Federal Court Cour fédérale

Date: 20230726

Dockets: T-97-19
T-98-19

Citation: 2023 FC 1023

Docket: T-97-19

BETWEEN:

BRISTOL-MYERS SQUIBB CANADA CO.
AND BRISTOL-MYERS SQUIBB HOLDINGS IRELAND UNLIMITED COMPANY

Plaintiffs

and

PHARMASCIENCE INC.

Defendant

Docket: T-98-19

AND BETWEEN:

BRISTOL-MYERS SQUIBB CANADA CO.
AND BRISTOL-MYERS SQUIBB HOLDINGS IRELAND UNLIMITED COMPANY, AND PFIZER INC.

Plaintiffs

and

PHARMASCIENCE INC.

Defendant

REASONS FOR ASSESSMENT

GARNET MORGAN, Assessment Officer

I. Background

[1] This assessment of costs is related to the Court's Judgment and Reasons (2021 FC 354) dated April 22, 2021, which stated the following regarding costs:

> **THIS COURT'S JUDGMENT is that** having awarded the Plaintiffs their costs of these actions, and the Court declining to fix costs at a lump sum amount, costs are to be taxed in accordance with these Reasons at the upper end of Column V of Tariff B.

[2] In addition, at paragraphs 28-33 of the Court's Judgment and Reasons the following instructions were provided to the Assessment Officer conducting the assessment of costs for these files:

> [28] Therefore, I will be sending this matter to an assessment officer. A few discrete items need to be addressed, as they will no doubt be raised again by the Defendants before the assessment officer.
>
> [29] First, the Defendants raise invoice 3162786 which they say relates not to fees billed but to a $500,000 bonus for success. BMS entered into a fixed fee arrangement with its counsel. If successful, counsel could bill a further sum of $500,000, which it did by way of this invoice. However, while not previously billed, counsel says that they performed legal services that were not billed, and that were in excess of $500,000. If so, then on this basis, the sum claimed is recoverable.
>
> [30] Second, the Defendants take issue with the fees charged by the experts and in particular, the hourly rates of Dr. Weitz ($1,000 USD) and Dr. Davies (£550 GBP). I am satisfied that although high, those rates are appropriate given their expertise.

> [31] Third, they challenge the fees charged by Dr. Greenlee, as he was not called to testify. Like the Defendants, BMS chose not to call one of the experts it had retained. He prepared a report that was filed in these actions. It was a last minute litigation decision and I am satisfied that his fees are justified and recoverable.
>
> [32] No objection was taken to BMS being compensated for all four counsel at trial, and I agree that all are recoverable fees in these circumstances.
>
> [33] Given the factors set out in the opening paragraphs of these reasons, I find that costs at the upper end of Column V of Tariff B are appropriate. BMS submits that costs assessed on that basis and including its disbursements is $695,330.66. This Court cannot blindly accept that given the difficulties noted earlier with the evidence; however, the Court hopes that the parties will have a dialogue as to whether the Defendants are prepared to accept that sum, rather than challenge the fees and disbursements before an assessment officer.

II. Documentation

[3] On October 14, 2022, the Plaintiffs [hereafter collectively referred to as BMS] initiated a request for an assessment of costs by filing a Bill of Costs.

[4] On October 19, 2022, a direction was issued to the parties regarding the conduct and filing of additional documents for the assessment of costs.

[5] 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 November 28, 2022, BMS filed a Book of Authorities, and a costs record containing Written Representations of the Plaintiffs (BMS' Representations), and affidavits of Dr. William J. Greenlee; Professor Martyn C. Davies; Dr. Jeffrey Weitz; Dr. David Taft; James S. S. Holtom; and Christina Vincent;

b) On February 3, 2023, the Defendant [hereafter referred to as Pharmascience] filed a Book of Authorities, and a costs record containing Pharmascience's Responding Written Representations (Pharmascience's Representations), and an Affidavit of Ben Wallwork;

c) On March 3, 2023, BMS filed a Book of Authorities, and Reply Representations of the Plaintiffs (BMS' Reply).

