

Federal Court



Cour fédérale

**Date: 20131113**

**Docket: T-880-03**

**Citation: 2013 FC 1153**

**BETWEEN:**

**TRUEHOPE NUTRITIONAL SUPPORT  
LIMITED AND DAVID HARDY**

**Applicants**

**and**

**THE ATTORNEY GENERAL OF CANADA  
AND THE MINISTER OF HEALTH OF  
CANADA**

**Respondents**

**ASSESSMENT OF COSTS – REASONS**

**Bruce Preston - Assessment Officer**

[1] By way of Reasons for Order and Order dated January 20, 2010, the Court dismissed the Application for Judicial Review. Further, by way of an Order Respecting Oral Argument on Costs dated November 19, 2012, the Court awarded costs of the Application to the Respondents and specified that costs were to be assessed in accordance with Column III of Tariff B of the *Federal Courts Rules*.

[2] On June 6, 2013, the Respondents filed their Revised Bill of Costs and on July 4, 2013, the Respondents filed a Further Bill of Costs which addresses the disbursements related to the assessment of costs. The assessment of costs was heard by way of teleconference on July 11, 2013.

[3] At the commencement of the hearing, counsel for the Respondents submitted that the claims for photocopies for July 24, 2003, July 25, 2003 and April 5, 2004 were being removed from the Bill of Costs as they related to motions for which costs had previously been withdrawn. The Respondents also withdrew the claim for photocopies produced by the Federal Court on January 27, 2009.

[4] Both parties have produced extensive submissions concerning the scale of cost to be used for assessable services. I will address this preliminary issue prior to proceeding with the assessment of assessable services and disbursements.

#### Scale of Costs

[5] At paragraph 3 of the Respondents Submissions on Costs, counsel submits:

The respondents claim costs at the upper range of Column 3 of the tariff because the hearing of the applicants' judicial review application, including the hearing of a number of motions, which were directed to be heard and determined at the hearing of the application for judicial review (the "Application"), was inordinately lengthy and complex. This was not a "garden variety" judicial review.

Then, at paragraph 171, counsel submits that a consideration of the factors under Rule 400(3) of the *Federal Courts Rules* supports an award of costs in the highest range of column III of the table in Tariff B.

[6] In response, at paragraph 7 of the Applicants' Memorandum on the Quantum of Costs (Applicants' Memorandum), counsel argues:

It was open to Justice Campbell, on hearing the exact arguments made here, to award costs at the highest range of Column 3. Justice Campbell did not do so. In light of this, and despite the same arguments by the Respondents here, the Applicants submit that the default position for any specific Tariff Item is the mid-point of Column 3, unless there are reasons to vary from the mid-point. To accede to the Respondents' argument, and award allowable costs at the highest range of Column 3 for all Tariff Items, would in effect usurp Justice Campbell's specific response to the same arguments (he found "no reason to award costs other than as set out in Column 3 of Tariff B"). This would be akin to making a costs order which is not within the jurisdiction of an Assessment Officer.

In support of this, counsel for the Applicants referred to *Eurocopter v Bell Helicopter Textron Canada Limitée*, 2012 FC 842, at paragraph 20.

[7] At paragraph 6 of the Respondents' Reply Submissions, counsel submits:

While Justice Campbell awarded costs under Column III, he did not comment or make any direction with respect to the range within that Column, properly leaving that determination to the Assessment Officer. The Applicants' argument that the Respondents are not entitled to costs for any item at the top of Column III must fail for these reasons.

[8] Rule 407 of the *Federal Courts Rules* states:

Unless the Court orders otherwise, party-and-party costs shall be assessed in accordance with column III of table to Tariff B.

I find nothing in the wording of Rule 407 which limits the assessment of the assessable services claimed to the mid-point of Column III.

[9] In the final paragraph of the Order Respecting Oral Argument on Costs dated November 19, 2012 (the Costs Order), the Court ordered:

I find that, while the Applicants' *Charter* challenge was complex and required a significant amount of time and effort by both sides of the litigation as well as the Court, there is no reason to award costs other than as set out in Column 3 of Tariff B of the *Federal Courts Rules*, and I so order.

[10] While I agree with counsel for the Applicants that the Order does not specify that the costs are to be allowed at the high end of Column III, I also agree with counsel for the Respondents that the Order does not limit any allowance of costs to the mid-point of Column III.

[11] In *Eurocopter (supra)*, the Court referred to *Apotex Inc v Sanofi-Aventis*, 2012 FC 318, at paragraph 5, in which the Court held: "According to Rule 407 of the Rules, these costs are typically assessed at the mid-point of Column III of Tariff B, along with certain additional fees and disbursements" (emphasis added). Although the Court held that costs are "typically assessed at the mid-point", I find that this does not limit me to allowing costs only at the mid-range of Column III as there may be circumstances when the costs claimed are not of a typical nature.

[12] On that point, in *Bellemare v Canada (Attorney General)*, 2004 FCA 231, at paragraph 7, the Federal Court of Appeal held:

Acting pursuant to Rule 405, the assessment officer had no choice but to apply column III of the Tariff B table, as stipulated in Rule 407. In assessing and allowing the costs within the limits set in Rule 407 and pursuant to the judgment rendered in case A-598-99 she could, under Rule 409, consider in allocating the units allowed the factors referred to in Rule 400(3)... (emphasis added).

In stating that an Assessment Officer may consider the factors in Rule 400(3) when allocating the units allowed within the limits of Rule 407, the Court is clearly suggesting that, absent a direction of

the Court, an Assessment Officer has jurisdiction to determine the number of units to be allowed, within the range of Column III.

[13] In *Starlight v Canada*, 2001 FCT 999, at paragraph 7, it was held:

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.

[14] Given that the Court has provided no specific direction concerning the range of Column III, I find that, as an Assessment Officer, I am able to determine the number of units to be allocated for each individual assessable service within the full range of Column III, recognizing that typically services are assessed around the mid-point except when circumstances dictate that a specific cost should be assessed at a level below or above the mid-point of Column III.

#### Assessable Services

[15] Having reached the conclusion above, I will proceed with the assessment of the various Items claimed, taking into consideration the factors listed in Rule 400(3) of the *Federal Courts Rules*, as necessary.

[16] Concerning Item 2, preparation and filing of all defences, replies, counterclaims or respondents' records and materials, counsel for the Respondents submits that 7 units is claimed for the preparation of the Respondents' Record filed October 6, 2009.

[17] At paragraph 10 of the Applicants' Memorandum, counsel submits that the Applicants take no issue with Item 2 being allowed at the mid-point of Column III.

[18] In preparing their Application Record, the Respondents were required to defend the case presented by the Applicants. I have reviewed the Respondents' Application Record, Affidavits and Memorandum of Fact and Law and when consideration is given to their preparation and the issues raised by the Applicants which the Respondents had to address, the Respondents' claim under Item 2 is completely reasonable. Therefore, Item 2 is allowed as claimed at 7 units.

[19] The Respondents have submitted five claims at 7 units each under Item 5, preparation and filing of a contested motion, including materials and responses thereto. These include claims for the Respondents' Motion for an order striking John and Jane Doe from the Application (Motion Doc. No. 12), the Applicants' Motion to Admit (Motion Doc. No. 52), the Respondents' Motion for an order striking the whole or parts of Affidavits filed by the Applicants in support of their Application (Motion Doc. No. 83), the Applicants' Motion for an order striking various paragraphs from various affidavits filed by the Respondents (Motion Doc. No. 99) and, the Respondents' Submissions on Costs requested by the Court. I will address each of these motions individually.

[20] Concerning the claim under Item 5 for Motion Doc. No. 12, commencing at paragraph 23 of the Respondents' Submissions on Costs, counsel argues that on December 12, 2003, the Applicants filed a Discontinuance on behalf of the Applicant Jane Doe and, on March 19, 2004 the Applicants filed a Notice of Motion for an order for leave to file an Amended Notice of Application, abandoning their Judicial Review of the decisions listed in paragraph (b), (d) and (e) of the Notice of Application filed May 28, 2003. Then, at paragraph 34 of the Respondents' Submissions on Costs, counsel submits:

In effect, the applicants conceded most of the AGC's 2003 strike motion by filing the Jane Doe discontinuance and by their first motion to amend that discontinued and abandoned the review of the purported decisions listed in (b), (d) and (e) of their Original Application. For these reasons, the AGC seeks costs of its 2003 strike motion pursuant to Rule 402 and 410 of the *Federal Courts Rules*.

In support of this contention, the Respondents refer to *National Steel Car Ltd v Trenton Wood Works Inc*, [1996] F.C.J. No. 678 and *Milliken & Co. v Interface Flooring Systems (Can) Inc*, [1998] F.C.J. No. 541.

[21] Commencing at paragraph 11 of the Applicants' Memorandum, counsel contends that Rule 401 of the *Federal Courts Rules* permits the Court to award costs of a motion. Counsel continues by submitting that if no specific order for costs is made on a motion, no costs may be allowed. Then at paragraph 17, counsel argues that the Order of November 4, 2008, concerning Doc. No. 12, is silent as to costs. Concerning Rule 402 and Rule 410, commencing at paragraph 19 of the Applicants' Memorandum, counsel argues:

19. Rule 402 applies if there is a discontinuance or abandonment. The applicants did not discontinue the Application, nor did they abandon a motion. This Rule does not apply. In addition, when the Application was filed the Applicants believed that

all the shipments listed as seized had been seized. Subsequent release of some shipments, and hence the reasonable amendment of the Application to drop them, does not lead to an entitlement to costs under Rule 402 A situation akin to Bayer AG v Apotex, 2010 FC 1133). The Respondents cases are not on point.

20. Rule 410 only applies to an amendment to a pleading “made without leave”. As outlined by the Respondents, a motion to amend was brought and allowed by Justice Campbell with no costs... Rule 410 does not apply because the amendment was made with the leave of the Court and without an order for costs.

[22] At paragraph 22 of the Respondents’ Reply Submissions, counsel refers to paragraphs 23 to 34 of their submissions filed June 7, 2013 and makes no further submissions.

[23] I have reviewed Motion Doc. No. 12 and find that the Applicants’ discontinuance and subsequent Motion to amend their Notice of Application did not completely dispose of the Motion. This is evidenced by the Order of November 4, 2008, which, I have confirmed, relates to the Respondents’ Motion Doc. No. 12. As submitted by the Applicants, the Court’s Order strikes John Doe from the style of cause and is silent as to costs. These being the circumstances, I find that the Respondents are not entitled to their costs of the Motion and that it is not necessary to address the Respondents’ submissions concerning Rule 402 and Rule 410. Therefore, the costs claimed under Item 5 for the Motion Record filed September 2, 2003 are not allowed.

[24] Concerning the Respondents’ claim under Item 5 for Motion Doc. No. 52, the claim relates to the Respondents’ Motion Record filed April 30, 2008, which contains one volume. Commencing at paragraph 40 of the Respondents’ Submissions on Costs, counsel argues that the Applicants



applied to amend their Amended Application to add 45 new paragraphs. Counsel for the Respondents also submits that the Motion was set for hearing on May 9, 2008 and then adjourned to be heard November 13 and 14, 2008 in Calgary. Then, at paragraph 45 of the Respondents' Submissions on Costs, counsel contends:

In addition, Campbell J. directed that the applicants 2008 Motion to Admit would be dealt with as part of the hearing of the judicial review application (i.e. that the admissibility of the 1-800 call notes, Jarvis' and Brosseau's testimony as well as the ITO from the prior criminal proceeding would be addressed at a *voir dire* at the hearing of the application).

In support of this, counsel refers to the Written Directions of the Court dated November 13, 2008. Then at paragraph 176 c. of the Respondents' Submissions on Costs, counsel contends that the Attorney General is seeking costs as the Motion was directed to be heard as part of the main Judicial Review and the Court's Reasons dismissed the Applicants Motion.

