

Federal Court  
of Appeal



Cour d'appel  
fédérale

**Date: 20120127**

**Docket: A-500-06**

**Citation: 2012 FCA 29**

**BETWEEN:**

**NOVOPHARM LIMITED**

**Appellant**

**and**

**JANSSEN-ORTHO INC. and  
DAIICHI PHARMACEUTICAL CO., LTD.**

**Respondents**

**ASSESSMENT OF COSTS - REASONS**

**Bruce Preston**  
**Assessment Officer**

[1] By Judgment dated June 7, 2007, the Court dismissed this appeal with costs. On August 23, 2007, the Court dismissed the Appellant's motion for reconsideration of this Judgment, with costs of this motion at the top end of Column V of Tariff B. The Respondent Janssen-Ortho Inc. (Janssen) has filed a Bill of Costs for each of these decisions. These reasons will address the costs for both Bills of Cost; however, a separate Certificate of Costs will be issued for each one.

[2] These matters were heard together with the assessment on file T-2175-04 (Janssen et al v. Teva). At the hearing of the assessment, counsel for both parties agreed that the assessment of the

appeal and the motion for reconsideration would proceed based on the written submissions previously filed and on any submissions common to file T-2175-04.

### Appeal

#### Fees

[3] Having reviewed the submission of the parties, it is apparent that the only assessable service in dispute is Item 22. At paragraph 107 of their Rebuttal Submissions, counsel for Janssen removed the amount claimed for Item 13, preparation for trial or hearing, from the Bill of Costs. Further, Items 19 and 26 are not contested by the Appellant and are allowed as claimed.

[4] Concerning Item 22 (counsel fee on hearing of appeal), the only submission by the Appellant is that Janssen has not deducted the time for lunch from the hours claimed.

[5] By way of rebuttal Janssen argues that the time claimed for attendance was calculated based on the length of the days in court.

[6] In *Aventis Pharma Inc. v. Apotex*, 2009 FC 51, it was held that the time for lunch breaks should be factored out of any calculation for counsel time per hour in Court (see also: *Estensen Estate v. Canada (Attorney General)*, 2009 FC 152 (*Estensen*), *Aventis Pharma Inc v. Apotex Inc*, 2008 FC 988, *Mercury Launch & Tug LTD v. Texada Quarrying Ltd*, 2009 FC 331, *Astra Zeneca AB v. Apotex Inc*, 2009 FC 822). In keeping with these decisions and my findings in *Janssen v. Teva*, 2012 FC 48, I find that lunch breaks may not be included in the calculation of counsel time in court. The hearing of the appeal was held on March 13 and 14, 2007. On the first day, the Court sat from 10:00 AM until 5:00 PM. On the second day, the Court sat from 9:30 AM until 12:30 PM.

Given a total duration of 8 hours over two days and removing the time for lunch on the first day of the appeal, I find that the appeal had a duration of approximately 7 hours. However, given that it is perfectly reasonable and necessary for counsel to arrive in advance of the hearing in order to get settled prior to the hearing's commencement, Item 22 is allowed as claimed for a total of 8 hours.

### Disbursements

[7] Counsel for the Appellant has not disputed Janssen's claims for facsimiles, long distance calls or court reporting services on the appeal. Having reviewed the Court record I find these disbursements to be reasonable and justified and allow them as claimed.

[8] Janssen has claimed \$16,924.25 for photocopies produced internally and \$18,668.66 for photocopies produced by an external service provider. Counsel for the Appellant submits that Janssen has not provided any evidence showing why these copies were necessary. At paragraph 109 of their Responding Submissions, counsel for the Appellant argues:

The invoices Janssen has submitted do not offer any clarity. The amounts on the external invoices do not correlate with the amounts in the Bill of Costs. Janssen has claimed almost \$13,457.39 for photocopies made in a two week period from November 29, 2006 to December 13, 2006. At \$0.25 per page, this amounts to 53,829 copies. During this time, the only activity was a motion for a stay of the trial decision. Costs were not awarded to Janssen for this motion. Janssen has not established that any copies were required during this period, let alone the 50,000 plus copies it claims to have made.

