Federal Court Cour fédérale

Date: 20221207

Docket: T-1047-21

Citation: 2022 FC 1669

Ottawa, Ontario, December 7, 2022

PRESENT: Madam Justice St-Louis

BETWEEN:

CATALYST PHARMACEUTICALS, INC.
AND KYE PHARMACEUTICALS INC.

Applicants

and

ATTORNEY GENERAL OF CANADA
AND MÉDUNIK CANADA

Respondents

ORDER AND REASONS

I. Introduction

[1] This Order on costs follows the Judgment (2022 FC 292) granting the application for judicial review brought by Catalyst Pharmaceuticals Inc. and Kye Pharmaceuticals Inc. [the Applicants]. The issue of costs was reserved and the parties filed submissions in this regard.

[2] For the reasons that follow, I will award costs to the Applicants in the form of a lump sum representing 25% of the legal costs incurred, which represents $78,686.43, plus applicable taxes, and disbursements of $852.04. Costs will be ordered to be paid by the Respondents jointly and severally.

II. Parties' positions

[3] The Applicants submit that in light of the factors set out under Rule 400(3) of the *Federal Court Rules*, DORS/98-106 [the Rules], elevated costs are warranted in the form of a lump sum award reflecting 50% of their legal costs paid, for a costs award of $157,372.86 plus tax, and disbursements of $4,191.38. The Applicants add that this amount should be paid by the Respondents jointly and severally.

[4] In the alternative, if the Court finds that an award under the Tariff is appropriate, the Applicants submit that an award at the high end of column V is appropriate and that costs for two counsel should be permitted for each assessable item. The Applicants tendered two Bill of Costs calculated under the Tariff; one under the high end of column V for a total cost award of $47,400.00 plus tax and disbursements (Exhibit C) and the other under the mid-range of column V for a costs award of $35,917.50 plus tax and disbursements (Exhibit B).

[5] Relying on the Court's jurisprudence, the Applicants contend that the following factors weigh in favour of awarding costs in excess of the Tariff and in the form of a lump sum of 50% of their actual legal fees:

> a) It would fix an amount for the Applicants' costs of this judicial review once and for all and avoid the Applicants having to incur further costs litigating the appropriate quantum under the Tariff;
>
> b) It would appropriately compensate the Applicants here, whereas even the highest award under the Tariff would not. In fact, the "best-case" scenario is $44,778.16, including tax and disbursements, which represents only 14% of the actual costs the Applicants incurred; and
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> c) It is appropriate in light of the volume of work, the conduct of the parties, the result, and the importance of the issues.

[6] To support their position that 50% of their actual legal fees is warranted in their case, the Applicants rely on the decisions of *Allergan Inc v Sandoz Canada Inc*, 2021 FC 186 [*Allergan*]; *Nova Chemicals Corporation v Dow Chemical Company*, 2017 FCA 25 [*Dow*]; *Whalen v Fort McMurray No 468 First Nation*, 2019 FC 1119 [*Whalen*]; *Sport Maska Inc v Bauer Hockey Ltd*, 2019 FCA 204 [*FCA Sport Maska*]; *Canadian Pacific Railway Company v Canada*, 2022 FC 392 [*Canadian Pacific*]. They add that in applying the above factors to determining the appropriate magnitude of a lump sum cost award, this Court has held that, in complex cases involving sophisticated parties, the appropriate starting point in determining a lump sum award is the middle of the 25%-50% range. The Applicants assert that the application of these factors demonstrates why a lump sum of 50% of actual legal fees is warranted.

[7] In support of their position, the Applicants filed an affidavit from Diane Zimmerman, a law clerk at Torys LLP, sworn on April 19, 2022, introducing the following exhibits:

> • Exhibit A: an email sent to Ms. Zimmerman by the Senior Manager, Client Accounting at Torys, which indicates the hours worked by Tory' professionals and the fees Applicants have paid for this judicial review application through December 31, 2021. The hours are divided in three "task codes": 1) work completed on the application generally (task code 100), 2) work completed

> preparing affidavit evidence for the application (task code 300), and 3) work completed to implement amendments to the notice of application for judicial review (task code 500). The email indicates that 802.1 hours were registered, and that the Applicants paid $314,745.72 for time up to December 31, 2021.
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> • Exhibits B, and C: one Bill of Costs prepared in accordance with the mid-range of column V of Tariff B of the Rules for an amount of $35,917.50, plus tax and plus disbursements, and another Bill of Costs prepared in accordance with the high-end of column V of Tariff B of the Rules for a total amount of $47,400.00, plus tax and plus disbursements.
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> • Exhibit D: copy of the Memorandum of Fact and Law dated December 1, 2021, filed by the Respondent Médunik in Court File No. T-1047-21.
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> • Exhibit E: copy of the redacted affidavit of Steven Miller (without exhibits) filed on behalf of the Applicants in the Application.
>
> • Exhibit F: copy of the affidavit of Douglas Reynolds (without exhibits) filed on behalf of the Applicants in the Application.