[25] At paragraph 12 of the Applicants' Memorandum, counsel submits that if a motion is heard at a judicial review hearing and the order emanating from the judicial review is silent concerning the costs of the motion, there is no order of costs for the motion. In support of this, counsel refers to paragraphs 8 to 11 of *Estensen v Canada*, 2009 FC 152. Then at paragraph 25 of the Applicants' Memorandum, counsel contends:

Item B. 5 Motion Record filed April 30, 2008 (Court Doc. 58) in reply to Applicants' Motion (Court Doc. 52). The Respondents argue ... that they are seeking costs for this motion "as it was subsumed within and was directed to be heard as part of the main judicial review application and the Court reasons dismissed the applicants' Motion to Admit". The Respondents' assertion is incorrect, the motion was largely successful. Item 1 in the motion was largely granted at the May 9, 2008, hearing of the motion and an Amended Notice of Application was later filed. Items 2 and 3 were brought out of an abundance of caution and those affidavits were filed (the relief requested). Items 4 and 6 became moot only after the cross

examination of Sandra Jarvis (similar testimony to the testimony referred to in Item 4 was given on cross, and the ITO in Item 6 was admitted as an exhibit to the cross of Ms. Jarvis). Item 6 was admitted into evidence by Justice Campbell. Item 3 only became unnecessary after the Respondents conceded they never took safety into consideration. Item 7 was granted at the hearing (the 1-800 crisis line notes were admitted). In any event, there was no costs order for this motion, and so the relative success of the motion is not relevant. Without a costs order there are no costs for motions.

[26] At paragraph 25 of the Respondents' Reply Submissions on Costs, counsel disagrees with the Applicants' contention that the Applicants were "largely successful" in their Motion and refers to paragraph 77 of the Respondents' Submissions on Costs, which suggests:

With respect to the applicants' 2008 Motion to Admit, the Court found the contents of the "1-800 crisis line notes" irrelevant and refused to admit them for the truth of their contents. With respect to the "in court testimony of Mr. Miles Brosseau...to prove that Health Canada did not consider the health consequences of the April 2003 seizure before making the seizure", the Court found their motion unnecessary given that the respondents did not contest this fact. In this regard, the Court dismissed the applicants' 2008 Motion to Admit.

[27] Counsel for the Respondents has submitted that they are seeking costs as the Motion was directed to be heard as part of the main Judicial Review and the Motion was dismissed. In this situation, there must be an Order of the Court specifically awarding costs of the Motion before I am able to assess the costs of the Applicants' Motion to Admit (Motion Doc. No. 52). On this point, in keeping with the findings in *Estensen (supra)*, I find that the Court did not exercise its discretion to award costs of this Motion, or any other motion, in the Order Respecting Oral Argument on Costs dated November 19, 2012. On page 4 of the Order, the Court states: "As a result, I award costs of the Application to the Respondent" (emphasis added). The Court was very precise in awarding costs of the Application. By specifically mentioning the Application in the award of costs, I find that the

Court was limiting the costs award to the costs of the Judicial Review Application and was clearly indicating that no costs were being awarded for the motions heard at the Judicial Review hearing. Therefore, the Respondents' claim under Item 5 for Motion Doc. No. 52 is not allowed.

[28] The Respondents have claimed 7 units for Motion Records filed September 8, 2009 and October 6, 2009. These Motion Records are related to the Respondents' and Applicants' Motions to Strike, Motions Doc. No. 83 and Motion Doc. No. 99 respectively. Pursuant to the Order of May 11, 2009, both of these motions were returnable November 2, 2009 to be heard at the commencement of the Judicial Review. Both parties made extensive submission concerning these motions at the hearing of the Assessment of Costs and in their Written Submissions. Essentially the Applicants submit that there was no order awarding costs of the motions and that the Court would have had to specifically award costs of the motions before they could be assessed. The Respondents argued that this was a complex Judicial Review Application in which the Court directed that the motions be heard at the Judicial Review hearing on November 2, 2009 and that the evidentiary motions became part of the Judicial Review. Counsel for the Respondents contended that the Court was contemplating the entirety of the hearing, including the motions when it awarded costs.

[29] I do not find it necessary to delve extensively into the submissions of the parties concerning the Motions to Strike. Having reviewed the Reasons for Order and Order dated January 20, 2010, I find that, at paragraphs 75 through 85, the Court addresses the parties' Motions to Strike portions of the affidavit evidence filed. At paragraph 85 the Court concludes: "the evidence found to be irrelevant is inadmissible". There is no mention of an award of costs in the Court's disposition of the motions. Given this, my finding at paragraph 25, above, that the Courts award of costs is specific to

the Application for Judicial Review, applies equally to these motions. Therefore, in keeping with my decision in paragraph 27, the Respondents' claim under Item 5 for their Motion Record filed September 8, 2009 and their claim under Item 5 for their Motion Record filed October 6, 2009 are not allowed.

[30] The Respondents have claimed 7 units under Item 5 for the Motion Record filed September 17, 2012, for an order of costs in favour of the Respondents. At paragraph 94 of the Respondents' Submissions on Costs, counsel contends that the Court "directed that the entitlement issue would be decided by way of a motion in writing". The Applicants only submission concerning this claim is that there is no order for costs made by the Court.

[31] I have reviewed the Court Record and find that at the Case Management Conference (CMC) of May 22, 2012, the Court directed that the Attorney General of Canada was to forward its "application on the issue of costs via Memorandum of Argument by September 17, 2012". Although the Court uses the word application in the direction, there is nothing in the direction which indicated that the Respondents were to file a Motion Record. This must have been apparent to the Respondents as, on September 17, 2012, they filed a document titled "Respondents' Memorandum on Their Entitlement to Costs", not a Motion Record. Under these circumstances, I find that there is no entitlement to costs under Item 5 as there was no motion. In the alternative, if the Court intended the Respondents' application on the issue of costs to be considered a motion, the Order Respecting Oral Argument on Costs dated November 19, 2012 does not specifically award costs for any motion on costs. Therefore, the Respondents' claim under Item 5, relating to the Respondents' Memorandum on Their Entitlement to Costs, filed September 17, 2012, is not allowed.

[32] The Respondents' have also submitted a claim under Item 15, preparation and filing of written argument, where requested or permitted by the Court, for the Respondents' Memorandum on Their Entitlement to Costs. At paragraph 188 of the Respondents' Costs Submissions, counsel argues that the submissions relate to the Respondents entitlement to costs and whether costs should be decided on the basis of a motion in writing.

[33] In response, Applicants' counsel contends that Item 15 is under the heading "E. Trial or Hearing" and that it is not for the preparation for a motion. Counsel further submits that this is a duplicate claim as the Respondents have already submitted a claim under Item 5 and that there is no award of costs on the Motion, which would preclude an allowance of costs.

[34] At paragraph 50 of the Respondents' Reply, counsel submits that the Court directed that the parties file submissions on the entitlement to costs and that in consideration of these materials, the Respondents' claim is proper and should be allowed.

[35] The Respondents' claim under Item 5 for the preparation of their Costs Memorandum was disallowed at paragraph 31 above. As previously indicated, the Respondents' Costs Memorandum was filed on September 17, 2012, further to a Direction of the Court. It has been held that a prerequisite for Item 15 to be allowable is a prior direction of the Court requesting or permitting written submissions (see: *League for Human Rights of B'nai Brith Canada v Canada*, 2012 FC 234, at paragraph 21). Having found that the Respondents' claim under Item 5 could not be allowed, I find the Respondents' claim under Item 15 to be proper as the Memorandum was filed further to the Court's Direction of May 22, 2012. Concerning the number of units allowable, I find the

Respondents' claim of 7 units to be excessive. Given that the Memorandum concerned the party's entitlement to costs and not substantive issues before the Court, I find an allowance of 5 units reasonable. Therefore, Item 15 is allowed at 5 units.

[36] The Respondents have claimed 10 units (3.33 Hours x 3 units) under Item 6 for their appearance on a motion held May 9, 2008. This hearing concerned the Applicants' Motion to admit (Motion Doc. No. 52). In keeping with my decisions at paragraph 27 above, I find that the Respondents are not entitled to any costs on this particular motion. Therefore, the Respondents' claim under Item 6 is not allowed.

[37] The Respondents have submitted 17 claims under Item 8 and Item 9 respectively, for the preparation and cross-examinations on the affidavits of the various affiants on the Judicial Review. The Respondents have requested 5 units for each claim under Item 8 and 3 units per hour for each claim under Item 9.

[38] The first four claims under each Item relate to the cross-examinations of Sandra Jarvis, Miles Brosseau, Rod Neske and Dennis Shelley, conducted in November and December 2003. At paragraph 24 of the Respondents' Submissions on Costs, counsel submits that these affidavits were filed in support of their motion to strike (Motion Doc. No. 12). Then at paragraph 51, the Respondents submit that they gave notice that they were going to rely on 7 affidavits on the Judicial Review, including the affidavits of Sandra Jarvis and Rod Neske, mentioned above. At the hearing of the assessment, counsel for the Respondents submitted that the Applicants included the transcripts of the cross-examination of Sandra Jarvis and Rod Neske in their Application Record.

[39] At paragraph 34 of the Applicants' Memorandum, counsel argue:

The first four preparations claimed...all relate to examinations in 2003, connected to a motion brought by the Respondents.... Because costs were not ordered on this motion, these costs should not be allowed. It is not material that the Applicants filed one of these transcripts in the Judicial Review.

At the hearing of the assessment, counsel for the Applicants submitted that although portions of the transcripts of Sandra Jarvis and Rod Neske were relative to the Judicial Review and were included in the Applicants' Record, the cross-examination were conducted for the Respondents' Motion to strike.

[40] Commencing at paragraph 28 of the Respondents' Reply Submissions on Costs, counsel argues:

- i. The AGC submits that the examinations of Sandra Jarvis, Miles Brosseau, Rod Neske and Dennis Shelley were part of the Respondents' September 2003 Motion to Strike in respect of which costs are sought pursuant to Rules 402 and 410 of the FCR....
- ii. Alternatively, costs should be granted for the preparation on the cross-examination on the affidavit of Rod Neske in 2003 as the applicants filed that in their Record on the judicial review. The AGC submits that the applicants should not be allowed to use a transcript on an examination at the hearing of the judicial review to make out their case, but try to hide from the costs associated with it by claiming it was for a prior motion. Such a decision would allow the applicants to gain the benefit of using a transcript without the associated risk and cost.

At the hearing of the assessment, counsel for the Respondents argued that if the costs for the Motion to strike are denied, the cross-examination of Sandra Jarvis and Rod Neske should be allowed as part of the Judicial Review.

[41] The parties are in agreement that these cross-examinations were part of the Respondents' Motion to Strike (Motion Doc. No. 12). At paragraph 29, above, I found that the Respondents are not entitled to their costs related to the Motion to Strike. In keeping with this decision, the claims under Item 8 and Item 9 for the cross-examinations of Miles Brosseau and Dennis Shelley are not allowed as they only relate to the motion. Concerning the cross-examinations of Sandra Jarvis and Rod Neske, the parties agree that the Respondents relied on the respective affidavits at the Judicial Review and that the transcripts of the 2003 cross-examinations were included in the Applicants' Record. Contrary to the Respondents' contention that the Applicants should not be able to avoid the costs by arguing that the cross-examinations were for a prior motion, I find that the claim under Item 8 for the cross-examinations of Sandra Jarvis and Rod Neske should not be allowed. The Respondents have presented no evidence of when they notified the Applicants of their intention to rely on the affidavits of Sandra Jarvis and Rod Neske at the Judicial Review. This being the circumstance, the Applicants would have had no reason to cross-examine the affiants on anything other than the motion. On that point, the Respondents have presented claims for subsequent cross-examinations of Sandra Jarvis and Rod Neske on August 3, 2009 and June 23, 2009 respectively and, at paragraphs 35 and 39 of the Applicants Memorandum, counsel submits that the Applicants do not take any issue with the second examinations as these examinations were to obtain evidence for the hearing of the judicial review, as opposed to the motion.