III. Preliminary Issues

A. *Success Fee*

[6] In BMS' Bill of Costs, a "Success Fee" has been claimed for $500,000.00. At paragraph 29 of the Court's Judgment and Reasons dated April 22, 2021, it states that this particular claim is related to services that were performed by counsel for BMS but not billed to the client because of a "fixed-fee arrangement." Through an arrangement made between counsel and the client, if BMS was successful in the action proceedings, counsel would be entitled to an additional $500,000.00 as a success fee (BMS' Representations at paras 18-19). BMS' affidavits of J. Holtom and C. Vincent provide some clarification regarding the documentation for the success fee, such as separate invoicing, which was created to identify the time spent working by counsel but not included in any client invoices that were billed (Holtom Affidavit at paras 26-29; Vincent Affidavit at paras 11-12 and Exhibits B and C).

[7] In response, Pharmascience submitted that "BMS" request for a $500,000 lump sum award on top of its Tariff costs expressly contradicts the costs decision that gave rise to this assessment and that "[o]nly the Court can award a lump sum in addition to, or in lieu of, assessed costs." Pharmascience submitted that a reading of the costs decision in its entirety clarifies that "the Court did not intend to award BMS a lump sum award in addition to the Tariff B amount"

but additional fees "if properly evidenced, could be recovered under the tariff." Pharmascience noted that the Court also referred to "recoverable fees" at paragraph 32 of the Court's Judgment and Reasons dated April 22, 2021, and that BMS understood this to mean recovery under Tariff B (Pharmascience's Representations at paras 45-54).

[8] In reply, BMS submitted that if Pharmascience had any issues with the Court's direction to the Assessment Officer that an appeal or reconsideration of the Court's Judgment and Reasons could have been sought. BMS replied that the Court "intended that the $500,000 payment would be raised on assessment" and "directed the assessment officer to tax the $500,000 payment based on the evidence proffered." BMS submitted that Pharmascience only disputed that the success fee should be assessed under Tariff B but not whether the Court's requirement for evidence had been met. BMS highlighted that Tariff B does not have any taxable items for payments such as a success fee and cited *Seedlings Life Science Ventures, LLC v Pfizer Canada ULC*, 2020 FC 505, at paragraph 5, to support its argument that the Court intended to award a lump sum amount (BMS' Reply at paras 15-18).

[9] Further to my consideration of the parties' costs documents and jurisprudence, I am in agreement with Pharmascience's position that the Court's Judgment and Reasons dated April 22, 2021, does not exempt the success fee from being assessed in accordance with the requirements found in Tariff B (Pharmascience's Representations at paras 45-47 and 49; Judgment and Reasons at paras 28 and 33). My understanding of the Court's instructions for my assessment of the success fee is that if the success fee contains assessable services, they can be included under an applicable item in BMS' Bill of Costs as recoverable services. I did not understand the

instructions to state that the Court had exercised its discretion to award a lump sum amount for the success fee pursuant to subsection 400(4) of the FCR and that my role was to simply verify that $500,000.00 worth of invoices were provided by BMS (*Apotex Inc v Shire LLC*, 2021 FCA 54 at paras 18-19 and 24; *Eli Lilly and Co v Novopharm Ltd*, [1998] FCJ No 1343 at para 7; *Janssen Inc v Pharmascience Inc*, 2022 FC 1218 at para 178). I find that the Court exercised its discretion under subsection 400(1) and Rule 407 of the FCR to award elevated costs in accordance with column V of Tariff B but I did not find that the Court awarded a lump sum amount. In fact, the Court's Judgment and Reasons dated April 22, 2021, at page 12, explicitly states, "the Court declining to fix costs at a lump sum amount, costs are to be taxed in accordance with these Reasons at the upper end of Column V of Tariff B" (emphasis added). In addition, I did not find that the Court departed from party-and-party costs to award solicitor-client costs for the success fee, which would permit the allowance of legal services that are outside of the parameters of Tariff B (*Canada v Furukawa*, 2002 FCA 56 at paras 9-11; *Sawridge Band v Canada*, 2006 FC 656 at para 70; *Estensen v Canada (Attorney General)*, 2007 FC 1202 at para 6; *Cheung v Target Event Production Ltd*, 2010 FCA 255 at paras 36-37).