[8] In her affidavit, Ms. Zimmerman testified having been advised by Alicja Puchta, one of the counsel for the Applicants, that she (Ms. Puchta) had reviewed the dockets in this matter for time up to and including December 31, 2021 and that she (Ms. Puchta) could advise that the work done by the four legal professionals (including Ms. Zimmerman) included the list of items enumerated. Raising solicitor-client privilege, the Applicants have not disclosed any dockets.

[9] In regards to the disbursements, the Applicants have adduced no evidence apart from the information contained in their Bill of Costs.

[10] The Attorney General of Canada [the AGC] does not object to the Court fixing costs. However, the AGC responds that the quantum requested by the Applicants is significantly

overstated. The AGC has also tendered a Bill of Costs reflecting the Tariff value under the middle of column V, which totals $41,827.50 plus tax and Applicants' disbursements of $4,191.38. The AGC included fee items not considered by the Applicants, as well as the application of second counsel throughout calculated at 50% of the total amount calculated for first counsel. The AGC does not contest the disbursements claimed by the Applicants. The AGC submits that a reasonable amount for the Applicants' costs is $51,456.46 (including tax and disbursements).

[11] The AGC adds that the criteria for an elevated lump sum award are not met, essentially relying on the same decisions as the Applicants (e.g., *Dow*; *Canadian Pacific*; *Allergan*).

[12] Médunik Canada [Médunik] disagrees with the Applicants' proposed methodology (i.e., lump sum) or quantum (i.e., elevated). Médunik submits that costs should be awarded to the Applicants in accordance with the Tariff under the mid-range of column V. Médunik adds that costs award should be apportioned between the Respondents in equal shares and should not be payable on a joint and several basis. Médunik adds that he Applicants' claim for second counsel fees should be allowed at 50% of the total amount calculated for first counsel under sections 14(a) and (b) of Tariff B of the Rules. Médunik also opposes three claimed fees in the Bill of Costs the Applicants tendered under the mid-range of column V.

[13] Médunik submits that the Applicants' costs should be assessed. Médunik tendered its own Bill of Costs under the mid-range of column V which calculates $30,607.50 in legal fees, plus the applicable taxes, and the disbursements of $852.04.

[14] Médunik adds that if the Court would prefer a lump sum to avoid an assessment, then Médunik submits that the amount payable should be based on the amount that would have been payable under the Tariff, which represents $30,607.50 plus tax and disbursements.

[15] Médunik disagrees with the Applicants' request for lump sum costs on an elevated scale for the following reasons:

> a) The four public case law cited by the Applicants are either readily distinguishable or did not order elevated costs;
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> b) The 25% to 50% range for determining a lump sum award is only applicable in private law cases;
>
> c) All parties co-operated to ensure that this application could be heard on an expedited basis, as requested by the Applicants in the Notice of Application (Rule 400(3)(i), (k));
>
> d) There is insufficient information about the Applicants' dockets to assess whether the amount claimed is reasonable. The Applicants rely on hearsay when better evidence was available (affidavit of a law clerk in support of their claim, not the person who prepared the dockets). In addition, the Applicants refused to disclose their dockets based on solicitor-client privilege.

[16] As for disbursements, Médunik asks that the claim for disbursements be disallowed in its entirety because the Applicants have not filed evidence to show that the claimed disbursements were reasonable. In the alternative, Médunik argues that at least the costs of binding, exhibit tabs, laser printing and copy preparation should be disallowed as excessive on their face.

III. Analysis

A. *General Rules*

[17] As my colleague Justice Grammond outlined at paragraphs 2 to 5 of his decision in *Whalen*:

> Awarding costs to the successful party in a lawsuit is a longstanding practice of Canadian courts. In *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71, [2003] 3 SCR 371 [*Okanagan*], the Supreme Court of Canada analyzed the purposes of costs awards.
>
> The first and more traditional goal of costs awards is the indemnification of the successful party. The legal costs associated with successfully bringing or defending a lawsuit are considered as a form of damage that calls for compensation. By asserting a position that was found to be without merit, the losing party is seen as having wrongfully injured the successful party.
>
> Nowadays, costs awards also bear a "policy" function (*Okanagan* at paragraphs 22–26). By shifting the costs of legal proceedings to the losing party, they force litigants to "internalize" such costs, that is, to take those costs into account when making decisions regarding the conduct of a lawsuit. Thus, costs awards provide incentives to make a rational use of scarce judicial resources. This may happen in various contexts. For example, costs awards are said to favour settlements, because parties will take legal costs into consideration when they calculate the risks of going to trial. Likewise, costs awards are thought to discourage frivolous or vexatious lawsuits, because litigants who bring such lawsuits know they will have to indemnify the defendant.
>
> Thirdly, costs awards have the potential of facilitating access to justice. […]

[18] The law of costs is not an exact science. Also, in adjudicating costs, courts attempt to strike an appropriate balance between three main objectives: compensation, providing incentive to settle, and dissuasion of abusive conduct in litigation. In this exercise, Rule 400(1) of the

Rules provides that the Court "shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are paid".

