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Annie Ruhlmann for / pour
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OTTAWA, ONT.

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THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF the acquisition by Parrish & Heimbecker, Limited of certain grain elevators and related assets from Louis Dreyfus Company Canada ULC;

AND IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the *Competition Act*.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- AND -

PARRISH & HEIMBECKER, LIMITED

Respondent

**SUBMISSIONS OF PARRISH & HEIMBECKER, LIMITED
(COSTS)**

I. Introduction

1. In the event that the Commissioner's Application is dismissed, P&H seeks costs payable as a lump sum (guided by the top end of Column IV of Tariff B) in the amount of \$2,206,958.18 (inclusive of taxes), consisting of fees of \$209,197.80 and disbursements in the amount of \$1,997,760.38 (both figures inclusive of taxes). For the reasons set out below, P&H submits that such an award of costs is reasonable and appropriate in the circumstances of this case.

2. Should the Application be allowed, P&H takes no position with respect to the bill of costs submitted by the Commissioner, save that the claim for item #5 (Preparation and filing of the Commissioner's Motion materials dealing with Confidentiality Designations – filed December 7, 2020) is an ineligible cost in view of the Tribunal's order dismissing the Commissioner's confidentiality motion without costs.¹

II. General Principles

3. Section 8.1 of the *Competition Tribunal Act* gives jurisdiction to the Tribunal to award costs of proceedings in accordance with the provisions governing costs in the *Federal Courts Rules* (the "Rules"). Pursuant to Rule 400(1) of the *Rules*, the Tribunal has "full discretionary power over the amount and allocation of costs and the determination by whom they are to be paid". The exercise of this discretion, however, must be guided by recognized principles and Rule 400(3) lists a number of factors that the Tribunal may take into consideration in awarding costs.²

4. The most basic principle is that the losing party must, as a general rule, pay costs to the successful party.³ The successful party is generally not penalized for raising substantive issues that are not ultimately accepted.⁴ In *Nadeau Ferme Avicole Ltee v Group Westco Inc*, for example, Nadeau argued that there should be no costs awarded or that costs should be reduced by 30% because success in the matter was divided insofar as it was successful on its application for leave pursuant to section 103.1,

¹ See *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2021 Comp Trib 2, para 168; *Nadeau Ferme Avicole Ltee v Groupe Westco Inc.*, 2010 Comp Trib 1 at para 40, BOA, Tab 1 [*Nadeau*]; *Seedlings Life Science Ventures, LLC v Pfizer Canada ULC*, 2020 FC 505 at para 11, BOA, Tab 2 [*Seedlings*].

² See, e.g., *Bauer Hockey Ltd v Sport Maska Inc*, 2020 FC 862 at para 7, BOA, Tab 3 [*Maska FC*].

³ See, e.g., *Nadeau*, para 13, BOA, Tab 1; *Maska FC*, para 7, BOA, Tab 3.

⁴ See, e.g., *Novopharm Limited v Eli Lilly and Company*, 2010 FC 1154 at para 7 [*Novopharm*], aff'd 2011 FCA 220 at paras 54-55, BOA, Tab 4; *Allergan Inc v Sandoz Canada Inc*, 2021 FC 186 at para 31, BOA, Tab 5; *Raydan Manufacturing Ltd v Emmanuel Simard & Fils (1983) Inc*, 2006 FCA 293 at paras 2-5, BOA, Tab 6 [*Raydan*]; *Illinois Tool Works Inc v Cobra Anchors Co*, 2003 FCA 358 at para 11, BOA, Tab 7 [*Illinois Tool*].

on its application for interim relief pursuant to section 104 and in establishing certain elements under section 75.⁵ The Tribunal rejected this argument:

In order to be successful, Nadeau had the burden of establishing *all* elements under section 75 of the Act (our emphasis). As a general rule, costs should follow the event ... Absent an abuse of process, a successful party should not be penalized simply because not all the points advanced by that party have found favour with the Court...

...

The Respondents were successful in their defence of the application. For this reason, costs will be awarded to the Respondents without reductions by reason of the above stated grounds.⁶

5. In contrast, in *The Commissioner of Competition v. Vancouver Airport Authority*, the Tribunal reduced the legal costs to be paid to VAA on the basis that success on the issues in dispute had been divided.⁷ In doing so, the Tribunal appears to have been significantly influenced by VAA's insistence on persisting in spending time on the issues on which it did not prevail "notwithstanding the Tribunal's encouragement to move along to the issues in respect of which VAA ultimately proved to be the successful party".⁸ (In this regard, there is no parallel between VAA and the case at bar.)