[9] The Appellant contends that as Janssen was provided with the Appeal Book and only needed to copy its factum and authorities, allowing \$3,000 for photocopies would more than fairly compensate Janssen for the cost of all copies required for the appeal.

[10] In rebuttal, Janssen submits that it is standard practice in the legal profession not to keep detailed records of how many copies were made of which document. Counsel further argues:

The appeal book consisted of 53 volumes. At 375 pages per volume, that is almost 20,000 pages of material. Typically only one volume is provided to counsel, so it is reasonable that copies would be made for lawyers working on the case, and a file copy. Making just two copies would amount to almost 40,000 pages [sic], which would make up a large portion of the photocopies claimed by Janssen. Page 703 of the record, refers to a photocopy and binding charge of over \$10,000 for close to 60,000 pages on January 5, 2007, the date of service of the appeal book. Likewise, page 669 of the record refers to internal photocopy orders for roughly \$7,000 on January 5, 2007.

[11] Janssen has claimed for a grand total of \$35,592.91 in photocopies for the appeal. Given the amount claimed, I found the substantiation for photocopying to lack evidence concerning the number of copies produced, what they were related to and their necessity. Although this was an appeal with a substantial number of documents, I find the amount claimed to be excessive. The Appeal Book contains 15,041 pages. Counsel has claimed approximately \$17,000.00 for the photocopying of the Appeal Book. Although, I am in agreement with counsel for Janssen that it is reasonable that counsel would require more than the one copy of the Appeal Book served on them by the Appellant, I find it reasonable to allow for two photocopies of the Appeal Book. Given the number of pages found in the Appeal Book and allowing for \$0.25 per page, I allow \$7,520.50 for the photocopying of the Appeal Book. Further, it appears that some of the photocopies claimed relate to the Appellant's motion for a stay of the trial Judgment and Janssen's motion for costs. As costs were not awarded for these motions, any photocopies made for them will not be allowed.

[12] There are numerous claims for photocopies made on dates for which there appears to be no evidence of filings with the court or exchange of documents between the parties. In addition, at page 752 of Janssen's Costs Submissions there is a claim for \$1,122.39 in photocopies made on August

10, 2007. This appears to be a separate claim from the claim for photocopies relating to the motion for reconsideration but the expense was incurred after the final judgment had been rendered. If these copies relate to the motion for reconsideration, they should have been claimed under that Bill of Costs. These amounts will not be allowed as there is no evidence concerning what they relate to and no evidence of necessity. Notwithstanding these gaps in the evidence, I find that the number of photocopies required in this appeal would have been extensive, including a three volume Book of Authorities and a Compendium of Documents for the Court. Therefore, photocopying is allowed for one lump sum of \$17,178.09 to cover both internal and external photocopies.

[13] Janssen has submitted a claim for \$3,820.75 for binding. The Appellant argues that binding is overhead and cannot be recovered. In support, counsel refers to *Minde v. Ermineskin Cree Nation*, 2009 FCA 128 and *Morphy v. Canada (Attorney General)*, 2009 FC 190.

[14] By way of rebuttal, Janssen submits that binding is recoverable and that most of the amount claimed was charged on January 7, 2007, shortly after the appeal book was served by the Appellant.

[15] At the hearing of the assessment, counsel for Janssen submitted that the binding is not reusable as it was used for filings with the Court. Having reviewed the Disbursement Summary for binding found at Tab 7 of Exhibit C of the Affidavit of Mira Rinnie, it is apparent that the amount claimed for the majority of the binding (\$3,109.80) was expended in one event on January 8, 2007. Although I have not been provided with evidence confirming what this binding was for, from a review of the court record and in keeping with Janssen's submissions concerning photocopies, it appears that this charge relates to the binding of copies of the Appeal Book. As the Appeal Book had been previously filed with the Court by the Appellants, I find that the vast majority of the

binding claimed was not related to filings with the Court. Therefore, in keeping with my decision in *Janssen (supra)*, I will reduce the claim for binding by \$3,109.80. Further, having reviewed the six pages of entries in the Disbursement Summary, it is noted that the vast majority of the binding events had no correlation with filing dates. On the other hand, I was able to correlate four dates for binding events with filings in the Federal Court of Appeal. As I find that it is only reasonable or necessary to allow for internal binding when there is a correlation between the binding and Court filings, binding is allowed at \$148.30.

