Federal Court of Appeal  Cour d'appel fédérale

Date: 20230428

Docket: A-374-19

Citation: 2023 FCA 86

Present: **GARNET MORGAN, Assessment Officer**

BETWEEN:

ZARA NATURAL STONES INC.

Appellant

and

INDUSTRIA DE DISENO TEXTIL, S.A.

Respondent

Assessment of costs without appearance of the parties.
Certificate of Assessment delivered at Toronto, Ontario, on April 28, 2023.

REASONS FOR ASSESSMENT BY: GARNET MORGAN, Assessment Officer

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REASONS FOR ASSESSMENT

GARNET MORGAN, Assessment Officer

I. Introduction

[1] This is an assessment of costs pursuant to a Judgment, and Reasons for Judgment of the Federal Court of Appeal dated December 1, 2021, wherein Zara Natural Stones Inc.'s (ZNSI) appeal proceeding was "allowed with costs before this Court and the Federal Court."

[2] Further to the Federal Court of Appeal's Judgment, and Reasons for Judgment, costs will be assessed in accordance with Rule 407 of the *Federal Courts Rules*, SOR/98-106 [FCR], which states the following:

Assessment according to Tariff B **407.** Unless the Court orders otherwise, party-and-party costs shall be assessed in accordance with column III of the table to Tariff B.	**Tarif B** 407 Sauf ordonnance contraire de la Cour, les dépens partie-partie sont taxés en conformité avec la colonne III du tableau du tarif B.

II. Documents filed by the parties

[3] On June 17, 2022, ZNSI filed a Bill of Costs, which initiated ZNSI's request for an assessment of costs. On June 28, 2022, a direction was issued to the parties regarding the conduct and filing of additional documents for the assessment of costs.

[4] The court record (hard copy file and computerized version) shows that the following documents were filed by the parties for this assessment of costs:

a) On August 12, 2022, ZNSI filed a Book of Authorities, and a costs record containing Written Costs Submissions, and an Affidavit of Deborah Lecourt, sworn on August 12, 2022 (Lecourt Affidavit #1);

b) On September 23, 2022, Industria de Diseno Textil, S.A. (Industria) filed a Book of Authorities, Written Submissions, and a suggested Bill of Costs;

c) On October 14, 2022, ZNSI filed a costs record containing Reply Submissions, and an Affidavit of Deborah Lecourt, sworn on October 14, 2022 (Lecourt Affidavit #2).

III. Preliminary Issues

A. *Assessments of costs for files T-468-15 and A-374-19*

[5] The parties have agreed that Industria will only pay ZNSI's costs with respect to the Federal Court proceeding (T-468-15) and not for the Federal Court of Appeal proceeding (A-374-19) (ZNSI's Written Costs Submissions at para. 2, Lecourt Affidavit #1 at exhibits E and K; and Industria's Written Submissions at para. 3). Further to the parties' agreement, no costs have been claimed, and consequently, no costs will be assessed for the Federal Court of Appeal proceeding (A-374-19). This assessment of costs will only pertain to ZNSI's claims for costs for the Federal Court proceeding (T-468-15), which are contained in the Bill of Costs filed on June 17, 2022.

B. *Assessable Services for file T-468-15 - level of costs under Column III of Tariff B of the FCR*

[6] All of ZNSI's claims for assessable services have been submitted at the highest end of Column III. To support this level of costs, ZNSI cited the following jurisprudence: *Seedlings Life Science Ventures, LLC v. Pfizer Canada ULC*, 2020 FC 505 [*Seedlings*], at paragraph 15; *H-D U.S.A. LLC v. Berrada*, 2015 FC 189 [*Berrada*], at paragraph 26; *Nova Chemicals Corporation v. Dow Chemical Company*, 2017 FCA 25 [*Nova*], at paragraph 17; and *Loblaws Inc. v. Columbia Insurance Company*, 2019 FC 1434 [*Loblaws*], at paragraph 16. The aforementioned jurisprudence support the premise that intellectual property proceedings "with sophisticated commercial parties" and other special attributes, may be deserving of an elevated level of costs depending on the facts pertaining to that proceeding (*Seedlings* at para. 8; *Berrada* at para. 22; *Nova* at para. 16; *Loblaws* at para. 15).

[7] In response, Industria submitted that ZNSI "has consistently based its cost assessment on values located at the higher end of Column III," although costs are typically assessed at the mid-point of Column III of Tariff B, and cited *Truehope Nutritional Support Limited v. Canada (Attorney General)*, 2013 FC 1153 [*Truehope*], at paragraph 11; and *Wihksne v. Canada (Attorney General)*, 2002 FCA 356 [*Wihksne*], at paragraph 11. Industria submitted that ZNSI has not sufficiently justified why costs should be assessed at a level higher than the mid-point of Column III, except for stating that "the claimed number of units is reasonable and proportional given the result of the proceeding and the amount of work performed" (Industria's Written Submissions at paras. 13, 15, 16).

[8] In reply, ZNSI submitted that Industria has not "pointed to any cases that support its allegation that costs of this proceeding must be assessed at the mid-range of column III of Tariff B." ZNSI submitted that *Truehope* does not state "that costs may not be assessed at the upper end of column III," and cited *Allergan Inc. v. Sandoz Canada Inc.*, 2021 FC 186 [*Allergan*], at paragraph 28, which states that Tariff B "is considered particularly inadequate in Intellectual Property litigation [and in] maritime proceedings." ZNSI also submitted that Industria's "reliance on the Wihksne case is misplaced," as this decision does not address the level of costs claimed under Column III. ZNSI also clarified that the use of the statement "the claimed number of units is reasonable and proportional given the result of the proceeding and the amount of work performed" was intended to invoke Rules 400(3)(a), (b), (e), (g) and (o) of the Federal Courts Rules" (ZNSI's Reply Submissions at paras. 1 to 5).

