response falls short of showing that the disbursements claimed were not in fact incurred for this matter or were excessive or unreasonable. Disbursements are therefore assessed at \$73,277.71....

Here, Abbott did request and receive additional supporting documentation, but it did not cross-examine on the T-1133-02 Brodtkin affidavit, meaning that the reasonableness of Apotex's disbursements have been established on a *prima facie* basis in the absence of acceptable contrary evidence. Abbott's challenges to Apotex's evidence must be discounted because they contradict the long-established rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L.) [*Browne*] that the credibility of a witness cannot be impugned if criticisms of his evidence were never put to him for explanations.

[6] Apotex argued that the length (43 pages) of the decision in the T-1133-02 file reflects the complexity of highly technical and scientific pharmaceutical patent litigation involving a variety of allegations of invalidity, all carrying large costs consequences as for example here being the initial case of five cases to gain access to huge market share. The assessment officer in *Merck & Co. v. Canada (Minister of Health)*, [2007] F.C.J. No. 428 (A.O.) [*Merck* assessment] addressed the circumstances (litigation as here further to the NOC Regulations for access to a large pharmaceutical market) of only a single patent and allowed \$605,575.78. On appeal of the

assessment, the Court in *Merck & Co. v. Apotex Inc.*, [2007] F.C.J. No. 1337 (F.C.) [*Merck* appeal] reduced that to \$384,686.01. The amount of \$369,655.99 sought here is therefore not disproportionate given the market implications.

[7] Tariff B for fee item 2 provides for preparation “of all...respondents’ records and materials.” Apotex argued that its several claims under fee item 2 do not violate the finding in para. 28 of *Novopharm Ltd. v. AstraZeneca AB*, [2006] F.C.J. No. 854 (A.O.) [*Novopharm* assessment] denying multiple claims under fee item 1 (wording for an applicant’s record similar to that for fee item 2) on the basis of duplication of costs. That is, the considerable work here for preparation of each of the affidavits was discrete and clearly distinguishable from the work to prepare the Respondent’s Record. Multiple fee item 2 claims (affidavits and record), unopposed in the *Merck* assessment above (decided by the same assessment officer for the *Novopharm* assessment) were found reasonable and allowed in paragraph 25, indicating discretion to determine such items on a case by case basis as long as duplicate fees are precluded. Apotex argued alternatively for a fee item 2 allowance for the Respondent’s Record and then a fee item 27 allowance for each affidavit, including multiple allowances for Dr. McClelland and Dr. Brown who each prepared three affidavits requiring discrete work for each. Abbott could have, but did not, move further to Rule 403 for directions precluding these claimed costs.

[8] Apotex noted that the order underlying the fee item 4 claim did not address costs, but argued that there were costs incurred in the cause for the work in reviewing and consenting to the motion. That is, Apotex’s entitlement flows globally from the award of costs in the cause of the judicial

review. Relative to the fee item 5 and 6 claims (preparation and hearing of motion respectively), Apotex argued that the provision in the October 7, 2003 Order, that “if the parties cannot agree as to costs they may be separately spoken to,” gives me the jurisdiction to hear submissions and allow the costs sought, the parties not having returned to this outstanding matter in the interim. A motion under Rule 397 would have been inappropriate because reconsideration of the decision was not the issue. Apotex is using the assessment of costs to speak as directed to these costs. Similarly, Rule 403 for directions on costs would have been inappropriate. Apotex was essentially successful in that a small percentage of paragraphs were struck and therefore is entitled to costs of the motion.

[9] Apotex discounted Abbott’s objection, advanced partly per absence of proof of necessity and partly per experts numbering more than five, to fee items 8 and 9 (preparation and appearance respectively) associated with the cross-examination of Dr. Allan William Rey on his affidavit by relying on its *prima facie* argument above concerning unchallenged reasonableness and by asserting that the Court’s decision did not express any difficulties with his evidence. As well, Abbott did not seek directions limiting Apotex to five experts as sometimes has occurred in other cases and the Court did not so order of its own volition. The Court in *Merck & Co. v. Canada (Minister of Health)*, 30 C.P.R. (4th) 342 (F.C.) [*Merck* 2003] held on appeal that a prothonotary had erred in law by ignoring and failing to follow existing jurisprudence which had held that the limitation on experts in the *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 7, should be applied per issue and not to the case as a whole. Paragraph 47 of *Merck* assessment above accepted and applied that finding. Paragraph 49 of *Merck* assessment above found the comment in para. 78 of *Pfizer Canada Inc. v. Canada (Minister of Health)*, [2005] F.C.J. No. 2155 (F.C.) [*Pfizer*] that expert fees should not

“exceed those allowed for lead counsel in preparing for and arguing the case” to simply be the concerns of a single judge for escalating expert fees and not binding in an assessment of costs.

In *Merck* assessment and in *Merck* appeal, costs for more than five experts were allowed without any expressed concerns that the authorities might limit recovery to five experts.

[10] Apotex noted that Abbott concedes that fee item 9 is allowable as claimed for first counsel, but objects to the claims for second counsel in the absence of a direction by the Court. Although services such as fee item 14(b) specifically require a prior direction, fee item 9 does not. The use of second counsel at the cross-examinations of affiants was reasonable for what was arguably the most important part of the case. Although the T-1133-02 Brodtkin affidavit does not address the necessity for second counsel, counsel for Apotex asserted that his appearance before me satisfied the threshold in Tariff B1(4) for proof. In *Merck* assessment, fee item 14(b) was disallowed in the absence of a prior direction. However, second counsel under fee item 9 was allowed in the absence of a prior direction. In one instance, a patent agent, who is not a lawyer, from the law firm of Ivor M. Hughes LLP (co-counsel with Apotex’s solicitor of record) (the Hughes law firm) performed the necessary functions of second counsel and should be compensated accordingly. Alternatively, he should be compensated at fifty percent under fee item 28 (service permitted by the law society of the province).

[11] Apotex calculated its claim under fee item 14(a) by using ten hours for the duration of the hearing day and characterized Abbott’s suggested reduction of two hours per day as unreasonable for a complicated hearing spanning four days. Counsel was fully engaged during the approach of

the commencement time, recess (often not even leaving the hearing room) and lunch and the uncontested *prima facie* evidence is that the client was billed accordingly. Apotex acknowledged that it did not obtain a prior direction for fee item 14(b), but argued that the record here clearly reflects the use of second counsel.

[12] Apotex argued that it is appropriate to allow for the compendia (used in conjunction with the record as a cross-reference for pages of evidence or legal authorities cited) accepted and used by the hearing judge to deal with a massive record. Their use has been increasing in recent years, i.e. paragraph 1 of the Direction dated October 4, 2007, in Federal Court file T-2131-05 (*Janssen-Ortho Inc. v. Apotex Inc.*) which required their preparation. Alternatively, it could be allowed under fee item 27 if it is not strictly considered as written submissions within the meaning of item 15.

[13] Before me, Apotex increased its claim for fee item 26, applicable in all five proceedings, to the maximum 6 units because delays on the part of Abbott in service of costs materials complicated Apotex's work. Apotex argued that fee item 27 should be allowed for preparation of the bill of costs because that work was substantive and very different from the preparation and appearance, claimed under item 26, for an assessment hearing requiring two days.

[14] Apotex noted that supporting materials for disbursements, additional to those in the T-1133-02 Brodtkin affidavit, were provided further to Abbott's request. Apotex argued that it was difficult or impossible to locate for example, and it is not necessary, every taxi receipt and to document things such as tips. The amount claimed for travel is actually several thousand dollars

less than the charges actually incurred and detailed in the evidence. The evidence here exceeds that in *Merck* assessment. There, the disbursement claims were allowed save for minor reductions associated with third counsel found excessive and included second counsel. *Merck* appeal upheld this result. Both decisions pointed to my findings in *Carlile v. Canada (M.N.R.)* (1997), 97 D.T.C. 5284 (T.O.) [*Carlile*] concerning the allowance of costs in the face of less than exacting proof. The charges actually incurred here were reviewed to remove improper or duplicative items. For example, this sort of litigation required the flexibility of business class fare, but the business class fare incurred for Mr. Brodtkin on September 10, 2003, was reduced to a full fare economy claim in the bill of costs.

[15] Apotex noted that some entries on their face might seem high, but in fact address the expenses of two people under a single heading and are therefore reasonable, i.e. Dr. Leonard Chyall's cross-examination in Chicago in January 2004, the expenses for which are lumped in with those for Jerry L. Atwood. The November 3, 2004 statement from the Hughes law firm shows \$1,850.08 as the airfare for Dr. Michael Cima between Boston and Toronto. That seems high for an economy fare, but what obviously happened is that his billing included his airfare, hotel, meals and taxis which were paid and then billed to the client under the misleading reference to airfare.

[16] Apotex relied on its submissions above to argue that the charges for its five experts have been proven *prima facie* to be reasonable. The expert charges and evidence here are consistent with *Merck* assessment and *Merck* appeal where only one of the eight experts, whose account exceeded \$300,000.00, was subjected to significant reductions in turn by the assessment officer and appeal

judge. The total claim here of \$226,731.53 averages \$45,346.31, which compares favourably to the approximate average of \$35,000.00 for each of Abbott's three experts. This indicates that Apotex did not unreasonably engage the "Cadillac" of experts. Litigants required to engage experts to address complex matters with great financial ramifications should not have the necessary associated charges limited by hindsight: see *Apotex Inc. v. Egis Pharmaceuticals*, 4 O.R. (3d) 321 at 331 (Ont. Ct. Gen. Div.) [*Egis*]. As well, Abbott's costs for experts should have been lower because the record confirms that the patents have been the subject of some 22 cases involving generic drugs, meaning that its experts would have not required as much work to prepare evidence because of their ongoing familiarity with the patents. Apotex pointed to several instances of the hearing judge's reliance on the strength of Apotex's expert evidence and the weakness of Abbott's expert evidence in ruling in favour of Apotex.

[17] Apotex argued that there is nothing in the record to warrant reducing the \$30,616.78 claimed by Dr. James Hendrikson, an amount consistent with the allowances in *Merck* assessment and *Merck* appeal. Apotex asserted that the charges for Dr. Robert Brown (\$68,933.84) and Dr. Nicholas Taylor (\$71,715.43) would have exceeded those for Dr. Cima (\$21,650.00) because their mandate, which included considerable experiments and laboratory work, was significantly broader than his, which essentially was the review of relevant literature. Abbott's evidence on expected charges is irrelevant hindsight. Abbott's assertion of lack of reference in the decision to the evidence of Dr. Brown or Dr. Taylor is irrelevant because the Federal Court does not make distributive awards of costs. That is, costs are recoverable for the prudent work to prepare for issues

not ultimately determinative of the outcome: see *Illinois Tool Works Inc. v. Cobra Fixations Cie*, 29 C.P.R. (4th) 417 (F.C.A.) [*Illinois Tool Works*].

[18] Apotex discounted Abbott's position on multiple affidavits by certain of Apotex's experts by arguing that Abbott presumably concluded that the strength of Apotex's initial evidence was such that the Court might rely on it, which it ultimately did, and therefore Abbott sought leave to file reply affidavits. Apotex consented on the condition that it could file supplemental affidavits in response, which did not duplicate its initial evidence. Subsequently, Abbott moved to strike evidence from these supplemental affidavits. The Court allowed only part of that motion and third affidavits were then prepared. The Court ultimately relied on this combined evidence necessitated by Abbott's conduct. The associated charges were not excessive and not in the nature of those challenged for the expert characterized in *Apotex Inc. v. Syntex Pharmaceuticals International Ltd.*, 2 C.P.R. (4th) 368 (F.C.T.D.) [*Syntex*] as the "Cadillac" of experts and who coincidentally was the same expert experiencing significant reductions of his charges in *Merck* assessment and *Merck* appeal. Rather, the charges here reflected prudent work by counsel for Apotex in perfecting the record.

[19] Apotex objected to the proposed and arbitrary 75 percent reduction of photocopy charges for which the supporting evidence stands uncontradicted. There were three copies required for filing, at least two copies for Apotex's counsel, a client copy, service copies for two different Respondents and copies of relevant literature and prior art. The size of the record justifies the \$28,117.43 claimed.

[20] Apotex noted the finding in *Carlile* that reductions to nil dollars are unrealistic when it is apparent that real expenditures were necessarily made and the references to *Carlile* in *Merck* appeal and in *Merck* assessment. The prior art charges and other disbursements and the supporting evidence here are consistent with those in *Merck* assessment upheld in *Merck* appeal notwithstanding complaints there of excessiveness and unreasonableness. The Court in *Merck* appeal, in approving the approach by the assessment officer, specifically cited paragraph 69 of *Merck* assessment which read:

69 As noted above, 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. Brodtkin, sworn March 7, 2006, 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 includes 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.

For similar reasons and for judicial comity, the disbursements here should be found reasonable on a *prima facie* basis and allowed with GST. This would include the disbursements for travel by second

counsel and by a patent agent assisting lead counsel. There was no evidence of overtime or rush fees for couriers found problematic in Abbott's authorities.

[21] In rebuttal, Apotex disagreed with Abbott's reply materials on a number of fronts. Apotex argued that Abbott had options and its choice to commence this litigation, which triggered an automatic 24-month statutory stay preventing Apotex's access to the market, in response to Apotex's Notice of Allegation further to the NOC Regulations, now obligates it to indemnify Apotex's costs as claimed. Abbott could have avoided this by recognizing the limitations of its patents and by not initiating this litigation.

[22] Apotex discounted Abbott's submissions on possible economies of approach by experts gaining increased familiarity with the core issues as various pieces of litigation unfolded by asserting that the T-1133-02 file unfolded before the other litigation and, in any event, the invention claimed in each patent is new and unique requiring independent work regardless of experience with the active ingredients. The Court relied on all of Apotex's experts in making its findings on a number of issues. The number and costs of Abbott's experts are irrelevant for this assessment of Apotex's sound decisions concerning the experts required. It is prudent to have some overlap in expert testimony in case a given expert experiences difficulties in cross-examination and another expert must bolster the evidence. Abbott's submissions misstate the result in *Merck* appeal. There, the Court did not limit costs to \$206,411.00, but awarded \$384,686.00. In fact, the \$206,411.00 was the amount of the reduction of the assessment officer's allowance, \$205,911.00

of which addressed the charges of a single expert found to be disproportionate to the other experts' charges. No such discrepancy exists or is alleged here.