6. In *Allergan Inc v Sandoz Canada Inc*, Chief Justice Crampton recently considered a similar split in the patent litigation costs jurisprudence of the Federal Court.⁹ In one line of cases, the costs award in favour of the defendant who prevailed in the action by showing non-infringement of the plaintiff's patent was reduced to reflect the fact that it did not succeed with respect to some or all of its allegations of patent invalidity. In the second line of cases, "it has been explicitly held that this type of outcome does not constitute 'divided success' or 'mixed results' and that therefore the defendant is entitled to its costs", without reduction.¹⁰ The Chief Justice held that he was bound by the second line of cases.¹¹ It is submitted that the Tribunal should similarly follow this precedent.¹²

⁵ *Nadeau*, para 12, BOA, Tab 1.

⁶ *Ibid* at paras 13 and 15.

⁷ See *The Commissioner of Competition v. Vancouver Airport Authority*, 2019 Comp. Trib. 6 at para 819, BOA, Tab 8 [VAA].

⁸ *Ibid*.

⁹ See BOA, Tab 5.

¹⁰ See, e.g., *Raydan*, at paras 2-5, BOA, Tab 6 ["[A] defendant in a patent infringement case need not be successful in both its defences of non-infringement and invalidity in order to be entitled to costs. If successful in defending the main action of patent infringement, such a defendant is entitled to costs"]; *Illinois Tool*, at para 11, BOA, Tab 7 ["An attack on the validity of a patent expressly found 'not strong' ... can scarcely be called frivolous or unnecessary to the defence of an action claiming its infringement. There are many reasons for a judicial exercise of discretion to deny costs to a successful part but, with respect, no such reason was disclosed by the learned trial judge or is otherwise apparent here. The mere prolongation of a trial, without more, by reliance on an ultimately unsuccessful defence is no such reason"].

¹¹ See *Allergan*, paras 31 and 43, BOA, Tab 5.

¹² The Commissioner may argue that in the event that the Application is dismissed on the basis that the Commissioner did not discharge his burden of proving an SLC under section 92, but the Tribunal indicates in *obiter* that it may not have accepted

7. The Federal Court has also emphasized the need in fixing costs to be conscious of the difficulties with judging litigation conduct after the fact:

After a judgment on the merits is rendered, it is tempting to criticize steps taken by the parties in the proceedings with the benefit of hindsight. During the trial, however, parties must make decisions in a state of uncertainty. They do not know what amount of evidence will be judged sufficient. They advance alternative arguments to which the other party will want to respond, even though the Court may ultimately not address the issue. Tactical decisions may be made for reasons not disclosed to the judge...¹³

8. The Court has also commented that “it should not be for the losing party ‘to tell the winning party how they could have succeeded by doing or spending less’”.¹⁴ In *Seedlings Life Science Ventures, LLC v Pfizer Canada ULC*, for example, the Court rejected a challenge to the reasonableness of the successful party’s fees (Pfizer) based on a comparison between the fees incurred by each party:

Seedlings’s second line of attack challenges the reasonableness of Pfizer’s legal fees. That challenge is based on a comparison between the fees incurred by each party. Pfizer incurred legal fees that were three times those actually incurred by Seedlings. Pursuant to its litigation funding agreement, not all of Seedlings’s counsel’s fees were billed. Nonetheless, Pfizer’s legal fees were more than twice the fees Seedlings would have incurred had its counsel billed all of its fees. Seedlings argues that Pfizer did not overcome its burden of proof to show that its fees were reasonable in the circumstances. It suggests that Pfizer’s fees for this case ought to have been “well under \$3 million” (Seedlings’s Submissions on Costs at paragraph 20).

At the outset, I would like to note that we all wish legal services were more affordable. In deciding whether Pfizer’s fees are reasonable, however, I am not called upon to approve the way in which the market sets lawyers’ remuneration. I am simply assessing whether, given current market conditions, the amount of resources that Pfizer chose to devote to this case results from a defensible choice.