[19] Rule 400(3) provides a non-exhaustive list of considerations. With respect to quantum, Rule 407 provides that column III of Tariff B is the "default" scale (*Consorzio del Prosciutto di Parma v Maple Leaf Meats Inc*, 2002 FCA 417 at para 9 [*Consorzio del Prosciutto*]). However, the Court's broad discretion includes the power to order an assessment under a different column of Tariff B or to permit a departure from the Tariff (*Philip Morris Products SA v Marlboro Canada Ltd*, 2015 FCA 9 at para 4 [*Philip Morris*]). Rule 400(4) allows the Court to fix costs and award a lump sum in lieu of an assessment of costs pursuant to Tariff B.

[20] The Court often deviates from the Tariff in complex litigation because the application of Tariff generally results in costs awards that are significantly lower than the successful party's actual expenses (*Whalen* at para 9; *Dow* at para 13). An award of costs is usually intended to ensure a "reasonable contribution" to the successful party's legal costs (*Whalen* at para 9; *Dow* at para 13; *Consorzio del Prosciutto* at paras 8-9). In addition, the award of a lump sum is increasingly valued by the courts as it saves the parties time and money and further the objective of securing "the just, most expeditious and least expensive determination" of proceedings (Rule 3) (*Dow* at para 11). Despite this, the Tariff remains the rule and an increase the exception (*Wihksne v Canada (Attorney General)*, 2002 FCA 356 at para 11; *Dow* at para 13). The Federal Court of Appeal also cautioned that the difference between a party's actual costs and the Tariff award is not, in and of itself, sufficient grounds for a higher award (*Dow* at para 13; *Whalen* at

para 11; *Bauer Hockey Ltd v Sport Maska Inc* (*CCM Hockey*), 2020 FC 862 at para 12 [*Sport Maska*]).

B. *Lump Sum Award*

[21] I agree with the Applicants that a lump sum can avoid the additional expense of litigating the appropriate quantum under the Tariff. In recent years, the granting of a lump sum award has become increasingly common (*Dow* at para 13). As previously noted, a lump sum is frequently preferred to the Tariff because of its simplicity, the time and effort it saves in not having to prepare and debate the minutiae of items under the Tariff (*Consorzio del Prosciutto* at para 12). Requests for lump sum awards are generally accompanied by a Bill of Costs, "as a matter of good practice" (*Dow* at para 14. See e.g., *H-D USA, LLC v Berrada*, 2015 FC 189 at para 8 [*Berrada*]; *Allergan* at para 57), which was the case in these proceedings.

[22] I find awarding a lump sum award is appropriate in this case as it will avoid any potential litigation on the assessment of the costs. I will now examine whether elevated costs, i.e., departure from the Tariff is warranted.

C. *Elevated Awards in Judicial Reviews*

[23] The AGC submits that the case law on lump sum awards in excess of the Tariff in patent or trademark actions does not apply to an application for judicial review. He adds that the reasoning in *Allergan,* cited by the Applicants, involved private intellectual property disputes between sophisticated commercial parties who were each litigating for their private commercial

interests (the cases were either regarding patent infringement or trademark infringement). He stresses there is no principled reason that *Allergan* should apply to judicial review of public law decisions made by representatives of the Government of Canada fulfilling their statutory obligations under Federal statutes and regulations.

[24] Médunik submits that the Applicants have not cited any case in which the Court awarded elevated costs in a public law case with analogous circumstances. Medunik stresses that the four public case law cited by the Applicants are either readily distinguishable or did not order elevated costs: (1) in *Whalen*, a lump sum of $40,000 was granted because there was an imbalance between the parties, whereas there is no financial imbalance between the parties in this case; (2) in *Cowessess First Nation No 73 v Pelletier*, 2017 FC 859, the Court did not award costs to the successful party; (3) in *Jama v Canada (Attorney General)*, 2022 FC 285 [*Jama*], the Court awarded a sum to the Applicant despite being unsuccessful due to reasons beyond her control, whereas the Applicants' judicial review was successful; and (4) in *Zoghbi v Air Canada*, 2021 FC 1447 [*Zoghbi*], the application for judicial review was allowed.; the Court granted costs to the application calculated in accordance with the high end of column III of Tariff B.