[42] When viewed in hindsight, it appears that the Respondents should be entitled to Item 8 and Item 9 for the cross-examinations of Sandra Jarvis and Rod Neske held in 2003, because the Applicants included the transcripts in their Application Record. However, it has been decided that an assessment of costs may not be predicated on hindsight (see: *Carlile v Canada (Minister of*



*National Revenue*), [1997] F.C.J. No. 885, at paragraph 5). Considering this, I find that the fact that the Respondents determined, at a later date, that it was necessary to include the transcript in their Record, is irrelevant. Further, when looked at from this perspective, it is not reasonable to expect the Applicants to reimburse the Respondents for a claim related to a motion for which no costs are allowed. Therefore, for the above reasons, the Respondents' claims under Item 8 and Item 9, relating to the cross-examinations of Sandra Jarvis and Rod Neske in 2003 are not allowed.

[43] Concerning the remaining claims under Item 8 and Item 9, the next group consists of 11 claims relating to the cross-examinations of Dr. Kaplan, Dr. Popper, Anthony Stephan, David Hardy, Rod Neske, Dr. Vu, Dr. Mueller, Dr. Mithani, Dr. Robin Marles, Sandra Jarvis and Bruce Dale. At paragraph 35 of the Applicants' Memorandum, counsel submits that the Applicants consented to the eleven claims under Item 8, at the mid-point of Column III. Then at paragraph 39, the Applicants submit:

Adjusting for breaks...the Applicants do not take any issue with the next eleven Item 9 claims....The Applicants consent to these eleven Item 9 claims at one unit per hour. The three units per hour claimed by the Respondents would be excessive for this type of proceeding.

Counsel continues by submitting that lunch breaks and recesses in which counsel are not engaged working on the case are not recoverable under Item 9. In support of this, counsel refers to, *Aventis Pharma Inc v Apotex Inc*, 2009 FC 51, at paragraphs 32 to 37, *Janssen Inc v Teva Canada Limited*, 2012 FC 48, at paragraphs 44 and 45, and *AstraZeneca AB v Apotex Inc*, 2009 FC 822 at paragraph 38. Then, on page 11 of the Applicants' Memorandum, counsel outlines that for the cross-examinations of Dr. Kapan, Dr. Popper, Mr. Hardy, Mr. Neske, Dr. Vu and Dr. Mueller, the number of hours claimed should be reduced to account for lunches each day.

[44] The Respondents presented no rebuttal concerning Item 8. Having regard to Item 9, at the hearing of the assessment, counsel submitted that, for the attendance at the cross-examinations of the Respondents' affiants, there would have been a break for lunch. However, for the Applicants' affiants, counsel argued that they were full working lunches. Then at paragraph 32 of the Respondents' Reply Submissions, counsel submits:

...The Respondents' counsel examined 3 of the applicants' expert witnesses which involved very technical areas and included, in the Kaplan affidavits, a number of studies which required significant and ongoing preparation in order to conduct an effective cross-examination.

Having regard to the number of units claimed under Item 9, counsel for the Respondents argues that the Affidavits of Mr. Hardy and Mr. Stephan were voluminous, dense and contained many contentious issues. Then at paragraph 34 of their Reply Submissions, the Respondents contend:

For these reasons, the AGC respectfully submits that the applicants' suggestion that 3 units would be "excessive for this type of proceeding" is significantly off base. A review of the nature and content of those affidavits shows that this was a very complex matter.

[45] Concerning Item 8, the Respondents have presented no evidence to justify a claim at the high end of Column III. However, despite the lack of evidence I find that the Respondents would have considerably more preparation for the cross-examination of the Applicants' affiants than for the Applicants' cross-examination of the Respondents' affiants. Under these circumstances and given the nature of the issues addressed in this proceeding, Item 8 is allowed at 4 units for the cross-examinations of Dr. Kaplan, Dr. Popper, Mr. Stephan, Mr. Hardy and Mr. Dales and is allowed at 3 units for the cross-examinations of Mr. Neske, Dr. Vu, Dr. Mueller, Dr. Mithani, Dr. Marles and Ms. Jarvis for a total of 38 units.

[46] Concerning Item 9, having regard to lunch breaks, as the Respondents have conceded that there would have been a break for lunch during the cross-examinations of the Respondents, the amount of time claimed for Mr. Neske, Dr. Vu and Dr. Mueller will be reduced by one hour per day of cross-examination. Having regard to the Applicants' affiants, although the Respondents have submitted that these would have been full working lunches, I find that there would have been a period of time during each break when counsel would have been eating and performing other functions unrelated to this proceeding. Therefore, for the cross of Dr. Kaplan, Dr. Popper and Mr. Hardy, the amount of time claimed will be reduced by 30 minutes per day of cross-examination. As the cross-examinations of Mr. Stephan, Dr. Mithani, Dr. Marles, Ms. Jarvis and Mr. Dales did not extend over lunch, the amounts claimed have not been adjusted.

[47] Concerning the number of units claimed per hour under Item 9, the Applicants have provided no explanation or evidence as to why 3 units per hour are excessive. On the other hand, the Respondents have provided no evidence or explanation why the cross-examinations of the Respondents' affiants should be allowed at the high end of Column III and only scant comments concerning the affidavits of Dr. Kaplan, Mr. Hardy and Mr. Stephan for the Applicants. Given these circumstances and the nature of the issues addressed in this proceeding, I will allow the claims for the cross-examinations of Dr. Kaplan, Dr. Popper, Mr. Stephan, Mr. Hardy, Mr. Neske, Dr. Vu, Dr. Mueller, Dr. Mithani, Dr. Marles, Ms. Jarvis and Mr. Dale at 2 units per hour for the number of hours as adjusted in paragraph 46 above. Therefore, Item 9 for the above mentioned individuals is allowed for a total of 108 units.

[48] The next claims under Item 8 and Item 9 concern the cross examination of Dr. Silverstone. Having reviewed the material submitted by the parties, I find it necessary to consider all of the fees and disbursements related to Dr. Silverstone together. For this reason, I will consider the Respondents' claims under Item 8 and Item 9, concerning the cross examination of Dr. Silverstone, in conjunction with my consideration of the fees claimed for his services.

[49] The final claims under Item 8 and Item 9 relate to the cross-examination of Ms. Kim Seeling. At paragraphs 37 and 43 of the Applicants' Memorandum, counsel submits that these claims should not be allowed as Ms. Seeling was called as a witness, at the direction of the Court, at the Judicial Review hearing on November 27, 2009. Counsel argues that these claims are duplicates to the Respondents' claims under Item 13(b) and Item 14(a) for preparation and attendance at the hearing.

[50] At paragraph 30 of the Respondents' Reply Submissions, counsel argues that the attendance and cross-examination of Ms. Seeling on the last day of the Judicial Review hearing was directed by the Court. Counsel argues that this is not a duplicate claim as counsel was required to prepare the witness and arrange for the delivery of the seized materials.

[51] I have reviewed the Court Record and confirmed that on November 27, 2009 Ms. Seeling was called as a witness at the judicial review hearing. This being the circumstance, any preparation and attendance relating to the witness are accounted for under Item 13(b) and Item 14(a). As the Respondents have submitted claims under Item 13(b) and Item 14(a), the examination of Ms.

Seeling will be considered when assessing those costs. Therefore, the Respondents' claims under Item 8 and Item 9 for the cross-examination of Ms. Seeling are not allowed.

[52] The Respondents have submitted 32 claims, at 6 units each, under Item 10 for preparation for Case Management Conferences (CMCs).

[53] At paragraph 44 of the Applicants' Memorandum, counsel submits:

This case needs to clarify whether what we call Case Management Conferences ("CMCs") when a Judicial Review is specially managed under Rule 383, are meant to be Pre-Hearing Conferences under Rule 315 (which incorporate Rules 258 to 267). Item 10 simply uses the word "conference" under the heading "D. Pre-Trial and Pre-Hearing Procedures".

[54] Then at paragraphs 46 and 47, the Applicants argue:

46. In *Canadian Private Copying Collective v Fuzion Technology Corp.*, 2010 FC 626 at [10-11]...Items 10 and 11 were disallowed for a conference because the matter was a judicial review and Items 10 and 11 are under sub-paragraph D (Pre-Trial and Pre-Hearing Procedures) which rely on Rule 258 in an action. This decision does not mean that such procedures cannot apply to a judicial review in a Rule 315 order is made. It does stand for the proposition that not every non-motion "conference" is covered by Items 10 and 11.
47. Rule 258 conferences mandate specific preparation akin to a motion, and Item 10 permits units in amounts similar to contested motions. CMCs held in specially managed proceedings have none of the requirements under Rules 258-267 (unless specifically directed by the CMC Judge). In this case there were no Rule 315 orders to impose duties under Rules 258-267 for any of the 32 CMCs. As in this case, many CMCs in specially managed proceedings require no or little preparation and can be mere scheduling sessions.

[55] And at paragraph 49, the Applicants submit:

There are cases where pre-hearings, even ones resulting in orders, have not been held to be Rule 315 pre-hearing conferences recoverable under Items 10 and 11 (see for example *Martselos v Poitras*, 2009 FC 957 at [3].... However, it is not clear where the dividing line, if any, is between Rule 315 pre-hearing conferences for which Items 10 and 11 clearly apply, and CMCs in specially managed proceedings in which no legal argument is made, no memorandums are filed, and most of which simply involve scheduling and reporting on progress to keep the file moving along.

[56] The Applicants also submit that if all 32 CMCs are allowed, it could have the effect of deterring the use of CMCs in specially managed cases because the potential costs are prohibitive. Counsel further argues that the Respondents have provided no evidence that they actually spent time preparing for the CMCs and that there are 11 of the CMCs, listed in paragraph 52 of the Applicants' Memorandum which would be more properly classified as preparation for motions and are not recoverable without a costs order.

[57] Commencing at paragraph 37 of the Respondents' Reply Submissions, counsel submits that the Applicants consented to having the Judicial Review case managed and that the Case Management Conferences were reasonable and necessary given the nature of the case and the issues involved, therefore, costs should be allowed. Then at paragraph 39 the Respondents submit:

The applicants cite one case for the connection to Rule 258 and the Tariff. However, that case does not restrict these items to pre-trial matters, Moreover, the Tariff heading is Pre-Trial and Pre-Hearing Procedures. In addition, this case does not refer to any authority that holds that Items 10 and 11 are not for judicial review. Rule 315 is clear that a Court may order that a conference be held in accordance with rule 258 to 267, with such modifications as necessary. (emphasis is the Respondents')

The Respondents continue by suggesting that there are a number of cases where fees under Items 10 and 11 have been allowed for CMCs in Judicial Reviews and that many of these CMCs dealt with

scheduling matters. In support of this the Respondents refer to: *Sam v Canada (Indian Affairs and Northern Development)*, 2010 FC 526, at paragraph 12, *Bayer Healthcare AG v Sandoz Canada Inc.*, 2009 FC 691, at paragraph 21, *Métis National Council of Women v Canada (Attorney General)*, 2007 FC 961, at paragraph 40 and 41, *Cockerill v Fort McMurray First Nations #468*, 2010 FC 1002, at paragraph 30, *Target Event Productions Ltd v Cheung*, 2011 FC 83, at paragraph 29, *GRK Fasteners Inc v Canada (Attorney General)*, 2011 FC 1027 at paragraph 17, and *Boshra v Canadian association of Professional Employees (CAPE)*, 2011 FCA 278 at paragraph 17.

[58] The Respondents also submit that if costs are not allowed for the CMCs, litigants would be able to utilize the Court's time without regard to the associated costs. Counsel further argues that the present case has a procedural history which spans over 10 years, that it is not surprising that there were 32 CMCs and that preparation by counsel was required for these CMCs since many of them went beyond mere scheduling.