[10] 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.
> […]

[11] Having considered the aforementioned facts and jurisprudence, I have determined that BMS' claim for the success fee cannot be allowed at this time, as it would require me to exceed the instructions provided within the Court's Judgment and Reasons dated April 22, 2021. As stated by the Court in the *Pelletier* decision, my role as an Assessment Officer is only "to assess costs, not award them." In the absence of a Court decision or direction specifically awarding a lump sum amount or solicitor-client costs for the success fee, I have determined that I do not have the discretion to allow BMS' claim as it has been submitted for this assessment of costs. Although I have determined that BMS' claim has not been submitted in accordance with Tariff B, my review of Part 11 of the FCR did not reveal that BMS is precluded from resubmitting the claim for the success fee within a supplemental Bill of Costs for a follow-up assessment of costs.

B. *Quantum of Costs*

[12] Concerning the quantum of costs claimed, Pharmascience submitted that BMS' Bill of Costs co-mingled the costs for four separate action proceedings (T-97-19, T-98-19, T-503-19, and T-504-19), which are not joined or consolidated files. Pharmascience noted that each proceeding had separate counsel, pleadings, expert reports, and witnesses but that the trials were heard together and that the parties "agreed that the actions could be dealt with on the same evidentiary record with a single decision to issue in respect of all four actions." The double accounting of costs with the action proceeding T-351-18, against Apotex Inc. [hereafter referred to as Apotex], was also raised as an issue. Pharmascience has requested that in the absence of a Court decision specifying whether costs should be paid jointly or severally that Pharmascience's

costs payable be apportioned at 50% of BMS' Bill of Costs, as "costs should be apportioned among defendants in the same proportion as their liability for damages" (Pharmascience's Representations at paras 3, 5-7, 21-23, 28-31 and 37-44).

[13] In reply, BMS submitted that the Bill of Costs for files T-97-19 and T-98-19 only pertain to Pharmascience. BMS concurred that the four action proceedings were not joined or consolidated but noted that Pharmascience elected to rely on the expert evidence and arguments provided by the Defendant, Sandoz Canada Inc. [hereafter referred to as Sandoz], in files T-503-19 and T-504-19, which required BMS to incur additional costs. BMS clarified that any costs that solely pertained to Sandoz were omitted from the Bill of Costs. Concerning the apportionment of costs, BMS submitted that Pharmascience's request should be rejected, noting that each action proceeding only has one Defendant and that the parties had collectively agreed for the Court to issue one decision, which would apply to each file separately (BMS' Reply at paras 1 and 6-11).

[14] Concerning the apportionment of costs, I have reviewed Pharmascience's costs documents filed on March 16 and 26, 2021, which were for the Court's consideration, and they did not reveal that apportionment of liability was raised as an issue before the Court. Additionally, my review of the Judgment and Reasons dated January 8, 2021, and April 22, 2021, did not reveal that the Court addressed the issue of apportionment of liability as a general concept or regarding costs. The Court had first-hand knowledge of all of the issues pertaining to these proceedings and apportionment was not one of the factors that was addressed as an issue. Consequently, I do not find that apportionment of liability is a factor that should be weighed in

this assessment of costs (paragraph 400(3)(d) FCR; BMS' Reply at para 11; Orkin and Schipper, *Orkin on the Law of Costs*, 2nd ed., (Thomson Reuters, 2022), at ch. 2, s. 2:58).

[15] Concerning BMS' possible double accounting with the Apotex proceeding, the Court found that "[t]he submission that the Defendants' costs obligation was reduced by virtue of the Apotex action strikes me to be fair and reasonable" and provided instructions to the Assessment Officer regarding the need for an affidavit from Professor Martyn C. Davies "explaining his charges and attesting that they do in fact relate to these actions and not the Apotex action" (Judgment and Reasons dated April 22, 2021, at paras 15 and 26). My review of BMS' claims did not find that any of them solely pertained to Apotex and the affidavit of Professor Davies satisfactorily clarified that the expert services invoiced were only related to files T-98-19 and T-503-19, which did not involve Apotex (BMS' Representations at paras 24-25; Davies Affidavit at para 6). Similarly, I did not find that any of the claims submitted by BMS solely pertained to Sandoz. Although there are some interrelated issues and invoices for the various action proceedings, as highlighted by Pharmascience, I did not find that BMS submitted claims for this assessment of costs that were completely unwarranted (Pharmascience's Representations at paras 6-8; Judgment and Reasons dated April 22, 2021, at para 12).