[25] Médunik also submits that the 25% to 50% range for determining a lump sum award is only applicable in private law cases. The rationale for awarding elevated costs (i.e. to require sophisticated commercial parties to pay for the legal choices they make) does not apply in this case (public law cases).

[26] The Applicants reply that several cases have awarded elevated costs, in the form of a lump sum, in the context of an application for judicial review. In support of their proposition, the Applicants rely on: *Whalen* at paras 33-35 (lump sum costs award of 40% of actual costs); *Air Canada v Toronto Port Authority*, 2010 FC 1335 at paras 11-18 [*Air Canada*] (lump sum costs award of 50%); *Pelletier v Canada (Attorney General)*, 2011 FC 1459 at paras 17-20 (lump sum costs award of around 40%); *Shirt v Saddle Lake Cree Nation*, 2022 FC 321 at paras 106-107; *Garner v Union Bar First Nation*, 2021 FC 657 at paras 53-54 (lump sum costs award of 50%); *Loblaws Inc v Columbia Insurance Company*, 2019 FC 1434 at para 16 [*Loblaws*]. The Applicants also argue that the AGC cannot hide behind the Office of Submissions and Intellectual Property's [OSIP] role as an administrative decision maker to avoid paying elevated costs. They add that the AGC was not a disinterested litigant acting in the public interest, but that on the contrary, he played an intensely adversarial role in the litigation. The Applicants assert that in any event, Médunik is a direct, commercial competitor to the Applicants and the AGC's argument does not apply to it.

[27] While it is true that elevated lump sum awards are generally warranted in complex private law litigation, lump sum awards in excess of Tariff have been previously granted in the context of a judicial review, as the cases cited by the Applicants have shown. Moreover, contrary to the position taken by Médunik and the AGC, the Court noted that the 25% to 50% range is not confined to cases where there are exceptional circumstances and are not exclusive to patent infringement or trademark infringement (private law cases) (*Loblaws* at para 16). For instance, as cited by the Applicants, in *Air Canada*, Justice Hughes awarded 50% of actual costs in applications for judicial review of certain decisions made by the Toronto Port Authority in respect

of operations at a commercial airport. Finally, nowhere in any of the cases cited by the AGC and Médunik (nor in any of the cases I have reviewed) have I found the direct statement indicating that elevated lump sum awards do not apply to judicial reviews.

[28] I accept that applying the reasoning for elevated costs developed in the case law in actions raises different concerns, namely because application for judicial review must be brought quickly and must be heard and determined "without delay and in a summary way" (18.1(2), 18.4(1) of the Rules). However, the simpler and faster procedure is reflected in the legal fees that serves as the basis of the calculation. While it might be true that elevated costs could generally not be justified in the context of judicial review applications because of the particular nature of the proceedings, I think that the rationale for awarding elevated costs, discussed in private law cases, may apply in this case given its particular circumstances.

D. *Elevated Awards – Factors*

[29] There does not appear to be a clearly defined test to justify lump sum on an elevated basis, i.e., in excess of the Tariff. Nevertheless it remains that the court's wide discretion to award costs on an elevated lump sum basis is structured by the factors set out in Rule 400(3), by case law, and by the objectives of costs awards. These include "greater than average complexity, sophisticated parties, legal bills far in excess of what is contemplated by Column III of Tariff B" (*Allergan* at para 26), and "giving parties an incentive to litigate efficiently" (*Seedlings Life Science Ventures, LLC v Pfizer Canada ULC*, 2020 FC 505 at para 4 [*Seedlings Life*]. See also *Seedlings Life* at para 6; *Dow* at paras 13-19; *FCA Sport Maska* at paras 50-51; *Philip Morris* at para 4).

(1) Sophistication of the Parties

[30] The Applicants argue that this is a complex case that involves all sophisticated parties. In *Sport Maska* at paragraph 13, Grammond J. appears to have provided some guidance as to what is meant by "sophisticated parties":

> The parties are represented by teams of lawyers whose hourly rates are well beyond what the framers of the tariff may have contemplated. Given the resources at their disposal, the parties are able to respond to the financial incentives provided by the costs regime and make rational calculations.

[31] On this basis, the commercial litigants here are certainly sophisticated, while I note that the Federal Court has previously determined that the AGC is a sophisticated party (*Canada (Attorney General) v First Nations Child and Family Caring Society of Canada*, 2020 FC 643 at para 46). This is a factor favouring an elevated lump sum costs award (see e.g., *Ark Innovation Technology Inc v Matidor Technologies Inc*, 2022 FC 72 at para 15; *Consorzio del Prosciutto* at para 6). As noted in *Berrada* at paragraph 22, this approach is consistent with the "[t]rend in recent case law favouring the award of a lump sum based on a percentage of the actual costs to the party when dealing with sophisticated commercial litigants that clearly have the means to pay for the legal choices they make" (*Berrada* citing *Eli Lilly v Apotex Inc*, 2011 FC 1143 at para 36).