[23] Apotex argued that Dr. Taylor's account (\$71,715.43) reflected his extensive testing of ingredients relative to the claims in the various patents. His credentials were considerable and his background, independent of the parties, reinforced the integrity and worth of his evidence being the scientific backbone of much of Apotex's positions in the various proceedings. His charges for consultant work after completion of his affidavit is allowable as occurred in other cases.

[24] Apotex noted that paragraph 16 of *AB Hassle v. Genpharm Inc.*, 34 C.P.R. (4th) 18 at 25 (F.C.) [*AB Hassle*] discounted the potentially greater work and expense to defend a patent as compared to other types of litigation as justification for higher than normal party-and-party costs, i.e. solicitor-client costs. That essentially addressed counsel fees and is irrelevant for an assessment of disbursements such as experts for which complexity and volume of work as here are clearly relevant.

[25] Although the number of experts in the T-1133-02 file was not strictly an issue, Apotex dealt with it as part of its rebuttal to Abbott's general submissions on the use of experts throughout the various proceedings. Apotex argued that although the case law may be moving towards displacement of past findings that the *Canada Evidence Act*, s. 7, which provides that a party be limited to five expert witnesses unless the presiding judge permits more, means five experts per issue as opposed to five experts per the case as a whole, it is not yet there. Therefore, an assessment

of costs is too late for an objection, which should have been made earlier before the presiding judge, that Apotex has exceeded the limit on experts. If there was an onus on Apotex, it has been implicitly discharged by the Court's acceptance and reliance on the experts as led and the number of experts cannot now be a factor in the assessment of costs. In particular, an assessment officer cannot strike expert affidavits already accepted by the Court. The associated charges could be reduced if for example some aspect of the work was deemed irrelevant or done further to faulty instructions from counsel.

[26] Apotex argued that *Eli Lilly Canada Inc. v. Novopharm Ltd.*, [2007] F.C.J. No. 800 (F.C.) [Eli Lilly 2007 1st] indicated the appropriate timing for a challenge to the number of experts. There, the hearing judge in paragraph 5 commented that he was “sure that certain jurisprudence of this Court has led some to believe” that the *Canada Evidence Act* allows five experts per issue, but that he will “leave that for another day.” He then noted the difficulty for judges in assimilating masses of materials (there were 21 experts before him) and commented that the number of witnesses and volume of documents must be reduced in NOC proceedings. His subsequent award of costs reflected these concerns by restricting the successful party to recovery of the costs of only five experts of its choice. He had previously noted that *Pharmascience Inc. v. Canada (Minister of Health)*, [2007] F.C.J. No. 506 at para. 41 [*Pharmascience*] held that validity is a single issue and was the only issue before him. His findings did not change the law permitting five experts per issue. His restriction there of five experts was within his discretion as the hearing judge disposing of that NOC proceeding, discretion that is not available to an assessment officer.

[27] The Court in *Altana Pharma Inc. v. Novopharm Ltd.*, [2007] F.C.J. No. 853 (F.C. Proth.) [Altana] decided nine days after *Eli Lilly 2007 1st* and containing a reference to it, entertained a motion alleging that the applicants had violated the limitation in the *Canada Evidence Act* by filing 13 expert affidavits. In paragraph 5, the Prothonotary agreed with the respondent's position that said Act limited each side to five experts for the case as a whole and not five experts per issue, but held that she was bound to apply the existing jurisprudence such as *Merck 2003* permitting five experts per issue. The respondent had also argued before her that the applicants had exceeded even the five experts per issue limitation. After some consideration of her jurisdiction, she then held that she could address that concern instead of deferring it to the judge hearing the NOC application. Such jurisdiction is not available to an assessment officer. In her subsequent determination of the number of issues necessary to apply *Merck 2003*, she referred to paragraph 41 of *Pharmascience*. Apotex argued that said paragraph 41 did not address the matter of the number of experts relative to the notion of invalidity as a single issue. Apotex argued in any event that invalidity flowing from several distinct patents the subject of multiple proceedings breaks out into discrete issues each of which can be subjected to five experts before triggering the leave requirement of the *Canada Evidence Act*.

[28] Apotex noted the timing in *Eli Lilly v. Apotex Inc.*, [2007] F.C.J. No. 1367 (F.C.) [*Eli Lilly 2007 2nd*] of a motion to adduce more than ten expert witnesses, i.e. a few months prior to trial and not on the assessment of costs after the trial. There, the Court in paragraphs 22-27 inclusive surmised that if the attention of the respective hearing judges in *Eli Lilly and Co. v. Novopharm Ltd.* (1997), 73 C.P.R. (3d) 371 (F.C.T.D.) [*Eli Lilly 1997*] and *Merck 2003* had been drawn to certain

other case law which undermined the rationale in the existing jurisprudence allowing five experts per issue, they would or might have found that the limit should be five experts for a case as a whole. The Court then held that it followed that a determination of the number of issues was unnecessary. At most, that is a difference of opinion by the judge in *Eli Lilly 2007 2nd* which did not change the current jurisprudence permitting five experts per issue and, in any event, such considerations are not within an assessment officer's jurisdiction.

[29] Apotex agreed with my comment in paragraph 31 of *Biovail Corp. v. Canada (Minister of National Health and Welfare)*, 61 C.P.R. (4th) 33, [2007] F.C.J. No. 1018 (A.O.) [*Biovail*] that “judges have varied writing styles and do not always set out discrete and explicit statements of their exact use, or not, of experts,” made as part of my reservations concerning the application of the three-part test for experts in *Allied Signal Inc. v. Dupont Canada Inc.*, 81 C.P.R. (3d) 129 (T.O.) [*Allied Signal*], and argued that an additional factor here perhaps precluding the need to set out a detailed summary and analysis in the respective reasons of the evidence was intervening and binding case law on certain issues as these five pieces of litigation unfolded. As for the other two parts of the test in paragraph 81 of *Allied Signal*, i.e. the hiring of the expert must have been prudent and reasonable in the circumstances existing at the time and the hiring of an expert must not constitute a blank cheque for costs, Apotex argued that *Eli Lilly 2006* is a much more recent authority confirming that evidence such as the T-1133-02 Brodtkin affidavit is acceptable *prima facie* proof of the experts' charges.

[30] Apotex discounted Abbott's reliance on *Laboratoires Servier v. Apotex Inc.*, [2007] F.C.J. No. 465 (F.C.) [*Laboratoires*] by arguing that the motion there was addressed via written submissions thereby precluding the opportunity for counsel to appear as permitted by Tariff B1(4), as was done here, and prove the disbursements. As well, the judge there having heard the matter giving rise to the use of the experts was in the best position, as the three judges here would have been, to entertain the motion for directions on costs. Abbott chose here not to bring such motions and cannot now seek comparable relief via assessments of costs. As the evidence adduced in *Merck* assessment was much more consistent with the approach here and as the evidence adduced in *Laboratoires* was not, the approach in *Merck* assessment, approved by *Merck* appeal, should prevail for items such as "meetings" rejected in *Laboratoires*.

[31] Apotex conceded that the principle in *Browne* may not be absolute, but it discounted Abbott's position on *Browne* by arguing that cross-examination on the T-1133-02 Brodtkin affidavit could have been useful because it would have required Mr. Brodtkin to detail his rationale for his assertions of reasonableness. The *Merck* assessment referred to *Browne* and to *Eli Lilly 2006* and approved most of the disbursements on the basis of *prima facie* reasonableness.

[32] Apotex discounted Abbott's position on *Fournier Pharma Inc. v. Canada (Minister of Health)*, [2007] F.C.J. No. 576 (F.C. Proth.) [*Fournier*] by arguing as above for *Laboratoires* that the application in writing precluded the opportunity afforded by Tariff B1(4) for counsel to appear to adduce proof, which was in fact done here partly prompted by questions from me. One aspect of the evidence in *Fournier* that was similar to the T-1133-02 Brodtkin affidavit was the table of

disbursements broken down by category and amount. However, Apotex here has advanced via the T-1133-02 Brodtkin affidavit and the additional materials requested by Abbott the underlying invoices such as for the experts, none of which was before the Prothonotary in *Fournier*.

The evidence here was comparable to that in *Merck* assessment. *Merck* appeal approved the assessment officer's allowances further to *prima facie* proof in paragraph 69.

[33] Apotex discounted Abbott's position further to *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] F.C.J. No. 1399 (F.C.A.) [*CCH*]; *Diversified Products Corp. v. Tye-Sil Corp.*, 34 C.P.R. (3d) 267 (F.C.T.D.) [*Diversified*] and *Windsurfing International Inc. v. Bic Sports Inc.*, 6 C.P.R. (3d) 526 (F.C.T.D.) [*Windsurfing*] concerning photocopies and other miscellaneous disbursements by arguing that the *prima facie* proof here meets the threshold of those cases and by noting that Abbott's position conceded \$0.25 per page as reasonable and did not assert overhead considerations. Abbott's proposed reductions are arbitrary and inconsistent with the necessary work in these matters.

[34] Apotex argued that the technical assistance provided by Dr. Taylor and Dr. Cima outside the scope of their affidavits was permissible further to paragraph 29 of *Biovail*. *Biovail* also confirmed that an award of costs is not distributive and it did not apply benchmarks in its allowances for experts.

B. Abbott's Position

[35] Abbott first led some general comments about the five proceedings. Validity of the patents was the primary issue, infringement being only a secondary argument in some instances. Apotex used some of the same experts in the T-1847-03 file and the T-840-05 file, advanced the same prior art and advanced certain other evidence that was identical. Abbott argued that the impetus for this litigation lay in the choice by Apotex to assert a Notice of Allegation in turn forcing Abbott to protect its patent monopoly by initiating a judicial review application.

[36] The irony of Apotex's assertion that the T-1133-02 file was the first to address issues of crystal polymorphism is that it seeks less costs there than for the subsequent T-1847-03 file and the T-840-05 file by which time said issues would already have been explored. The opposite should have occurred particularly given that certain issues, i.e. onus in NOC proceedings, were more significant in the T-1133-02 file than in the other two files. As well, economy of approach should have occurred in the subsequent proceedings given increasing familiarity with the chemistry of clarithromycin and common challenges throughout to validity. Generally, the expert charges were outrageous, i.e. those in the T-1847-03 file almost equalled the total amount of the bill of costs for the T-1133-02 file. Dr. Taylor's charges were the most, yet he was not a person skilled in the art. His expertise was unnecessary given Apotex's capacity for in-house testing. As well, his work after completion of his affidavit improperly equated to technical consultant for counsel.

[37] Abbott argued that the photocopying charges were outrageous throughout with particular regard to the T-1847-03 file and the T-840-05 file. The T-840-05 file, the last of the three NOC

proceedings, addressed only two patents and the same issues of validity, yet Apotex advanced more experts than in T-1847-03 file having seven patents in issue. There was duplication of evidence, in some instances verbatim. That the photocopying charges in the T-840-05 file were the highest (\$98,335.66) of the three files yet addressed fewer patents undermines Apotex's position that the volume of the record and amount of photocopying charges are directly related to the requisite number of experts.

[38] Abbott argued further to Rules 409 and 400(3)(a) (result) and to paragraph 50 of *Conorzio del Proscuitto di Parma v. Maple Leaf Meats Inc.*, 22 C.P.R. (4th) 177 (F.C.A.) [*Conorzio*] that success in the cause does not necessarily mean higher costs and relief from the onus to prove costs. Abbott argued further to Rule 400(3)(c) (importance and complexity of issues) and to paragraph 6 of *Aird v. Country Park Village Property (Mainland) Ltd.*, [2004] F.C.J. No. 1153 (F.C.) [*Aird*], that it is the legal significance and complexity of issues and not the factual subject matter which warrants increased costs. *AB Hassle* came to similar conclusions. These proceedings were no more complex than most. *Merck* appeal allowed costs of \$206,411.00 for a matter with approximately C\$130 billion annual market sales, nearly twice the annual sales in this case. The assessed costs here should therefore be significantly less than in *Merck* appeal. Abbott argued further to Rule 400(3)(g) (amount of work) that Apotex's introduction of improper (additional) reply materials in the T-1133-02 file created unnecessary work.

[39] Abbott argued that as the case law indicates that the onus was on Apotex to obtain leave for more than five experts, the assessment of costs is not too late for Abbott to insist that Apotex

be limited to five experts. Paragraph 34 of *Altana* referred to paragraphs 5-7 of *Eli Lilly 2007 1st* and then held that the onus for seeking leave to exceed five expert reports is on the party attempting to introduce them. As well, *Altana* held that validity is a single issue. Validity may have sub-issues, i.e. utility, prediction, anticipation etc., but it still remains a single issue.

[40] Abbott argued that Apotex as the defendant in *Eli Lilly 2007 2nd* did there, i.e. move the Court for leave to adduce more than five experts, what it should have done here. *Eli Lilly 2007 2nd* considered in detail the case law on whether the number of experts is limited by issue or by the proceeding as a whole and concluded in paragraph 27 that the proper interpretation of s. 7 of the *Canada Evidence Act* is a limit of five experts for the proceeding as a whole and that a party desiring to exceed that number must move the Court for leave to do so. As such, the number of issues is irrelevant. *Altana* held that permitting an excessive number of experts interferes with efficient disposition of the Court's caseload.

[41] Abbott noted the three-part test in paragraph 81 of *Allied Signal* for assessment of an expert's account, i.e. prudent and reasonable disbursements at the time incurred, terms of engagement not a blank cheque and extent of reliance by the trial judge on the expert. *Syntex* held in paragraphs 19 and 20 that the unsuccessful party is not liable for extravagance, i.e. Cadillac experts. *Biovail* held that a paucity of evidence or instances of experts doing the work of counsel should result in reductions or disallowances. Paragraph 17 of *Laboratoires* found \$97,907.58 to be disproportionately high for an expert engaged by Apotex (defendant there), an amount even less than that charged by Dr. Taylor in the T-1847-03 file.

[42] Abbott argued that *Browne* is not an absolute rule of law, but rather a general principle whose scope and application will vary in the particular circumstances: see *R. v. Palmer*, [1980] 1 S.C.R. 759 at 782 [*Palmer*] and *Hurd v. Hewitt*, (1995) 120 D.L.R. 105 at 117 (Ont. C.A.) [*Hurd*]. Any cross-examination on the T-1133-02 Brodtkin affidavit would have resulted in assertions of reasonableness of no value given that Apotex did not cross-examine Steven G. Mason, an experienced solicitor for Abbott in NOC proceedings and whose affidavit sworn October 24, 2007 (the T-1133-02 Mason affidavit) contradicts said assertions of reasonableness, essentially leaving a record consisting of evidence from two solicitors, both with detailed knowledge of the T-1133-02 file but with opposing views of the reasonableness of the charges incurred. This undermines any usefulness here of *Browne*. Reasonableness is not determined as a result of a simple assertion of reasonableness as here by counsel in an affidavit. Rather, it results from evidence such as invoices, the circumstances of the case and Rule 400(3) factors, none of which were led by Apotex. The absence of cross-examination on the T-1133-02 Brodtkin affidavit did not result in the prejudice possible in a criminal case.