IV. Assessment of Costs

[16] BMS has submitted claims for assessable services totalling $309,791.76 and for disbursements totalling $419,964.00.

[17] I followed the instructions and guidance provided by the Court's Judgment and Reasons dated April 22, 2021, and I found most of BMS' claims to be reasonable and justifiable expenses for the concurrent litigation of two complex and layered intellectual property proceedings, which had several related proceedings (*Janssen Inc v Teva Canada Ltd*, 2022 FC 269 at paras 9-10; *Nova Chemicals Corporation v Dow Chemical Company*, 2017 FCA 25 at para 20). My review of BMS' assessment of costs documents only found that the claims submitted under Item 11 and for expert services required my intervention. These claims will be reviewed in greater detail later in these Reasons. Concerning the remaining claims for assessable services and disbursements, I found that the claims were verifiable with the court record and the Court's Judgment and Reasons dated April 22, 2021, and the requirements found at subsection 1(4) of Tariff B regarding evidence of disbursements were adhered to.

[18] My review of the factors listed under subsection 400(3) of the FCR, such as "(a) the result of the proceeding;" "(b) the amounts claimed and the amounts recovered;" "(c) the importance and complexity of the issues;" and "(g) the amount of work;" found that BMS was the successful party in the action proceedings; the amounts claimed and to be recovered are reasonable for intellectual property proceedings; the issues argued were of significant importance and complexity; and BMS performed a substantial amount of work to litigate the action proceedings and for this assessment of costs (Judgment and Reasons dated April 22, 2021, at paras 12-14, 16). There may be some nuances as to whether the number of units for an individual claim should have been selected at the highest end of Column V or one slightly lower, but Pharmascience did not provide any submissions regarding any individual claims being particularly excessive in the number of units claimed (Pharmascience's Representations at para

21; BMS' Reply at paras 12-14). In my role as an Assessment Officer, I should avoid "stepping away from a position of neutrality to act as the litigant's advocate," hence it is not my role to substitute absent submissions for a party due to procedural fairness (*Dahl v Canada*, 2007 FC 192 at para 2).

[19] Therefore, I have determined that based on my review of the factors listed under subsection 400(3) of the FCR that it is reasonable to allow BMS' claims for Items 1, 2, 7, 8, 9, 10, 12, 13(a) and (b), 14(a) and (b), 15, 25, 26, 27 and 28 and for the agent's fees and court reporter services as requested. Specifically, the following units are allowed, 26 units for Item 1; 26 units for Item 2; 66 units for Item 7; 11 units for Item 8; 140 units for Item 9; 88 units for Item 10; 10 units for Item 12; 11 units for Item 13(a); 104 units for Item 13(b); 455 units for Item 14(a); 682.5 units for Item 14(b); 22 units for Item 15; 1 unit for Item 25; 10 units for Item 26; 5 units for Item 27; and 5.5 units for Item 28.

[20] For the disbursements, the agent's fees for process service, and the court reporter services are allowed for a total of $26,576.00. This amount is inclusive of the sales tax claimed by BMS but was not added to the cumulative total for these particular disbursements within BMS' Bill of Costs.

A. *Item 11*

[21] Secure has submitted multiple claims under Item 11 for counsels' attendance at various case management conferences [CMC]. Concerning the CMCs held on July 15 and 27, August 18, and September 1, 2020, BMS has requested indemnification for three counsel for each CMC. It