[59] Concerning Item 10, I will first address the issue of whether certain CMCs should be disallowed because they took on the nature of motions. Although the Respondents made no reply in response to this issue, I have reviewed the Court Record and find that all but three of the CMCs mentioned by the Applicants dealt with the scheduling of motions and the exchange of materials. In *Sam (supra)*, *Métis National Council (supra)* and *Cockerill (supra)*, it was held that Item 10 may be allowed for CMCs dealing with the scheduling of motions. Concerning the remaining CMCs raised by the Applicants, I have reviewed the Abstracts of the Hearing for the CMCs held April 2, 2008, November 3, 2008 and November 13, 2008 and find that the outcomes of the CMCs directly address motions for which no costs have been allowed. For example, in the Abstract of Hearing for

the CMC held April 2, 2008, the result of the hearing indicates that Motion document 52 is adjourned to May 9, 2008 and “That it is agreed upon by the parties that paragraph 18 of the Affidavit of Janice Robinson located at Tab 5 of the Applicants Motion Record (DOC. 55 – Volume 1) (page 49), be blacked out with the words “By Order of Campbell J dated Aril 2, 2008” written in the margin”. Also, it is clear from the Abstract of Hearing for November 3, 2008 that Motion document 52, considered earlier; was extensively discussed as being “largely vacated”. Finally, the CMC of November 13, 2008 was held in conjunction with a motion for which no costs were allowed and there is no evidence to indicate whether the CMC dominated the 24 minutes the hearing lasted. Given these circumstances, I find that the CMCs on the above dates were so closely linked to motions that the Respondents claim under Item 10 cannot be allowed. It follows that the Respondents’ claim under Item 11 will also not be allowed for these dates.

[60] Concerning the remaining 29 CMCs, although I agree with the Applicants that this is a large number of CMCs for an individual proceeding, I can find no jurisprudence which limits the number of CMCs allowable. Further, given the obvious and agreed complexity of the matter and the duration of the proceeding, I find that one could expect that there would be a requirement for more than the usual number of CMCs. Further, the Respondents have provided several cases which stand for the allowance of claims under Item 10 for CMCs dedicated to scheduling matters.

[61] Concerning the Applicants’ contention that there is no evidence that the Respondents actually spent time preparing for the CMCs, in Reply, the Respondents suggested that many CMCs went beyond mere scheduling and required preparation by counsel. Moreover, in *Halford v Seed Hawk Inc*, 2006 FC 422 at paragraph 129, it was held:



...The Seed Hawk Defendants advanced several claims for items 10 and 11 (preparation for and attendance on case conferences respectively). The Plaintiffs, in addition to their general argument above concerning proof and the counterclaim result, argued that these conferences were brief and required little preparation and that the tariff did not contemplate a recovery for each and every one. With respect to that argument, I think that the subheading "D. Pre-trial and Pre-Hearing Procedures" in the tariff is sufficiently broad to capture such services. As well, I am reluctant to characterize a court-mandated appearance for the purpose of case management as so negligible in effect (these nine conferences ranged in duration from 10 to 35 minutes) that no meaningful work was required of counsel. I allow these fee items as presented. (emphasis added)

[62] In keeping with *Halford*, I find the very fact that the Court found it necessary to hold 32 CMCs is ample indication that the matters discussed were important and would have required meaningful work in preparation. On the other hand, as the Court Record indicates that scheduling of steps and the exchange of materials were the predominant issues at many of the CMCs; I find that an allowance of 3 units per event is reasonable for the remaining 29 CMCs claimed. Therefore Item 10 is allowed for a total of 87 units.

[63] Concerning the remaining 29 claims under Item 11, the parties adopt their submissions under Item 10. Therefore, in keeping with my findings above, the remaining 29 claims under Item 11 are allowed at 1 unit per hour. I have reviewed the Court Record and find that the number of hours claimed are reasonable with the exception of the amount claimed for January 24, 2004. I allow this CMC for duration of 30 minutes, consistent with the duration recorded in the Abstract of Hearing. Taking this one adjustment into consideration, I find that Item 11 should be allowed for a total of 10.75 hours, resulting in a total allowance for all 29 CMCs of 10.75 units.

[64] The Respondents have submitted two claims under Item 13(a) for preparation for motions heard September 18, 2003 and May 9, 2008. At paragraph 48 of the Respondents' Reply Submissions, counsel submits that these claims should be withdrawn if allowed under Item 5.

[65] Even though the claims under Item 5 have not been allowed, it has been held that claims under Item 13(a) may not be allowed for motions (see: *Lavigne v Canada (Commissioner of Official Languages)*, 2006 FC 620 at paragraph 2). Therefore, the claims under Item 13(a) for the motions heard September 18, 2003 and May 9, 2008, are not allowed.

[66] The Respondents have also submitted claims under Item 13(a), preparation for trial or hearing, and 13(b), preparation for trial or hearing per day in Court after the first day, for the Judicial Review hearing. Although the Applicants do not contest the Respondents' entitlement to the claims, they submit that the claims should be allowed at the mid-point of Column III to the Table in Tariff B. At paragraph 47 of the Respondents' Reply Submissions, counsel submits:

...Counsel for the Respondents can advise that the amount of time taken to prepare, continuously, for this case was excessive. Counsel for the Respondents prepared before the hearing, but were required to supplement their submissions every day and every weekend we had "off". Counsel for the AGC can advise as to hours spent preparing continuously during the hearing of this evolving matter as it unfolded each day in Court, working well into the morning hours almost every day of the hearing.

[67] Concerning Item 13(a), I find that preparation prior to the hearing would not have involved the preparation of witnesses who were being called to testify as this was a Judicial Review. Further, although there were a number of affidavits filed by the Respondents, any time spent on these was

allowed for under Item 2, Item 8 and Item 9. This being the circumstance, Item 13(a) is allowed at 3 units for preparation prior to the Judicial Review hearing.

[68] Concerning Item 13(b), the Respondents have submitted that extensive preparation was required after each day in Court. Given the nature of this proceeding, I find that the number of units claimed by the Respondents is reasonable. Therefore, Item 13(b) is allowed for a total of 42 units.

[69] Concerning the Respondents' claim under Item 14(a), first counsel per hour in Court, the Applicants, at paragraph 57 of their Memorandum, submit that they agree to first counsel time at the mid-point of Column III but, for the reasons outlined concerning Item 9, argue that the time for lunches and breaks should be removed. Counsel for the Applicants sets out the amount for time that should be removed from each day at the top of page 16 of the Applicants' Memorandum.

[70] At paragraph 49 of the Respondents' Reply Submissions, counsel submits that the complex and lengthy nature of this matter justifies their claim at the upper end of Item 14(a) and that the breaks are not an accurate reflection of the time spent in preparation to respond to the Applicants' arguments.

[71] Concerning Item 14(a), it has been decided that nothing is allowable under item 14(a) for lunch breaks and that brief recesses, when counsel must remain in or close to the courtroom, are allowable (see: *Halford (supra)* at paragraph 205 and *Buschau v Rogers Communications Inc*, 2012 FCA 100 at paragraph 17). In keeping with these decisions, I will reduce the number of hours claimed to remove one hour from each day claimed to account for a lunch recess. I find any time

beyond one hour is allowable as counsel would need to return to Court to organize their thoughts and settle for the resumption of the hearing. Concerning the number of units allowable, in keeping with my decision concerning Item 13(a), I allow 2 units per hour for the first 14 days as this was a Judicial Review Application which had no requirement for the examination or cross-examination of witnesses. For November 27, 2009, the final day of hearing, I allow 3 units per hour as this was the day Ms. Seeling was a witness (see paragraph 49 above). Therefore, for the above reasons, Item 14(a) is allowed for a total of 171 units.

[72] The next assessable service claimed by the Respondents is Item 24, travel by counsel to attend a trial, hearing, motion, examination or analogous procedure, at the discretion of the Court. The Respondents have submitted three claims of 5 units each for travel to the Motion held May 9, 2008 and the Judicial Review hearing in Calgary, Alberta from November 2 to 20, 2009 and Vancouver, British Columbia on November 27, 2009. In response to the Respondents' claims, counsel for the Applicants submits that Item 24 is at the discretion of the Court and there is no order for travel costs for either the motion or the Judicial Review, therefore, the claim should not be allowed. In support of this, counsel referred to *Merck & Co. Inc v Apotex Inc*, 2007 FC 312 at paragraphs 10 and 11, and *Carr v Canada* 2009 FC 1196 at paragraph 7 and 8.

[73] In the Respondents' Reply Submissions, counsel submits:

The Applicants filed the Requisition for Hearing and chose Calgary as the location of the hearing. The Court directed the parties to attend the hearing in Calgary from November 2 – 20 and again in Vancouver on November 27, 2009. As a result, travel by counsel to attend the hearing of the judicial review was “at the direction of the Court”.

[74] I note that Item 24 states: “at the discretion of the Court”. I have reviewed the file and have confirmed that the Court did not exercise its discretion to award costs of travel by counsel. As was decided in *Merck (supra)* and *Carr (supra)*, absent an order or direction of the Court, an Assessment Officer lacks the jurisdiction to allow the assessable services associated with travel. In keeping with these and many other decisions, I find that Item 24 may not be allowed as the Court has not awarded assessable services associated with travel. Therefore, the Respondents’ claims under Item 24 are not allowed.

[75] The Respondents have claimed 1 unit under Item 25 for services after judgment. As the Applicants do not contest this claim, it is allowed as presented in the Revised Bill of Costs.

[76] The Respondents have claimed 6 units under Item 26 for the assessment of costs. At paragraph 60 of the Applicants Memorandum, counsel submits that Item 26 should be allowed at the mid-point as the submissions of the Respondents were largely the same as those presented before the Court when entitlement to costs was being argued. At paragraph 52 of the Respondents’ Reply Submissions, counsel argues:

In respect of Item 26, the AGC submits that, given the voluminous materials filed to date by both parties, costs at the top end of Column III are amply justified. For this assessment, the AGC filed a Bill of Costs that spanned several years, an affidavit of disbursements comprised of 3 volumes and a 2 volume submission on June 7, 2013. To date the applicants have filed a 2 volume affidavit and a 4 volume response. The AGC’s Reply should also be taken into account.

[77] As has been indicated by the Respondents, this assessment of costs has generated several volumes of material from both parties. In addition to this, the Applicants cross-examined Tabitha

Potts concerning the Affidavit of Disbursements. Under these circumstances, I find that there is ample justification for the Respondents' claim. Therefore, Item 26 is allowed at 6 units.

[78] Concerning the Respondents' claim of 3 units under Item 27 for such other services as may be allowed by the Assessment Officer, at paragraph 192 of the Respondents' Submissions, counsel submits that this was for miscellaneous items such as paralegal costs incurred travelling to the University of Alberta to access materials not in the collection at the Department of Justice and to deliver materials to representatives of the client department.

[79] In response, at paragraph 61 of the Applicants' Memorandum, counsel argues:

... These are disbursements the Respondents claim as disbursements. If the Respondents are claiming paralegal time, it must be time that counsel could recover. Concerning the "to deliver materials to representatives of the client department" the Respondents are claiming Item 25 to report to the client. This would be a duplicate claim if claiming for time as opposed to disbursements. The "paralegal's costs incurred in travelling to the University" are claimed as disbursements (Potts Aff. p. 92 & Ex. Z pp. 262-4). If this is for paralegal time, it is covered under Item 13(a) which the Respondents have already claimed for. There is no order for second counsel to permit a duplicate claim. Item 27 is not meant to be for duplicate services already compensated for in Tariff B, it is meant for "other" services.

[80] At paragraph 53 of the Respondents' Reply Submissions, counsel contends:

As noted in the AGC's original submission filed June 7, 2013 at paragraph 192, the AGC claims costs under Item 27 for paralegal "costs incurred in travelling to the University of Alberta Law School to access books and materials that were not in Justice's collection...". I can advise that these materials were the historic or previous versions of the *Food and Drug Act* and Regulations, which were necessary to establish the Respondents' argument under "saving" section 1 of the *Charter*, in the event the Court found that the Applicants had made out a *Charter* infringement. A perusal of the Respondents' MFL filed on the Judicial Review will show that

the Respondents covered the legislative history of the relevant Acts and Regulations, as well as the House of Commons Debates from 1920 to 2003 (see paragraph 8 – 39 and the Tabs of sources cited there under of the Respondents' MFL filed on the Judicial Review).