In doing so, I must keep in mind that it is inherently difficult for a court to second-guess strategic litigation choices made by the parties. The court does not know each party’s degree of tolerance of risk and may not have a full appreciation of the impact of its judgment on the parties. And, of course, hindsight is always perfect. Indeed, it should not be for the losing party “to tell the winning party how they could have succeeded by doing or spending less:” *Kennedy Trust for Rheumatology Research v. Hospira Healthcare Corp.*, 2018 FC 1067 (F.C.) at paragraph 24.

I do not accept the basic premise of Seedling’s argument. There is no rule or expectation that the parties to a lawsuit should spend roughly equal amounts in legal fees. What is at stake may be different, or have a different value, for each party. Each party’s tolerance of risk may be different. The presence of a litigation funder may affect those parameters in a manner not known to the court.

P&H’s efficiency defence if it had been necessary to decide the issue under section 96, it bears emphasizing that the efficiency defence does not arise unless the Commissioner establishes an SLC and, therefore, that if an SLC is not found to have been established, the merits of the defence become moot. As *Allergan* and the cases followed by the Chief Justice make clear, the fact that the Tribunal may say what it would do with efficiencies if the Commissioner had established an SLC is not relevant to costs. It is the result of the case that drives costs, not *obiter dicta* of the Tribunal.

¹³ *Maska* FC, para 13, BOA, Tab 3. See also *Seedlings*, para 15, BOA, Tab 2.

¹⁴ *Seedlings*, para 15, BOA, Tab 2.

I am unable to conclude that Pfizer’s legal fees are unreasonable. One should keep in mind that Seedlings was suing Pfizer for an amount well in excess of \$100 million. Pfizer stood a lot to lose. Thus, Pfizer cannot be faulted for spending close to \$5 million in legal fees. While comparisons are inherently difficult, I also note that Pfizer’s fees are of the same order of magnitude as those incurred in other patent cases such as *Dow Chemical Company v. Nova Chemicals Corporation*, 2017 FC 759 (F.C.), and *Apotex Inc. v. Shire LLC*, 2018 FC 1106 (F.C.) [Shire LLC].¹⁵

9. Rule 407 directs that party-and-party costs are to be assessed in accordance with Column III of Tariff B, and the Tribunal has followed the jurisprudence of the Federal Court to the effect that there must be valid reasons to depart from Rule 407.¹⁶ However, the Tribunal has also held that “the objective of an award of costs is to award an appropriate contribution towards solicitor-client costs”, not rigid adherence to the Tariff.¹⁷

10. The Tribunal has stated that it favours lump sum awards guided by Tariff B (over formal taxation of bills costs) because such practice is in accordance with the direction in section 9(2) of the *Competition Tribunal Act* that all proceedings “shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit”.¹⁸

11. In *B-Filer Inc. et al. v The Bank of Nova Scotia*, the Tribunal held that an award of increased costs was warranted because the Bank had been wholly successful on the application under section 75; there were “numerous important and complex issues raised in the proceeding”, including an issue of first impression with respect to the interpretation of paragraph 75(1)(e) of the *Competition Act*; the “work required was substantial, both in respect of the preparation for the hearing and the hearing itself. The case was actively case managed with a compressed schedule for all discoveries, the provision of expert reports and the like”; and B-Filer failed to make a timely admission that “impacted significantly upon the Bank’s preparation for hearing”.¹⁹

12. In its Final Order as to Costs in that case, the Tribunal found that an award of \$284,100 for legal fees was reasonable “taking into account the result obtained by the Bank, the importance and complexity of the issues, the amount of work required, and the Bank’s solicitor and client fees” (which totaled

¹⁵ *Seedlings*, paras 13-17, BOA, Tab 2.

¹⁶ See *Rona Inc v Commissioner of Competition*, 2005 Comp Trib 26 para paras 11-12, BOA, Tab 9; *Nadeau*, para 20, BOA, Tab 1.

¹⁷ *B-Filer Inc. et al. v The Bank of Nova Scotia*, 2007 Comp Trib 26 at para 12, BOA, Tab 10 [**B-Filer Preliminary Costs Reasons**]; *B-Filer Inc. et al. v The Bank of Nova Scotia*, 2007 Comp Trib 29 at para 23, BOA, Tab 10 [**B-Filer Final Costs Order**].

¹⁸ *B-Filer Preliminary Costs Reasons*, paras 13-14, BOA, Tab 10.