[9] In *Allergan*, which was cited by ZNSI, the Court stated the following at paragraphs 25 and 26, regarding the inadequacies of Tariff B to sufficiently compensate some intellectual property proceedings:

> [25] The "default" level of costs in this Court is the mid-point of Column III in Tariff B: Rule 407; *Sanofi-Aventis Canada Inc v Novopharm Limited*, 2009 FC 1139 at para 4 [*Sanofi-Novopharm FC*], aff'd 2012 FCA 265; *Apotex v Sanofi-Aventis*, 2012 FC 318 at para 5 [*Apotex v Sanofi-Aventis*]; *Dennis v Canada*, 2017 FC 1011 at para 8; *Bernard v Professional Institute of the Public Service of Canada*, 2020 FCA 211 at para 38. Column III is intended to provide partial indemnification (as opposed to substantial or full indemnification) for "cases of average or usual complexity": *Thibodeau*, above, at para 21; *Novopharm Ltd v Eli Lilly and Co*, 2010 FC 1154 at para 5 [*Novopharm v Eli Lilly*].
>
> [26] In recognition of the particular attributes of intellectual property proceedings, it is common for increased costs to be awarded in those proceedings: see, e.g., *Consorzio*, above, at para 6; *Lainco Inc c Commission scolaire des Bois-Francs*, 2018 FC 186 at para 8(c). Those particular attributes include greater than average complexity, sophisticated parties, legal bills far in excess of what is contemplated by Column III of Tariff B, and "giving parties an incentive to litigate efficiently": *Seedlings Life Science Ventures, LLC v Pfizer Canada ULC*, 2020 FC 505 at para 4 [*Seedlings*]. For cases that involve drug patent disputes and a cost award fixed by reference to the tariff, the high end of Column IV is often considered to be reasonable and appropriate: *Sanofi-Novopharm FC*, above, at para 13, aff'd 2012 FCA 265; *Novopharm v Eli Lilly*, above, at para 7; *Apotex v Sanofi-Aventis*, above. See also Federal Court of Appeal and Federal Court Rules Committee, *Review of the Rules on Costs: Discussion Paper*, October 5, 2015, at page 8.

[10] In *Allergan*, the Court stated that the default level of costs in the Federal Court is “the mid-point of Column III in Tariff B” and that “[i]n recognition of the particular attributes of intellectual property proceedings, it is common for increased costs to be awarded in those proceedings.” The particular attributes that the Court may consider for increased costs are “greater than average complexity, sophisticated parties,” and “legal bills far in excess of what is contemplated by Column III of Tariff B.” The *Allergan* decision recognizes that “it is common for increased costs to be awarded” for intellectual property proceedings, but did not state that

increased costs are absolute for these types of proceedings [emphasis added]. My review of the Federal Court of Appeal's Judgment, and Reasons for Judgment dated December 1, 2021, and the Federal Court's Judgment and Reasons dated August 22, 2019, did not reveal that either Court highlighted any of the aforementioned attributes as being significant factors that influenced the overall level of costs awarded to ZNSI or Industria. Neither Court awarded increased costs under Columns IV or V of Tariff B, nor were there stipulations that a higher range of units should be applied within Column III of Tariff B.

[11] Further to my consideration of the aforementioned facts and jurisprudence, I will note that I did not find that ZNSI was precluded from selecting any particular range of units within Column III. It was open to ZNSI to select any number of units within Column III that it considered to be appropriate for the assessable services claimed, pursuant to the Federal Court of Appeal's Judgment, and Reasons for Judgment dated December 1, 2021. Although there was no preclusion for ZNSI's selection of units within Column III, I did not find that sufficient justification was presented by ZNSI to compel me to make a blanket allowance for all of the claims for assessable services at the highest end of Column III. In *Starlight v. Canada*, [2001] F.C.J. No. 1376 [*Starlight*], at paragraph 7, the Assessment Officer stated the following regarding assessing each assessable service based on its own circumstances:

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

> item 5 and the upper end of the range for item 6 are possible results. Some items with limited ranges, such as item 14, required general distinctions between an upper and lower assignment in the range for the service rendered.

[12] Utilizing the *Starlight* decision as a guideline and pursuant to the Federal Court of Appeal's Judgment, and Reasons for Judgment dated December 1, 2021, I will assess ZNSI's claims for assessable services individually to determine the quantum of costs to allow for each claim. For my assessment of each claim, I will consider the full range of units available under Column III, in conjunction with the factors listed under subsection 400(3) of the FCR, which I am able to consider as an Assessment Officer pursuant to Rule 409 of the FCR. My assessment of each claim will also include a review of the parties' costs documents, the court record, and any relevant rules, statutes and jurisprudence that may be applicable for a particular claim.

C. *ZNSI's offer to settle for file T-468-15 – Rule 420 of the FCR*

[13] ZNSI has requested a doubling of costs pursuant to Rule 420 of the FCR for ZNSI's offer to settle that was made to Industria on May 31, 2016. ZNSI has submitted that the offer complied with paragraphs 420(3)(a) and (b) of the FCR, and that it "was not accepted by the Respondent, who was ultimately unsuccessful (as held in the FCA Decision)" (ZNSI's Written Costs Submissions at paras. 15, 16, and Lecourt Affidavit #1 at exhibit E).