[16] Concerning Janssen's claims for scanning and Summation, the Appellant submits that the invoices supplied by Janssen suggest that this amount was an in-house charge. Further, the only cost of in-house scanning is staff time, which is unrecoverable overhead. Counsel argues that Janssen has provided no explanation as to why any scanning costs were necessary. Having regard to Summation document management services, the Appellant argues that the cost of Summation is not recoverable. Further, counsel submitted that Janssen had already paid to have the Trial record entered into Summation and has not explained why a subsequent charge was necessary.

[17] By way of rebuttal, Janssen submits that the trial record and appeal book were different documents and Summation had to be performed for each to provide easy access to the documentation. Counsel argued that, given the size of the appeal book, it was critical that counsel have access to a portable, electronic, searchable copy while preparing for and attending the appeal.

[18] It is clear from a review of page 793 of Janssen's Costs submissions that Janssen has claimed scanning at \$0.25 per page. Having reviewed the invoices found at tab 37 to the Affidavit of Mira Rinne, it is apparent that the commercial rate for scanning is \$0.17 per copy. As I am

satisfied that the scanning claimed was reasonable and necessary, and in keeping with my decision in *Janssen (supra)*, I allow scanning at \$0.17 per page for a total of \$150.00.

[19] Concerning Summation, at the hearing of the assessment, counsel for Janssen submitted the Reasons for Judgment and Judgment as to Costs in *Adir and Servier Canada Inc. v. Apotex*, 2008 FC 1070. In that decision, the Court held that the parties agreed to the use of Summation at trial and the unsuccessful party did not object to reasonable disbursements relating to the cost of Summation technology. Counter to this, counsel for the Appellant submitted the Reasons for Judgment on Costs in *Sanofi-Aventis Canada Inc. v. Apotex Inc.*, 2009 FC 1138. In that decision the Court held that Summation is part of the normal overhead costs of litigation. It is noted that the Court did not indicate in that decision that Summation was part of the overhead of a law office.

[20] Considering the above factors, and in keeping with *Sanofi-Aventis (supra)* and my reasons concerning Summation in *Janssen (supra)*, the claim for Summation is not allowed.

[21] Concerning taxis and meals, the Appellant argues that both of these charges were incurred locally and are therefore not recoverable.

[22] By way of rebuttal, counsel for Janssen contended that taxis and meals are common expenses in litigation when counsel is working late.

[23] At the hearing of the assessment, counsel for Janssen conceded that taxi fares for travel to and from work and meals for counsel should be deducted. As I have been provided with no evidence that the claims for taxis and meals were for anything other than counsel working late, the claims for taxis and meals are not allowed.

[24] Concerning Janssen's combined claim of \$1,050.10 for QuickLaw and LexisNexis, at paragraph 118 of their Responding Submissions, the Appellant submits:

.... Janssen has not established that all this research was necessary. Many charges postdate the filing of Janssen's memorandum of fact and law. Some of the charges postdate the hearing of the appeal. These charges cannot reasonably be considered necessary.

[25] In rebuttal, counsel for Janssen submits that case law research is an accepted part of patent litigation and is considered a reasonable and necessary component of preparation for an appeal.

[26] Although I agree with counsel for the Appellant, that legal research conducted after the appeal may not be allowed, I find that legal research conducted up to the commencement of the appeal, even after the filing of the memorandum of fact and law, is reasonable as new decisions which may affect the pending appeal could be rendered at any time. Therefore, deducting QuickLaw research conducted after the hearing of the appeal and allowing all other on-line case law research, QuickLaw and LexisNexis are allowed for a total of \$973.17.

[27] Having regard to Janssen's claim of \$158.00 for process servers, at paragraph 119 of their Responding Submissions, the Appellant argues that process servers are not necessary for filings in the Court of Appeal.

[28] By way of rebuttal, Janssen contends that process servers are a reasonable and necessary cost incurred in document-intensive litigation.