¹⁹ *B-Filer Preliminary Costs Reasons*, paras 15-22, BOA, Tab 10.

\$1,664,660.55):

We repeat the principles set out in our [Preliminary Costs] Reasons that the objective of an award of costs is to award an appropriate contribution towards solicitor-client costs. The objective is not rigid adherence to the Tariff. Thus, in the present case, the objective was not to insure the appropriateness of every Tariff item. Rather, we are satisfied that our award, guided by the Tariff, provides an appropriate contribution towards the Bank’s solicitor-client costs.²⁰

13. Consistent with the Tribunal’s concern for ensuring “an appropriate contribution towards ... solicitor-client costs”, recent Federal Court jurisprudence has recognized that in complex litigation the application of tariffs usually results in costs awards that are significantly lower than the prevailing party’s actual outlays and does not provide a level of indemnification sufficient to further the purposes of costs awards.²¹ More particularly, the Federal Court of Appeal has held that lump sum awards calculated as a percentage of the legal fees actually incurred by the successful party are appropriate in “complex litigation conducted by sophisticated parties”.²² This, indeed, has become the norm in intellectual property disputes involving sophisticated parties.²³

14. The rationale for such lump sum awards based on actual legal fees incurred was explained by Chief Justice Crampton in *Allergan*:

In recognition of the particular attributes of intellectual property proceedings, it is common for increased costs to be awarded in those proceedings: see, e.g., *Conorzio*, above, at para 6; *Lainco Inc c Commission scolaire des Bois-Francis*, 2018 FC 186 at para 8(c). **Those particular attributes include greater than average complexity, sophisticated parties, legal bills far in excess of what is contemplated by Column III of Tariff B, and “giving parties an incentive to litigate efficiently”**: *Seedlings Life Science Ventures, LLC v Pfizer Canada ULC*, 2020 FC 505 at para 4 [. For cases that involve drug patent disputes and a cost award fixed by reference to the tariff, the high end of Column IV is often considered to be reasonable and appropriate: *Sanofi-Novopharm FC*, above, at para 13, aff’d 2012 FCA 265; *Novopharm v Eli Lilly*, above, at para 7; *Apotex v Sanofi-Aventis*, above. See also Federal Court of Appeal and Federal Court Rules Committee, Review of the Rules on Costs: Discussion Paper, October 5, 2015, at page 8.

For essentially the same reasons identified immediately above, it is also increasingly common in intellectual property cases to award a significant lump sum amount “well in excess of the Tariff”: *Vengo*, above, at para 85; *Bauer Hockey Ltd v Sport Maska Inc*, 2020

²⁰ *B-Filer* Final Costs Order, para 23, BOA, Tab 10.

²¹ See, e.g., *Nova Chemicals Corp v Dow Chemical Co*, 2017 FCA 25 at paras 13, 16 and 25, BOA, Tab 11 [*Nova Chemicals FCA*], aff’g 2016 FC 91, BOA, Tab 11 [*Nova Chemicals FC*]; *Allergan*, paras 26-28, BOA, Tab 5; *Maska FC*, paras 10-13, BOA Tab 3. In *Maska FC* (para 22), a costs award based on the top end of Columns IV and V of the Tariff would have amounted to respectively to 6% and 7.5% of the successful party’s actuals fees. Similarly, in *Nova Chemicals FC* (paras 24 and 26), a costs award pursuant to Column V of Tariff B would have equalled 11% of the plaintiffs’ total legal costs and was described by the Court as “totally inadequate” and “not acceptable”.

²² See, e.g., *Seedlings*, para 4, BOA, Tab 2 and *Sport Maska Inc v Bauer Hockey Ltd*, 2019 FCA 204 at para 50, BOA, Tab 12.

²³ See, e.g., *Maska FC*, para 13, BOA, Tab 3; *Allergan*, paras 26-27, BOA, Tab 5.