[14] In response, Industria submitted that ZNSI's offer to settle "contained no incentive and was rather akin to a request to capitulate." Industria submitted that "[t]he mere offering of the withdrawal of an application in exchange for there to be no costs cannot be considered as a reasonable incentive." Industria has therefore deduced that ZNSI's offer to settle "did not fall

under the purview of Rule 420." Industria cited the following jurisprudence in support of the aforementioned arguments: *Venngo Inc. v. Concierge Connection Inc. (Perkopolis)*, 2017 FCA 96 [*Venngo*], at paragraph 87; *Canadian Olympic Assn. v. Olymel, Société En Commandite*, [2000] F.C.J. No. 1725 [*Olymel*], at paragraphs 10, 11 and 13; and *Rosenberg v. Canada (National Revenue)*, 2016 FC 1376 [*Rosenberg*], paragraph 116 (ZNSI's Written Costs Submissions at paras. 21 to 29).

[15] In reply, ZNSI submitted that the offer to settle would have clearly terminated the litigation and would have had a quicker and less expensive outcome for the judicial review proceeding. ZNSI submitted that the terms of the settlement were "nearly identical" to an offer made by Industria to ZNSI, and that the law related to Rule 420 offers does not "require a subsequently-successful party to offer the subsequently-unsuccessful party a payment in order for an offer to be valid under Rule 420." Concerning the *Venngo* decision, ZNSI submitted that the quoted section referred to by Industria does not include the words "incentive" or "benefit," and that ZNSI's offer to settle complies with Rule 420. Concerning the *Olymel* decision, ZNSI highlighted that the Court used the conjunction "or" to specify that offers to settle must have an "element of compromise (or incentive to accept)" (ZNSI's Reply Submissions at paras. 6, 7 and 9 to 11, and Lecourt Affidavit #2 at exhibit A).

[16] I have reviewed Rules 419 to 422 of the FCR, which specify the requirements for offers to settle, in conjunction with ZNSI's offer to settle dated May 31, 2016, and I find that the evidence provided supports the utilization of Rule 420 for the doubling of costs (Lecourt Affidavit #1 at exhibit E). The circumstances for this particular file differ from the *Venngo*

decision cited by Industria, as ZNSI's offer to settle was made on May 31, 2016, and there is no evidence that ZNSI's offer was withdrawn before the judicial review hearing held on March 6, 2019 (*Venngo* at paras. 87 to 90; and paragraphs 420(3)(a) and (b) of the FCR). I find that ZNSI's offer to waive its prescribed entitlement to costs pursuant to Rules 402 and 412 of the FCR, allowed Industria to consider withdrawing the judicial review proceeding in the Federal Court with no costs consequences if accepted, qualifies as a "compromise (or incentive to accept)" (*Olymel* at para. 10; *Venngo* at para. 87; and *Rosenberg* at para. 116). In *Berrada* (above), at paragraphs 31 to 33, the Court stated the following regarding an offer to settle that contained the waiving of costs:

> [31] The burden of proving that a settlement offer is as favourable or more favourable than the final judgment lies with the party requesting the application of Rule 420, in this case the Plaintiffs (*Apotex Inc v Sanofi-Aventis*, 2012 FC 318 at para 30).
>
> [32] The Court has set out a number of factors to be taken into account in this assessment, and those factors are:
>
> > [39] In order to trigger the double costs rule, an offer must be clear and unequivocal in that the opposite party need only decide whether to accept or reject the offer (*Apotex Inc. v. Syntex Pharmaceuticals*, [2001] FCA 137, [2001] F.C.J. No. 727 (QL), at para. 10). The offer must also contain an element of compromise (or incentive to accept) (*Canadian Olympic Assn. v. Olymel, Société en commandite*, [2000] F.C.J. No. 1725 (QL), at para. 10). The offer must also be presented in a timely fashion such that the benefit would still be derived from the opposite party if accepted (*Sammammas Compania Maritima S.A. v. Netuno (the) Action in rem against the Ship "Netuno"*, [1995] F.C.J. No. 1442 (QL), at paras. 30 and 31). Finally, if accepted, the offer must bring the dispute between the parties to an end (*TRW*, supra, at p. 456). (*MK Plastics Corp v Plasticair Inc*, 2007 FC 1029 at para 39).
>
> [33] Those factors have been met by the Plaintiffs: the Offer was presented at least 14 days before the commencement of the hearing; it was not withdrawn; it did not expire before the commencement of the hearing; it was clear and unequivocal; it was presented in a timely fashion; and it would have brought the dispute between the parties to an end. Also, the Offer did contain an element of compromise as the Plaintiffs suggested that there be no costs or that the costs

> would be reduced, depending on the date of acceptance by the Defendants (*Culhane v ATP Aero Training Products Inc*, 2004 FC 1667 at para 6; *Kirgan Holding SA v Panamax Leader (The)*, 2003 FCT 80 at para 12).

[17] Further to my consideration of the aforementioned facts and jurisprudence, and utilizing the *Berrada* decision as a guideline, I have determined that the evidence supports the utilization of paragraph 420(2)(b) of the FCR for file T-468-15. As stated in *Berrada*, ZNSI's offer to settle "was presented at least 14 days before the commencement of the hearing; it was not withdrawn; it did not expire before the commencement of the hearing; it was clear and unequivocal; it was presented in a timely fashion; and it would have brought the dispute between the parties to an end" (*Berrada* at para. 33). Therefore, pursuant to paragraph 420(2)(b), ZNSI's claims for assessable services for file T-468-15 will be doubled from May 31, 2016, until the issuance of the Federal Court's Judgment and Reasons dated August 22, 2019.