is noted that BMS' assessment of costs pertains to two separate files (T-97-19 and T-98-19), which would account for one counsel for each file but there is no provision under Item 11 for indemnification for second counsel. For action proceedings, Item 14 is the only Item listed in Tariff B that has a specific provision for second counsel fees but there is no equivalent provision in Item 11. My review of the court record found that the second counsel fees were only awarded for the trial hearing (under Items 14(a) and (b)) but there is no similar Court direction or decision for the aforementioned CMCs that have been claimed under Item 11 (Judgment and Reasons dated April 22, 2021, at para 32). As the Court stated in *Pelletier* (above), my role as an Assessment Officer is only "to assess costs, not award them." In the absence of a Court direction or decision specifically awarding second counsel fees for Item 11, or alternatively any unknown jurisprudence from BMS to support the allowance of these costs in the absence of a Court direction or decision, I find that I do not have the authority to assess these types of costs autonomously. Therefore, I have determined that BMS' claims for second counsel fees for the CMCs held on July 15 and 27, August 18, and September 1, 2020, must be disallowed as they pertain to the facts for this particular file. Other than the issue of second counsel fees, I found that all of the remaining claims under Item 11 echoed my assessment (at paras 17-18) for the other assessable services reviewed and they are allowed as requested for a total amount of 37.15 units.

B. *Total amount allowed for BMS' assessable services.*

[22] A total of 1700.15 units have been allowed for BMS' assessable services totalling $307,387.12, inclusive of the HST claimed.

C. *Expert Services*

[23] BMS has submitted disbursements for the services of four experts (Dr. William J. Greenlee; Professor Martyn C. Davies; Dr. Jeffrey Weitz; Dr. David Taft) totalling $393,388.00. As discussed earlier in these Reasons, Pharmascience has raised issues regarding the quantum of costs requested by BMS for the experts' services. In reply, BMS submitted the following at paragraph 14 of BMS' Reply:

> [14] Nor does PMS [Pharmascience] dispute any disbursements. Its only complaint is that the experts' invoices cannot be divided into Sandoz- versus PMS-related time. However, the same patents were at issue in both actions and PMS relied on Sandoz's evidence in respect of each patent. BMS's experts' time was required to respond to the case PMS marshalled at trial.

[24] My review of BMS' costs documents found that follow-up affidavits were provided for all of the experts. Each expert affirmed within their follow-up affidavit that they performed services related to both the Pharmascience and Sandoz proceedings (Greenlee Affidavit at para 3; Davies Affidavit at para 2; Weitz Affidavit at para 2; Taft Affidavit at para 2). The affidavits and attached invoices do not provide separate breakdowns of the services provided for the Pharmascience and Sandoz proceedings and have been co-mingled together (Holtom Affidavit at paras 8-9). Although the Pharmascience (T-97-19 and T-98-19) and Sandoz (T-503-19 and T-504-19) proceedings involved the same patents, the parties have acknowledged that these action proceedings were not joined or consolidated together (BMS' Representations at para 7; Pharmascience's Representations at para 7; Wallwork Affidavit at paras 3-4, BMS' Reply at paras 7 and 14).

[25] Further to my consideration of the facts pertaining to these particular claims, I am in agreement with Pharmascience's position that BMS' disbursements for expert services should be divided between the Pharmascience (T-97-19 and T-98-19) and Sandoz (T-503-19 and T-504-19) proceedings. The facts show that BMS' experts performed services related to both the Pharmascience and Sandoz proceedings and I do not find it reasonable for all of the costs for these services to solely fall upon Pharmascience without a Court direction or decision specifying this; affirmations from the experts confirming the quantum of services pertaining specifically to Pharmascience; or an agreement between the parties (*International Brotherhood of Locomotive Engineers v Cairns*, 2002 FCA 120 at para 27; *Air Canada v Toronto Port Authority*, 2010 FC 1335 at para 15; *Abbott Laboratories v Canada (Health)*, 2008 FC 693 at para 71). This is not the situation at the moment. Having considered that there were four files heard together at the trial hearing, of which two files involved Pharmascience as a sole Defendant, I have determined that it is reasonable for Pharmascience to be responsible for the reimbursement of two-fourths of the disbursements for expert services for a total of $196,694.00.

D. *Total amount allowed for BMS' disbursements.*

[26] The total amount allowed for BMS' disbursements is $223,270.00.