[29] Counsel for the Appellant submitted that it is not necessary to use process servers in the Federal Court of Appeal. However, no jurisprudence in support of this contention has been



provided. It has been held many times that costs should not be assessed from the perspective of hindsight (see: *Dableh v. Ontario Hydro* [1994] F.C.J. No. 1810). As I find it reasonable that Janssen incurred expenses for process servers for the service and filing of documents, I allow the claim for process servers as presented.

#### Motion for Reconsideration

[30] The Appellant' motion for reconsideration proceeded in writing. As mentioned in paragraph 1 above the Court dismissed the motion and awarded costs to the Respondents at the top end of Column V of Tariff B.

[31] It is noted that the Appellant does not contest the billable services claimed. Therefore Items 21 and 26 are allowed as presented. Further, the Appellant does not contest Janssen's disbursements for binding, courier and QuickLaw. Therefore, having reviewed the Court record I find these disbursements to be reasonable and necessary and allow them as claimed.

[32] Concerning Janssen's claim of \$261.75 for photocopying, the Appellant's only submission is that the amount allowed per page should be reduced to \$0.11 per page.

[33] By way of rebuttal, counsel for Janssen argued that photocopies should be allowed as they are reasonable and necessary when responding to a motion.

[34] In keeping with my decision in *Janssen (supra)* and already having allowed photocopies at \$0.25 per page at paragraph 11 above, the claim for photocopying is allowed as presented.

[35] The only other contested disbursement is Janssen's claim for process servers. Once again, the only argument put forward by counsel for the Appellant was that process servers are not required for filing in the Federal Court of Appeal. In keeping with my decision at paragraph 29 above, I find the claim for process servers reasonable and necessary and allow it at \$314.40, as claimed.

### Interest

[36] Janssen has claimed post judgment interest from the date of judgment. The Appellant submits that the Federal Court of Appeal did not award Janssen post-judgment interest and that an assessment officer has no jurisdiction to award interest or set an interest rate. In support, counsel referred to *Wilson v. Canada*, 2000 DTC 6641 at paragraphs 46 to 48. Then, at paragraph 120 of its Responding Submissions, the Appellant argues:

...The cause of action underlying these proceedings (the manufacture and sale of levofloxacin in Canada) arose in more than one province (as Janssen admitted in the Statement of Issues served in connection with its damages reference). Accordingly, any right Janssen may have to post-judgment interest must flow from s. 37(2) of the *Federal Courts Act*, not s. 37(1) as Janssen seems to suggest....

[37] By way of rebuttal, Janssen contends that an assessment officer may allow interest when not explicitly awarded by the Court. In support, counsel referred to *Bayer AG v. Novopharm Ltd*, 2009 FC 1230. Counsel also refers to *Morin v. Canada*, 2002 FCT 898 which relies on *Wilson (supra)*. Further, Janssen argues that the Appellant has made no specific reference to Janssen's alleged admission that the cause of action falls under s. 37(2) of the *Federal Courts Act*. Finally, Janssen submits that interest should be allowed under s. 37(1) of the *Federal Courts Act*, at 6 %, not compounded, per the Ontario *Courts of Justice Act*.

[38] The decision in *Wilson (supra)* stems from an appeal from an assessment of costs. In *Wilson*, the Court reversed the assessment officer's decision on the issue of interest. At paragraph 46 in *Wilson*, the Court held that when interest has not been awarded by the Court, an assessment officer may not award interest or set an interest rate on an assessment. However, the Court also held that an assessment officer does not have the jurisdiction to deny interest either. Further, at paragraph 38 of *Wilson*, after a thorough analysis of the law related to post judgment interest, the Court held:

....At all times he was entitled to post-judgment interest, but there was jurisdiction in the Court, not apparently exercised in these cases, with respect to disallowance of interest, the interest rate and the period over which interest would be paid. The exercise of the Court's discretion would be governed either by jurisprudence of this Court or the Ontario Courts, depending upon whether the judgment was rendered prior to February 1, 1992.

Therefore, although I lack jurisdiction to award post judgment interest, in the assessment before me, I find that the Court did not exercise its jurisdiction to disallow post judgment interest.

Consequentially, post judgment interest runs from the date of judgment.