IV. Assessable Services (T-468-15)

[18] ZNSI has claimed 67 units for assessable services in relation to the judicial review proceeding for file T-468-15.

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

[19] ZNSI has claimed 7 units for "the preparation, service and filing of the Notice of Appearance" (ZNSI's Written Costs Submissions at para. 11, and Lecourt Affidavit #1 at exhibit G). Industria did not provide any specific submissions regarding Item 2 but in the Bill of Costs provided by Industria, the suggested number of units for Item 2 was reduced to 5.5 units.

[20] Item 2 in Tariff B of the FCR is for the "[p]reparation and filing of all defences, replies, counterclaims or respondents' records and materials" and is designated for assessable services related to the preparation and filing of a responding party's pleadings. Therefore, ZNSI's Notice of Appearance does not fall under Item 2. Actually, Notices of Appearance are not included in Items 1 to 26 of Tariff B. This being noted, I find that a Notice of Appearance is a necessary document for a responding party to prepare and file pursuant to Rule 305 of the FCR, when there is an intention to participate in a judicial review proceeding. In *Carlile v. Canada (Minister of National Revenue - M.N.R.)*, [1997] F.C.J. No. 885 [*Carlile*], at paragraph 26, the Assessment Officer stated the following regarding not penalizing successful litigants with a denial of costs when it is apparent that real costs were incurred:

> [26] […] Taxing Officers are often faced with less than exhaustive proof and must be careful, while ensuring that unsuccessful litigants are not burdened with unnecessary or unreasonable costs, to not penalize successful litigants by denial of indemnification when it is apparent that real costs were indeed incurred. This presumes a subjective role for the Taxing Officer in the process of taxation. My Reasons dated November 2, 1994, in T-1422-90: *Youssef Hanna Dableh v. Ontario Hydro cite*, [1994] F.C.J. No. 1810, at page 4, a series of Reasons for Taxation shaping the approach to taxation of costs. *Dableh* was appealed but the appeal was dismissed with Reasons by the Associate Chief Justice dated April 7, 1995, [1995] F.C.J. No. 551. I have considered disbursements in these Bills of Costs in a manner consistent with these various decisions. Further, *Phipson On Evidence*, Fourteenth Edition (London: Sweet & Maxwell, 1990) at page 78, paragraph 4-38 states that the "standard of proof required in civil cases is generally expressed as proof on the balance of probabilities". Accordingly, the onset of taxation should not generate a leap upwards to some absolute threshold. If the proof is less than absolute for the full amount claimed and the Taxing Officer, faced with uncontradicted evidence, albeit scanty, that real dollars were indeed expended to drive the litigation, the Taxing Officer has not properly discharged a quasi-judicial function by taxing at zero dollars as the only alternative to the full amount. Litigation such as this does not unfold solely due to the charitable donations of disinterested third persons. On a balance of probabilities, a result of zero dollars at taxation would be absurd. […]

[21] In addition, in *Mitchell v. Canada (Minister of National Revenue - M.N.R.)*, 2003 FCA 386 [*Mitchell*], at paragraph 12, the Assessment Officer stated the following regarding the positive application of costs provisions and Item 27:

> [12] The Appellants are correct that the wording for item 27 does not generally fetter discretion. However, that discretion, as for other items in bills of costs, is still fettered by reasonable necessity and the limits of an award of costs. Consistent with Rule 3, and with my sentiment in *Feherguard Products Ltd. v. Rocky's of B.C. Leisure Ltd.*, [1994] F.C.J. No. 2012 (A.O.), at para. 10 that the "best way to administer the scheme of costs in litigation is to choose positive applications of its provisions as opposed to narrower and negative ones", application of discretion should be part of a reasoned process to achieve a result on assessment which is equitable for both sides. Item 27 addresses the professional services of counsel not already addressed by items 1 - 26. Its wording, "such other services", is clearly plural and I understand that to permit assessment of discrete services, as opposed to a restriction to a bundling of several services, not already addressed by items 1 - 26, within a single item 27 claim. That is, item 27 may be claimed more than once.

[22] Utilizing the *Carlile* and *Mitchell* decisions as guidelines, I have determined that assessing ZNSI's claim for the Notice of Appearance under Item 27 is an acceptable alternative to assessing it under Item 2 and will allow for a positive application of the costs provisions instead of a narrower one, as "a result of zero dollars at taxation would be absurd" (*Carlile* at para. 26). Further to my review of the court record, I have verified that ZNSI performed the service claimed for the Notice of Appearance, which was filed with the court registry on April 1, 2015. Considering that a Notice of Appearance is a very simple document to prepare, I have determined that it is reasonable to allow 1 unit under Item 27.

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

[23] ZNSI has submitted claims under Items 7, 8 and 9 for the preparation of affidavits for H. Khatau and B. Chung, and the preparation for, and attendance at their examinations.

(1) Item 7

[24] Concerning Item 7, ZNSI has submitted that the claims of 5 units each for the affidavits of H. Khatau and B. Chung are "reasonable and proportional to actual legal costs incurred" (ZNSI's Written Costs Submissions at para. 14). Industria did not provide any specific submissions regarding Item 7 but in the Bill of Costs provided by Industria, the suggested number of units for Item 7 was reduced to 3.5 units for each claim.