(2) Insufficiency of awards made according to the Tariff

[32] The Applicants submit that an elevated lump sum would appropriately compensate, whereas even the highest award under the Tariff would not. The Applicants assert that the

highest amount the Applicants would recover under mid-range of column V of the Tariff (which accounts for second counsel fees and the highest number of potential units) represents only 14% of the actual costs incurred.

[33] The AGC responds that the quantum sought by the Applicants is nearly three times the size of the award calculated in column V of the Tariff – which is already significantly in excess of the "average or usual" award, which is column III.

[34] As previously mentioned, increased costs are justified in situations where a Tariff B award would not properly satisfy the purpose of indemnification (*Ultima Foods Inc v Canada (Attorney General)*, 2013 FC 238 at paras 25-26; *Berrada* at para 21). For instance, in *Dow*, a motion of costs in a patent infringement action, the judge found legal fees allowable under column V of Tariff B, which would have awarded an amount equivalent to 11% of the plaintiffs' legal costs, to be "totally inadequate". He concluded that an amount representing 30% of the plaintiff's actual legal costs and approximately three times what would be available under the Tariff was reasonable (*Dow* at paras 3-4, 22; *Dow Chemical Company v Nova Chemicals Corporation*, 2016 FC 91 at paras 26, 29).

(3) Rule 400(3)(c) – The Importance of the Issue

[35] The Applicants argue that this judicial review application was of significant commercial importance for the Applicants and their direct competitor, Médunik. The data protection issues in this case concerned FIRDAPSE, which is the first commercially launched product of KYE, a small pharmaceutical startup, in collaboration with Catalyst, following significant time, expense,

and investment on both their parts. The outcome of this case has direct bearing on the Applicants' entitlement to market exclusivity for FIRDAPSE, and on whether Médunik's version of amifampridine, RUZURGI, will remain on the market to compete with FIRDAPSE. The importance of these issues to the Applicants and Médunik militates in favour of the Applicants' requested costs award.

[36] I have not found anything in the Respondents' submissions that contradicts or responds to the Applicants' submissions. I am satisfied that the issue was important to all parties. For instance, in *Loblaw* at paragraph 24, the Defendant argued that the claim was critically important to it, as *Loblaw* sought to prevent it from using two of its most important marks that were central to its rebranding. The Court considered the issue important to both parties, which favoured a lump sum award on an elevated scale.

(4) Rule 400(3)(c) and (g) – Complexity and Amount of Work

[37] The Applicants submit that the volume of work entailed complicated factual record, notably on the evidence on Health Canada's regulatory approval processes and its approach to data protection provisions. The parties also substantially increased the amount of work. First, Médunik prepared its own written and oral submissions, and raised distinct arguments from the AGC. Second, AGC refused to concede the relevance of the exchanges from April to July 2020 between Médunik, Health Canada's Office of Intellectual Property, and its Therapeutic Product Directorate. These were clearly relevant documents, for which the Applicants had to spend considerable time and resources preparing submissions on this issue.

[38] The AGC agrees that the issues were complex, involving review of a lengthy decision and two distinct statutory interpretation issues and a significant amount of work was necessary to conduct this judicial review was significant, and this is reflected in the application of column V of the Tariff. Médunik is silent on this factor.

[39] I agree with the Applicants and the AGC in that the issues were complex and significant amount of work was required.

(5) Rule 400(3)(h) – Public Interests

[40] The Applicants submit that there was significant public interest in having the judicial review application decided that extends beyond the immediate interests of the parties, mainly because this is one of the only cases to consider the operation of subsection C.08.004.1(3) of the *Food and Drug Regulations*. The AGC submits that the Applicants pursued this litigation for their own private commercial interests – to block a competitor from receiving authorization to sell a competing medicine – not out of a desire to advance some dispassionately identified public interest.

[41] I note that the Applicants cited *Zoghbi* and *Jama* in support of their proposition. However, in both cases, the question was not only novel, but also raised a human rights issue. In *Zoghbi*, the applicant sought damages as a remedy for racial discrimination in private international aviation under the *Canadian Human Rights Act*, RSC 1985, c H-6. In *Jama*, the judicial review engaged substantive and procedural rights in the national security context under

the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[42] In contrast, the Applicants in this matter seem to have substantial private interests (see e.g., *Arctos Holding Inc v Canada (Attorney General)*, 2018 FC 365; *Doherty v Canada (Attorney General)*, 2021 FC 695 at para 14). The Applicants sought to protect its data from Médunik, its competitor, who received authorization to supply a drug with the same medicinal ingredient as the Applicants' (*Catalyst* at para 143). The Applicants do not appear to deny that the purpose of judicial review is to protect their commercial rights at stake.