[81] Item 27 of the Table to Tariff B found in the *Federal Courts Rules*, is for “such other services as may be allowed by the assessment officer or ordered by the Court”. The Respondents have submitted a claim for the services of a paralegal in relation to research conducted prior to the preparation of the Respondents' Memorandum of Fact and Law. As was held at paragraph 131 of *Halford (supra)*, Item 27 only comes into play for services not otherwise addressed by items 1 to 26. Concerning the claim by the Respondents, I find that research related to the preparation of a Memorandum of Fact and Law is properly included under Item 2. This being the circumstance, I find that the services claimed are not allowable under Item 27. Therefore, the Respondents' claim under Item 27 is not allowed.

[82] The Respondents have claimed 154 units under Item 28 for the services of a paralegal at the hearing of the Judicial Review, assisting the Court and parties in locating materials in the parties' Records. In response, the Applicants submit that the Respondents have already claimed for the identical hours for first counsel under Item 14(a). Then at paragraph 63, counsel argues:

Item 14(b) requires a Court order for second counsel. The Respondents can only claim Court time for one counsel. They made an Item 14(a) claim for one counsel. Item 28 covers the work of paralegals to the extent that they reduce the work of the lawyer. Item 28 is not meant to be an additional indemnity permitting double billing for an Item claimed by the lawyer. In the alternative this claim should be limited to the actual Court time of 70'27”.

In support of these submissions, counsel refers to *Air Canada v Canada (Minister of Transport)*, [2000] F.C.J. No. 101 at paragraph 15.

[83] In Reply, the Respondents submit that they rely on the materials filed June 7, 2013, outlined above.

[84] The circumstances found in *Air Canada (supra)* are essentially the same as the situation before me. At paragraph 15 of the *Air Canada* decision, the Assessment Officer finds:

...By contrast, item G28 does not suggest an indemnity additional to an indemnity already sought and approved for supervising counsel. Rather, it suggests indemnification at "50% of the amount that would be calculated for a solicitor" (my emphasis). That is, the lawyer delegates to the non-lawyer who then provides a service, and the supervising lawyer may bill the client accordingly at a lower hourly rate. Item G28 then reflects a reduced indemnification in the party and party scheme of costs. Further, I doubt that the scheme of this Tariff, requiring a special direction of the Court in the circumstances of items E14(b) and F22(b), was intended to leave unfettered the access to indemnification for non-lawyers...

Then further down in the paragraph the Assessment Officer concludes, "Here, the Defendants were indemnified already under items D13(a) and E14(a) thereby precluding the claim for item G28". In agreement with these findings and having allowed Item 13(a) and Item 14(a) at paragraphs 67 and 71 respectively, I find that the Respondents' claims under Item 28 may not be allowed. Therefore, Item 28 for the attendance of a paralegal at the Judicial Review hearing is not allowed.

#### Disbursements

##### Dr. Silverstone

[85] The Respondents have submitted disbursements totalling \$172,500.00 for the services of Dr. Silverstone, an expert witness who swore two affidavits in response to the Application for Judicial Review. Concerning the services provided by Dr. Silverstone, the Respondents have submitted that the specialized knowledge and expertise of Dr. Silverstone was required in order to properly



respond to the Applicants' case. Then, at paragraph 204 of the Respondents Submissions on Costs, counsel argues:

In *Abbott Laboratories Limited v Canada (Minister of Health)*, Assessment Officer ("AO") Parent dealt with the Respondents' expert fees/disbursements where there had been a late, but successful, motion to dismiss the application. AO Parent determined that the parties had to be fully prepared for both the motion to dismiss and the application on its merits on the day the motion to dismiss was heard and, citing *Apotex Inc v Egris Pharmaceuticals*, (1991) 4 O.R. (3d) 321, stated that a case should not be approached from the perspective of hindsight. This principle applies to allow this disbursement notwithstanding that Dr. Silverstone's evidence was ultimately ruled irrelevant and therefore inadmissible as a result of the Court deciding the Standing Issue against the applicant.

[86] Commencing at page 18 of the Applicants' Memorandum, counsel presents 20 pages outlining reasons why all of the claims for Dr. Silverstone should be denied. At paragraphs 65 and 66, counsel argues that the Applicants motion to strike most of Dr. Silverstone's Affidavit was argued at the Judicial Review hearing but no decision was reached as Dr. Silverstone's evidence was excluded on the grounds that it was irrelevant. The Applicants continue by contending that public policy issues favoured the Applicants, proportionality suggests that the disbursements related to Dr. Silverstone account for over 40 percent of the total amount claimed in the Respondents' Bill of Costs, Dr. Silverstone presented argument instead of impartial expert evidence and Dr. Silverstone went beyond his area of expertise and mis-cited studies. Then, commencing at paragraph 125, counsel submits that the Court excluded Dr. Silverstone's evidence as inadmissible because the parties could not lead evidence on EMPowerplus (EMP), that during the hearing the Court indicated that the efficacy issue, the prime focus of Dr. Silverstone's affidavit was not relevant, and that the Court made it clear that the safety issue raised by Dr. Silverstone was not relevant. Then at paragraph 127, counsel contends that the costs relating to inadmissible evidence

should not be allowed on an assessment of costs. In support of this counsel refers to; *Camp Robin Hood Limited v The Queen*, [1982] 1 FC 19 at paragraph 19, *Apotex Inc v Sanofi-Aventis*, [2012] F.C.J. No. 435 at paragraphs 21 and 22, *Grismer v Squamish Indian Band*, [2006] F.C.J. No. 1757 at paragraph 13 and *Arnusch v Regina School Division No. 4*, 1998 CanLII 1373.

[87] At paragraph 71 of the Respondents' Reply Submissions, counsel submits:

The AGC submits that the applicants' submissions at paragraph 88 – 128 ought not to be considered. The Applicants are improperly attempting to obtain, in the context of a costs assessment, a ruling on whether or not Dr. Silverstone's expert evidence would have been admitted at the judicial review, had it not been excluded on the grounds of irrelevance (again, because the Court rejected the applicants' position on the Standing Issue). With respect, the AGC submits that this is not the role of an Assessment Officer.

Counsel for the Respondents continues by submitting that Dr. Silverstone's evidence was necessary and a direct result of the incorrect position the applicants took on the standing issue. Counsel also argues that Dr. Silverstone's evidence was required due to the Applicants' *Charter* argument which was based on the premise that EMP actually treats serious mental illness and that Health Canada's actions denied them access to this treatment, thereby infringing their *Charter* rights. At paragraph 74 of the Respondents' Reply, counsel argues that if the Applicants' premise that EMP is a treatment was disproved, the Applicants' *Charter* argument would fail as it could not be argued that Health Canada denied access to treatment. Finally, at paragraph 75 the Respondents contend:

The Respondents could not predict the outcome of the Standing Issue and had to be prepared for an adverse ruling on that issue and had to prepare their case on the assumption that all of the Applicants' evidence would be admitted. As a result, the AGC submits that the costs associated with Dr. Silverstone were necessary and reasonable – not only the fact of them but also the quantum of them given that he had to respond to almost every affidavit tendered by the applicants.

[88] Prior to proceeding with a determination of the quantum concerning the disbursements relating to Dr. Silverstone, I must reach a determination whether or not the costs relating to inadmissible evidence should be allowed on a party-and-party assessment of costs or whether, as submitted by the Respondents, hindsight should not be a factor in an assessment of costs and therefore, notwithstanding that Dr. Silverstone's evidence was ultimately ruled irrelevant and therefore inadmissible, the related disbursements should be allowed.

[89] At paragraph 76 of the Reasons for Order and Order dated January 20, 2010, the Court held:

Much of the contested evidence has been tendered in anticipation that the *Charter* claim evidence of non-Applicant users is relevant to the present Application. The determination of the narrow scope of the present Application as found in the preceding Section of these reasons has rendered this evidence as irrelevant. I find that both the Respondents' and the Applicants' strike motions can be dealt with on this basis. The law with respect to the relevance and admissibility of evidence is as follows:

Facts in issue, which are sometimes called "principal" facts, are those necessary by law to establish the claim, liability or defence, forming the subject-matter of the proceedings; and which are in dispute between the parties [footnote omitted].

[...]

Relevancy must be distinguished from admissibility, of which, though the primary, it is by no means the sole condition. Evidence may be relevant and yet, on grounds of convenience or policy, inadmissible. Indeed, this exclusion of matter otherwise relevant has been called the distinguishing feature of the English law of evidence. It is correct then, in deciding whether evidence is admissible, to ask first whether the evidence is relevant and, thereafter, whether there are any rules or discretions, based on convenience or policy, which nonetheless make this relevant evidence inadmissible.

[Emphasis in the original]

(*Phipson on Evidence*, 16th Ed. (London: Sweet and Maxwell, 2005), paras. 7 - 02, 7 - 05)

Further, the Ontario Court of Appeal decision in *R. v. Truscott*, [2006] O.J. No. 4171 at paragraphs 22 and 23 is instructive:

Evidence is relevant if, as a matter of logic and human experience, it renders the existence or absence of a material fact in issue more or less likely [...]. Evidence will be irrelevant either if it does not make the fact to which it is directed more or less likely, or if the fact to which the evidence is directed is not material to the proceedings.

Relevance is contextual in that it depends on the facts in issue, the position taken by the parties in respect of those facts, and the other evidence adduced in relation to those facts: see *R. v. Arp* (1998), 129 C.C.C. (3d) 321 at 338 (S.C.C.). Because relevance is contextual, a court will often be unable to determine relevance at the time the evidence is proffered, but will receive the evidence conditionally and determine the relevance of the evidence after the evidentiary picture has been fully developed. It does not follow, however, that because relevance often cannot be determined when the evidence is tendered, that relevance should not be addressed when the evidence is tendered. If a court is satisfied when the evidence is tendered that the evidence is irrelevant, it should so hold and refuse to admit the evidence. A court should not hear evidence on the chance that it might somehow, at some time, in some way become relevant in the proceedings.

[Emphasis is the Court's]

[90] Concerning the evidence of Dr. Silverstone, at paragraph 84 of the Reasons for Order and

Order, the Court held:

For the same reason applied to the expert evidence of Dr. Kaplan and Dr. Popper with respect to the Respondents' strike motion, I find that the expert evidence of Dr. Silverstone, a psychiatrist, which also goes to the treatment effect of EMpowerplus, is irrelevant.

[91] Concerning Dr. Kaplan and Dr. Popper, at paragraph 79 and 80 of the Reasons, the Court states:

While it is an undisputed fact that users of EMpowerplus report an improvement in their mental health as a result of taking a recommended dosage of the product, controversy exists as to whether EMpowerplus treats mental illness and is, therefore, "efficacious", or whether EMpowerplus merely creates a placebo response because it is expected to treat, and is, therefore, only "effective". Given the limited scope of the present Application as found, I find that the question does not constitute a fact in issue because it can only be advanced if the *Charter* rights of users are in play. This was the strategy advanced by the Applicants, but it has failed.

As a result I find that the following affidavit evidence is irrelevant: the evidence of Ms. Coulson and Ms. Oxby which goes to prove the positive effect that EMpowerplus has had on their lives; the evidence of Mr. LaJeunesse, a past executive with the Canadian Mental Health Association, which goes to support user claims; and the expert opinion evidence of Dr. Kaplan, a psychologist, and Dr. Popper, a psychiatrist, which goes to the treatment effect of EMpowerplus.

[92] Then at paragraph 85 of the Reasons for Order and Order dated January 20, 2010, the Court concluded that "the evidence found to be irrelevant is inadmissible".

[93] In summary, I find that the Court determined the evidence of Dr. Silverstone to be irrelevant and inadmissible due to the narrow scope of the Judicial Review which is as a result of the Court findings in paragraphs 57 through 74 of the Reasons for Order and Order dated January 20, 2010.

[94] Concerning the Respondents' "hindsight argument", I find that the matter before me may be distinguished from *Abbott Laboratories Limited v Canada (Minister of Health)*, 2009 FC 399. In *Abbott* the Assessment Officer found that, as a result of the motion to dismiss, "the parties had to be

fully prepared to proceed on both the motion to dismiss and the application on its merits". In *Abbott* there is no indication that the Court found the expert evidence inadmissible. On the other hand, I am faced with a finding by the Court that the evidence of Dr. Silverstone is irrelevant and inadmissible. Given this finding, it is necessary to determine the effect of the inadmissibility finding and not simply allow the disbursements based on the premise that the parties had to be fully prepared to proceed.