[43] Abbott argued further to *Fournier* at paragraph 23 that Apotex bore, but did not meet, the onus of leading evidence sufficient to establish the reasonableness and necessity of its disbursements. The Court in *Fournier* was critical of evidence, i.e. tables of disbursements with no underlying breakdown which might assist in the determination of reasonableness, similar to that led here, and disallowed the claim for disbursements in its entirety. Abbott is not arguing here for a complete disallowance of claimed disbursements, but is pressing for sharp reductions.

[44] Abbott argued generally relative to all five proceedings that the photocopy charges are excessive particularly given that Apotex as Respondent did not have Abbott's onus to prepare the records for the Courts. *CCH* in paragraphs 23-25 held that a party must produce some evidence for challenged disbursements, failing which reductions should result. The findings on photocopies in *Diversified*, *Fournier*, and *Windsurfing* were consistent with that sentiment. Although *Merck* assessment gave generous allowances for several disbursements, it still sharply reduced the photocopying allowance. Abbott argued further to *Fournier* and *Laboratories* that miscellaneous disbursements such as transcripts, couriers, computer searches, translation fees, etc. must be reduced in the face of inadequate evidence. In *Fournier*, a vague claim such as here for meetings was disallowed.

[45] Abbott discounted Apotex's general position concerning item 26 by asserting that pressing factors in the busy schedule of counsel for Apotex led to service problems as opposed to deficiencies in Abbott's conduct. In fact, Apotex had several months after initially submitting its bill of costs to perfect its supporting materials whereas Abbott had only two weeks further to the agreed timetable. The absence of invoices interfered with Abbott's capacity for reply.

[46] Abbott argued further to *Kassam v. Canada*, [2005] F.C.J. No. 799 (A.O.) [*Kassam*] that the word "all" in the Tariff B wording for item 2, i.e. preparation "of all...replies...or respondents' records and materials," precludes multiple claims particularly if compared to item 4. The word "an" in the Tariff B wording for the latter item clearly contemplates a discrete claim for each respective motion, unlike item 2 which is limited to a single claim for whatever number of affidavits and

documents comprise the Respondent's record. It would prejudice Abbott if the remaining mid-level item 2 claim was adjusted to a maximum amount once the other offending item 2 claims are disallowed. Item 27 provides for services not already addressed such as under item 2 in the Tariff and therefore is not an alternative for the item 2 claims to be removed. Abbott did not necessarily agree that costs are recoverable for a compendium, but did note that because it is not specifically addressed in the Tariff, it would fit more easily under item 27 than the multiple claims advanced for affidavits under item 2.

[47] Relative to items 4, 5 and 6, Abbott argued further to Mark M. Orkin, Q.C. *The Law of Costs*, looseleaf, 2nd ed. (Aurora, Ont.: Canada Law Book, 2007) vol. 2, c. 4 at ¶402, that no costs are assessable further to an order silent on costs. As for the motion to strike Apotex's reply affidavits, the resultant order directed the parties to agree on costs failing which they could speak to them. The correct procedure in law is not to speak them during an assessment of costs, but rather to proceed under Rule 397 (motion to reconsider) or Rule 403 (motion for directions): see *AB Hassle* which admittedly addressed the amount of costs and not entitlement as here. Apotex cannot acquire via an assessment of costs an absent entitlement to costs.

[48] Part of Abbott's materials before me included a reproduction of Apotex's bills of costs with two columns added: the first summarizing its objections to given items and the second displaying the proposed adjusted amount or deletion, all of which I found very useful. Abbott conceded the item 8 costs as claimed for all of Apotex's experts except for Dr. Rey, objected to as excessive on the basis of exceeding the limit of five experts, amount claimed and irrelevance. Abbott conceded

the hours and amounts calculated for item 9 relative to the attendance of first counsel. Abbott objected to claims for attendance of second counsel in the absence of permission from the Court. As well, an additional reason to disallow certain item 9 claims is that they are for a patent agent who is not a lawyer. As this item is restricted to an indemnity for the time of counsel, nothing is allowable. Something might be allowable under item 28 (services as permitted by the law society of the province).

[49] Abbott argued further to *AB Hassle* paragraph 22 that a prior direction of the Court is necessary to claim item 14(b). Abbott proposed that the item 14(a) claim be reduced on the basis of an eight-hour day as opposed to a ten-hour day because that is the usual duration of a sitting day. Abbott argued that a compendium is essentially a compilation of evidence and therefore is not written argument within the meaning of item 15. Abbott conceded that item 27 might be better applied to this service, but argued that, as lawyers usually instruct clerks to prepare it by pulling together evidence already filed, nothing should be allowed. Abbott conceded the \$480.00 claimed under item 26 and argued that nothing should be allowed under item 27 for preparation of the bill of costs because items 25 and 26 already provide for that.

[50] Relative to disbursements, Abbott noted that the T-1133-02 decision acknowledged that the core expertise of three of Apotex's experts (Dr. McClelland, Dr. Brown and Dr. Hendrickson) was organic chemistry. This was unnecessary duplication. Dr. Brown's fee was disproportionately high compared to that of Dr. McClelland who was the only medicinal chemist. Dr. McClelland's affidavit was much more detailed and thorough than that of Dr. Brown, yet the former's charge was

about one-half of the latter's charge. Dr. Cima was the only chemical engineer and had expertise in polymorphism. Given that paragraph 34 of the T-1133-02 decision stated that the Court would examine the work of the experts and give it the appropriate weight, it is fair to say that the Court cited the evidence it considered most relevant to its decision.

[51] Abbott again asserted validity was the only issue requiring expert evidence. The other two issues, concerning burden of proof and the sufficiency of Apotex's Notice of Allegation, did not require expert evidence. There were sub-issues for validity. For novelty, the Court cited (paragraph 63) the evidence of Dr. Hendrickson and Dr. Brown. Apotex was unsuccessful on anticipation and there was no reference to the expert evidence. For sound prediction, the Court cited (paragraphs 80, 88 and 93) the evidence of Dr. McClelland, Dr. Brown and Dr. Cima. The statement in paragraph 80 that the evidence of Dr. Brown and Dr. Cima "was to the same effect" as that of Dr. McClelland was an implicit acknowledgement of duplicative evidence. For inutility, the Court cited the evidence of Dr. McClelland and Dr. Hendrickson as well as testing done by Dr. Allen Rey and Dr. Carlos Zetina Rocha as employees of Apotex. The Court in paragraph 133 essentially said that Dr. Rocha's affidavit was unnecessary because he was the assistant to Dr. Rey. That should also apply to Dr. Taylor who essentially performed testing, who was not referred to in the T-1133-02 decision and who charged the highest fee. Any allowance for Dr. Taylor should be minimal given that his charges do not satisfy the test in *Allied Signal*.

[52] Abbott conceded Dr. Cima's fee of \$21,650.00 as presented subject to a reduction of about \$1,900.00 associated with work after his October 2004 cross-examination presumably to assist

counsel and not to create evidence. Abbott argued further to its position above on insufficiency of the evidence that the fees of Dr. Hendrickson, Dr. McClelland, Dr. Brown and Dr. Taylor were excessive and should be reduced to \$15,308.39, \$22,318.18, \$22,748.17 and \$20,000.00 respectively, being amounts comparable to those charged by other experts. As Apotex's evidence did not establish that duplication of costs did not occur relative to the struck and replacement portions of the evidence of Dr. McClelland and Dr. Brown, their claims should be reduced. The reductions in *Biovail* resulted in a total allowance for experts of about \$115,000.00, an amount comparable to the approximate \$105,000.00 incurred here by Abbott. The Court in *Engine & Leasing Co. v. Atlantic Towing Ltd.* [1995] F.C.J. No. 250 (F.C.T.D.) [*Engine & Leasing*] held that the reasonableness of an expert's fee is a relevant factor in assessing recoverability. In *Laboratoires*, all disbursements were reduced by about 50 percent. *Merck* appeal reduced the \$237,000.00 allowed in *Merck* assessment for Dr. Langer to \$31,000.00. The analysis in *Merck* appeal is important because the Court based its calculated reduction on the average number of hours claimed by Apotex's other experts. The Court in *Fournier* disallowed entirely the claims of \$15,000.00 and \$79,000.00 for lack of evidence of relevance and reasonableness.

[53] Abbott argued further to *AB Hassle* and *Fournier* that the \$226,731.53 claimed for experts is clearly excessive. The Court relied more on Dr. McClelland whose evidence was much more detailed than that of Dr. Brown and who charged about one-half of Dr. Brown's fee. Abbott is not responsible for such extravagance particularly given the duplicative elements of this evidence. Abbott conceded that Apotex is entitled to recovery for its experts, but at sharply reduced amounts in some instances. The finding in *Illinois Tool* concerning the parsing of costs by issue does not

preclude the application of *Allied Signal* to the account of Dr. Taylor for example, who is not mentioned in the T-1133-02 decision and for whom no evidence of relevance was led.

[54] Abbott argued that the record does not justify travel costs of second counsel for the cross-examinations and in particular of a patent agent who is not a lawyer. A reasonable allowance would be \$2,660.11. Abbott suggested a 75 percent reduction of the photocopying claim to \$6,779.36 given the absence of evidence of relevance and reasonableness. The approach in *Merck* assessment was appropriate, i.e. length of the documents multiplied by the number of requisite Court and service copies multiplied in turn by the agreed rate of \$0.25 per page. The factor of eight copies used in *Merck* assessment may be excessive particularly for the appeals in which Abbott bore the onus of reproductions.

[55] Abbott argued further to *Johnson & Johnson Inc. v. Bristol-Myers Squibb Canada Inc.*, 71 C.P.R. (3d) 24 (Ont. Gen. Div.) [*Johnson & Johnson*] that overtime charges are overhead and not recoverable. Abbott argued that courier charges are acceptable if they do not include rush fees, but they should still be reduced here by 75 percent to \$549.71. Abbott conceded the telephone and telecopy charges subject to production of records. There is insufficient evidence for agents' fees (\$453.80). Abbott argued that the charges for parking/cab/mileage, computer time charges, file histories (characterized by Abbott as off-site storage) and LPIC (an insurance premium incurred by a law firm for each piece of litigation) are overhead and in some instances duplicative of other charges such as Quicklaw and should be disallowed completely. If Apotex's counsel choose to store materials off-site, Abbott is not liable for those and the retrieval costs. Abbott argued further to the

T-1133-02 Mason affidavit's suggested amounts that the Quicklaw charge was excessive and should be reduced by 50 percent to \$1,630.88. The record indicates that some computer searches were billed through the Hughes law firm as co-counsel and there is no evidence to confirm that duplicate and irrelevant charges did not occur. Abbott asserted that the transcript charges were excessive, exceed any presented in the other files and should be reduced by 75 percent to \$4,160.66. Abbott conceded process servers presented at \$630.00.

C. Assessment of the T-1133-02 File

[56] I will first review in chronological sequence the case law advanced before me to ascertain any principles for resolution of the circumstances of this assessment of costs. In so doing, and for convenience, I will touch on matters not necessarily relevant for the T-1133-02 file, but of relevance for some of the other matters before me. Technically, I should consider the assessment of each bill of costs in isolation, but the reality was that these bills of costs related to a single and extended struggle relative to various aspects of a pharmaceutical with considerable market implications. In that vein, I have given some weight to Abbott's submission that Apotex's experts should have demonstrated more efficiency as the matters unfolded in turn due to increasing familiarity with the pharmaceutical in issue. That weight will be limited as I think that an expert cannot presume that the work required to address a Notice of Allegation in one matter becomes a set piece for rigid and unthinking application in the circumstances of the Notice of Allegation and different patents in another matter albeit for the same pharmaceutical.

[57] As it happened, Abbott advanced certain case law after the hearing before me: *Altana Pharma Inc. v. Novopharm Ltd.*, [2007] F.C.J. No. 1421 (F.C.) [*Altana appeal*] decided October 23, 2007, *Pfizer Canada Inc. v. Canada (Minister of Health)*, [2008] F.C.J. No. 3 (F.C.) [*Pfizer 2008*] decided January 2, 2008 and *Eli Lilly Canada Inc. v. Apotex Inc.*, 63 C.P.R. (4th) 406 (F.C.) [*Eli Lilly 2008*] decided February 5, 2008. This resulted in sharp disagreement between opposing counsel on whether counsel for Abbott should have done so and the weight to be given to this case law: Abbott argued that Apotex's alleged breach of the five expert provision resulted in excessive costs and Apotex argued that the case law existing at the time the experts were led renders Abbott's position irrelevant in the assessment of their costs, the number of experts not having been put in issue before the case management judge or the application judge. Apotex emphasized that the evolving jurisprudence on the *Canada Evidence Act*, s. 7, is irrelevant for this assessment of costs, a position discounted by Abbott further to *Eli Lilly 2008*. After the hearing, Apotex advanced *Fournier Pharma Inc. v. Canada (Minister of Health)*, 2008 F.C.J. No. 462 (F.C.) [*Fournier appeal*] decided March 20, 2008, and which set aside the disallowance in *Fournier* of disbursements and referred them to an assessment officer for assessment. Apotex also advanced *Biovail Corp. (c.o.b. Biovail Chemicals Canada) v. Canada (Minister of National Health and Welfare)*, 2008 F.C.J. No. 342 (F.C.) [*Biovail appeal*] decided February 29, 2008, and which affirmed *Biovail* (decided July 23, 2007). These cases support the proposition that litigation requires real costs and that the assessment of those costs may require rough measures of the appropriate allowances.

[58] I think that unsolicited argument subsequent to a hearing is a practice to be discouraged, but I also think responsible counsel both in their obligation to act in the best interest of their clients and as officers of the Court may bring what could be relevant case law of assistance for disposition of a matter to the attention of the Court. Indeed, and I am not intending any criticism of conduct in the past, the very issue before me, i.e. Apotex's alleged breach of the five-expert limit, might have been precluded if the Court's attention, before release of its decision, in *Eli Lilly* 1997 had been drawn to certain relevant case law not led at the hearing. Paragraph 31 of *Altana* appeal notes that the "number of witnesses "per issue" versus "per case" was not the central focus of what was an interlocutory decision made in the course of the trial." Paragraph 8 thereof noted that *Eli Lilly* 1997 was "upheld on appeal without any reference to the s. 7 issue." Paragraph 43 thereof held that "it is appropriate for this Court to consider s. 7 more directly in the light of recent authority." I thank counsel for both sides for bringing these additional cases to my attention and I thank them as well for their objections courteously advanced. I will apply these cases, but not precisely in the manner urged by counsel.

