

Competition Tribunal



Tribunal de la concurrence

Citation: *JAMP Pharma Corporation v Janssen Inc*, 2024 Comp Trib 10

File No.: CT-2024-006

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IN THE MATTER OF the *Competition Act*, RSC 1985, c C-34, as amended;

AND IN THE MATTER OF an application by JAMP Pharma Corporation for an order pursuant to section 103.1 granting leave to make an application under section 79 of the *Competition Act*;

BETWEEN:

JAMP Pharma Corporation
(applicant)

and

Janssen Inc.
(respondent)



Decided on the basis of the written record.

Before: Mr. Justice Andrew D. Little (Chairperson)

Date of order: December 17, 2024

ORDER AND REASONS ON COSTS

[1] By Reasons for Order and Order dated November 20, 2024 (the “Reasons”), the Tribunal dismissed an application by JAMP Pharma Corporation (“JAMP”) for leave under section 103.1

of the *Competition Act*, RSC 1985, c C-34, as amended (the “Act”) to commence an application against Janssen Inc. (“Janssen”) under the abuse of dominance provisions of the Act.

[2] The Tribunal reserved its decision as to costs and gave the parties time to make submissions in writing. The Tribunal advised in its Reasons that it was inclined to fix costs, if any, in an all-inclusive lump sum.

[3] As the successful party, Janssen seeks costs of the application in the amount of \$131,031.18, which it advised represents 30% of its actual legal fees incurred on this application of \$436,770.36.

[4] JAMP argued for a lump sum in the amount of \$5,292.00 based on the mid-point of Column III of Tariff B of the *Federal Courts Rules*, SOR/98-106. JAMP submitted that a lump sum based on a percentage of actual legal fees was not appropriate, and in any event, was not supported by evidence and a description of the services provided by Janssen, including the details of the docketed time.

[5] Under subsection 8.1(1) of the *Competition Tribunal Act*, RSC, 1985, c 19 (2nd Supp), the Tribunal has jurisdiction to award costs of proceedings before it in accordance with the provisions governing costs in the *Federal Courts Rules*. Under subsection 400(1) of those Rules, the Tribunal has “full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.” A non-exhaustive list of factors that the Tribunal may consider when exercising its discretion is set out Rule 400(3).

[6] The applicable legal principles have been discussed in several recent Tribunal decisions: *Canada (Commissioner of Competition) v Rogers Communications Inc and Shaw Communications Inc*, 2023 Comp Trib 3, esp. at paras 20-28; *Canada (Commissioner of Competition) v Secure Energy Services Inc*, 2023 Comp Trib 2, esp. at paras 723-726; *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2022 Comp Trib 18 (“P&H”), esp. at paras 768-785.

[7] In *Rogers/Shaw*, the Tribunal noted that the default level of costs in the Federal Court is the mid-point of Column III of Tariff B of the *Federal Courts Rules*. Column III is intended to provide partial indemnification for cases of average or usual complexity: *Rogers/Shaw*, at para 22.

[8] In *Rogers/Shaw* and in *P&H*, the Tribunal found that proceedings under section 92 involve complex legal and factual matters that support higher costs awards under Tariff B, Column IV, subject to consideration of other factors in a given case: *Rogers/Shaw*, at para 23; *P&H*, at para 781. However, the Tribunal declined to make an award based on 25% of the respondents’ actual legal fees: *Rogers/Shaw*, at paras 15-16, 67.

[9] In *Rogers/Shaw*, the Tribunal stated at paragraphs 25-26:

Having regard to all of the foregoing, the fixing of costs typically involves a compromise between compensating a successful party and not unduly burdening an unsuccessful party, bearing in mind the parties’ conduct during the litigation. The costs ordered should not be excessive or punitive, but rather reflect a fair and

reasonable relationship to the actual costs of litigation, keeping in mind that the Rules are based on a partial indemnification model.

In considering what is fair and reasonable, it cannot be ignored that there is broad recognition that Tariff B no longer provides an adequate level of partial indemnification and that the Federal Courts Rules Committee has approved amendments that would increase the amounts recoverable under Tariff B by approximately 25% [...].

[10] In the result in *Rogers/Shaw*, the Tribunal awarded counsel fees to the successful respondent merging parties at the top end of Column V of the Tariff B, in the amounts of approximately \$415,000 and \$416,000: *Rogers/Shaw*, at para 62. The Tribunal considered a number of aggravating factors and some modest mitigating factors in determining the award for legal costs. In *Secure*, the Tribunal was satisfied that a lump sum of \$150,000, an amount agreed between the parties, should be awarded to the successful Commissioner in respect of legal fees: *Secure*, at para 726. In *P&H*, the Tribunal awarded costs to the respondent of \$157,000, which the Tribunal noted was approximately 75% of the amount claimed by P&H for legal fees under Column IV of Tariff B: *P&H*, at paras 778, 785.

[11] In abuse of dominance cases under section 79, the Tribunal has in one instance set a successful respondent's Tariff B legal costs at \$70,000, reducing the parties' agreement on a fixed amount because of divided success and the conduct of the respondent at the hearing: *Commissioner of Competition v Vancouver Airport Authority*, 2019 Comp Trib 6, at para 819. In another instance, the Tribunal ordered Tariff B costs payable to the successful Commissioner in the amount of \$215,000 (albeit for two hearings before the Tribunal): *Commissioner of Competition v The Toronto Real Estate Board*, 2016 Comp Trib 8, at para 3(k).

[12] In *Cineplex*, an application decided on the merits under section 74.1, the Tribunal ordered costs payable to the Commissioner in respect of legal fees in an amount agreed by the parties (\$77,000): *Canada (Commissioner of Competition) v Cineplex Inc*, 2024 Comp Trib 5, at paras 483, 490.