[95] Concerning relevance and admissibility, in *Carruthers v Canada*, [1982] F.C.J.No. 235, the Court held:

... In cases in which experts are called by both parties and they give conflicting opinions, the Court has to choose the opinion of one of the experts as preferable to the other, unless the Court chooses to reject both opinions and substitute its own based on the evidence, but the fact that one expert's report is rejected, or not accepted in full, would not justify non-payment of his fees for the preparation of same, unless the Court finds that the requisitioning of such a report was entirely unnecessary or the contents useless... (emphasis added)

[96] Referring to *Carruthers*, at paragraph 51 of *Merck & Co v Canada (Minister of Health)*, 2007 FC 312, (Merck) the Assessment Officer held:

Since the Federal Court ruled that most of the evidence attached to the Affidavit of Frank Tassone was "unnecessary" and that "most of it was inadmissible," it is my opinion that the Apotex Respondent should not be entitled to claim these expert fees in their entirety. For these reasons and considering the proposition expressed in *Grace M. Carlile, supra*, that "a result of zero dollars would be absurd", I exercise my discretion and allow a reduced amount of \$500.00 for the associated expert fees of Frank Tassone.

[97] The Assessment Officer appears to allow a reduced amount due to the fact that the Court did not find the evidence entirely inadmissible. On the review of the Assessment Officer's decision, at paragraphs 31 and 32 of *Merck & Co v Apotex Inc*, 2007 FC 1035, (*Merck Review*) the Court held:

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

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

[98] In *Merck Review*, the Court noted that Justice Mosley found the affidavit to be unnecessary and excessive. Therefore, even though not all of the material under cover of the Tassone Affidavit was inadmissible, the Court reduced the assessed amount to nil. I find this to be consistent with the Court's finding of necessity in *Carruthers (supra)*.

[99] In the matter before me, the Court found the evidence of Dr. Silverstone to be irrelevant and inadmissible and, following the findings in *Carruthers* and *Merck Review (supra)*, the disbursements claimed for the services of Dr. Silverstone are not allowed.

[100] At paragraph 132 of the Applicants' Memorandum, counsel submits:

If it is accepted that there should be no costs allowed for Dr. Silverstone, then in addition to his expert fees, the following costs should be also disallowed:

- a. Item 8 concerning Dr. Silverstone;
- b. Item 9 concerning Dr. Silverstone;
- c. \$1322.50 for transcripts (Potts Aff. Ex. BB p. 325);
- d. The part of the copying and tabs for the affidavits which is attributable to Dr. Silverstone's affidavit (Potts Aff. pp. 92-3, Ex. Z 265-8, 270);
- e. The part of the Respondents' Record and courier charges attributable to Dr. Silverstone's affidavit.

The Respondents submitted no rebuttal concerning these points.

[101] Having found that the disbursements for Dr. Silverstone's expert fees could not be allowed, I also find that the fees and disbursements associated with the cross-examination of Dr. Silverstone, the disbursements related to the duplication service and filing of his affidavit should not be allowed. This being the circumstance, the amounts claimed under Item 8 and Item 9 for the cross-examination of Dr. Silverstone on August 5-7, 2009 and the disbursement of \$1,322.50, for the transcript of the cross-examination of Dr. Silverstone are not allowed. Further, the amounts of \$140.59 and \$86.46 respectively for the duplication and courier charges associated with the Affidavits of Dr. Silverstone are not allowed.

### Travel

[102] Concerning disbursements for travel, counsel for the Applicants has raised two issues, travel costs for second counsel and travel costs for meeting with clients and preparing witnesses. I will address each of these issues prior to reaching a determination concerning the quantum of the disbursements to be allowed.



[103] At paragraph 200 of the Respondents' Submissions on Costs, counsel argues that travel costs for second counsel may be allowed even in the absence of a direction of the Court allowing fees for second counsel. In support of this, counsel refers to *Simpson Strong Tie Co v Peak Innovations Inc*, 2010 FCA 78, at paragraph 9 and *Sanders Holdings Ltd c Canada (Attorney General)*, 2009 FCA 199, at paragraph 15.

[104] At paragraph 135 of the Applicants' Memorandum, counsel submits:

...The Applicants take no issue with the travel costs of "one" counsel for examinations for the judicial review (not on the motions) and for attendance at the judicial review. The Court did not exercise its discretion to order travel fees for any counsel. Nor did it exercise its discretion for second counsel fees. An Assessment Officer has the discretion to allow travel disbursements even when the Court has not awarded travel fees. However, considering that neither travel fees nor second counsel fees were granted, the Applicants submit that travel fees for second counsel should not be allowed. In the context of litigation seeking only a declaration with litigants who did not have a budget for second counsel, travel expenses for second counsel are also excessive. Mr. Shaw was lead counsel. All of the travel expenses for Ms. Kaminski and Ms. Oltean should not be allowed.

In support of their submissions, counsel refers to *Canada (Attorney General) v Peletier*, 2008 FCA 251, at paragraph 9 and *Truehope Nutritional Support v Canada*, 2012 FCA 217, at paragraph 23.

[105] At paragraph 77 of the Respondents' Reply Submissions, counsel argues:

Ms. Kaminski was co-lead counsel on the file from 2003 – 2008. Mr. Shaw was lead counsel throughout this matter and Ms. Oltean was co-counsel from 2008 to the present. Both Mr. Shaw and Ms. Oltean prepared and presented argument at the hearing of the judicial review equally, with Ms Oltean dealing primarily with the evidentiary issues and Mr. Shaw addressing the substantive *Charter* issues. Given the number of witnesses on both sides, the number of issues involved procedural, evidentiary and substantive, second counsel on this matter is amply justified....

[106] Counsel for the Applicants and Respondents have presented what appear to be conflicting decisions concerning second counsel travel costs. The two decisions presented by the Applicants did not allow second counsel travel costs and the two decisions presented by the Respondents allowed the travel expenses for second counsel in the absence of a Direction of the Court awarding second counsel fees pursuant to Item 14 (b) of the Table to Tariff B of the *Federal Courts Rules*. Having reviewed the case law presented, I find that Assessment Officers have the jurisdiction to allow reasonable and necessary travel expenses for second counsel, when justified by the evidence presented, even when the Court has not made a direction pursuant to Item 14 (b). However, whether or not there is a direction of the Court pursuant to Item 14(b), when the evidence does not support second counsel travel expenses, an Assessment Officer is not bound to allow them.

[107] Having reviewed the Court Record, the submissions and evidence presented and having confirmed that both Mr. Shaw and Ms. Oltean were active participants and presented argument before the Court, I find that the circumstances of this matter justify reasonable and necessary travel expenses for two counsels for the cross-examinations on affidavits and the attendance at the judicial review hearing.

[108] Concerning travel costs to meet with clients and prepare witnesses, commencing at paragraph 136 of the Applicants Memorandum, counsel makes submissions concerning the following trips:

1. Mr. Shaw's trip to Ottawa January 19 to 21, 2009 to meet with clients;
2. Mr. Shaw's and Ms. Oltean's trip to Ottawa March 7 to 13, 2009 for examinations;
3. Mr. Shaw's and Ms. Oltean's trip to Ottawa May 5 to 7, 2009 for examinations and to meet with the client ;

4. Mr. Shaw's and Ms. Oltean's trip to Vancouver June 21 to 26, 2009 for the examinations of Mr. Neske and Ms. Seeling, and;
5. Ms. Kaminski's and Mr. Shaw's trip to Calgary November 18 to 21, 2003 for the examinations of Mr. Brosseau and Ms. Jarvis.

[109] Counsel for the Applicants contends that the Respondents are claiming travel disbursements to meet with the client representative, review the Applicants' affidavits and prepare for examinations. Counsel also submits that as there were no examinations scheduled for the periods in March 2009 and May 2009 making the travel inessential. Concerning the trip to Vancouver in June 2009, counsel submits that the six days are not warranted as the examination of Mr. Neske had duration of three and one half hours on June 23, 2009 and the examination of Ms. Seeling did not take place until the hearing of the Judicial Review. Counsel also argues that the trip to Calgary in November 2003, for the examination of Mr. Brosseau and Ms. Jarvis, is not allowable as the examinations relate to a motion and the examination of Ms. Jarvis actually took place on August 1, 2003. For all of these trips, counsel argues that there was no urgency to make these trips essential or necessary, therefore, they should not be allowed. Counsel's final submissions concerning travel are found at paragraphs 156 to 158 of the Applicants' Memorandum and relate to a change fee for air fair on November 27, 2009 which counsel argues is not justified, a charge for airfare which they argue should have been split with another file and long distance charges for telephone calls while counsel was on travel status, for which, counsel argues, there is no evidence that the calls relate to this file.

[110] Commencing at paragraph 78 of the Respondents' Reply Submissions, counsel submits that contrary to the Applicants' submissions the test for assessing whether disbursements are allowable is whether they are reasonable and necessary. Counsel argues that most of the Respondents' affiants

were located in Ottawa and Vancouver and it was appropriate for counsel to travel to these locations to prepare the witnesses. Counsel further contends that travel to prepare witnesses is not done because of urgency but because it is reasonable and necessary to assist the witness with their affidavits and to prepare for their cross-examination. Concerning the cross-examination of Ms. Seeling, counsel argues that there was a requirement to prepare the affiant as the Applicants did not inform the Respondents that the cross-examination was not to take place until the day tentatively scheduled for the examination. Finally, commencing at paragraph 89 of the Respondents' Reply Submissions, counsel argues that the change fee was as a result of the hearing on November 27, 2009 concluding much earlier than anticipated, that the air fare for Mr. Shaw's trip of November 18 to 21, 2003 should not be split with another file because the main purpose of travel related to this file and that there is no reason to suggest that the long distance calls claimed for the same trip did not relate to this file.

[111] Concerning the Respondents' trips on the various dates outlined above, to meet with the client representative, review the Applicants' affidavits and prepare for examinations, I find that to second guess Respondents' counsel concerning trips which represent prudent and reasonable representation of the client in a litigation process is tantamount to hindsight. As was held in *Dableh v Ontario Hydro*, [1994] FCJ No 1810, "indemnification of disbursements is not a function of hindsight but whether, in the circumstances existing at the time a litigant's solicitor made the decision to incur the expenditure, it represented prudent and reasonable representation of the client". On the other hand, I find that the trips to Calgary by Ms. Kaminski and Mr. Shaw from November 18 to 21, 2003, for the cross-examination of Mr. Brosseau and Ms. Jarvis, relate to the Respondents' Motion to Strike. As the costs of the Motion and the fees for the cross-examinations have not been

allowed, I find that the costs of travel may not be allowed. Given this the Applicant's concerns related to the splitting of air fare and long distance telephone calls are moot.

[112] Concerning the November 27 to 28, 2003 trip to Vancouver for the cross-examination of Mr. Neske, although it was not contested by the Applicants, having found that this cross-examination related to the Respondents' Motion to Strike, and in keeping with my finding concerning Mr. Brosseau and Ms. Jarvis, above, I find that the costs of travel for the November 2003 trip to Vancouver may not be allowed. Also, having found that the Respondents are not entitled to costs for the Applicants' Motion to amend their application (Motion Doc. No. 52), I find that the travel claimed for Ms. Kaminski and Mr. Shaw for May 9, 2008, to attend the hearing of the Applicants motion, may not be allowed. Further, as the amounts claimed for Jessica Stalknecht's expenses, incurred while on travel status, have not been contested, they are allowed as being reasonable and necessary expenses. Also, concerning the change fee, for the flight on November 27, 2009, I find the Respondents' explanation of the circumstances to be reasonable and allow the claim as presented.

[113] Finally, as the Applicants have not contested the actual amounts claimed as being unreasonable, and having determined which trips were reasonable and necessary and which trips were not, I have reviewed the travel disbursements claimed and, subject to the reasons above, I find the remaining expenses claimed to be reasonable and necessary. Therefore, travel disbursements are assessed and allowed for a total amount of \$36,776.23.