FC 862 at para 12 [. **In this regard, a lump sum award in the range of 25-50% of actual fees, plus reasonable disbursements, is often made:** *Nova v Dow*, above, at paras 17 and 21; *Seedlings*, above, at para 6; *Bauer*, above, at para 13. See also *Loblaws Inc v Columbia Insurance Company*, 2019 FC 1434 at para 15.²⁴ [emphasis added]

15. These actual fees lump sum cost awards tend to range between 25% and 50% of actual fees incurred, plus disbursements.²⁵ In *Allergan*, Chief Justice Crampton adopted the mid-point of that range as the starting point for determining an actual fees lump sum cost award to the prevailing party on the basis that:

[it] would provide a better incentive than the lower end of this range for parties to conduct their litigation in a manner that permits the Court to achieve its objective of shorter trials in the drug patent area. This is particularly so given that legal costs tend to be very small compared to what is at stake in these types of proceedings. This has been repeatedly drawn to the Court's attention by representatives of the intellectual bar over the course of the last several years, in support of their efforts to persuade the Court to increase its cost awards in complex IP litigation. Moreover, the parties to such disputes generally are very sophisticated commercial litigants who can be assumed to calibrate the strategic decisions made over the course of the proceeding with a keen eye on the economic consequences of those decisions.²⁶

16. In addition to the foregoing general principles applicable to legal fees, disbursements are typically assessed in full, provided that they are reasonable (judged as at the time they were incurred).²⁷ In *Dableh v Ontario Hydro*, the Court held that the indemnification test for 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 a prudent and reasonable representation of the client.²⁸

III. An Increased Costs Award is Justified

17. There was really only one issue in this case: whether P&H should be compelled to divest either the Virden or Moosomin Elevator. In the event that P&H succeeds in resisting the imposition of that remedy, it should (in accordance with *Allergan*) be awarded its costs without reduction.

18. A costs award based on mid-column III of Tariff B would not achieve the objective of making a reasonable contribution toward P&H's legal expenses. P&H's actual legal fees in respect of this Application total \$3,686,818.28 (inclusive of taxes). As such, an award of legal fees based on mid-column III of Tariff B of \$113,998.50 (inclusive of taxes) would cover only approximately 3% of

²⁴ *Allergan*, paras 26-27, BOA, Tab 5.

²⁵ See *Seedlings*, paras 6 and 21-24, BOA, Tab 2; *Allergan*, paras 32 and 39, BOA, Tab 5. See also Appendix A.

²⁶ *Allergan*, para 35, BOA, Tab 5.

²⁷ See section 1(4) of Tariff B, *Federal Courts Rules*; *Nadeau*, para 49, BOA, Tab 1; *Allergan*, para 36, BOA, Tab 5.

²⁸ *Dableh v Ontario Hydro*, [1994] FCJ No 1810 at para 15 (TD), BOA, Tab 13.

P&H's actual legal fees.²⁹

19. P&H submits that the Tribunal should follow the Federal Court's actual fees lump sum award cases. The rationale for actual fees lump sum awards in IP cases (as described by Chief Justice Crampton) applies with full force to contested applications before the Tribunal. Such applications are of greater than average complexity (compared to non-competition law cases)³⁰ – necessitating sophisticated economic expert evidence – involve sophisticated parties and legal bills far in excess of what is contemplated by Column III of Tariff B.

20. While P&H believes that a lump sum costs award equal to 25% of its actual legal fees incurred (\$921,804.57), plus disbursements, would be appropriate in this case, P&H requests only a lump sum award calculated based on the top end of Column IV of Tariff B.³¹ As noted above, this amounts to \$209,197.80, or approximately 5.6% of P&H's actual legal fees (and still bears little relationship to the objective of making a reasonable contribution to P&H's actual costs of this litigation).

21. P&H submits that, viewed in the light of the actual fees lump sum cases, the relevant Rule 400(3) factors also weigh in favour of awarding its costs guided by the top end of Column IV; namely, (a) the importance and complexity of the issues; (b) the amount of work; and (c) any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding / the failure by a party to admit anything that should have been admitted.

22. As in *B-Filer*, there were “numerous important and complex issues raised in the proceeding”, including two issues of first instance for the Tribunal (i.e., the importance of the overall consideration of ‘exports’ in both the application of section 92 and section 93, reflecting the objectives stated in section 1.1. of the *Competition Act*, and the application of section 96(2)).³² The complexity of the issues in this matter is borne out by the volume of evidence and the length and intricacy of the legal submissions made by the parties. The Tribunal heard testimony from 16 fact witnesses and three expert witnesses. The parties filed an agreed book of documents consisting of almost 58,000 documents and marked more than 253 exhibits (consisting of thousands of pages). P&H's written closing argument was 50 pages long, with an accompanying compendium containing 460 tabs of legal and evidentiary citations, totaling

²⁹ Affidavit of Erin Penney sworn April 9, 2021 at para 8 [**Penney Affidavit**].