[59] I think it useful to deviate in one respect from my expressed intention above to address the case law in chronological sequence as it will reduce the need for comment on certain jurisprudence. Specifically, I doubt that I could add to the succinct commentary and findings in *Altana* appeal on the state of law concerning experts per issue versus per case. *Altana* appeal found that s. 7 of the *Canada Evidence Act* intends only five experts per case, set aside the finding of *Altana* permitting five experts per issue and indicated that the parties may wish to address leave to apply to exceed the five-expert limit with the case management prothonotary. I accept its rationale and, subject to

variance or rejection on appeal, I presume that it summarizes prescribed practice, i.e. five experts per case is the intent of s. 7 unless the Court orders otherwise, for matters in the future given its assertions that this principle should extend beyond NOC proceedings. Therefore, I will not purport to add my analysis of the respective positions before me of Apotex and Abbott in that vein, but I assure both parties that I have carefully reviewed the submissions and materials in that area applicable to the specifics of amounts sought to be disallowed, reduced or allowed as presented.

[60] I need not comment further on *Eli Lilly* 1997 (decided April 25, 1997); *Merck* 2003 (decided December 22, 2003); *Pharmascience* (decided April 5, 2007); *Eli Lilly* 2007 1st (decided June 5, 2007); *Altana* (decided June 14, 2007) and *Eli Lilly* 2007 2nd (decided October 10, 2007). My analysis of the case law unfolds relative to three themes or factors requisite in my opinion for my resolution of all of the assessments of costs: (i) sufficiency or threshold of evidence; (ii) whether my jurisdiction flowing from Rule 405 providing that costs “shall be assessed by an assessment officer,” permits me to give something akin to the relief in *Altana* appeal; and (iii) whether the practice in *Biovail* affirmed by *Biovail* appeal and in *Halford* is valid and appropriate here.

[61] *Merck* assessment and *Merck* appeal did not analyze the relevance of *Browne* (decided November 28, 1893) for an assessment of costs. I find *Browne* to be of limited value in the circumstances here. *Browne* addressed factual evidence given orally by a witness at a trial, i.e. did a witness consult with the respondent and give him instructions. *Browne* did not appear to address a challenge to a subjective opinion of past events akin to the assertions in the T-1133-02

Brodkin affidavit of the reasonableness of the costs incurred. It is well settled that an assessment of costs is an interlocutory proceeding, being incidental to the hearing of the substantive issues of the litigation. As such, Apotex was entitled to lead the T-1133-02 Brodkin affidavit on information and belief. Said evidence differed from that addressed in *Browne* in one significant way in that the former, unlike the latter which appeared to be fact evidence only, was a mix of fact evidence, i.e. the disbursements were incurred for the T-1133-02 file, and opinion evidence, i.e. the disbursements were reasonable. The T-1133-02 Mason affidavit essentially challenged the opinion evidence in the T-1133-02 Brodkin affidavit.

[62] I do not think that *Browne* binds me on fact evidence such as the T-1133-02 Brodkin affidavit in every instance because Lord Morris at page 79 quite sensibly noted exceptions, i.e. fact evidence irreconcilable with the record. I do not think that *Browne* requires me to accept without question *prima facie* opinion evidence based on information and belief.

[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. Brodkin, 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.

[64] *Palmer* (decided December 21, 1979) addressed fact evidence and at pages 781-782 agreed with case law referencing *Browne* that there can be no general or absolute rule of evidence in the absence of cross-examination. John Sopinka et al., *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999), pp. 954-956, at ¶¶16.146-16.148, addressed various authorities and agreed. I note and agree with the taxing officer’s assertion in paragraph 20 of *Allied Signal* that he was not bound by “a general affirmation on the reasonableness of the fees and disbursements made by one of the counsel, whatever the context in which it was made” and that reasonableness “in the context of an assessment is the domain of the Taxing Officer” (there arising out of correspondence between opposing counsel). Having accepted *prima facie* that the costs were incurred, I must determine the reasonableness and necessity of the various items of costs and allow, reduce or disallow each as I find appropriate.

[65] *Windsurfing* (decided September 26, 1985) confirmed the disallowance of the entire claim for photocopies in the absence of evidence of what was copied, relevance and reasonable necessity. With respect, I think that my findings in paragraph 7 of *Canadian Union of Public Employees, Local 4004 v. Air Canada*, [1999] F.C.J. No. 464 (A.O.) [CUPE] (decided March 25, 1999), coupled with the parameters outlined below relative to *Carlile*, have been for me a reasonable practice for photocopies so as to strike the appropriate balance between the right of a successful litigant to be indemnified for its reasonably necessary costs and the right of an unsuccessful litigant to be shielded from excessive or unnecessary costs. These comments apply as well to *Diversified* (decided November 22, 1990).

[66] *Egis* (decided July 5, 1991) at pages 323-324 asserted the considerable market implications for pharmaceuticals and the reality that associated litigation usually results in high costs given the financial stakes. I find those comments still apt in the circumstances before me. However, I would hesitate to accept absolutely the comment (p. 323) that a litigant need not shop for cheaper services. That was made in the context of asserting that a litigant may retain “the legal services that can best submit its cause to the Court.” The Court in *Egis* was fashioning a lump-sum award and was careful to say at page 326 that it was not assessing costs. However, the allowance on page 330 of miscellaneous disbursements as not unreasonable, mostly self-evident and satisfactorily explained by counsel appearing indicates that a practical approach to costs is appropriate, not unlike my comments relative to *Carlile* below. Its comment on page 331 that hindsight should not be used “to determine whether a service charged for was an extra service or frill not reasonably necessary to defend the client’s position” is still applicable in 2008 to assessments of costs. Finally, the

circumstances of *Egis*, i.e. lump-sum full indemnity for solicitors, were dissimilar enough to preclude its direct application in the circumstances before me. However, Tariff B1(4) can, subject to the threshold of reasonable necessity, permit full indemnity for disbursements. I note with interest the disinclination in *Egis* to apply a formula for hourly rates based on a schedule of allowances by assessment officers, i.e. a benchmark approach.

[67] *Hurd* (decided November 8, 1994) is of limited relevance. Although not intended to apply specifically to assessments of costs, its comment on page 112 concerning evidence and argument in the adversary system defined by civil trials that one “frailty of the adversary system, or concession it must make, is that the search is not in hope of absolute truth but for the closest one can come to truth on the evidence presented,” could be applied to assessments of costs further to my comments below on *Carlile*.

[68] *Engine & Leasing* (decided February 15, 1995) acknowledged the rough justice, sensible approximations and value judgments required in assessments of costs. It contemplated restrictions to recovery for experts beyond the direct preparation for their evidence. My practice referred to in *Biovail* and affirmed on appeal has permitted recovery of costs for technical advice by experts to supervising counsel beyond such restrictions. *Johnson & Johnson* (decided November 26, 1996) held that meals were non-recoverable overhead. I tend to agree if they are not incurred as part of necessary travel, but I do not think that a category of costs should be universally excluded without some consideration of whether it might be allowable in particular circumstances.

[69] *Eli Lilly* 1997 (decided April 25, 1997) was not an assessment of costs. However, I find its comments useful in the circumstances before me of a large record. It stated at page 407:

...It is always difficult for a trial judge to decide how much detail to include in reasons. In not mentioning certain parts of the evidence there is always a danger that it may be successfully argued, at a later time, that these have been ignored by the judge. At the same time, evaluating in writing and commenting on every detail makes the writing of reasons impossibly long and time consuming. The comments that have been made on certain aspects of the evidence should not be taken as meaning that everything that is not referred to was believed or found to have weight or that it was ignored....

My comments at paragraph 2 of *Halford* were to similar effect. Here, I have in some instances summarized the parties' respective positions in a broad manner and again I assure the parties that I have read and considered all of the assessment materials as well as considerable portions of the court record beyond them as I deemed relevant.

[70] I still hold to my view, often expressed further to my approach in *Carlile* (decided May 8, 1997) and the sentiment of Lord Justice Russell in *Re Eastwood (deceased)* (1974), 3 All.E.R. 603 at 608, that assessment of costs is "rough justice, in the sense of being compounded of much sensible approximation," that discretion may be applied to sort out a reasonable result for costs equitable for both sides. I think that my view is reinforced by the editorial comments (see: The Honourable James J. Carthy, W.A. Derry Millar & Jeffrey G. Gowan, *Ontario Annual Practice 2005-2006* (Aurora, Ont: Canada Law Book, 2005)) for Rules 57 and 58 to the effect that an assessment of costs is more of an art form than an application of rules and principles as a function of the general weight and feel of the file and issues, and of the judgment and experience of the

assessment officer faced with the difficult task of balancing the effect of what could be several subjective and objective factors.

[71] In *Almecon Industries Ltd. v. Anchartek Ltd.*, [2003] F.C.J. No. 1649 at para. 31 (A.O.), I found certain comments in the evidence, although self-serving, nonetheless to be pragmatic and sensible concerning the reality of a myriad of essential disbursements for which the costs of proof might or would exceed their amount. However, that is not to suggest that litigants can get by without any evidence by relying on the discretion and experience of the assessment officer. The proof here was less than absolute, but I think there is sufficient material in the respective records of the Federal Court and the Federal Court of Appeal for me to gauge the effort and associated costs required to reasonably and adequately litigate Apotex's position. A lack of details makes it difficult to confirm whether the most efficient approach was indeed used or that there were no errors in instructions, as for example occurred in *Halford*, requiring remedial work. A paucity of evidence for the circumstances underlying each expenditure make it difficult for the respondent on the assessment of costs and the assessment officer to be satisfied that each expenditure was incurred further to reasonable necessity. The less that evidence is available, the more that the assessing party is bound up in the assessment officer's discretion, the exercise of which should be conservative, with a view to the sense of austerity which should pervade costs, to preclude prejudice to the payer of costs. However, real expenditures are needed to advance litigation: a result of zero dollars at assessment would be absurd.

[72] Paragraph 31 of *Biovail* expressed my reservation about the application of *Allied Signal* (decided May 11, 1998) to experts' accounts. *Syntex* (decided September 23, 1999) approved costs for an expert as an advisor to counsel.

[73] *Conorzio* (decided October 28, 2002) is useful on a number of fronts. If an order is silent on costs, I disallow any costs claimed for the underlying motion further to my conclusions in *Balisky v. Canada (Minister of Natural Resources)*, [2004] F.C.J. No. 536 (A.O.) at para. 6 [Balisky] and *Aird v. Country Park Village Properties (Mainland) Ltd.*, [2005] F.C.J. No. 1426 (A.O.) at para. 10 [Aird assessment]. I do not think that paragraph 10 of *Aird* assessment, asserting that the Court is *functus* as to its disposition of costs, is inconsistent with paragraph 3 of *Conorzio* holding that "a motion under Rule 403 must be considered a statutorily sanctioned procedure for the amendment or variation of a judgment." The Court of its own volition cannot change its award of costs. Paragraph 25 (the dissenting opinion) asserted a different perspective. A formal appeal would seem to be the only other way to change the award of costs.

[74] *Conorzio* in setting lump-sum costs characterized an award of party and party costs in paragraph 8 as "not an exercise in exact science" and the Tariff B counsel fees in paragraph 9 as arbitrary. That was not intended to embrace assessments of costs, but I think it indicative that my comments above further to *Carlile* are valid. Paragraph 28 characterized any motion under Rule 403, further to an award of costs triggering default Column III in Rule 407, for directions to the assessment officer as effectively seeking to vary the award and therefore must be made before the presiding judge. In my view, that reinforces my conclusions in *Balisky* and *Aird* assessment.

Paragraph 52 asserted that the Court did not “wish to second-guess counsel as to the propriety of their work,” but could not blindly impose a substantive indemnity on an adverse party (the evidence simply being broad statements of relevance). Finally, paragraph 53 authorized compensation under item 27 for preparation for the appeal hearing, a service characterized as inexplicably overlooked in the Tariff.

[75] I agree with Apotex’s submissions on *Illinois Tool Works* (decided September 30, 2003) and I have nothing further to add to my analysis in *Halford* of that decision. *AB Hassle* (decided June 22, 2004) analyzed the findings in *Conorzio* and found that only a formal appeal and not a motion under Rule 403 could effect a change to an award of costs. Paragraph 22 stated that an assessment officer cannot address counsel fee items 14(b) and 24 without directions. It appears (paragraph 25) that item 24 was put to the Court as the authority for travel disbursements for counsel and the Court dealt with it as such. With respect, the wording of the Tariff does not support that approach, although I do agree that the Court can properly address the travel disbursements further to its Rule 400(1) discretion. Item 24 only addresses costs for the time of counsel in transit. Any associated disbursements fall under Tariff B1(4) in which there is no provision comparable to that in item 24 limiting the assessment officer’s authority. In other words, I think that my conclusions in *Marshall* still apply.

[76] The Court in *Aird* (decided June 30, 2004) refused to issue directions reducing or denying an expert’s account despite characterizing the evidence as not “entirely satisfactory” (para. 10). That and the comment in paragraph 11 that awarding costs “is not a science” reinforce, I think,

my comments above in *Carlile*. *CCH* (decided August 25, 2004) addressed a motion for increased costs, the Supreme Court of Canada having awarded “costs throughout”. The Court considered this latter award relative to *Conorzio* and concluded that it had the jurisdiction to entertain such a motion as long as an order inconsistent with the decision of the Supreme Court of Canada did not result. Keeping in mind that the Court was not performing an assessment of costs, I still think its approach, i.e. some reductions in the face of scanty evidence, is practical and relevant in the context of my comments above on *Carlile*.

[77] I do not think that a single item 2 fee here would achieve an amount within the notion of partial indemnity. However, I think that *Kassam* (decided May 9, 2005) still applies and I must restrict Apotex to a single item 2 allowance in each matter.

[78] Paragraphs 34 and 41 of *Pfizer* (decided December 20, 2005) are a useful and succinct reminder of an expert’s role relative to patent litigation, i.e. not to construe the claims, but to enable the trial judge to do so in a knowledgeable way. The Court in paragraph 78 expressed its concern for escalating expert fees. I do not think paragraph 78 is binding on me, but its suggested limitation, i.e. expert fees capped at those for lead counsel, could be useful.