Court Reporter Fees

[114] Concerning Court Reporter fees, at paragraph 143 of the Applicants' Memorandum, counsel submits:

\$4,339.65 is claimed for daily transcripts of every day of the Judicial Review except for the last day. Generally daily transcripts are ordered in necessary when "evidence" is being called, which, because this was a judicial review based on affidavits, did not happen until the last day. Even when evidence is called, daily transcripts are generally a luxury that is not allowed as costs, especially when not ordered by the party liable to pay costs. The applicants oppose this cost as an unnecessary luxury....

In support of their submissions, counsel refers to *Leithiser v Pengo Hydra Pull of Canada Ltd*, [1973] FCJ No 1106, at paragraph 10, *Janssen-Ortho Inc v Novopharm Ltd*, 2006 FC 1333, at paragraph 21 and *Canada (Minister of Citizenship & Immigration) v Rogan*, 2011 FC 1119, at paragraph 26.

[115] In reply, counsel for the Respondents argues that the Janssen-Ortho decision related to real time reporting not daily transcripts and that the other case law referred to by the Applicants are discretionary decisions which do not set out any specific principles. Then at paragraph 83 of the Respondents' Reply, counsel submits:

In this case, daily transcripts were required because the parties' submissions were greatly amplified orally, beyond what was set out in the parties' written arguments. Daily transcript costs are not unusual or unreasonable for a hearing of this duration, complexity and given the number and quality of the issues.

[116] In *Carpenter Fishing Corp v Canada*, [1999] FCJ No 393, at paragraph 30, the Assessment Officer, with reference to *Leithiser (supra)*, held that daily transcripts for opening statements and argument were not allowed, only allowing for verbal testimony and reasons. In the present case, the

Respondents' justification for daily copy is that the oral submissions were amplified beyond that set out in the parties' written argument. I do not find the Respondents' submissions to be sufficient justification to allow for the expense of daily transcripts as there were no witnesses called on the dates daily transcripts were ordered. Further, I do not think it is reasonable for the Applicants to be required to reimburse the Respondents for an expense that was not reasonable and necessary. Therefore, the Respondents claim of \$4,339.65 for daily copy of the Judicial Review Hearing is not allowed.

[117] Concerning other Court Reporter disbursements, although not raised by the Applicants, I find that the amounts claimed for the transcript of the cross-examination of Mr. Brosseau and Ms. Jarvis (Amicus-December 3, 2003 - \$195.20) cannot be allowed as the cross-examination related to the Respondents Motion to Strike, for which no costs were awarded. Also, the disbursement for transcript from the hearing of the Applicants' Motion to amend their application (Motion Doc. No. 52), held May 9, 2008, cannot be allowed as no costs were awarded for the motion. Finally, as was held at paragraph 101, above, the disbursement of \$1,322.50, for the transcript of the cross-examination of Dr. Silverstone is not allowed. Therefore, for the above reasons, disbursements for Court Reporters are allowed for a total of \$10,031.38.

#### On-Line Computer Searches

[118] The Respondents have claimed \$5,959.98 for Quicklaw searches between 2003 and 2009, with the majority of the expense being incurred in 2009. The evidence supporting these expenses is found in the Affidavit of Tabitha Potts sworn February 1, 2013. At paragraph 16 of her Affidavit, Ms. Potts states:

Attached to my affidavit and marked as Exhibit "I" is a copy of the charts indicating the amount billed to file 2-98528 to recover charges for on-line research in the total amount of \$538.51. I am advised by Susan Seutter, finance specialist with Department of Justice and verily believe that during the 2003/2004 fiscal year we had a flat rate per month agreement with Lexis Nexis. The invoices from Lexis Nexis detailed the cost for each search based on search time and were not calculated pro-rata to adjust to the flat rate charge. I am further advised by Susan Seutter that upon receipt of the Lexis Nexis statement, our finance specialists or library technicians would create the charts attached as Exhibit "I" to pro-rate all the searches charges so they equalled the flat rate amount and then finance would post the amount from the charts to the applicable files.

At paragraphs 34 and 40, similar evidence is provided for the 2008/2009 and 2009/2010 fiscal years.

[119] At paragraph 144 of the Applicants' Reply, counsel submits that M.M. Orkin, *The Law on Costs*, 2<sup>nd</sup> Ed. (Toronto): Canada Law Book, 2012 at page 2-290, states:

The court has allowed a disbursement for a Quicklaw search, but the trend has been to disallow them in absence of special circumstances. The reasonableness of the amount claimed must be critically examined. However, an Alberta court ruled that in the reality of current legal practice computerized research is expected of counsel both by clients and the court and consequently disallowed a disbursement for research...

[120] Then commencing at paragraph 145, counsel submits:

The Alberta decision Orkin cites makes it clear that in Alberta, the province this matter was in, Quicklaw fees are not recoverable because it reduces counsel time which is recoverable as a costs fee (*Aram Systems Ltd v Novatel Inc*, 2010 ABQB 152 (CanLii) at [19-25]. If this same review had been held in the Court of Queen's Bench, instead of Federal Court, the Respondents' Quicklaw claim would be disallowed as overhead.

Probably because most users of Quicklaw have switched to monthly rates, Courts have generally switched to treating Quicklaw as no-costs overhead.



*Sanofi-Aventis Canada Inc v Novopharm Ltd*, [2009] FCJ No 1625 at [19]; *Fairchild v Vancouver Coastal Health Authority*, 2011 BCSC 616 at [78-81]; *Creighton v Nova Scotia*, 2011 NSSC 437 at [39]

The Respondents are billed a flat monthly fee for Quicklaw but do not disclose the amount (Potts Aff. pp. 4, 6, 7 and Potts Cross pp. 1-4). Quicklaw was available for \$180/month, and free at courthouse libraries (Buckley Aff. Vol. 1 pp. 3-4, Exs. C-E). Some of the single day “flat fee” charges are excessive (April 6/09 of \$699.03, September 29/09 \$573.19 and September 11/09 of \$408.12), exceeding by multiples the going \$180 monthly flat fee available to the Applicants. It is likely the Respondents have a flat fee for a group of lawyers, many of whom do not use Quicklaw, making the charges for those that do excessive. If this is the case then the Respondents are really seeking to recover office overhead which is not reasonably necessary for this litigation. In 2009 they are claiming \$4,725.02 for Quicklaw (equal to 26.25 monthly flat fee months at the rate available to the Applicants).

As indicated earlier Potts Aff. Exs. I and Y are most likely Quicklaw for motions. It is unclear what amount of Ex. EE is for motions, but it is unlikely that all of those searches were for the judicial review. The length of the searches and the necessity for them is also unclear. The Respondents give no reasons why any specific search was necessary. Nor do they indicate what any search was for. There is simply a general averment the cost was “reasonable and necessary” (Respondents’ Memorandum at [201]). It is an error in law to allow a disbursement without evidence it was essential (*Diversified Products Corp*, supra, last page). Because computer research has become more widely used, evidence that it is relevant has become more important (*Janssen Inc. v. Teva Canada Ltd.*, supra at [152]). Here there is zero evidence of necessity or relevance. The Respondents give no reasons why these expenses were necessary other than a general statement that they were “reasonable and necessary (Respondents’ Memorandum at [201]). Ms. Potts could not tell us the purpose of any search (Potts Cross p. 6 L4 top. 7 L8)

*Merck & Co. Inc. v Apotex Inc.*, supra, [33-35]

On cross Ms. Potts could not say whether the Quicklaw charges set out in Ex. EE of her Affidavit were the amounts paid to Quicklaw. She was unsure (Potts Cross p. 4 L6 to p.5 L4).

[121] At paragraph 84 of the Respondents' Reply, counsel submits that legal research costs for a case of this kind are necessary and reasonable and that volumes 20 to 33 of the Respondents' Record were authorities.

[122] It is apparent that the jurisprudence, concerning on-line legal research, is evolving. This is creating a situation where there is some inconsistency of application. At paragraph 18 of *Exeter v Canada (Attorney General)*, 2012 FCA 153, it was held:

Concerning the disbursement claimed for Quicklaw, although I have no hesitation to allow legal research, I find a claim of \$200.00 for a proceeding of this type excessive. In the circumstances of an appeal from a motion for an extension of time, and not having been provided with adequate evidence to justify the amount claimed, and considering that the Respondent's Book of Authorities contained only ten decisions, I allow Quicklaw in the amount of \$75.00 in recognition that some on-line legal research would have been necessary.

However, at paragraph 19 of *Sanofi-Aventis v Novopharm (supra)*, the Court held that computerized searches were part of the normal overhead of litigation and was not prepared to award costs for the expenses. Then, at paragraph 152 of *Janssen Inc v Teva (supra)* it was held:

Although I agree with counsel for Janssen that a party should not be required to spend a disproportionate amount of money to prove a disbursement, the Affidavit of Mira Rinne and Janssen's Written Submissions provide very little evidence to support hundreds of computer searches. I think that it is a well known fact that computer research is becoming more and more widely used. This being the situation, I am of the opinion that the burden of proving that computer research is required has declined but that the requirement to provide evidence that the research is relevant is becoming more important. For these reasons I will allow computer research but I will conservatively allow for approximately one half of the searches claimed as the evidence of relevance was limited....

[123] The approach taken in the provincial courts has been of a somewhat more consistent nature.

In *Aram Systems Ltd v Novatel Inc*, 2010 ABQB 152, the Court undertakes an extensive review of the jurisprudence relating to computerized legal research in that province and concludes:

... the disbursement claimed in these cases is for access to the legal databases and is based upon the time spent doing research for the particular client on the particular matter. There is no suggestion that the disbursement is meant to reimburse the law firm for the cost of computers as capital assets. In my view, disbursements for electronic legal research are similar to disbursements for photocopying; it is the copies, not the copiers, that are being paid for.

Nevertheless, I am bound by the weight of authority and must therefore refuse to allow the disbursement. Perhaps the time has come for our Court of Appeal to revisit this issue, but in light of the existing authority, I am not in a position to do so.

At paragraph 81 of *Fairchild v Vancouver Coastal Health Authority*, 2011 BCSC 616, the

Court held:

As for the charge for QuickLaw, it is true that in some cases, QuickLaw is a necessary and proper disbursement. But that is not a given. There must be some evidence justifying its use. Here, I was not told why QuickLaw searches were necessary or proper or why searches could not have been conducted using free online services, as opposed to a pay-per-use service such as QuickLaw. I am not aware that this case involved any unusual legal issues requiring QuickLaw's use.

The plaintiff has not justified the necessity or propriety of this charge. It is disallowed.

And at paragraph 39 of *Creighton v Nova Scotia (Attorney General)*, 2011 NSSC 437, the

Court held:

In *Cunning v Doucet*, 2009 NSSM 35, on the subject of Quicklaw disbursements, the court stated:

#### Other specific items

\$37.55 for Quicklaw research: There was a time years ago when online research was a novel development and lawyers paid for this research by the time spent and could track individual client files. Most lawyers, including Mr. Richey, no longer do this. They pay the much less costly monthly fee and take advantage of the system's ability to track individual clients or files and bill out the amount that would have been charged, had the lawyer subscribed to the "pay as you go" plan. That amount is basically a fiction because it is not an actual expense to the lawyer.

Performing legal research is part of a lawyer's job. In my view, the ability to do online research is merely a convenience to lawyers, which is now available for a minimal cost. Absolutely free services are quickly becoming available, eg. through CanLII, which will in time as their databases grow likely give the commercial services a run for their money. As such, it is my view that online research is part of overhead and is not a necessary disbursement that can be passed along on a party and party basis.

I am not prepared to allow an amount for Quicklaw searches.

[124] From the case law submitted, there appears to be a trend toward limiting or eliminating allowances for on-line computer research. Although Courts have found circumstances when online research could be seen as part of overhead and not a necessary disbursement to be passed along on a party and party assessment, I find that there are still circumstances when it may be a justifiable claim. As was held in *Aram Systems Ltd v Novatel Inc (supra)*, I consider disbursements for electronic legal research similar to disbursements for photocopying. However, in keeping with *Janssen Inc v Teva (supra)*, I find that there is also a requirement to provide evidence that the research is relevant. Further, considering that the charges for on-line research can mount up, the justification for on-line charges claimed is essential.