[25] My review of the court record did not reveal that there were any discoveries of documents conducted for this particular file. The affidavits of H. Khatau and B. Chung were ZNSI's supporting affidavits pursuant to Rule 307 of the FCR, and were not affidavits of documents pursuant to Rule 223 of the FCR (Court's Order dated June 22, 2015). ZNSI's two affidavits were served on Industria on September 14, 2015, and were filed on the court record on March 30, 2017, as part of Industria's Applicant's Record, pursuant to Rule 309 of the FCR. The costs for supporting affidavits are subsumed within claims under Item 2 for responding documents.

[26] Further to my review court record, and utilizing the *Carlile* (above) decision as a guideline, I have determined that although the claims for the affidavits of H. Khatau and B. Chung were submitted under the incorrect Item number, as an Assessment Officer, I have an obligation to "not penalize successful litigants by denial of indemnification when it is apparent

that real costs were indeed incurred" (*Carlile* at para. 26). Utilizing the *Mitchell* (above) decision as a guideline, I have determined that assessing ZNSI's affidavits under Item 2 instead of Item 7 will allow for a positive application of the costs provisions instead of a narrower one. In addition, in *Apotex Inc. v. Merck & Co*., 2008 FCA 371 [*Apotex #1*], at paragraph 14, the Court stated the following regarding the issue of an Assessment Officer having limited material available for assessing costs:

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

[27] For my assessment of these affidavits, I took into consideration that Item 2 has a range of units of 4 to 7 units under Column III, and pertains to <u>all</u> responding documents for a judicial review proceeding, of which supporting affidavits are a component of a record pursuant to Rule 310 of the FCR [emphasis added]. I also considered that ZNSI did not submit a claim under Item 2, for the responding documents prepared and filed for the judicial review proceeding, such as ZNSI's Respondent's Record filed on May 1, 2017. This being noted, in my role as an Assessment Officer, I should not step "away from a position of neutrality to act as the litigant's advocate" (*Dahl v. Canada*, 2007 FC 192, at para 2). Therefore, I could not assume a reason for the absence of a claim for ZNSI's responding documents under Item 2, nor is it my role to submit additional claims that were omitted by a party due to procedural fairness. I assessed ZNSI's Bill of Costs as presented, and found that the affidavits claimed under Item 7, should have been claimed under Item 2. This being stated, I did take note that in the Bill of Costs provided by Industria, the suggested number of units for the affidavits of H. Khatau and B.

Chung were reduced to 3.5 units per affidavit. Further to my consideration of the aforementioned facts, and utilizing the *Apotex #1* decision as a guideline, I have determined that the preparation and service of ZNSI's affidavits of H. Khatau and B. Chung were necessary and that it is reasonable to allow a cumulative total of 4 units under Item 2.

(2) Items 8 and 9

[28] Similar to the claims for Item 7, ZNSI has submitted two claims under Items 8 and 9, for the preparation for, and attendance at the cross-examinations of H. Khatau and B. Chung, and has submitted that the amounts claimed are "reasonable and proportional to actual legal costs incurred" (ZNSI's Written Costs Submissions at paras. 17 to 19, and Lecourt Affidavit #1 at exhibits F, G). Industria did not provide any specific submissions regarding Items 8 and 9 but in the Bill of Costs provided by Industria, the suggested number of units for Item 8 was reduced to 3.5 units per claim, and for Item 9 the suggested number of units was reduced to 1.5 units per claim to be multiplied by the duration of each examination.

[29] For Items 8 and 9, I reviewed the factors in awarding costs that are listed under subsection 400(3) of the FCR, and having considered factors such as; "(a) the result of the proceeding;" "(c) the importance and complexity of the issues;" and "(g) the amount of work;" the court record reflects that ZNSI was the successful party in the judicial review proceeding; that the issues reviewed and examined were of significant importance and of moderate complexity; and that ZNSI performed a significant amount of work in relation to the examinations (Lecourt Affidavit #1 at exhibits F and G). Therefore, I find it reasonable to allow

ZNSI's claims for Items 8 and 9, as requested in the Bill of Costs. For Item 8, a cumulative total of 10 units are allowed, and for Item 9, a cumulative total of 6 units are allowed.

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

[30] ZNSI has claimed 21 units (3 units multiplied by 7 hr) for first counsel's attendance at the judicial review hearing held on March 6, 2019, and has submitted that the amount claimed is "reasonable and proportional to actual legal costs incurred" (ZNSI's Written Cost Submissions at para. 20). Industria did not provide any specific submissions regarding Item 14(a) but in the Bill of Costs provided by Industria, the suggested number of units for Item 14(a) was reduced to 17.5 units (2.5 units multiplied by 7 hr).

[31] The Abstract of Hearing for this file, which is a computerized hearing details report created by the Court Registrar in attendance at a hearing, has the judicial review hearing documented as being heard from 12:00 p.m. to 3:35 p.m., which is a duration of 3 hours and 35 minutes. In *Apotex Inc. v. Merck & Co. Inc.*, 2002 FCA 478 [*Apotex #2*], at paragraph 4, the Assessment Officer expanded on the usefulness of abstracts of hearing in assessing claims for hearing attendance:

> [4] […] An appearance at a hearing necessarily includes some time in the courtroom identifying oneself with the Court Registrar and waiting for the call of the case, none of which is preparation time addressed by other items. Therefore, the abstract of hearing is a useful, but not absolute, guide for attendance at hearing. The record satisfies me that the claim of 8 1/2 hours at 3 units per hour is reasonable for item 22 in these circumstances. […]

[32] In addition, in *Halford v. Seed Hawk Inc*., 2006 FC 422 [*Halford*], at paragraph 211, the Assessment Officer stated the following regarding abstracts of hearing, and allowing additional time for hearings:

> [211] […] I have consistently held that counsel must be in court some time before the scheduled start or resumption times to permit the court registrar to satisfy herself that the hearing is ready to go. I consider that integral to attendance. I compared the court file's abstract of hearing, the Seed Hawk Defendants' asserted hours for item 14, those of the Simplot Defendant, Mr. Halford's evidence and information in the trial transcript.