[79] I do not think that *Novopharm* assessment is useful here because the assessment officer had received directions on second counsel further to a Rule 403 motion. With respect, I am also uncertain as to its rationale in addressing second counsel allowances. The Court’s direction (para. 1(iv)) permitted counsel fees for second counsel within the discretion of the assessment

officer. Yet, the assessment officer in paragraph 25 held that there was no such direction. As well, paragraph 50 purports to set out certain findings in the case law on disbursements. The quoted passage was actually part of a party's submission.

[80] That apportionment of costs among similar proceedings addressing the same pharmaceutical was raised (but rejected) in *Eli Lilly* 2006 (decided June 19, 2006) indicates that the assertion of common elements of work encompassing multiple proceedings is not unique. Paragraph 11 held that costs for a given service cannot be recovered multiple times by claiming them in turn in each of several files. Experts cannot charge twice for the same work. I do not read paragraph 15 as holding that the Court was automatically bound to accept the disbursements as having been proved *prima facie* in the absence of cross-examination of the supporting affidavit. Rather, the Court accepted them *prima facie* because they appeared "consistent with the record." I think that I can use a similar approach. If I feel there are inconsistencies, I can reduce or disallow accordingly.

[81] I agree with the findings in *Merck* assessment (decided March 22, 2007) concerning items 14 and 24, i.e. a visible direction of the Court is required to empower an assessment officer to address these items. I also agree that the same does not apply to the associated travel disbursements. *Merck* assessment noted that item 2 was unopposed and allowed it several times. That was not an issue in *Merck* appeal (decided October 9, 2007) and the Court did not interfere. That result does not bind me if I determine the wording of item 2 limits Apotex to a single item 2 in the absence of directions otherwise. *Merck* assessment used a formula, i.e. eight copies of each page, developed further to the assessment officer's feel for the litigation. My approach to photocopies per *CUPE* and

my comments above on *Carlile* are consistent with such an approach even if a formula is not used. In my experience, disbursements for binding, tabs, etc. included as part of his formula are often claimed separately.

[82] The dispute in *Merck* assessment concerning prior art centered on whether the associated charges had already been paid and resolved in a separate proceeding. The assessment officer noted certain limitations in the evidence and allowed the charges as presented. I endorse his approach, but note that said result is not binding in the circumstances before me. However, I do think that if respective proceedings are not greatly dissimilar, it could be expected that the assessed results for given items of costs may be comparable, i.e. benchmarking of sorts.

[83] I endorse the very practical approach of *Merck* assessment in paragraph 69 used to fix an amount for miscellaneous disbursements further to the summary of relevant work and factors involved in advancing litigation.

[84] The Court in *Laboratoires* (decided March 30, 2007) addressed entitlement to costs as well as a request for a lump sum. That is different from a formal assessment of costs, but that does not necessarily mean its findings on given items of costs are of no relevance. It applied benchmarking in addressing one of the experts. It also termed the category “meetings” as quite vague and characterized as unusual the expression of travel and hotel costs in round figures. It then allowed disbursements at a capped amount of \$100,000.00.

[85] *Fournier* (decided April 23, 2007) addressed entitlement to solicitor-client costs and as an alternative increased lump-sum costs. The Court refused solicitor-client costs and considered lump-sum costs. It found the evidence, apparently comparable to that before me, wanting for disbursements claimed at \$146,299.40 and refused any allowance on the basis that that would be an arbitrary award given the reasonableness of the disbursements was less than obvious and their propriety had not been established. That result, set aside by *Fournier* appeal, could occur on assessments of costs but, with respect, I am usually reluctant to effect it given my comments above on *Carlile*. I note that paragraph 5 confirmed that an interlocutory award of costs can only be varied by way of appeal or motion for reconsideration.

[86] *Merck* appeal (decided October 9, 2007) is a decision with potentially the greatest impact on the issues before me. I tried to confine my comments on *Merck* assessment to summaries of results and features of acceptable practice as I deemed it inappropriate to add my analysis of issues already addressed in *Merck* appeal. My approach to *Merck* appeal will be different as I think that I need to examine, among other things, its use of benchmarking as a potentially binding tool for assessments of costs.

[87] *Merck* appeal (para. 4) accepted market size as a relevant consideration further to Rule 400(3)(o) (any other relevant matter) in an assessment of costs. That is, substantive costs should have been expected in a NOC proceeding relative to a market of \$130 million per year.

[88] *Merck* appeal (paras. 8-13) summarized the benchmark or band principle which I appreciate roughly as mandating that the costs for each expert in turn should be comparable if the work required of each was essentially the same. The benchmark principle presumes that the highest account among the experts is not the standard against which the other accounts are measured. *Merck* assessment referred to charts in the evidence in benchmarking the hourly rates of the experts and indicated that the invoices were examined as to the breakdown of work. There was little indication in *Merck* assessment of direct analysis of the reports themselves.

[89] *Merck* appeal affirmed the allowance in *Merck* assessment for Dr. David Weissberg made further to less than detailed evidence and on the basis of discretion akin to my comments above further to *Carlile*. *Merck* appeal set aside an allowance made further to *Carlile* for Franco A. Tassone, whose affidavit was found to be improper and inadmissible, and held that the reliance on a decision of a fellow assessment officer was ill-founded in that instance. I observe only that *Merck* assessment misstated the proposition in *Carlile*.

[90] The deliberations on Dr. Robert S. Langer (the Cadillac expert in *Syntex*) in paragraphs 35-38 of *Merck* appeal represent for me my concerns with benchmarking. These paragraphs refer to at least three benchmarking formulas. One, rejected in *Merck* assessment, proposed using the lesser hourly rate and billable hours of another expert. Two, used in *Merck* assessment but rejected in *Merck* appeal, proposed an hourly rate developed by reference in part to other proceedings but without regard to variances of the billable hours of the experts. Three, used in *Merck* appeal, applied a benchmark to the hours claimed by Dr. Langer, adopted the hourly rate developed in

Merck assessment and adopted the benchmark rejected in *Merck* assessment and further reduced Dr. Langer's accounts. This resulted in an allowance of \$31,785.00 certainly in the range of the \$28,236.46 for Dr. Weissberg allowed not by benchmarking, but based on the assessment officer's subjective feel for the litigation. In other words, comparable results occurred, one by fairly subjective means and the other by more measured benchmarking. I think that benchmarking as an approach can be useful, but it should not necessarily be paramount or mandatory. That is, there may be factors present which cause differentiation in the amount and nature of the work and associated costs. For example, the affidavit of Dr. Weissberg appeared to have been prepared further to instructions leading to hearsay and not expert opinion, an issue which benchmarking would not easily resolve.

[91] *Merck* appeal affirmed *Merck* assessment on prior art. *Merck* appeal affirmed the application in *Merck* assessment of *Carlile* to travel disbursements, which included an exercise of discretion in the latter to allow them for second counsel. *Merck* appeal affirmed *Merck* assessment on the miscellaneous disbursements.

[92] In paragraph 60 above, I set out three themes or factors underlying my analysis of the case law. I think that my comments further to *Browne* and *Carlile* indicate relative to the first factor (sufficiency or threshold of evidence) that the absence of detail in the T-1133-02 Brodtkin affidavit does not necessarily mean that Apotex's costs must be drastically reduced, but it could mean general reductions if I feel that amounts claimed are inconsistent with the record.

[93] I find for the second factor (my jurisdiction to restrict Apotex to recovery for five experts) that I cannot do so. I must presume that the presiding judge acted in a lawful manner. I cannot speculate on whether the presiding judge had in mind the limitation in the *Canada Evidence Act* in permitting the hearing to unfold with more than five experts and further to award costs to Apotex in those circumstances. It is incontrovertible that such costs were so awarded. In the absence of Rule 403 directions on this point, I find that Abbott's only recourse would have been a formal appeal under the *Federal Courts Act*, s. 27(1)(a). *Altana* appeal provided relief in response to a problematic precedent. That I find that I cannot provide the same relief does not however bind me to accept without limitation the claims as presented for all of the experts as they are still subject to reasonable necessity. That is, I could still reject a claim in its entirety not because it violates the statutory limit of five experts but because, for example, it was superfluous.

[94] I find for the third factor that I may still assess costs, with particular regard to experts, further to my practice set out in paragraph 29 of *Biovail*:

I have assessed the accounts of the Respondent's three experts consistent with my approach in *Merck* above, affirmed by [2002] F.C.J. No. 1357 (F.C.T.D.) and *Bayer* above. I considered there some of the jurisprudence advanced here: I will not add more analysis given that reference here was made to *Halford* above in which I analyzed expert accounts in some detail. Experts may provide technical assistance, in addition to the work for their own reports and their oral evidence, in areas of case preparation beyond the capacity of supervising counsel. However, such work, potentially recoverable on a full indemnity basis as a function of reasonable necessity, should not stray into areas for which supervising counsel bear sole responsibility. That is, Tariff limitations could be circumvented because the assessable costs for counsel are limited to partial indemnity....

In considering the appropriate indemnity for experts here, I have kept in mind that this is a prohibition proceeding with evidentiary thresholds different from patent infringement proceedings.

[95] The key words in fee item 2 are “Preparation...of all...respondents’ records or materials.” The use of the adjective “all” would embrace the experts’ affidavits. I can only allow a single item 2. In so doing, I note in my experience with various authorities and sources over the years that the partial indemnity intended by superior court tariffs can range from one-third to two-thirds. Client billings were in the record, but with fees redacted. I have no doubt that my allowance of \$660.00 for item 2 falls well below that range.

[96] Relative to item 4, my comments above on *Consortio* refute Apotex’s position that a judgment on the substantive issues of the litigation effectively asserts a residual jurisdiction to permit costs of an interlocutory proceeding disposed of by an order silent on costs. However, in my experience misidentification of items and dates can occur in bills of costs. An order issued May 28, 2003, on consent, addressed a motion by Abbott to file additional affidavits and allowed costs in the cause. There was no provision that they be payable forthwith and no evidence that they were paid or settled between the parties. I allow \$360.00 under item 4 for this motion.

[97] The order dated October 7, 2003, provided that “if the parties cannot agree to costs they may be separately spoken to.” I reject Apotex’s position that they can be spoken to before an assessment officer. Any disposition further to said provision in the order could only have elicited an exercise of the Court’s Rule 400(1) discretion to perhaps allow or deny costs. What is clear is that I cannot

exercise Rule 400(1) jurisdiction as I am not the “Court” as that term is used in Rule 400(1): see the first sentence of paragraph 6 of *Marshall*. I disallow the \$600.00 claimed under item 5. It follows that the associated fee item 6 for appearance is disallowed.

[98] My consideration of items 8 and 9 necessarily addressed reasonable necessity for the amount of expert evidence because Abbott put that in issue. This consideration was also relevant in my assessment below of the actual accounts of the experts. I read the Notice of Allegation dated May 31, 2002, and then examined the evidence led by both sides for the judicial review. I examined the instructions from supervising counsel to Abbott’s experts on the scope and variances of work to be performed. For example, Dr. Jerry Atwood, one of Abbott’s experts, was directed to address factual and scientific arguments in the Notice of Allegation further to a number of factors and later directed to address alleged misinterpretations of his evidence by Dr. McClelland.

[99] As well, I perused the cross-examinations of affiants from both sides to get a sense of the difficulties, or not, for Apotex in addressing Abbott’s evidence and to gauge the effort required of supervising counsel and the experts themselves. The exchanges between opposing counsel and Dr. Atwood concerning inventive ingenuity at pages 53-60 of the transcript of the cross-examination on his affidavit held January 22, 2004, indicate to me that the required work was not always straightforward for counsel attempting to shape case strategy and for experts to fashion persuasive evidence in the face of competent opposing experts. Another example concerns Abbott’s expert Dr. Stephen Byrn and melting points at pages 109 to 128 of the transcript of the cross-examination on his affidavit held January 8, 2004.

[100] The instructions to Apotex's experts Dr. McClelland, Dr. Cima, Dr. Brown and Dr. Hendrickson and their work were not identical, but were more closely aligned among one another than those for and the work of Dr. Rey and Dr. Taylor on crystallography. Dr. Taylor's instructions originated with Dr. Rey. I noted the respective differences in qualifications and experience of the Apotex experts. I noted the considerations in the T-1133-02 decision of hearsay evidence.

[101] I allow the various item 8 claims as presented further to my comments above on the case law. I allow the various item 9 claims as presented for first counsel. I think that the use of second counsel was prudent and reasonable. However, the scheme of the Tariff providing that a direction of the Court is necessary to claim second counsel under item 14, for example, indicates to me that item 9 not containing comparable language means that the item 9 allowance is intended to be a global fee regardless of the number of counsel engaged. It is not necessary therefore to rule on the use of the patent agent.

[102] I have consistently held that an appearance by counsel at a hearing within the meaning of item 14(a) necessarily includes some time in the courtroom before the scheduled start or resumption times identifying oneself with the Court Registrar, waiting for the call of the case and otherwise satisfying the Court Registrar that the hearing is ready to proceed, none of which I consider to be preparation time embodied in other counsel fee items. Therefore, the abstract of hearing in the record is a useful, but not absolute, guide for assessing attendance at hearings which may have had a mix of shorter or longer breaks for recesses and lunch. The record discloses sitting times

respectively of 6 h 40 min, 7 h 20 min, 7 h 50 min, and 6 h 48 min respectively for four days, meaning Abbott's suggestion of an eight-hour sitting day is a somewhat uneven fit. However, I think it works out to adequate compensation for the entire hearing and I apply it accordingly to reduce the claim of \$12,000.00 for first counsel to \$9,600.00. Again, as above for fee item 9, the use of second counsel was prudent, but I must disallow the claimed \$6,000.00.

[103] A compendium is not written argument within the meaning of fee item 15. In a broad sense, it might be viewed as part of case preparation under item 2 or hearing preparation under item 13. However, I reject that view because I think both of those items reflect the professional training, experience and skill of counsel in shaping a winning strategy for the client. A compendium is a technical tool which can be developed by juniors further to instructions from supervising counsel. I allow a mid-range item 27 fee of 2 units (\$120.00 per unit) for each compendium as I think that this was not the most difficult of tasks.

[104] Although Apotex's position, i.e. the distinction between preparation of the assessment record and the actual appearance to argue the assessment, is correct, item 26 has been applied as the global and single allowance for those two services. I disallow the item 27 claim, but allow in part Apotex's request to increase fee item 26 by bumping it up to 5 units.