[43] That said, I think that even if the issue does not involve a broad societal interest and the Applicants have private motives, the proceedings nevertheless appears to have a general interest in ultimately providing guidance for future litigation, which may be a factor in favour of the Applicant (*Whalen* at para 32).

[44] Médunik submits that the application raised a question of first impression and that it is customary in such cases to award costs based on the Tariff and not on an elevated scale. Médunik only relies on the paragraph 41 of *SNC Lavalin Inc v Canada (Minister for International Cooperation)*, 2003 FCT 681 which states: "As a matter of first impression, both parties having requested costs of this application, I find nothing that would warrant variation from the general rule that costs, on the ordinary scale, should follow the event".

[45] I am not convinced the case Médunik cited supports this proposition. I also agree with the Applicants that the novelty of an issue does not mandate any particular result, as costs remain in the Court's discretion (*Quality Program Services Inc v Canada*, 2019 FC 19 at paras 8-10).

(6) Rule 400(3)(i) – Conduct of a Party that Tended to Shorten or Unnecessarily Lengthen the Duration of the Proceeding

[46] The Applicants suggest that the AGC's choice not to concede the relevance of the April to July 2020 exchanges between Médunik, Health Canada's Office of Intellectual Property and its Therapeutic Product Directorate, despite clear indications otherwise, should have costs consequences. One of the policy rationales behind costs awards is to force litigants to "internalize" the costs of their litigation choices, that is, to take those costs into account when making decisions regarding the conduct of a lawsuit.

[47] The AGC responds that his position was not unreasonable and there is nothing to suggest it was not made in good faith. The disputed documents had not been before the decision maker, the Director of OSIP; the Director of the OSIP swore an affidavit explaining why such documents were not considered relevant to the decision making process; and the AGC referred to case law to support its position.

[48] One of the purposes of an elevated lump sum award is to give parties "an incentive to litigate efficiently by internalizing the costs of conducting legal proceedings" (*Seedlings Life* at para 4). For example, in *Allergan*, Sandoz made a strategic decision to bring a counterclaim that ultimately failed, rather than simply defending Allergan's action on the basis of claim

construction. The Court decided that “there should be consequences for having advanced and then failed to succeed on these issues. This is particularly so given the substantial costs that Allergan had to incur to address them, and given the very real practical result that Allergan achieved by avoiding the declaration of invalidity” (*Allergan* at para 42).

(7) Rule 400(3)(a) – The Results of the Proceeding

[49] The Applicants submit that they were wholly successful in their application. Therefore, “the Applicants’ success alone merits a lump award in the amount requested”.

[50] The AGC asserts that the fact that a party was successful on the merits does not justify departing from the Tariff. The AGC also submits that the Applicants were not wholly successful because the Court did not grant the exceptional remedy the Applicants had sought. Médunik accepts that the Applicants were the successful party on this application.

[51] In my understanding, the result of the proceedings does not dictate a particular result that binds the Court (e.g., the award of the amount requested) but may guide the exercise of the Court’s discretion. Additionally, the Applicants were successful as the Court granted the judicial review application and set aside the Minister’s decision. Ultimately, success ought not to be measured in terms of how many issues were argued and won or lost but rather by the Court’s overall finding (*Aux Sable Liquid Products LP v JL Energy Transportation Inc*, 2019 FC 788 at para 5).

E. *Overall analysis*

[52] The following factors lead me to conclude that an award of costs according to the Tariff would be insufficient and that an elevated sum is warranted. This was a complex case involving sophisticated parties. The Applicants were successful. There was no public interest in this application; however, as noted it was of significant and material interest to the parties, and the litigation may ultimately serve to help set certain legal questions of general interest with respect to the interpretation of subsection C.08.004.1(3) of the *Food and Drug Regulations*. As both parties agree, the amount of work was greater than would ordinarily have been required on an application for judicial review, and the parties "are in a position to respond to the incentives provided by an elevated award of costs" (*Sport Maska* at para 22. See also *Allergan* at para 38).

F. *Quantum*

[53] Lump sums must not be "plucked from thin air", and have been found to fall within a range of 25-50% of the actual legal costs of the successful party to ensure a degree of consistency (*Dow* at paras 15-17; *Whalen* at para 33; *McCallum v Canoe Lake Cree First Nation*, 2022 FC 969 at para 135).