[39] Having reached this conclusion, I must determine whether Section 37(1) or Section 37(2) of the *Federal Courts Act* is applicable to the calculation of interest. Section 37 reads:

**37.** (1) Except as otherwise provided in any other Act of Parliament and subject to subsection (2), the laws relating to interest on judgments in causes of action between subject and subject that are in force in a province apply to judgments of the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that province.

(2) A judgment of the Federal Court of Appeal or the Federal Court in respect of a cause of action arising outside a province or in respect of causes of action arising in more than one province bears interest at the rate that court considers reasonable in the circumstances, calculated from the time of the giving of the judgment.

[40] Appellant argued that section 37(2) of the *Federal Courts Act* is applicable to the calculation of interest as the cause of action arose in more than one province. Having reviewed the Statement of Issues, at paragraphs 6 and 9, I find that both Janssen and Teva are corporations located in Toronto, Ontario. Further, I can find no admission by Janssen in the statement confirming that s. 37(2) of the *Federal Courts Act* is applicable to the issue of interest. This being the case, I find that s. 37(1) of the *Federal Courts Act* should be used in determining post judgment interest as both companies have head offices in Ontario. Therefore, in keeping with the finding in *Wilson (supra)* and utilizing the approach in *Bayer (supra)*, I find that post judgment interest, pursuant to section 37(1) of the *Federal Courts Act*, runs from the date of judgment. Therefore, interest shall be calculated according to the laws relating to interest, on judgments in causes of action between subject and subject, which are in force in the province of Ontario.

#### G.S.T.

[41] The Appellant submits that Janssen has claimed for G.S.T. when G.S.T. had already been included in the amount claimed for given disbursements. At paragraph 125 of their Responding Submissions, the Appellant argues:

As Janssen bears the burden of establishing its right to recover G.S.T., its entitlement to recover G.S.T. should be assessed conservatively. In *Astrazeneca AB v Apotex Inc.*, the Court awarded only approximately one third of the amount claimed for G.S.T. as a result of inadequate evidence and improper claims. A similar reduction is appropriate in this case. Janssen should be limited to G.S.T. on only one third of its taxed costs.

[42] By way of rebuttal, Janssen submits that a 10 percent reduction in the amount of G.S.T. claimed is appropriate.

[43] Having reviewed the Disbursement Summaries provided in the Affidavit of Mira Rinnie, I find that a 10 percent reduction in G.S.T. is not sufficient as several claims included G.S.T. To allow a second claim would be duplicitous. On the other hand, a reduction of 66 percent as suggested by the Appellant is too severe. Therefore, under the circumstances of this file, in order to account for the G.S.T. already included in the disbursements claimed, the G.S.T. claimed by Janssen will be reduced by 25 percent on the taxed disbursements claimed and allowed.

[44] Finally, counsel for the Appellant submitted that the costs awarded to the Appellant in the order of the Honourable Madam Justice Sharlow dated March 9, 2007 must be set-off against the amount allowed. Having reviewed the order of March 9, 2007 I find that the order awards the Appellant costs in the amount of \$1,500.00. Therefore, as I have been presented with no evidence that the amount owing has been paid, the \$1,500.00 will be set-off from the total amount allowed for the appeal.

[45] For the above reasons, the Bill of Costs for the appeal, presented at \$76,746.47, is assessed and allowed for a total amount of \$25,550.98 plus interest from the date of judgment. Also, the Bill of Costs for the motion for reconsideration, presented at \$2,718.84, is assessed and allowed for a total amount of \$2,710.87 plus interest from the date of judgment. A certificate of assessment will be issued for each Bill of Costs.

“Bruce Preston”  
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Assessment Officer

Toronto, Ontario  
January 27, 2012

**FEDERAL COURT OF APPEAL**

**SOLICITORS OF RECORD**

**DOCKET:** A-500-06

**STYLE OF CAUSE:** NOVOPHARM LIMITED v. JASSEN-ORTHO INC. AND  
DAIICHI PHARMACEUTICAL CO., LIMITED

**ASSESSMENT OF COSTS WITH PERSONAL APPEARANCE OF THE PARTIES**

**PLACE OF ASSESSMENT:** TORONTO, ONTARIO

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

**DATED:** JANUARY 27, 2012

**APPEARANCES:**

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