E. *Post-judgment Interest Rate*

[27] BMS has requested that the "post-judgment interest be assessed in the amount of 43,318.95, plus $80.07 per day from October 14, 2022 up to the date that PMS pays the costs owed" (BMS' Representations at para 30). In response, Pharmascience submitted that BMS has

provided no justifications for the amounts requested and that the "post-judgment interest should be assessed at a rate of 2.5% per annum from the date of the judgment, which is consistent with jurisprudence" (Pharmascience's Response at paras 55 and 57; *Seedlings* (above) at para 40; *Bauer Hockey Ltd v Sport Maska Inc (CCM Hockey)*, 2020 FC 862 at para 67). In reply, BMS submitted that Pharmascience incorrectly argued that the post-judgment interest rate should be 2.5% per annum. BMS has proposed that a reasonable way to calculate the post-judgment interest for these interprovincial proceedings (Ontario and Quebec) is to average the applicable interest rates from "the date of the costs order (April 22, 2021), rounded up to the next whole number, 4%, i.e., $80.07 per day" (BMS' Reply at paras 19-20).

[28] Further to the parties' proposals and jurisprudence regarding the post-judgment interest rate, the Court stated the following in *Wilson v Canada*, [2000] FCJ No 1783 at paragraphs 46-47, and 60, regarding the role of an Assessment Officer with respect to interest:

> [46] In the present case, the assessment officer justified his non-assessment of interest on the costs, and presumably the non-inclusion of interest in the certificate of assessment certified by the assessment officer, on the basis of his interpretation of the Rules, particularly Rules 407 and 409. With respect, I find that in so relying upon the Rules, the assessment officer erred in principle. While I agree that the Federal Court Act and Rules confer no jurisdiction on an assessment officer to award interest to a successful party, similarly the Act and Rules do not confer jurisdiction on an assessment officer to deny the substantive right to judgement interest provided by the Federal Court Act or other applicable legislation.
>
> [47] A party may receive either pre-judgment or post-judgment interest as a result of the operation of some statute or because of an order of a judge or prothonotary who dealt substantively with the proceeding. Part XI of the Rules contains no provision which authorizes an assessment officer either to award or to withhold interest. The entitlement to interest will depend upon the terms of the applicable legislation and the order of the presiding judge or prothonotary.

> […]
>
> [60] As for implementation of this order, I think it simplest if these matters are remitted to the assessment officer for the purpose of re-calculating the set off in the light of the respective entitlements of the parties to interest on their awards of costs. It should not be overlooked that the Crown, in the absence of an order made by the trial judge to the contrary, will be entitled to post-judgment interest on its judgments as provided by section 37 of the Federal Court Act (assuming it to be in force when the Crown's judgments were obtained, the evidence before me not being clear as to when those judgments were obtained) and pursuant to the provisions of the Ontario Courts of Justice Act.
>
> (emphasis added)

[29] In addition, in *Seedlings* (above) at paragraphs 35 and 38-39, the Court stated the following regarding post-judgment interest rates:

> [35] It is useful to clarify the relationship between the *Federal Courts Act* and the *Interest Act* with respect to post-judgment interest. Where the cause of action arises in a single province, section 37(1) of the *Federal Courts Act* provides for the application of the laws of that province regarding interest. Where it is not possible to link the cause of action to a single province, section 37(2) provides that the judgment "bears interest at the rate that [the] court considers reasonable in the circumstances." […]
>
> […]
>
> [38] Section 3 is a broader provision. It provides for a default rate of interest where "no rate is fixed … by law." This provision, however, must be reconciled with section 37(2) of the *Federal Courts Act*. When confronted with two seemingly conflicting statutory provisions, one must attempt to give them meanings that dovetail and avoid an interpretation that would render one of them meaningless. When Parliament enacted the *Federal Courts Act*, it cannot have contemplated that the discretion it gave to judges of this Court to set a reasonable interest rate in the circumstances would be rendered nugatory by section 3 of the *Interest Act*. The better view is that section 37(2) is a process provided "by law" for setting the interest rate, thus displacing section 3 of the *Interest Act*. See, for example, *Kraft Canada Inc v Euro Excellence Inc*, 2004 FC 652 at paragraphs 70–71, [2004] 4 FCR 410; *Astrazeneca*