[54] The case law is not entirely clear on the level and detail of evidence that must be adduced to support a lump sum award in excess of the Tariff calculated as a percentage of the actual legal costs. Furthermore, I am cognizant that the evidence adduced by the Applicants to support their request is not optimal. As Justice McHaffie outlined in *Fluid Energy Group Ltd v Exaltexx Inc*, 2020 FC 299, here a greater degree of breakdown would have assisted the exercise and is to be

encouraged. However, an even if it would have been preferable for the Applicants to provide a more direct and detailed account of their legal fees, I am nonetheless satisfied, in the circumstances of this case, that the fees identified were incurred by the Applicants in respect of the second Application for judicial review, and that they are reasonable.

[55] While there is no rigid guideline regarding the percentage of recovery to be used, if an elevated lump sum award is appropriate, I propose to set a starting point of 25% for lump sum awards of fees and to analyze whether the circumstances warrant a higher or lower number, as the Court has done in recent cases (*Sport Maska* at para 14; *Seedlings Life* at para 22; *Teva Canada Limited v Janssen Inc*, 2018 FC 1175 at paras 35-36 [*Teva*]*; Canadian Pacific* at para 66).

[56] In *Chanel S de RL v Lam Chan Kee Company Ltd*, 2016 FCA 987 at paragraph 5, the Federal Court order costs of 60% due to misconduct, such as for deliberate infringers and counterfeiters (*Chanel S de RL v Kee*, 2015 FC 1091 at paras 26-27). Costs of 66% were also confirmed due to unnecessary steps taken during the proceedings, and aggressive litigation strategies on a tight schedule (*Packers Plus Energy Services Inc v Essential Energy Services Ltd*, 2021 FC 986 at paras 34-36).

[57] In *Dow*, the Court granted a lump sum award of 30%: there were 33 days of trial, over 180 days of "extensive and scientifically-complex testing" and written submissions at the end of the trial totalling over 700 pages. In *Apotex Inc v Shire LLC*, 2018 FC 1106, the Court awarded 30%. There were discoveries of 8 inventors and 17 days of hearings. In *Seedlings Life* at

paragraph 24, the Federal Court concluded that a 25% award was appropriate because the case was not overly complex: this was a 13-day trial and there were fewer than 11 days of discoveries.

[58] I also note: *Bodum USA Inc v Trudeau Corp (1889) Inc*, 2013 FC 128 (10%); *Dimplex North America Ltd v CFM Corp*, 2006 FC 1403 (20%); *ABB Technology AG v Hyundai Heavy Industries Co*, 2013 FC 1050 (12.5%); and *Berrada* (33%).

[59] I do not see that the circumstances justify increasing the percentage to 50% of the incurred legal fees as the Applicants suggest. I find there is no reason to depart from the 25% starting point. As previously mentioned, the complexity of the case is already included in the legal fees that forms the basis of the calculation (*Seedlings Life* at para 23).

[60] I will thus grant a lump sum award of 25% of the legal costs incurred which represents $78,686.43, plus applicable taxes.

G. *Disbursements*

[61] The Applicants ask for disbursements in the amount of $4,191.38, including tax, and provide a breakdown by category. The large majority of these disbursements, $2,468.80, are for laser printing. Médunik argues that the Applicants provided no evidence of the necessity and reasonableness of these disbursements and that many are excessive and inappropriate and should thus be disallowed in their entirety. In the alternative, Médunik submits that at least the following amounts should be disallowed as being excessive on their face: binding charges ($192.00); exhibit tabs ($275.24); laser printing ($2,468.80); and copy preparation ($19.13). The

Applicants reply that the amounts in question total less than $3.000.00, and Médunik has filed no evidence of its own to suggest that the amounts in question are excessive or unreasonable, nor did Médunik attempt to cross-examine the Applicants' affiant.

[62] On the recovery of disbursements, the question is if they were reasonable and necessary at the time they were incurred (*MK Plastics Corporation v Plasticair Inc*, 2007 FC 1029 at paras 34-37). The determination of the reasonableness of the services and disbursements claimed involves the exercise of a substantial degree of discretion (*Lundbeck Canada Inc v Canada (Health)*, 2014 FC 1049 at para 20 [*Lundbeck*]). Section 1(4) of Tariff B of the Rules states:

1. (4) 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.	1. (4) À l'exception des droits payés au greffe, aucun débours n'est taxé ou accepté aux termes du présent tarif à moins qu'il ne soit raisonnable et que la preuve qu'il a été engagé par la partie ou est payable par elle n'est fournie par affidavit ou par l'avocat qui comparaît à la taxation.

[63] In *Fournier Pharma Inc. v Canada (Health)*, 2008 FC 369 [*Fournier*], the Federal Court allowed the appeal of an order of a prothonotary which denied Apotex's claim for disbursements in its entirety on the ground that Apotex had failed to submit evidence that the disbursements were necessary to defend the prohibition proceedings and were reasonable. The Federal Court determined that the prothonotary committed a reviewable error in dismissing the entire claim for disbursements by failing to consider the evidence that Apotex submitted. In fact, the affidavit was an unqualified statement that the disbursements claimed were incurred, the

affiant was not cross-examined and no evidence was submitted by the other party to dispute or contradict the disbursements that were claimed.