[105] The invoices for Dr. Hendrickson, whose cross-examination on his affidavit occurred on December 16, 2003, are typical for experts in my experience. That is, they are detailed in some respects, i.e. six hours on August 24, 2002 for calculation of isomer numbers, but vague in others,

i.e. three hours on April 28, 2003 for assessing and consulting for response. A weekend intervened between April 25, 2003, for which he billed three hours to analyze Abbott's affidavit, and the work on April 28, 2003. I think these two pieces of work were related. The *prima facie* evidence was of no assistance for my speculation as to why the rate of US \$250.00 per hour used from August 8, 2002 to April 29, 2003 had increased by 60 percent to US\$400.00 per hour in December 2003 for 25 hours (which included 14 hours travel time). His airfare of US\$1,037.24 between Boston and Toronto was not a faresaver. It may have been business class, but not all short haul routes have business class seats. Counsel for Apotex travelled in business class between Toronto and Chicago, but the evidence is that only estimated economy fares were claimed. That the distances from Toronto to Boston and Chicago respectively are comparable does not mean the airfares would be comparable because market factors might be different. The full fare economy fare presented for Toronto-Chicago is however just over C\$1,000.00. Dr. Hendrickson appears to have billed for 63 hours. I reduce his account by 25 hours x US\$150.00 per hour x 1.37 (the currency exchange rate in the December 17, 2003 invoice) leaving \$25,497.28 as his assessed allowance which I do not consider a benchmark.

[106] The cross-examination of Dr. McClland on his affidavit occurred on December 18, 2003. The *prima facie* evidence does not explain why he used C\$300.00, C\$350.00 and C\$400.00 per hour intermittently throughout 2003. Inexplicably, he charged C\$400.00 per hour for report writing on May 15 and only C\$300.00 per hour (his travel rate for June 13) for report writing on May 25. Certain charges addressing an unspecified motion for reply evidence occurred prior to the motion leading to the October 7, 2003 order addressing reply evidence for which I refused costs.

They occurred at about the time of the May 28, 2003 order addressing Abbott's motion to adduce additional evidence for which I allowed costs. This latter order also addressed reply evidence.

The imprecision of such evidence makes it difficult to determine whether the charges relate to interlocutory applications for which there were no costs. That, coupled with the unexplained use of three rates during the same year, induces me to reduce his account to an amount of \$27,000.00. This includes a reduction for struck portions of his evidence.

[107] The cross-examination of Dr. Cima on his affidavit occurred on October 29, 2004.

His rates progressed from US\$300.00 per hour on January 10, 2003 to US\$350.00 per hour by October 28, 2004 and then US\$400.00 per hour by December 2, 2005. He billed for services after his cross-examination. Notations of what appear to be currency exchange rates were made on his invoices, giving a total of C\$19,799.97 for his fees. The difference between that and the claimed \$21,650.00, i.e. \$1,850.03, could be the laboratory costs noted throughout as charged separately.

His invoices described his work as "consulting services." What he did and its relevance is somewhat apparent from the record, except for the work after his cross-examination. I disallow the latter costs (\$1,823.38) plus a factor of \$500.00 for laboratory work leaving his account approved at \$19,326.62.

[108] The cross-examination of Dr. Brown on his affidavit occurred on November 19, 2004.

He billed 179.59 hours or just over 22 days (eight-hour day) at \$400.00 per hour from January 17, 2003 to November 20, 2004. I do not think that the record warrants that much work given the work

of the other qualified experts. I allow his account at the reduced amount of \$56,500.00, which includes a reduction as above for struck portions of his evidence.

[109] The cross-examination of Dr. Taylor on his affidavit occurred on January 27, 2004. He billed 122 hours at \$450.00 per hour from January 2003 to January 2004. In the larger scheme of the case that Apotex had to meet, his evidence required more time. There were vague entries, i.e. examination of affidavits. I allow his account at the somewhat reduced amount of \$65,000.00.

[110] The travel claim, which is reasonable, is however allowed at the reduced amount of \$9,836.82 to reflect the removal of costs further to my refusal above to allow costs of the October 7, 2003 order. I allow the telephone, telecopy, transcript, prior art and LPIC Levy charges as presented. The tendency with photocopying charges is to include client copies and sometimes copies associated with interlocutory proceedings not having awards of costs. There may have been superfluous materials. The record here was considerable. I allow only \$21,000.00. Couriers are billed differently, but may carry similar concerns. I allow only \$1,700.00. The parking/cab/mileage charge of \$175.76 is difficult to assess both because of vagueness and because it might have addressed multiple points in time. I allow only \$45.00. The agent's fee (\$453.80) could be just about anything, but in intellectual property cases, it sometimes relates to retrieval of certified copies of official records, prior art or other potential evidence. I allow \$400.00. Apotex's evidence, i.e. redacted invoices, distinguished file histories from file retrieval, but did not explain their relevance. Claims for the prosecution history of patents are allowed as assessed costs. If these file histories are

of that nature, then my considerations would address relevance and reasonableness. With reluctance, I find the presentation of this item too obscure and I therefore disallow the \$1,730.00.

[111] My decision in *Englander v. Telus Communications Inc.*, [2004] F.C.J. No. 440 (A.O.) confirms that I routinely allow costs for online computer research. However, that process includes consideration of whether all, none or only part of the research was reasonably necessary, irrelevant or simply in the nature of cautionary or secondary authorities keeping in mind the professional obligation of counsel both to the client for diligent representation and to the Court for as much assistance as reasonably possible on all aspects of the law potentially affecting final adjudication on the substantive issues of the litigation. The redacted law firm billings were of no help in this and other areas above. Some of these charges likely addressed motions. I allowed reduced amounts of \$2,350.00 (computer time) and \$2,370.00 (Quicklaw).

[112] It appears that the bill of costs claims GST relative to expenditures outside Canada for experts and for travel. As I am unclear from the record that that is not so, I have done a GST exclusion calculation. The total for allowed disbursements is \$252,140.01. From that, I remove \$50,317.52 (US dollar assessed amounts for experts and travel not subject to GST and converted to Canadian currency using the various exchange rates in the record: this GST exclusion calculation is endorsed on the assessed bill of costs and includes C\$150.00 removed as a global ground transportation factor in Canada) leaving \$201,822.49 subject to GST. The GST rate used (6%) applied to \$201,822.49 gives \$12,109.35. This is complicated by the apparent GST calculation performed on certain charges already likely including GST, i.e. Dr. Hendrickson's Toronto hotel

charge. There may be other miscellaneous expenditures not attracting GST. To ensure that Abbott is not inadvertently saddled with this, I further reduce the allowed GST to \$12,037.35. Apotex's bill of costs for the T-1133-02 file, presented at \$369,655.99, is assessed and allowed at \$295,413.36.

II. The A-510-05 File

A. *Assessment*

[113] Abbott conceded the counsel fee items except for items 26 and 27 claimed as above in the same manner as in the T-1133-02 file. For the reasons above, I allow item 26 as claimed at 4 units and disallow item 27.

[114] Abbott conceded some disbursements and put only photocopies, meetings, Quicklaw and file retrieval, claimed at \$9,165.98, \$155.14, \$1,261.78 and \$132.00 respectively, in issue. Abbott argued that the claims for meetings and file retrieval should be disallowed as overhead and not proven. Abbott argued that the claims for photocopies and Quicklaw were excessive and not proven and should be reduced to \$2,291.50 and \$315.45. Apotex relied on *prima facie* evidence and submissions similar to those above in the T-1133-02 file. It argued that the claim for meetings likely addressed food and beverages during conferences with the client, opposing parties and other relevant people.

[115] I note that Abbott as the Appellant would have been responsible for production of the appeal book, but that Apotex would still have prepared service and filing copies of its documents and authorities. Client copies are not assessable. I allow \$5,500 for photocopies. I allow \$1,100.00 for

Quicklaw. I disallow the claims for meetings and file retrieval. The GST allowance is reduced accordingly. Apotex's bill of costs, presented at \$15,508.69, is assessed and allowed at \$10,906.89.

III. The T-1847-03 File

[116] The counsel fee items conceded by Abbott are assessed and allowed as presented.

Notwithstanding the able submissions of counsel for Apotex, I allow only one fee item 2 as above.

As above, counsel for Abbott advanced able submissions on restricting Apotex to five experts, but for the reasons above, I allow Apotex counsel fee claims as presented under items 8 and 9. Abbott had objected to one of the item 8 claims on the basis that it was a patent agent and not a lawyer who prepared the witness. I think that might have been a factor to reduce the allowance but for the settlement at mid-level Column IV costs. I simply think that supervising counsel still had a role and therefore allow this particular item 8 claim. As above, I refuse item 27 for preparation of the bill of costs and restrict item 26 to the 5 units presented. I allow the claims of \$177.97 and \$305.00 respectively for telecopies and process servers, being the only disbursements conceded by Abbott. My disposition of the respective submissions of the parties on the *prima facie* evidence advanced by Apotex is consistent with that in T-1133-02 file above.

A. *Apotex's Position on Disbursements in the T-1847-03 File*

[117] Apotex argued that its case preparation was complicated by initially having to address seven patents. Ultimately, the hearing judge only had to address three patents. Abbott insisted on a hearing notwithstanding recent jurisprudence finding the prior art asserted by Apotex to be anticipatory. Again, there was significant market value at stake. The complexity of this proceeding can be

inferred from the filing of 11 and 9 expert reports on the part of Apotex and Abbott respectively, the agreement by Abbott to increased mid-level Column IV costs and the length (43 pages) of the Court's decision. Abbott's conduct, i.e. waiting until its memorandum of fact and law before dropping four patents, resulted in unnecessary costs for Apotex.

[118] Apotex claimed \$395,584.68 for nine experts, as well as \$47,215.53 for laboratory services associated with various technical and scientific experiments conducted for the seven patents. Abbott's average expenditure per expert was about \$42,500.00. Including the laboratory services, Apotex's average was about \$49,200.00 - hardly a Cadillac type of mark-up. Apotex did not have the benefit that Abbott did, i.e. prior experience with clarithromycin. Any prior experience on the part of Apotex's experts was attributable to only one of the seven patents in issue.

[119] Apotex argued that the claims for Mathew Buck (\$7,000.00) and Dr. Carlos Zetina Rocha (\$8,465.33) are assessable because they were no longer employees of Apotex at the relevant time. Abbott could have, but did not, raised issues of excessiveness of the claims for experts at the time it settled the level of costs, nor did it apply for limiting directions. The use by Abbott of Dr. Stang's hours billed to suggest excessive hours billed by Apotex's other experts should be discounted because the latter's mandate, i.e. seven patents, was much broader than that of the former. Dr. Nicholas Taylor's account here (\$128,100.00) is higher than for the T-1133-02 file because more patents were in issue and some were not removed until an advanced stage of the litigation. As well, he had to carry out a number of experiments. The decision could have been even longer and Dr. Taylor's evidence more prominent therein if all seven patents had been considered.

His work likely resulted in Abbott withdrawing certain issues. That the decision did not quote extensively from Apotex's expert evidence does not diminish the reality that it was the scientific basis for the Court's disposition of the issues.

[120] Apotex noted that Abbott's evidence conceded the \$0.25 per page used for the photocopying claim (\$79,926.89). Abbott's suggested reduction to \$10,000.00 ignores the reality of the number of patents in issue and the consequent volume of the materials necessary to address them. Abbott's complaints about excessiveness of the travel claim (\$31,729.33) are misplaced because, for example, London and Chicago are expensive cities. Apotex argued as above further to *Merck* assessment, *Merck* appeal and *Carlile* that miscellaneous disbursements were relevant for the outcome. Again, the Hughes law firm acted as co-counsel, but no duplication of work occurred, i.e. the computer research there did not duplicate the computer research conducted by Apotex's solicitor of record. Apotex argued that Abbott's reliance on *AB Hassle* is misplaced because that case addressed entitlement to a higher level of costs which is not an issue for this assessment of costs. Apotex argued that significant and necessary costs were part of a larger process of several pieces of litigation to resolve a number of patents allegedly blocking market access.

B. Abbott's Position on Disbursements in the T-1847-03 File

[121] Abbott argued generally that Apotex used a number of the same experts in these various proceedings and advanced the same pieces of prior art. The record indicates that Apotex, as a successful generic company, has internal testing capability which should have lessened its costs. Dr. Taylor in particular is objectionable because he was not skilled in the art, being a

crystallographer and not a chemist or chemical engineer. His work was largely irrelevant and strayed improperly into a consultant's role. The total claim for experts almost equals the entire party and party bill of costs for the T-1133-02 file. A reading of the decision in the T-1847-03 file indicates a number of issues common to the T-1133-02 file, meaning Apotex's experience with the latter file should have led to economies of costs. *Biovail* held that prior experience or duplication of evidence should result in reductions. The laboratory charges equated to duplication of charges for experts already claimed (Dr. Taylor and Dr. Cima).

[122] Abbott noted that Apotex's expert, Dr. Stang, charged only \$34,189.43 compared to the excessive, unnecessary and duplicative charges of Dr. McClelland (\$76,777.05), Dr. Brown (\$64,088.01) and Dr. Taylor (\$128,100.00) inconsistent with the work ordinarily required in proceedings of this sort. *Merck* appeal reduced Dr. Langer's charge of just over \$200,000.00 to just over \$30,000.00. Dr. Taylor's invoices add up to only about \$112,000.00 and indicate work as a consultant after his cross-examination. Dr. Hendrickson's invoices indicate a limited consultant's role. For the experts' accounts not proposed to be completely disallowed further to the five-expert limit, Abbott proposed these reduced allowances: Dr. Stang (\$34,189.43 down to \$15,000.00); Dr. Cima (\$35,721.04 down to \$15,000.00); Dr. McCelland (\$76,777.05 down to \$20,000.00); Dr. Brown (\$64,088.01 down to \$20,000.00) and Dr. Taylor (\$128,100.00 down to \$20,000.00).

[123] Abbott argued that McRoberts Legal Services (\$249.25) should be disallowed as Apotex did not discharge its onus of evidence of purpose, relevance and reasonableness. Abbott advanced similar submissions for LPIC (a mandatory insurance levy for civil litigation commenced in

Ontario) (\$50.00), translation (\$4,315.00), meetings (\$1,611.30) and file retrieval (\$60.25).