> *Canada Inc v. Apotex Inc*, 2011 FC 663 at paragraph 5 [*Astrazeneca*]; *Teva Canada Limited v. Janssen Inc*, 2018 FC 1175 at paragraph 61. Section 3 remains applicable in other circumstances.
>
> [39] Therefore, the granting of post-judgment interest according to section 37(2) is a discretionary power. The exercise of that discretion must be guided by the compensatory nature of interest: *Bank of America Canada v Mutual Trust Co*, 2002 SCC 43 at paragraph 36, [2002] 2 SCR 601. The purpose is to put the party entitled to the payment of a sum of money in the same situation as if the money had been paid immediately when it became due. In setting a reasonable rate, the Court may have regard to commercial rates: *Astrazeneca*, at paragraph 5. It may also take into consideration the rate that would have resulted from the application of provincial interest law: *Apotex Inc v Merck Canada Inc*, 2012 FC 1418 at paragraph 10.
>
> (emphasis added)

[30] Utilizing the *Wilson* and *Seedlings* decisions as guidelines, I find that in the absence of the Court's Judgment and Reasons dated April 22, 2021, awarding a specific interest rate to apply in this assessment of costs that I am bound by section 37 of the *Federal Courts Act*, R.S.C., 1985, c F-7, which states the following:

Judgment interest - causes of action within province **37 (1)** Except as otherwise provided in any other Act of Parliament and subject to subsection (2), the laws relating to interest on judgments in causes of action between subject and subject that are in force in a province apply to judgments of the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that province.	**Intérêt sur les jugements - Fait survenu dans une seule** **37 (1)** Sauf disposition contraire de toute autre loi fédérale et sous réserve du paragraphe (2), les règles de droit en matière d'intérêt pour les jugements qui, dans une province, régissent les rapports entre particuliers s'appliquent à toute instance devant la Cour d'appel fédérale ou la Cour fédérale et dont le fait générateur est survenu dans cette province.

Judgment interest - causes of action outside or in more than one province **(2)** A judgment of the Federal Court of Appeal or the Federal Court in respect of a cause of action arising outside a province or in respect of causes of action arising in more than one province bears interest at the rate that court considers reasonable in the circumstances, calculated from the time of the giving of the judgment.	**Intérêt sur les jugements - Fait non survenu dans une seule province** **(2)** Dans le cas où le fait générateur n'est pas survenu dans une province ou dans celui où les faits générateurs sont survenus dans plusieurs provinces, le jugement porte intérêt, à compter de son prononcé, au taux que la Cour d'appel fédérale ou la Cour fédérale, selon le cas, estime raisonnable dans les circonstances.
[Emphasis added.]	[Non souligné dans l'original.]

[31] Following the guidance provided in *Wilson* and *Seedlings*, I find that I do not have the "discretionary power" to determine post-judgment interest rates of 2.5% or 4% per annum because I am not a member of the Court but rather an officer of the Registry (*Seedlings* at paragraph 39; Pharmascience's Representations at para 25; Rule 2 of the FCR). As subsection 37(2) of the *Federal Courts Act* states, it is within the Court's discretion to select an interest that is considered "reasonable in the circumstances." In the absence of the Court exercising its discretion to set a post-judgment interest rate under subsection 37(2) of the *Federal Courts Act*, I am unable to include a specific interest rate in my Certificate of Assessment for this assessment of costs. Similar to my earlier assessment of BMS' success fee, my review of Part 11 of the FCR and subsection 37(2) of the *Federal Courts Act* do not seem to preclude BMS from seeking instructions from the Court regarding the post-judgment interest that can be applied. Once obtained, the Court approved post-judgment interest rate can be included in an Amended Certificate of Assessment that can be issued to the parties by an Assessment Officer.

V. Conclusion

[32] For the above reasons, the Plaintiffs' Bill of Costs is assessed and allowed in the total amount of $530,657.12, payable by the Defendant to the Plaintiffs. A Certificate of Assessment will also be issued.

"Garnet Morgan"
Assessment Officer

Toronto, Ontario
July 26, 2023

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-97-19 BRISTOL-MYERS SQUIBB CANADA CO ET AL v PHARMASCIENCE INC T-98-19 BRISTOL-MYERS SQUIBB CANADA CO ET AL v PHARMASCIENCE INC

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

REASONS FOR ASSESSMENT BY:	GARNET MORGAN, Assessment Officer
DATED:	JULY 26, 2023

WRITTEN SUBMISSIONS BY:

Steven G. Mason David A. Tait Rebecca Crane Sanjaya Mendis Kendra Levasseur	FOR THE PLAINTIFFS
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