[125] With this in mind, and considering the jurisprudence above, I find that, in order to determine whether on-line searches are reasonable and necessary, there is a need for the production of evidence concerning the relevance and necessity of the on-line searches claimed in the Bill of Costs. Further, given the Respondents' evidence that they pay a flat-rate monthly fee, there is a need to provide evidence of how these charges were calculated for this specific matter while ensuring that the amounts claimed in the Bill of Costs are a reflection of the actual disbursements. In light of these requirements, it is important to note that, despite the need for proof, the cost of proving the expenditures for computer research should not exceed the amount claimed (see: *Almecon Industries Ltd. v. Anchortek Ltd.*, [2003] F.C.J. No. 1649). Taking this into consideration, I find that, in the present assessment, the Respondents have not provided the evidence required to justify on-line computer searches.

[126] Concerning the relevance and necessity of the on-line searches claimed by the Respondents, I have reviewed the evidence provided in the Affidavit of Tabitha Potts and the cross-examination of Ms. Potts and find that there is no evidence concerning relevance. The Respondents have provided no evidence concerning what the searches relate to, whether they relate to the Judicial Review or a motion, or whether they relate to the *Charter* challenge or the striking of an affidavit. On cross-examination, Ms. Potts was not able to provide any assistance in determining which searches related to motions and which did not. As evidence of necessity, the Respondents have submitted that 20 volumes of their Application Record consisted of authorities. However, there is no evidence concerning the cost of researching those specific authorities and there is no evidence suggesting which of the on-line searches related to those authorities. It is left to the Assessment Officer to reach a conclusion concerning the relevance and necessity of the searches based on the

dates of the searches. This is an impossible task. Without evidence relating to the subject matter being researched, it is impossible to reach a determination concerning the relevance and necessity of individual searches. Therefore, it is impossible to make a finding of relevance and necessity concerning on-line searches based on nothing more than the volume of authorities filed.

[127] Concerning the flat-rate fees paid by the Respondents for Quicklaw services, I have reviewed the evidence provided in the Affidavit of Tabitha Potts and the cross-examination of Ms. Potts and find that Ms. Potts was unable to provide any information concerning the specifics of the fees. Although the Respondents have presented some evidence suggesting that the flat-rate fees were pro-rated, there is no evidence concerning how this was done. Further, the evidence of the Applicants suggests that the flat-rate fee for a sole practitioner could be as low as \$180.00 per month. Considering this, the pro-rated charges for on-line computer searches seem excessive given that there were two lawyers on record for the Respondents. As suggested by the Applicants, even if the Respondents have a flat fee for a group of lawyers, the amount claimed could be inflated due to inconsistent use by practitioners. Also, I have not been provided with any specific evidence concerning the nature of the Respondents' flat-rate per month agreement with Lexis Nexis. Without this evidence, it is impossible to know whether the calculations suggested by the Respondents are appropriate or whether the on-line searches being claimed should constitute office overhead.

[128] Having found that the Respondents have not provided evidence concerning the relevance and necessity of the searches or the nature and application of the flat rate fee, the Respondents' disbursements for on-line computer searches are not allowed.

Photocopying

[129] The Respondents have claimed a total of \$12,479.25 for photocopying. In support of this, at paragraph 197 of the Respondents' Submissions on Costs, counsel argues that the disbursements for photocopying were reasonable and necessary and supported by invoices.

[130] At paragraph 150 of the Applicants' Memorandum, counsel submits that the Respondents' disbursement of \$5,602.33 for the duplication of their Application Record may be due to the production of 6 copies of the Record rather than the 5 copies normally produced. Counsel contends:

...Although the Potts Affidavit at page 93 claims 5 copies were made, at Ex. Z page 276 it says that 6 copies plus the original were made (for 7 copies in total – 3 copies for the Respondents). Such costs are not recoverable without an order for second and/or third counsel. Copies for clients are not recoverable.

Then at paragraph 152, the Applicants argue that the Respondents have claimed \$1,275.55 for an additional copy of the Applicants' Record and \$231.54 for copies of the Applicants' Affidavits and that the Applicants should not be responsible for making extra copies of their own documents. The only other submission of the Applicants concerning photocopying is found at paragraph 155 of the Applicants' Memorandum where counsel submits that the copying of unidentified research books and associated travel in the amount of \$115.00 should not be allowed.

[131] At paragraph 85 of the Respondents' Reply, counsel submits that the claims for photocopies have been supported by invoices, that there were two counsels involved and each counsel required a copy of the materials. Concerning the copying of unidentified research materials, counsel submits that the research books were copies of historic versions of the relevant acts and regulation as well as House of Commons Debates.

[132] I have reviewed the Respondents' evidence concerning photocopying, as presented in the Affidavit of Tabatha Potts and have confirmed that all of the amounts claimed are supported by invoices from external service providers.

[133] Concerning the Respondents' claim for photocopying their Application Record, I have been presented with no case law which stands for the Applicants' proposition that the costs of duplicating an Application Record for second counsel is not allowable unless the Court awards costs for second counsel under Item 14(b). Further I find that the Respondents' suggestion that both counsel working on a file require a copy of all materials to be reasonable in the event of a judicial review of this type. Under these circumstances, I find that it was reasonable and necessary for the Respondents to produce 6 copies of their Application Record.

[134] Concerning the additional copy of the Applicants' Affidavits and Application Record, I find the same. Further, concerning the Application Record, at page 279 of the Affidavit of Tabatha Potts there is an indication that the copy was produced from a compact disc (CD). I find it is reasonable to produce a paper copy of a document which is stored on a CD, therefore this disbursement is allowed as claimed at \$1,275.55. On the other hand, concerning the Applicants Affidavits, at page 172 of the Potts Affidavit there is an indication that two copies of the documents were produced. I find that only one additional copy is justifiable for second counsel, therefore, this disbursement is allowed at the amount of \$115.77.

[135] Concerning the copying of relevant acts, regulations and House of Commons Debates, I have reviewed the evidence found at Exhibit Z to the Affidavit of Tabitha Potts and find that the



portion claimed for travel may not be allowed as the paralegal was not on travel status at the time of the expenditure. Therefore, I will deduct \$25.00 for the travel charge.

[136] Although the Applicants have provided no submissions concerning the photocopying related to the motions claimed, having found that no costs were awarded for any motions, I find that I am unable to allow any costs for photocopies related to the motions. Using the Disbursements Justification and Notes found at Exhibit B to the Affidavit of Tabatha Potts, I have removed any disbursements relating to motions. Further, as mentioned at paragraph 101, above, the cost of photocopying the Affidavits of Dr. Silverstone have been removed from the amount claimed for photocopying disbursements. Finally, as the Applicants have not opposed any other amounts claimed for photocopying, they are allowed as presented in the Respondents' Bill of Costs. Therefore, for the above reasons, the Respondents' claim for photocopies is allowed for a total of \$9,741.37.

#### Courier

[137] The Respondents have claimed courier charges of \$1,663.26. In support, the Respondents submit that the disbursements were reasonable and necessary given the volume of materials and the distance between the parties. In support of their submissions, the Respondents referred to *Simpson Strong-Tie Co v Peak Innovations Inc*, 2009 FCA 203, at paragraph 14, which held:

Although some disbursements may be seen as normal office overhead, I find that facsimile and courier costs do not fall into this category as they may be attributed to a specific file. In its rebuttal the respondent submits that all of the photocopies, courier and facsimile charges were necessary for the motion. Having reviewed the file and the materials filed in support of the motion to strike the Notice of Appeal, and noting that counsel for the respondent practices in British Columbia while counsel for the appellant practices in

Ontario, thus increasing facsimile and courier costs, I find the disbursements for photocopies, facsimiles and courier to be reasonable and necessary. Therefore, the respondent's disbursements are allowed as claimed.

[138] In reply, the Applicants refer to *Halford (supra)*, at paragraph 158, in support of the contention that they should not be responsible for courier charges for delivery to the Respondents' client where regular mail would have sufficed.

[139] By way of rebuttal, the Respondents submit that courier costs are reasonable given the locations of the parties and clients.

[140] I have reviewed the Respondents' evidence and find that the disbursements for courier are well documented. However, as was the case with other disbursements, I find that those courier costs associated with motions may not be allowed. Further, as mentioned at paragraph 101, above, the cost of couriering the Affidavits of Dr. Silverstone have been removed from the amount claimed for courier disbursements. Finally, concerning the Applicants' contention that they should not be responsible for courier deliveries to the Respondents' client, in *Halford (supra)* it was held that:

...The evidence indicates material being produced for lawyers in more than one city because Gowlings is a national law firm: the Plaintiffs should not be saddled with such costs. The claims of \$26.62 and \$86.15 (postage), compared to the large claims for couriers and facsimiles, emphasize the absence of any attempt at cost-effective options for all disbursements. It may be the prerogative of the Seed Hawk Defendants to retain counsel in multiple cities, but the associated and extra costs, i.e. long distance facsimile transmissions etc., are not the Plaintiffs' responsibility. As well, although communications with the client may be warranted, there is no evidence that regular mail would have been inadequate....  
(emphasis added)

Although the Respondents' evidence justifying the necessity of sending documents from counsel to client by courier is limited, the total amount for couriers to the client is \$121.35 spread over the nine years of the litigation. Given that counsel and client were in two different cities, Edmonton and Ottawa, I find the disbursements to be reasonable and necessary to the litigation process. For the above reasons, disbursements for couriers are allowed for a total of \$993.45

#### Courthouse Searches

[141] The final disbursement objected to by the Applicants is found at paragraph 154 of the Applicants' Memorandum and relates to an unsubstantiated court search at Alberta Justice in the amount of \$170.00. By way of rebuttal, at paragraph 87 of the Respondents' Reply Submissions, counsel submits that the court search relates to a file raised by Applicants' counsel at the cross-examination of Dr. Silverstone.

[142] Although the receipt provided by the Respondents provides no detail concerning what the search related to, given the submissions of counsel for the Respondents, that it relates to a file raised by the Applicants, I find that it was reasonable for the Respondents to conduct a search as part of this litigation. Therefore, the disbursement is allowed as claimed at \$170.00.

[143] As the amounts claimed for corporate searches and fee paid to the Federal Court pursuant to Tariff A have not been contested, they are allowed as claimed at \$6.00 and \$2,743.75 respectively.

[144] Finally, concerning the Respondents' Further Bill of Costs filed July 4, 2013, at the hearing of the assessment, counsel for the Applicants submitted that they take no position concerning the disbursements claimed as being unreasonable.

[145] I have reviewed the Respondents' Further Bill of Costs which claims disbursements for courier and photocopying related to the assessment of costs, and find that the disbursements claimed are reasonable and necessary for an assessment of this complexity. Therefore the disbursements claimed are allowed as presented.

[146] For the above reasons, the Respondents' Revised Bill of Costs is assessed and allowed at \$127,487.18 and the Respondents' Further Bill of Costs is assessed and allowed at \$822.27. I will issue a separate Certificate of Assessment for each Bill of Costs.

"Bruce Preston"  
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Assessment Officer

Toronto, Ontario  
November 13, 2013

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-880-03

**STYLE OF CAUSE:** TRUEHOPE NUTRITIONAL SUPPORT LIMITED  
AND DAVID HARDY v THE ATTORNEY  
GENERAL OF CANADA AND THE MINISTER  
OF HEALTH OF CANADA

**ASSESSMENT OF COSTS**

**PLACE OF ASSESSMENT:** TORONTO, ONTARIO

**DATE OF HEARING:** JULY 11, 2013

**REASONS FOR ASSESSMENT  
OF COSTS:** BRUCE PRESTON

**DATED:** NOVEMBER 13, 2013

**WRITTEN REPRESENTATIONS:**

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Jaxine Oltean FOR THE RESPONDENTS

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