[13] In sum, in these cases the Tribunal has usually awarded legal costs to the successful party based on a column in Tariff B of the *Federal Courts Rules*, sometimes in an amount agreed by the parties. Costs orders implement a principle of partial indemnification of the successful party based on what is fair and reasonable, without unduly burdening the unsuccessful party. The Tribunal has declined to award costs as a percentage of actual legal fees. The Tribunal has considered a range of factors, as contemplated by Rule 400(3) of the *Federal Courts Rules*, and given weight to factors such as success in the matter, the public interest in bringing the proceedings, and a party's conduct during the litigation that may unduly increase its duration and expense. The Tribunal has also recognized the nature and complexity of merger matters litigated under the Act.

[14] While these cases set out the general principles that apply to costs awards, they were all decided on the merits of an application by the Commissioner under Part VIII or Part VII.1 of the Act following a hearing and the discovery process under the *Competition Tribunal Rules*.

[15] I am also aware of the approach taken to costs in certain intellectual property matters before the Federal Court, which may result in an award of costs well in excess of the Tariff: see *Allergan Inc. v Sandoz Canada Inc.*, 2021 FC 186 (CanLII), [2021] 2 FCR 357 and cases following it. I am not persuaded that there are principled reasons to adopt that approach in the present application for leave under section 103.1.

[16] In prior applications for leave under section 103.1, the successful party has received costs awards as follows:

- a) In *Coretti*, the Tribunal awarded costs of \$1,000 to each respondent: *Luigi Coretti v Bureau de la Sécurité Privée and Garda World Security Corporation*, 2019 Comp Trib 4, at para 21;
- b) In *CarGurus*, the Federal Court of Appeal awarded an all-inclusive lump sum of \$15,000 for costs of the appeal and the hearing at the Tribunal: *CarGurus, Inc v Trader Corporation*, 2017 FCA 181, at para 37. The Tribunal had previously awarded costs at the midpoint of Column III of Tariff B: *CarGurus, Inc v Trader Corporation*, 2016 Comp Trib 15, at para 157;
- c) In *Audatex*, the successful parties were awarded their costs without further details: *Audatex Canada, ULC v CarProof Corporation*, 2015 Comp Trib 28, at para 90;
- d) In *Stargrove*, the Tribunal awarded costs to the applicant at the mid-point of Column IV: *Stargrove Entertainment Inc v Universal Music Publishing Group Canada*, 2015 Comp Trib 26, at para 48.

[17] In the circumstances of this leave application, particularly the nature of the parties and the subject matter of the application, the amount and nature of the work involved, the complexity of the legal and some of the factual issues, and the overall stakes in this application, I find it appropriate to use the top of Column IV of Tariff B as a benchmark for the quantum of legal costs.

[18] In exercising the Tribunal's discretion on costs, the following specific factors are relevant:

- a) The Tribunal's decision concerned an application for leave decided on the written record. It was not a decision on the merits of an application under section 79 or section 92 of the Act made after an oral hearing with witnesses before a panel of the Tribunal and following a discovery process under the *Competition Tribunal Rules*. The decision does, however, mark the end of the proceeding (subject to appeal).
- b) Janssen was the successful party on the section 103.1 application.
- c) Janssen also prevailed on a motion to adduce responding evidence under Rule 119(3) of the *Competition Tribunal Rules*, which JAMP opposed: *JAMP Pharma Corporation v Janssen Inc.*, 2024 Comp Trib 4.
- d) There was a non-contested informal motion for a confidentiality order.

- e) This application was the first one in which an applicant sought leave under section 103.1 to commence an application under section 79 of the Act.
- f) In that context, JAMP prevailed on a significant legal point related to the interpretation of subsection 103.1(7) as it concerns leave to commence an application under section 79: see Reasons, at paras 23-77.
- g) The application for leave was of importance to both sides, given the nature of the proposed allegations and issues under section 79 and the proposed remedies to be requested by JAMP if leave were granted (which included seeking wide prohibition orders against Janssen and a very significant administrative monetary penalty).
- h) This application for leave appears to have been more legally and factually complex than nearly all of the prior leave applications decided by the Tribunal.
- i) Both parties are sophisticated litigants in the pharmaceutical industry that were represented by experienced counsel.
- j) This application was hotly contested by both parties: see Reasons, esp. at para 79.
- k) The record makes clear that the amount of work for this application was considerable and done in a short period of time. The parties filed affidavits attaching numerous exhibits (Janssen's affidavit responded to all of JAMP's affidavits). Both parties filed lengthy written submissions (in total more than 130 pages of argument).
- l) JAMP's allegations referred to communications by Janssen to prescribing physicians, insurers and patients, which JAMP alleged were "intentionally vague" and half-truths. The Tribunal found that the evidence in the record on these issues, including of a negative exclusionary effect on JAMP, was insufficient to give rise to a *bona fide* belief that Janssen's behaviour could be anti-competitive acts under section 78 giving rise to a practice that could be subject to an order under section 79, for the purposes of subsection 103.1(7): Reasons, at paras 83(c), 119(d), 130-141. This is not a materially aggravating factor for legal costs in this case.
- m) Both parties made written representations on costs.
- n) Janssen made no representations on disbursements.

[19] Although JAMP referred to a potential "chilling" effect on future leave applications of a costs award in excess of \$10,000, the Tribunal will continue to determine all costs awards on the specific facts and circumstances of the relevant proceeding.

[20] In my view, it is fair and reasonable to award Janssen its costs this application for leave under section 103.1 in an all-inclusive amount of \$15,000.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

[21] JAMP shall pay costs of this application to Janssen in the all-inclusive amount of \$15,000.

DATED at Ottawa, this 17th day of December, 2024

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Andrew D. Little

COUNSEL OF RECORD:

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