The telephone charges (\$1,303.38) could be allowed in full if evidence of payment and relevance for this case was available. Abbott proposed a photocopying formula of eight copies: one for each of counsel for the three parties, three for the Court, one for the client and a spare. That would lead to something around \$10,000.00 to \$15,000 and not the \$79,926.89 claimed. The evidence is insufficient for couriers (\$3,392.26) and does not preclude rush fees: \$1,000.00 would be reasonable. As above, the claims for computer searches (\$1,146.10) and Quicklaw (\$2,091.16) are excessive, duplicative and not proven: reduce to a total of \$1,000.00.

[124] Abbott suggested reducing prior art (\$3,229.16) to \$1,000.00 given Apotex's prior experience with it and the patents. Court reporters/transcripts (\$18,457.50) should be reduced to \$4,000.00 in the absence of evidence of reasonableness. There is no evidence of relevance and reasonable necessity of travel (\$31,729.33): allow \$2,000.00. The unexplained parking/taxi/mileage (\$1,570.44) should be disallowed as overhead.

C. Assessment

[125] As above for the T-1133-02 file, I assessed the experts' account by first examining the case records of both sides to gauge the challenges and work for Apotex in its attempt by this litigation to secure market access. I considered benchmarking, but kept in mind any differences in mandates which would interfere with or preclude benchmarking. That required me, and this comment applies throughout these several assessments, to read confidential materials sealed by protective orders. The Court's decision (confidential version) outlined the role of each expert without hinting at

duplication of effort. The transcripts of cross-examination of affiants varied in length due in part I think to differences in mandate. Thus, I would expect that the respective accounts might differ, i.e. Dr. Taylor (\$128,100.00) and Mr. Buck (\$7,000.00).

[126] Pages 19 to 38 of the transcript of the cross-examination (May 24, 2006) of Abbott's expert Dr. Allan S. Myerson on his affidavit addressed his work as an expert on clarithromycin for Abbott during a number of proceedings and in part the manner of respective production of expert reports. If I understand his evidence correctly, he used two general approaches, i.e. prepare the draft, discuss it with counsel and then write it in conjunction with counsel or obtain the Notice of Allegation, prepare the draft, send it to counsel and then finalize it further to remote discussions with counsel. Pages 27 to 30 indicated that several drafts might occur, but I note that different working styles exist, i.e. minimal editing. Page 33 of the transcript of the cross-examination (April 19, 2006) of Dr. Taylor on his affidavit is an example of this latter style, i.e. first draft, mulling over it extensively, minor typographical corrections and a final draft very similar to the first draft.

[127] Pages 1 to 50 of the transcript of the cross-examination (May 16, 2006) of Abbott's expert Stephen R. Byrn disclosed probing as to experience and a working style. Some questions addressed whether prior experience would reduce the time taken and whether a certain number of hours (30 to 55) of work would be on low side. Mr. Byrn was reluctant to comment. Pages 174-175 probed on the number of drafts of a report. I speculate that such questions, and indeed in the other examples, were not intended as preparation for assessment of costs but rather to test the strength

of adverse evidence. However, I found them useful in understanding the parameters of work for experts.

[128] My initial reaction to Lee Timothy Grady's mandate, i.e. provide an opinion on two brief letters and a cumulative supplement, was to sharply reduce his account (\$19,746.82). However, I read the transcript of the cross-examination (February 14, 2006) on his affidavit, prompting me to reconsider. My reading of the several expert reports and cross-examinations on both sides provided context in considering each account in turn.

[129] Dr. Hendrickson charged US\$400.00 per hour for 41.5 hours. I find his account in order and allow it as presented at C\$21,497.00. Mr. Grady's account (C\$19,746.82) is more obscure and is based on US\$325.00 or US\$360.00 per hour, except for his deposition (2.5 hours) for which he inexplicably doubled his rate to US\$720.00 per hour. I find the latter to be unacceptable in the circumstances. He does however lower his rate to US\$180.00 per hour when sitting in an airplane. Currency exchange rates are in the record permitting me, for example, to calculate the Canadian dollar value of the difference between the use of \$360.00 and \$720.00 per hour. Although unlikely, there may have been other unacceptable fluctuations in his rate. I allow C\$17,000.00.

[130] Dr. Taylor charged C\$450.00 per hour. Abbott characterized his work as largely unnecessary further to his indulgence of his scientific interest in irrelevant matters. I would not go that far, but I have some difficulty in gauging how focused he was on the core of his mandate. He charged at least 30 hours for consulting on Abbott's affidavits and cross-examinations. I allow

Dr. Taylor's account at only \$80,000.00. Dr. McClelland charged C\$350.00 per hour. His invoice is precise as to hours worked. I would not expect a detailed breakdown of what was done in each hour of the report writing. I allow it as presented at \$76,777.05. Similarly, I allow Dr. Brown's account as presented at \$64,088.01 (C\$450.00 per hour). I acknowledge the size of these accounts relative to the others. I simply note that their amounts are small relative to the market share at stake for both sides and to be expected. I also acknowledge that certain similarities in work should exist among Notice of Compliance proceedings, but note that the subject pharmaceutical and associated patents will introduce unique work variables in each proceeding. I accept Apotex's position on the need to prepare for patents not ultimately in issue at the hearing.

[131] Dr. Cima billed at US\$400.00 per hour. I allow his account as presented at C\$35,721.04. Dr. Zetina -Rocha billed at C\$300.00 per hour. I allow his account as presented at C\$8,465.33. Dr. Stang billed at US\$500.00 per hour except his attendance (including preparation) at his cross-examination for which he billed at US\$5000.00 per day. He was one of several experts who charged for review of Abbott's evidence. I am not convinced that Abbott should bear all of his costs. I reduce his account from \$34,189.43 to \$26,500.00. If Mr. Buck prepared an invoice, I could not locate it in the record. The evidence confirms that the Hughes law firm billed (invoice dated April 5, 2006) Apotex for his work. I reduce his account from \$7000.00 to \$3,500.00. I allow the laboratory services as presented at \$47,215.53.

[132] Although I accept that the services of a law firm or search firm are sometimes necessary, i.e. to secure evidence in another jurisdiction, I am not certain of the purpose of McRoberts Legal

Services in the face of the *prima facie* evidence and therefore disallow its claim (\$249.25).

I examined the record looking for materials requiring translation. Apotex's application record included excerpts from foreign language texts and reports (German and Japanese) for which I do not see a translated version. There were European and Japanese Patent Applications for which I am uncertain on whether Apotex prepared the translated portions in the record. I reduce the claim (\$4,315.00) for translation services to \$3,000.00. For reasons similar to those above, I reduce parking/taxi/mileage from \$1,570.44 to \$350.00.

[133] I allow LPIC (\$50.00), telephone (\$1,303.38), prior art (\$3,229.16) and court reporter/transcripts (\$18,457.59) as presented. I reduce photocopying charges from \$79,926.89 to \$68,000.00 and courier charges from \$3,392.26 to \$2,700.00. The travel expenses for Canada, United States and England are in order and are allowed as presented at \$31,729.33. As above, I think that computer charges (\$1,146.10) and Quicklaw (\$2,091.16) should be reduced: I allow a total of \$2,800.00. I find meeting expenses (\$1,611.30) as a party and party item of costs obscure in the circumstances of the *prima facie* proof here and disallow them. I disallow file retrieval (\$60.25). GST requires a rough adjustment as above to account for US dollar expenditures and other factors. This is complicated as elsewhere by GST calculations apparently performed on certain charges already likely including GST, i.e. Dr. Grady's Toronto hotel charge. The GST exclusion calculation is endorsed on the assessed bill of costs. Apotex's bill of costs for the T-1847-03 file, presented at \$695,312.50 is assessed and allowed at \$591,983.32.

IV. The A-59-07 File

A. *Assessment*

[134] The fee items and disbursements not in issue are allowed as presented. Abbott objected to fee item 17 (preparation of notice of appeal) because Apotex had no work in that area. Apotex argued that there was work in considering whether to proceed and alternatively that item 27 could be applied. Given the record on market share, I do not think that Apotex had any doubts as to its response. I disallow item 17. Abbott advanced similar submissions for item 18 (preparation of appeal book). I reject its position: Apotex as respondent had very real work in ensuring the record was complete and could not simply remain passive. As above, I disallow the claim for second counsel under item 22(b). I allow item 26 as presented at \$480.00 and refuse Apotex's request for an additional indemnity under item 27. Apotex claimed item 27 for review of the decision. That claim belongs under item 25 (services after judgment not otherwise specified) and is allowed there. The submissions for the only two disbursement items in issue, i.e. photocopying (\$20,200.25) and travel (\$1,828.86) were similar to those above. I find the travel claim addressing first and second counsel reasonable and allow it as presented. As above, I allow a reduced amount for photocopies: \$16,500.00. Apotex's bill of costs, presented at \$29,532.34, is assessed and allowed at \$24,147.28.

V. The T-840-05 File

[135] Counsel fee items and disbursements not in issue are allowed as presented. As above, I allow only a single item 2 claim. As above, I reject Abbott's position on the item 8 and 9 claims relative to a five-expert limit. The claim for second counsel under item 14(b) is disallowed. As in the T-113-02 file, preparation of the compendium is allowed under item 27 (at the mid-point of

Column IV specified by the judgment). The item 27 claim for preparation of the bill of costs is removed and item 26 is allowed as presented at \$600.00.

A. Apotex's Position

[136] Apotex noted that this matter was very important to its interests being the third of the trilogy of hearings to clear access to the clarithromycin market, the first addressing one patent, the second addressing seven patents and this one addressing the ninth and tenth patents. As such, Apotex used 15 affidavits to Abbott's five. Apotex argued that Abbott's position on *Merck* appeal is incorrect, i.e. that the award there of \$206,411.00 is reasonable in NOC proceedings. Actually, *Merck* appeal awarded \$384,686.01, having reduced by \$206,411.00 the allowances in *Merck* assessment. Of that reduction, \$205,911.00 addressed a single expert's account found to be disproportionate to the other experts' accounts. No such discrepancy exists or is alleged here.

[137] Apotex argued that it is entitled to indemnification for its costs in responding to the notice of application for judicial review as filed notwithstanding several patent claims dropped by Abbott at an advanced stage. That left narrower issues for the hearing, but only after Apotex's work and costs in assembling the expert affidavits and memorandum of fact and law caused Abbott to do so. The Court's decision noted the dearth of evidence on Abbott's part, but did not at all criticize Apotex's evidence. Dr. Rocha and Mr. Buck are eligible for compensation because they invoiced for their time after their employment with Apotex. Dr. Taylor's evidence led to Abbott's dropping of claims and is therefore compensable even if not mentioned in the Court's decision.

[138] Apotex asserted that the M.I.T. laboratory charge (\$6,540.82) flowed from Dr. Cima's work. The proposed arbitrary reduction of telephone charges (\$2,651.01) is unreasonable given the international requirements. Detailed invoices are not needed for every single item. A similar argument applies to the proposal to reduce photocopies (\$98,335.66), couriers (\$5,702.58) and meetings (\$5,223.84) to \$10,000, \$1,500.00, and nothing respectively. The various other disbursements should be allowed further to paragraphs 68 and 69 of *Merck* assessment. The proposed reduction of travel (\$20,038.75) to \$4,000.00 is unreasonable given the chart in the evidence and the invoices subsequently produced.

B. *Abbott's Position*

[139] Abbott argued that Apotex's litigation approach was inconsistent and unreasonable, i.e. more patents in issue in the T-1847-03 file, but lower photocopy charges than here. The experts' total charges (\$314,363.78) should have been lower given familiarity with clarithromycin. Apart from its suggested disallowance of certain accounts further to the five-expert limit, Abbott argued further to insufficiency of the *prima facie* evidence that the accounts of Dr. Stang (\$50,214.78), Dr. McClelland (\$58,411.61) and Dr. Brown (\$56,528.73) should be reduced to \$32,000.00 each. The accounts of Dr. Cima (\$16,173.44) and Dr. Harris (\$28,851.12) would be allowable if underlying proof was available. The affidavits of Dr. Rocha and Mr. Buck are exactly the same, save for small differences, as those sworn in the T-1847-03 file. There should be significant reductions of the accounts of Dr. Stang, Dr. McClelland and Dr. Harris because their evidence was duplicative. Dr. Taylor improperly charged for work after his September 2006 cross-examination.

Invoices are missing for three experts, i.e. none for Dr. Cima (\$16,173.44), only \$18,628.00 of the \$50,214.78 for Dr. Stang and only \$8,983.00 of the \$12,311.03 for Dr. Rocha.

[140] Before counsel for Abbott could move on to the other items of costs, I put certain propositions and questions to her. I speculated that the benchmarking in the case law does not specifically consider the possibility that different approaches may have been warranted notwithstanding common elements of issues. Compounding my concern was that Abbott for the T-1847-03 file proposed limiting Apotex's recovery for experts to \$90,000.00 (down from \$395,584.68) in part further to benchmarking, yet for the T-840-05 file it urged reductions, in part further to existing familiarity with clarithromycin, leaving a higher total, i.e. \$141,024.56, than that proposed for the earlier matter. Adding to my concern was that Apotex's total claim for experts (\$314,363.78) was less than that for the T-1847-03 matter. Counsel for Abbott noted that the disproportionate size of Dr. Taylor's charge in the T-1847-03 file accounted for this. As well, a better benchmarking formula might simply be to compare total amounts allowed in NOC proceedings. Abbott advanced submissions on disbursements similar to those above for the other matters. In particular, Abbott discounted prior art (\$2,000.00) completely as duplicative of previous proceedings.

C. Assessment

[141] As above, I began by reviewing the applications records advanced by both sides. Essentially, Mr. Buck's affidavit here simply attached as an exhibit his affidavit in the T-1847-03 file. His first timesheet (March 8, 2006) charges \$7,000.00 and \$1,200.00 based on C\$200.00 per

hour. The \$7,000.00 related to the internal law firm reference number for the T-1847-03 file and included a charge for March 6, 2006, i.e. the date of his cross-examination in that matter. As his affidavit in that matter was sworn April 20, 2005 and January-March 2006 appears to be the period addressed by the \$7,000.00, I am unclear on whether the \$7,000.00 addresses the T-1847-03 file or whether it is simply coincidence that he claimed \$7,000.00 in said matter. His charges are not reflected in the disbursement portions of the redacted law firm invoices in the T-1847-03 file.

A subsequent timesheet charged \$6,000.00 for the cross-examination in the T-840-05 file.

The transcript of his cross-examination (August 31, 2006) does not clarify any of this. I reduce his claim (\$7,200.00) to \$3,000.00.