[33] Utilizing the *Apotex #2* and *Halford* decisions as guidelines, I find ZNSI's claim of 7 hours for the judicial review hearing to be excessive and not supported by the Court Registrar's Abstract of Hearing dated March 6, 2019, which is on the court record. I have taken into consideration that the judicial review hearing was conducted in-person and that this requires a party to be ready several minutes before the hearing begins so that the Court Registrar can ensure that the parties are present and there are no pre-hearing issues that need to be dealt with. Hence, I have added 25 minutes to the hearing duration to recognize counsel's time spent before, and after the hearing, for any post-hearing wrap up that may have been required.

[34] I have reviewed the factors in awarding costs that are listed under subsection 400(3) of the FCR, such as, (a), (c), and (g); and the court record reflects that ZNSI was the successful party in the judicial review proceeding; that the issues argued were of significant importance and of moderate complexity; and that a significant amount of work was performed by ZNSI to argue its position at the judicial review hearing (Lecourt Affidavit #1 at exhibit H). Item 14(a) has a range of 2 to 3 units under Column III of Tariff B, and further to my consideration of the

aforementioned facts, I find ZNSI's selection of 3 units to be reasonable. Therefore, 12 units (3 units multiplied by 4 hr) are allowed for Item 14(a).

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

[35] ZNSI has claimed 7 units for Item 15 "for the preparation and filing of the written argument for the hearing of the FC decision" (ZNSI's Written Cost Submissions at para. 21). Industria did not provide any specific submissions regarding Item 15 but in the Bill of Costs provided by Industria, the suggested number of units for Item 15 was reduced to 5 units. In *Biovail Pharmaceuticals Canada v. Canada (Minister of National Health and Welfare)*, [2009] FCJ No 858 [*Biovail*], at paragraph 27, the Assessment Officer stated the following regarding claims for Item 15:

> [27] Fee item 15 (written argument where requested or permitted by the Court) falls under the subheading E. Trial or Hearing. Such written argument usually occurs shortly after a hearing, but on occasion has been requested shortly before a hearing. It is not the memorandum of fact and law included in the respondent's materials under fee item 2. As the Court did not request such written argument, I disallow the fee item 15 claim in each matter.

[36] In addition, in *Moodie v. Canada (Minister of National Defence)*, [2009] FCJ No 791 [*Moodie*], at paragraphs 14, 15 and 16, the Assessment Officer stated the following regarding claims for Item 15:

> [14] I am not able to allow the amounts claimed under Item 14(b) for second counsel or Item 15. Under both of these items there is a requirement for the Court to make an award or direction. Item 14(b) includes the provision "where Court directs" and Item 15 includes "where requested or permitted by the Court".
>
> [15] *In Balisky v. Canada (Minister of Natural Resources)*, 2004 FCA 123, [2004] F.C.J. No. 536, at paragraph 6 the assessment officer states:

> Rule 400(1), which vests full discretionary power in the Court over awards of costs, means that orders and judgments must contain visible directions that costs have been awarded. Given the *Federal Courts Act*, ss. 3 and 5(1) defining the Court and Rule 2 of the *Federal Court Rules*, 1998 defining an assessment officer, the absence of that exercise of prior discretion by the Court leaves me without jurisdiction under Rule 405 to assess costs.
>
> [16] Since an assessment officer is not a member of the Court, and there is no direction or order concerning second counsel or written submissions, I am without jurisdiction to allow the amounts claimed under Items 14(b) and 15.

[37] Further to the guidance provided in the *Biovail* and *Moodie* decisions, my review of the court record did not reveal that the Court specifically requested any written arguments from the parties in relation to the judicial review hearing held on March 6, 2019, nor were any written arguments filed by ZNSI around the date of the hearing. Therefore, I have determined that in the absence of evidence on the court record that ZNSI performed a service claimable under Item 15, that this claim must be disallowed as it pertains to the facts for this particular file.

E. *Item 20 – Requisition for hearing.*

[38] ZNSI has claimed 1 unit for Item 20 “for the preparation of a requisition for hearing” (ZNSI’s Written Cost Submissions at para. 22). Industria did not provide any specific submissions regarding Item 20 but in the Bill of Costs provided by Industria, the suggested number of units for Item 20 is echoed at 1 unit. My review of the court record showed that Industria filed the Requisition for Hearing on May 11, 2017. This being noted, I find that a responding party could be entitled to claim costs related to the preparation of a Requisition for Hearing, for the back-and-forth communication conducted between parties to provide dates of availability and other hearing details. My review of the Requisition for Hearing filed on May 11,

2017, shows that there are dates of availability for both parties, which indicates that there was some communication between Industria and ZNSI.

[39] Utilizing the *Mitchell* (above), and *Carlile* (above) decisions as guidelines, I find that ZNSI is entitled to some indemnification for the services related to the communication with Industria for the preparation of the Requisition for Hearing. There is no specific Item in Tariff B for Requisitions for Hearing for judicial review proceedings. Item 20 is for claims related to Requisitions for Hearing for appeals proceedings in the Federal Court of Appeal. This being noted, I will exercise my discretion pursuant to paragraph 400(3)(o) "any other matter that it considers relevant" of the FCR and will allow 1 unit under Item 27, for ZNSI's claim for the Requisition for Hearing, which was initially submitted under Item 20.