[64] In *Novopharm Limited v Janssen-Ortho Inc*, 2012 FCA 29, the respondent claimed a grand total of $35,592.91 in photocopies for the appeal. The Federal Court of Appeal noted that, despite the lack of evidence concerning the number of copies produced, what they were related to and their necessity, the number of photocopies required in the appeal was extensive, including a three volume book of authorities and a compendium of documents for the court. Therefore, despite the gap of evidence, the court authorized the photocopies for a lump sum of $17,178.09.

[65] Further, I refer to the decision in *Eli Lilly Canada Inc v Novopharm Ltd*, 2006 FC 781 at paragraph 15 concerning the reasonableness of disbursements set out in a draft Bill of Costs, as follows:

> 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 or 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.

[66] Likewise, Justice Mosley in *Dimplex North America Ltd v CFM Corp*, 2006 FC 1403 at paragraph 39, held that "an assessment of costs is, at best, rough justice." "In other words, costs will not be determined with precision when being disposed of by a lump sum award" (*Fournier* at para 27). However, the "[t]he 'rough justice' approach is not to suggest that parties need not provide sufficient evidence, and to only rely on the discretion and experience of the assessment officer" (*Lundbeck* at para 34).

[67] In regards to binding costs, in *Leo Pharma Inc v Teva Canada Limited*, 2016 FC 107 at paragraph 45, Locke J. concluded that "binding costs are overhead and should not be allowed". However, in *Janssen Inc v Teva Canada Limited*, 2012 FC 48 at paragraph 103, the Court held that the determination concerning a reasonable and necessary amount to allow for internal binding should be based on the circumstances of the file.

[68] The Court previously established that the cost of photocopies is an allowable disbursement only if it is essential to the conduct of the proceedings (*Diversified Products Corp et al v Tye-Sil Corp*, 34 CPR (3rd) 267 refer to in *Trevor Nicholas Construction Co v Canada (Minister of Public Works)*, 2005 FC 1382 at para 32). The Federal Court of Appeal noted that, in assessing a disbursement for photocopying costs, the costs should be limited to the number of copies necessary to meet the requirements of the Rules in the absence of evidence (*Murphy v Canada (Minister of National Revenue)*, 2002 FCA 160 at para 4).

[69] In this case, I note that the Applicants submitted a USB key in lieu of a paper copy of their 21 volumes, confidential record, and, based on the record, it seems that most, if not all, of

the documents provided to meet the requirements of the Rules in this application were served by electronic service. Given that there is no evidence to support this expense, I agree with Médunik that laser printing costs ($2,468.80) should be disallowed. As binding, copy preparation and exhibit tabs costs are logically indistinguishable from printing costs and no justifications have been provided to support these expenses, I suggest that the amount claimed (respectively $192.00, $19.13 and $275.24) also be disallowed.

[70] Based on the foregoing, the amount allowed under the disbursements is reduced to $852.04.

H. *Should the Respondents be jointly and severally liable for costs?*

[71] The Applicants request for their costs to be payable by the Respondents jointly and severally.

[72] Médunik submits that any costs award should be apportioned between the Respondents in equal shares, but not payable on a joint and several basis, although it provides no case law or reasons to support this conclusion. The AGC is silent on this issue.

[73] As Médunik has not provided a basis for the Court to conclude that the award of costs should be apportioned among the Respondents in equal shares, I will decline its invitation to conclude otherwise and the Respondents will be held jointly and severally liable for costs.

ORDER IN T-1047-21

THIS COURT'S ORDER is that:

1. Costs are awarded to the Applicants for an amount of $78,686.43 (plus the applicable taxes) and disbursements of $852.04.

2. Costs are to be paid by the Respondents jointly and severally.

"Martine St-Louis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1047-21
STYLE OF CAUSE:	CATALYST PHARMACEUTICALS, INC., AND KYE PHARMACEUTICALS INC. v ATTORNEY GENERAL OF CANADA, AND MÉDUNIK CANADA
PLACE OF HEARING:	BY WAY OF VIDEOCONFERENCE
DATE OF HEARING:	DECEMBER 13, 2021
ORDER AND REASONS:	ST-LOUIS J.
DATED:	DECEMBER 7, 2022

APPEARANCES:

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Me John Lucki Me Karen Lovell Me Leah Bowes Me James Schneider	FOR THE RESPONDENTS
Me Jason Markwell Me Lina Bensaidane	FOR THE RESPONDENTS AND MÉDUNIK CANADA

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