[142] Dr. Rocha's affidavit and cross-examination were longer than Mr. Buck's. His two invoices in the record total \$8,984.03 which seems reasonable given his experience and which I allow in place of the \$12,311.03 claimed. The disbursement portions of the redacted law firm statements disclose charges of \$2,061.66 on April 5, 2006 and \$6,877.63 on November 2, 2006. The record does not clarify how these four charges related to the claimed \$12,311.03.

[143] I reviewed the transcripts of the cross-examination on the affidavits of Dr. Stang, Dr. McClelland and Dr. Harris with particular attention to the portions addressing their credentials and preparation for cross-examination relative to the extent, if any, that previous familiarity with clarithromycin might have affected their work. For instance, Dr. Stang (November 29, 2006 transcript, p. 5) did not review his affidavit sworn in a previous proceeding, but did review the associated transcript of his cross-examination. Dr. Harris confirmed under cross-examination that

he had no previous experience with clarithromycin. I was concerned whether his work was duplicative of Dr. Stang and Dr. McClelland given some similarity of their mandates. I was also concerned with focus for all three. For instance, he denied that personal scientific interest (September 19, 2006 transcript, p. 31) influenced how he produced his report.

[144] Dr. McClelland's billing practice is more obscure than that of Dr. Stang. The rate generally used by Dr. Harris is US\$200.00 per hour, with minor variances. He sometimes discounted charges for tasks such as downloading or scanning reports. Generally, I find these accounts straightforward. However, further to Abbott's submissions and regardless of references in the decision to the evidence, I am not convinced that Abbott should be responsible for the total for these three experts. I have accepted *prima facie* that Apotex paid the amounts claimed. Dr. Stang's invoices are scattered somewhat in the record, but do add up properly. I allow the accounts for Dr. Stang (\$50,214.78), Dr. McClelland (\$58,411.61) and Dr. Harris (\$28,851.12) at the reduced amounts of \$44,500.00, \$52,000.00 and \$10,000.00 respectively. Dr. Brown's mandate was similar to these three. His account includes minor charges for his time to download and print. Abbott led less evidence and lost. Apotex generally led more evidence, apart from consideration of its quality, and won. With a five-expert limit and benchmarking in place, NOC proceedings might effectively be constrained to a total budget for experts of about \$150,000.00. I am not convinced that is enough in all instances. However, there must be some limits absent extraordinary factors. I allow Dr. Brown's account (\$56,528.73) at a reduced amount of \$42,500.00.

[145] Pages 7 to 10 of the transcript of Dr. Taylor's cross-examination (September 14, 2006) on his affidavit acknowledged his affidavits and cross-examinations thereon (addressing the T-1133-02 and T-1847-03 files) attached as exhibits and indicated the intent to avoid repetition of prior cross-examination. I reviewed his affidavit and compared it to his account, which I allow as presented at \$70,250.00.

[146] Dr. Grady's assigned task appeared similar to that in the T-1847-03. His conclusions were somewhat longer, but did have elements common to those in the T-1840-03 file. As above, there was broad variance in his rates. I allow his claim (\$14,423.19) at a reduced amount of \$11,000.00. I accept the worth of Dr. Cima's work and allow his claim (\$16,173.44) however at the reduced amount of \$12,500.00 as I would have preferred some evidence of the breakdown of tasks.

[147] I accept that there were international factors present, i.e. witnesses and evidence, and allow the travel expenses (\$20,038.75) and telephone charges (\$2,651.01) as presented. The record was voluminous. I allow photocopy charges (\$98,335.66) and couriers (\$5,702.58) at reduced amounts of \$86,000.00 and \$5,200.00 respectively. I allow transcripts (\$9,149.38), M.I.T. laboratory charges associated with Dr. Cima (\$6,540.82), prior art (\$2,000.00), and LPIC levy (\$50.00) as presented. As above, computer research time (\$6,405.34) requires subjective consideration: I allow \$5,100.00 in addition to the \$917.32 already conceded for Quicklaw. As above, translation charges (\$2,903.00) are problematic given the obscurity of the evidence. There were translated excerpts in the evidence of Japanese patent applications. Counsel may have prudently examined other foreign patent applications not ultimately used. The heading of the European patent applications is

trilingual, including French and English. I allow a reduced and conservative amount of \$2,100.00. I disallow meetings (\$5,223.84), file retrieval (\$372.55) and file histories (\$528.00). As above, GST appears to have been claimed on foreign expenditures: I have made a rough and conservative adjustment. The GST exclusion calculation is endorsed on the assessed bill of costs. Apotex's bill of costs, presented at \$567,064.05, is assessed and allowed at \$451,936.34.

VI. Set-off

Assessment

[148] In the course of the T-1133-02 file, Apotex successfully moved (together with respondents in Federal Court files T-1035-02 and T-1847-02) for dismissal of Abbott's application for notice of prohibition. In Federal Court of Appeal file A-51-04 (the A-51-04 file), the Court set aside that decision with costs to Abbott for the appeal and below. Abbott presents for set-off against any costs allowed to Apotex a single bill of costs encompassing both matters and totalling \$16,094.51.

The parties agreed to serve and file written submissions as insufficient time remained on the second day of the hearing before me. Counsel fees were claimed at the mid-range of Column III, which I find appropriate. Counsel fee items and disbursements not in issue are allowed as presented. I reject Apotex's position on item 25 (services after judgment), i.e. no evidence of what was done, as I allowed it in its bills of costs above in the face of similar objections.

[149] Apotex argued that the Tariff does not permit Abbott to claim a second fee item 19 for its supplementary Memorandum of Fact and Law. Abbott argued that the wording of item 19 embraces a supplementary document. Alternatively, an allowance could be made under item 27. I do not think

that item 27 is appropriate. I agree with Abbott on the importance of this document. However, item 19 may generally only be claimed once for a given proceeding. Further to my comments above on *Carlile*, I think that I have certain discretion in irregular circumstances. As such, I allow only a single item 19, but at the increased and maximum amount of \$840.00.

[150] Apotex argued that the eight hours claimed under item 22(a) (appearance at hearing of appeal) should be reduced because the docket discloses a duration of only six hours. I agree. As well, Apotex argued that Abbott should be permitted only two hours because this appeal was consolidated with two others and heard together. I disagree although not necessarily further to Abbott's submission that this effectively makes the respondents in the other two appeals responsible for a portion of Abbott's costs. It would have been imprudent and likely impractical for Abbott's counsel to withdraw part-way through such a hearing. I allow 6.5 hours consistent with my comments on Apotex's claims, i.e. necessary presence in the courtroom prior to scheduled commencement time.

[151] Apotex applied a similar apportionment argument to photocopying (\$3,600.00) and travel (\$869.00). Apotex asserted that the appeal book totalled only 1,972 pages and not the 3,451 pages in Abbott's evidence to which Apotex's rate of \$0.25 per page was applied. As well, the other two appeals should not be a factor. Therefore, the photocopying claim should be reduced to \$684.00. The travel claim for the hearing should be reduced by one-third. Abbott argued that its evidence that all of these charges are attributable to the Apotex issues is uncontradicted as Apotex did not advance

contrary evidence. I allow the travel claim as presented. Abbott had to place its counsel at the hearing to protect its interests regardless of the other two appeal matters.

[152] I agree with Apotex that it is not responsible for costs directly attributable to the other two appeals. The order dated February 12, 2004, permitted Abbott to file a single set of appeal books bearing the style of cause of the three appeal files. Its length was 1,972 pages and it contained material not attributable to the T-1133-02 file. Abbott's evidence is that 250 pages addressed the T-1133-02 file and that the photocopying claim is based on seven copies of the set at \$0.25 per page. That works out to \$437.50, considerably short of the \$3,600.00 claimed. However, there were certainly other documents requiring photocopies, i.e. authorities (possibly attributable to the other two appeals), motions (any orders silent on costs preclude recovery thereof) or correspondence. These would not support a claim of \$3,600.00. This claim does include binding charges not part of the calculation based on \$0.25 per page. I allow \$975.00.

[153] Apotex did not directly object to fee item 24 (travel by counsel) for which there was no authorization from the Court. That may have been an oversight. Certainly, any objection would have advanced consistent with its apportionment argument. I allow item 24 as claimed. Abbott's bill of costs, presented at \$16,094.51 (calculated by bringing forward \$10,430.40 instead of the actual subtotal of \$7,759.20 for counsel fees: the submissions asserted a claim of \$13,423.31 being the sum of the actual subtotals for counsel fees and disbursements), is assessed and allowed at \$9,655.01 to be set off against Apotex's assessed costs of \$295,413.36 in the T-1133-02 file.

[154] In the course of the T-1847-03 file, Abbott successfully moved the Court to disqualify Apotex's expert Dr. Jack Dunitz. Apotex appealed in Federal Court of Appeal file A-126-06 (the A-126-06 file). The Prothonotary refused Apotex's motion to replace the evidence of Dr. Dunitz. The Federal Court dismissed Apotex's appeal of the Prothonotary's decision. Apotex appealed that latter refusal in Federal Court of Appeal file A-308-06 (the A-308-06 file). The Federal Court of Appeal heard the two appeals one after the other, issued single Reasons for Judgment and issued a Judgment in each file dismissing the appeal with costs in any event of the cause. Abbott presents for set-off against any costs allowed to Apotex for the T-1847-03 file a single bill of costs encompassing both appeals. Counsel fee items and disbursements not in issue are allowed as presented, except for item 24 addressed below. The parties agreed that the mid-range of Column IV would apply. Item 25, which was in issue as above, is allowed as presented.

[155] Abbott advanced two fee item 27 claims: one to review the notice of appeal in the A-126-06 file and a second to review the notice of appeal in the A-308-06 file plus prepare submissions for the bill of costs. Apotex put them in issue. I rejected item 17 for Apotex in similar circumstances in the A-59-07 file and I do so here for Abbott. I held above that costs for preparation of assessment submissions cannot be claimed under item 27.

[156] Apotex here, unlike in the A-51-04 file, did object to item 24 but not on the basis of the absence of an authorizing direction from the Court. Rather, Apotex argued that only one fee item 24 should be allowed because Abbott should not be permitted two such fee items for the same trip to attend the hearing of the two appeals. Abbott asserted that two counsel attended on the appeals and

a fee item is assessable for each. I will stretch my discretion to allow the one fee item conceded by Apotex, but I will not for the second in the absence of authority from the Court.

[157] Apotex argued that the \$433.50 claimed for process servers is excessive and should be reduced to \$216.75 given few documents in total and given evidence of rush fees (\$90.00).

Abbott argued that the size of the record is immaterial, the individual charges are in the range of \$35.00 to \$50.00 and Apotex agreed with Abbott's concession that rush fees are assessable.

The rush fee charges exceeded the charges for the deliveries. Abbott is not responsible for all rush fees, but I accept that some such charges were required. I allow a reduced amount of \$320.00.

[158] Abbott used a GST rate of 0.06 for counsel fees, but 0.08 for disbursements. I applied 0.06 as the GST rate for disbursements. Abbott's bill of costs, presented at \$7,606.45, is assessed and allowed at \$6,357.37, to be set off against Apotex's assessed costs of \$591,983.32 in the T-1847-03 file.

[159] A Certificate of Assessment in the usual format will issue for each of the A-510-05, A-59-07, T-840-05, A-51-04 and A-126-06 (A-380-06) files. A Certificate of Assessment for the T-1133-02 file will issue as follows:

I HEREBY CERTIFY that the costs of the Respondent, Apotex Inc. (Apotex), presented at \$369,655.99 are assessed and allowed at \$295,413.36.

SET-OFF

I HEREBY FURTHER CERTIFY that \$9,655.01, the assessed costs of the Appellants, Abbott Laboratories and Abbott Laboratories Limited (Abbott), as against Apotex in Federal Court of Appeal file A-51-04, are set off against the assessed total above of \$295,413.36 for Apotex giving a net amount of \$285,758.35 payable by Abbott to Apotex.

[160] Apotex did not put in issue Abbott's request to set off two lump-sum awards of costs (\$2,000.00 and \$4,000.00 on May 10 and June 28, 2006 respectively) against Apotex's assessed costs for the T-1847-03 file. I think that a lump-sum award of costs falls within the meaning of the phrase, "parties are liable to pay costs to each other," in Rule 408(2) which permits an assessment officer to "adjust those costs by way of set-off." That includes set-off of costs originating in multiple court files involving the same parties: see *Wilson v. Canada*, [2000] F.C.J. No. 506 (A.O.) reversed on an issue of interest on costs, but otherwise affirmed in *Wilson v. Canada*, [2000] F.C.J. No. 1783 (F.C.T.D.) and *Halford* at para. 300.

[161] The coming into force of the *Federal Courts Act* on July 2, 2003, did not change the basic scheme of costs and associated principles within the Federal Court of Canada coming forward and becoming immediately applicable on that date to matters in the Federal Court and in the Federal Court of Appeal as a function of transitional section 191 of the *Courts Administration Service Act* (CAS Act) providing that the Rules continue in force. Transitional sections 185(14) and 187(2) of the CAS Act provided respectively for my transfer to the Courts Administration Service providing registry services to these two Courts (as well as the Court Martial Appeal Court and the Tax Court of Canada) and for the continuing in force of my order of appointment as an assessment officer for

costs in these two Courts. Therefore, I think that I have the jurisdiction to set off costs between these two Courts.

[162] A Certificate of Assessment for the T-1847-03 file will issue as follows:

I HEREBY CERTIFY that the costs of the Respondent, Apotex Inc. (Apotex), presented at \$695,312.50, are assessed and allowed at \$591,983.32.

SET-OFF

I HEREBY FURTHER CERTIFY that \$6,357.37, the assessed costs of the Respondents, Abbott Laboratories and Abbott Laboratories Limited (Abbott), as against Apotex collectively in Federal Court of Appeal files A-126-06 and A-308-06, plus \$2,000.00 and \$4,000.00 being lump-sum awards of costs on May 10 and June 28, 2006 respectively in Federal Court file T-1847-03, payable by Apotex to Abbott, are set off against the assessed total above of \$591,983.32 for Apotex giving a net amount of \$579,625.95 payable by Abbott to Apotex.

“Charles E. Stinson”

Assessment Officer

Vancouver, BC
May 29, 2008

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1133-02

STYLE OF CAUSE: ABBOTT LABORATORIES et al. v.
THE MINISTER OF HEALTH et al.

PLACE OF HEARING: Toronto, ON

DATE OF HEARING: October 29 – 30, 2007

REASONS FOR ASSESSMENT OF COSTS: CHARLES E. STINSON

DATED: May 29, 2008

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