F. *Item 24 – Travel by counsel to attend a trial, hearing, motion, examination or analogous procedure, at the discretion of the Court.*

[40] ZNSI has claimed 5 units for Item 24 "for time spent travelling from Toronto, Ontario to Ottawa, Ontario and back for the hearing of the FC Decision" (ZNSI's Written Cost Submissions at para. 23). Industria did not provide any specific submissions regarding Item 24 but in the Bill of Costs provided by Industria, the suggested number of units for Item 24 was reduced to 3 units.

[41] My review of the text for Item 24 in Tariff B indicates that costs for travel as an assessable service can only be assessed "at the discretion of the Court." In *Marshall v. Canada*, 2006 FC 1017 [*Marshall*], at paragraph 6, the Assessment Officer stated the following regarding claims for travel by counsel:

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

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

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

[43] Further to my review of the court record and the FCR, and utilizing the *Marshall* decision as a guideline, I find that I do not have the authority to assess ZNSI's claim for travel by counsel as an assessable service. As the Court stated in the *Pelletier* decision, my role as an Assessment Officer is only "to assess costs, not award them." In the absence of a Court direction or decision specifically awarding travel by counsel as an assessable service, or alternatively any

jurisprudence from ZNSI to support the allowance of these costs in the absence of a Court direction or decision, I find that I do not have the authority to assess this type of costs autonomously. Therefore, I have determined that ZNSI's claim for Item 24 must be disallowed as it pertains to the facts for this particular file.

G. *Item 26 – Assessment of costs.*

[44] ZNSI has submitted an additional claim of 6 units under Item 26 for the preparation and filing of documents for this assessment of costs (ZNSI's Written Costs Submissions at para. 32, ZNSI's Reply Submissions at paras. 16, 17, and Lecourt Affidavit #2 at exhibit B). This claim is not listed in ZNSI's Bill of Costs. Industria did not provide any specific submissions regarding Item 26, nor were the number of units addressed in Industria's suggested Bill of Costs.

[45] For my review of this claim, I took into consideration the size and complexity of this file, the number of claims that were made, the fact that almost all of the claims were challenged by Industria, and the amount of documentation provided by ZNSI. I find that ZNSI performed a moderately high amount of work for this assessment of costs but I have also taken note that some claims could have benefitted from more fulsome submissions. Further to my consideration of the aforementioned facts, I find it reasonable to allow costs somewhere between the mid-point and the high end of Column III.

[46] I have reviewed the factors in awarding costs that are listed under subsection 400(3) of the FCR, such as, (a), (c), (g), and also "(b) the amounts claimed and the amounts recovered;" and I have determined that it is reasonable to allow 5 units for Item 26.

H. *Total amount allowed for ZNSI's assessable services (before the doubling of costs).*

[47] A total of 39 units have been allowed for ZNSI's assessable services for a total amount of $6,552.00, which is inclusive of GST.

I. *Rule 420 – Doubling of costs*

[48] I determined earlier in these Reasons that ZNSI is entitled to the doubling of costs for its assessable services pursuant to paragraph 420(2)(b) of the FCR, which states the following:

Consequences of failure to accept defendant's offer (2) Unless otherwise ordered by the Court and subject to subsection (3), where a defendant makes a written offer to settle.	Conséquences de la non-acceptation de l'offre du défendeur (2) Sauf ordonnance contraire de la Cour et sous réserve du paragraphe (3), si le défendeur fait au demandeur une offre écrite de règlement, les dépens sont alloués de la façon suivante:
[…](b) if the plaintiff fails to obtain judgment, the defendant is entitled to party-and-party costs to the date of the service of the offer and to costs calculated at double that rate, but not double disbursements, from that date to the date of judgment.	[…]b) si le demandeur n'a pas gain de cause lors du jugement, le défendeur a droit aux dépens partie-partie jusqu'à la date de signification de l'offre et, par la suite et jusqu'à la date du jugement, au double de ces dépens mais non au double des débours.

[49] Concerning ZNSI's request that the costs for Item 26 be doubled (ZNSI's Reply Submissions at para. 16), in *McKay v. Weatherford Canada Ltd.*, [2009] F.C.J. No. 1675

[*McKay*], at paragraph 3, the Assessment Officer stated the following regarding claims for Item 26 and the doubling of costs:

> [3] […] The Respondents' settlement offer qualifies them for double costs further to Rule 420(2)(b). However, I have adjusted this claim to exclude their doubling of GST as that item is a disbursement to a disinterested third party and would be inconsistent with a basic principle that costs are an indemnity thereby precluding profit. As well, I have excluded items 25 (services after judgment) and 26 (assessment of costs) as the doubling of counsel fees stops on the date of judgment. In all other respects, the amounts claimed in the bill of costs are arguable.

[50] Further to my review of paragraph 420(2)(b) of the FCR, and the *McKay* decision, I find that ZNSI's costs can be doubled from May 31, 2016, until the issuance of the Federal Court's Judgment and Reasons dated August 22, 2019, which will include most of the assessable services that have been allowed. The exceptions are the Notice of Appearance filed on April 1, 2015, and the preparation and service of the affidavits H. Khatau and B. Chung on September 14, 2015, which both occurred before the offer to settle. In addition, the services performed for this assessment of costs are excluded, as they occurred after the Court's decision dated August 22, 2019. Therefore, 29 units qualify for a doubling of costs, for a total amount of $4,640.00.

[51] Concerning GST, the *McKay* decision highlighted that GST is not applied for the doubled portion of costs, as it would amount to a double indemnification of taxes. As a result, the doubling of GST has not been allowed.

J. *Total amount allowed for ZNSI's assessable services (after the doubling of costs).*

[52] The total amount allowed for ZNSI's assessable services, after the doubling of costs, is $11,192.00.

V. Disbursements (T-468-15)

[53] ZNSI has submitted disbursement claims for administrative fees, couriers, photocopying, scanning, binding, research, and travel, totalling $3,926.90. In response, Industria has submitted that ZNSI's travel expenses should be reduced by half because file T-468-15 "was heard contiguously with a second proceeding which took place between the Respondent and the Appellant and was heard on the same day (2019 FC 1083, T-457-15)." Industria did not provide any specific submissions regarding the remaining disbursements claimed by ZNSI (Industria's Written Submissions at paras. 32, 33). In reply, ZNSI submitted that "[r]egardless of how many proceedings were heard on the same day, the fact of the matter is that the Appellant was required to travel to Ottawa for the hearing of this proceeding" and that the disbursements were necessary and should not be halved (ZNSI's Reply Submissions at paras. 14, 15). Neither party provided any jurisprudence to support their positions regarding the reduction of ZNSI's travel expenses.

A. *Travel*

[54] Further to the parties' submissions, I have reviewed the court records for Federal Court files T-457-15 and T-468-15, and they revealed that the hearings for these two files were held on consecutive days in Ottawa. File T-457-15 was held on March 5, 2019, from 10:00 a.m. to 12:30 p.m., and file T-468-15 was held on March 6, 2019, from 12:00 p.m. to 3:35 p.m. These two files involved the same parties, counsel of record, and Court member. There were separate decisions (Judgment and Reasons) issued for each file on August 22, 2019. Each Judgment and Reasons contained a separate award of costs, with costs for file T-457-15 being awarded to ZNSI, and for file T-468-15 costs were awarded to Industria. As noted earlier in these Reasons (at para. 1), the

Federal Court of Appeal set aside the Federal Court's decision dated August 22, 2019, for file T-468-15 and awarded costs to ZNSI for that file. Similarly, for file T-457-15, on December 1, 2021, the Federal Court of Appeal set aside the Federal Court's decision dated August 22, 2019, and remitted "the matter to the Federal Court for further consideration of the matters that were raised by the parties before the Federal Court but not considered" (Reasons for Judgment, 2021 FCA 231, at para. 32). The Federal Court of Appeal's decision did not provide any guidance on the issue of costs for file T-457-15, and my review of the court record for file T-457-15 did not reveal that the Federal Court has rendered a further decision addressing the issue of costs. Therefore, the costs for file T-457-15 appear to be unresolved at the moment.

[55] Utilizing the *Carlile* (above) decision, and subsection 1(4) of Tariff B regarding the reasonableness of disbursements, as guidelines, I find that the facts pertaining to this particular claim support Industria's argument that ZNSI's travel expenses should be split between files T-457-15 and T-468-15. Although these two files involved the same parties, counsel of record and Court member, they were not consolidated files and had separate final decisions rendered by the Court with differing awards of costs. The facts show that ZNSI's counsel's travel from Toronto to Ottawa was to attend two separate Federal Court hearings and I do not find it reasonable for all of the costs for that travel to solely fall upon file T-468-15, without a Court direction or decision specifying this, or an agreement between the parties. If the costs for file T-457-15 were resolved by the Federal Court and awarded to ZNSI, a persuasive argument could possibly be made to allow full indemnification of ZNSI's travel expenses solely under file T-468-15. This is not the situation at the moment. Therefore, ZNSI is allowed 50% of the travel expenses claimed for file T-468-15, for a total of $683.34.

B. *Remaining disbursements*

[56] Concerning the remaining claims for administrative fees, couriers, photocopying, scanning, binding, and research, I have reviewed ZNSI's costs documents in conjunction with the court record, the FCR, and any relevant jurisprudence and I have determined that these disbursements can be allowed as claimed. I found the remaining claims to be reasonable and necessary expenses for the type of judicial review proceeding that was being litigated. Therefore, the remaining claims are allowed for a total amount of $2,560.23, inclusive of any taxes that may have been paid.

C. *Total amount allowed for ZNSI's disbursements.*

[57] The total amount allowed for ZNSI's disbursements is $3,243.57, which is inclusive of any taxes that may have been paid.

VI. Conclusion

[58] For the above reasons, Zara Natural Stones Inc.'s Bill of Costs pertaining to file T-468-15 is assessed and allowed in the total amount of $14,435.57, payable by Industria de Diseno Textil, S.A. to Zara Natural Stones Inc. A Certificate of Assessment will also be issued.

[59] Copies of the Reasons for Assessment and Certificate of Assessment will also be placed on file T-468-15.

"Garnet Morgan"

Assessment Officer

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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STYLE OF CAUSE:	ZARA NATURAL STONES INC. v. INDUSTRIA DE DISENO TEXTIL, S.A.

MATTER CONSIDERED AT TORONTO, ONTARIO WITHOUT PERSONAL APPEARANCE OF THE PARTIES

REASONS FOR ASSESSMENT BY:	GARNET MORGAN, Assessment Officer
DATED:	APRIL 28, 2023

WRITTEN SUBMISSIONS BY:

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