³⁰ But see *Nadeau*, at para 22.

³¹ See P&H's Bill of Costs at Exhibit “A” to Penney Affidavit.

³² See P&H Closing Submissions at para 17.

6,682 pages. The Commissioner's closing argument was also 50 pages in length, with 244 footnotes containing evidentiary and legal citations, all of which were included in an accompanying 1,371-page compendium.

23. To quote *B-Filer* again, the “work required was [also] substantial, both in respect of the preparation for the hearing and the hearing itself. The case was actively case managed with a compressed schedule for all discoveries, the provision of expert reports and the like”. This was also the first ever fully virtual hearing before the Tribunal.

24. Finally, the Commissioner proceeded with his Application despite knowing that his own expert would testify that the predicted price effects from the P&H's acquisition of the Virден Elevator do not meet the 5% SSNIP threshold and that the so-called “value added” approach he intended to urge the Tribunal to adopt is without precedent in the jurisprudence or enforcement guidelines of this country, or any other, and was effectively ruled out by the Commissioner in both the 2004 and the 2011 MEGs.³³ The Commissioner may argue that there was a public interest in bringing this case, such that no costs award, much less an increased award, should be made against him. The Tribunal should reject that argument, as it did in *VAA*.³⁴ There has been no decision in a merger case that affected the conventional and well settled substantive approaches for determining market definition and competitive harm embodied in the current MEGs, no relevant amendment to the substantive provisions of the *Competition Act*, no ambiguity or controversy regarding the interpretation or application of the merger provisions and no public consultations of any kind regarding the unprecedented “value add” approach the Commissioner has advanced in this case. The Commissioner is, of course, free to bring applications before the Tribunal as he sees fit but private litigants like P&H should not be deprived of their costs when those cases fail.

IV. P&H Should be Entitled to Recover all of its Disbursements

25. P&H's disbursements total \$1,997,760.38 (inclusive of taxes). All of the disbursements are reasonable and necessary, were incurred by P&H and are supported by documentation.

26. The following chart summarizes the disbursements P&H is claiming, all of which were reasonable and necessary in the circumstances. The claimed disbursements fall into standard categories

³³ See P&H's submission in response to the Tribunal's Direction to Counsel dated March 10, 2021.

³⁴ See *VAA*, para 826, BOA, Tab 8.

that the Tribunal and the Federal Court have recognized to be reasonable and necessary expenses in litigation, such as printing costs, travel expenses and transcription service fees.

Category of Expense	Amount Incurred and Claimed (excluding taxes)
CRA Expert Fees	\$1,614,250.30
Hotel Conference Room and AV Equipment Rental (discovery and trial)	\$126,368.82
Case Law Searches (Westlaw and Quicklaw)	\$41,835.70
Discovery and Trial Transcription Services	\$31,647.50
Air Travel Expenses (50% of actual)	\$31,483.20
Photocopies, Printing and Binding	\$28,636.33
Relativity Data Hosting	\$10,693.38
Hotel Expenses (discovery and trial)	\$10,272.17
Courier	\$5,939.05
Meal / Meeting Expenses (discovery and trial)	\$1,367.89
Telephone Conference Calls	\$127.59
Corporate Registry Search	\$7.00
Total	\$1,902,628.93
Total plus applicable taxes	\$1,997,760.38

27. Certain specific disbursements are discussed below.

(a) Expert Witness Fees

28. For expert fees, P&H claims \$1,614,250.30 (exclusive of tax).³⁵ P&H's claimed expert fees are in the range of expert fees ordered reimbursed by the Tribunal in recent cases.³⁶

29. P&H submits that the expert fees incurred were necessary – indeed, Ms. Sanderson's evidence was indispensable to P&H's case – and reasonable, and that it should be entitled to recover those fees in full (plus applicable taxes).

(b) Conference Room and AV Equipment Rental

30. The rental of a conference room at the Fairmont Winnipeg for Mr. Heimbecker's examination for discovery in July 2019 and for the fact witness portion of the hearing in January 2021 was required because Borden Ladner Gervais LLP does not have an office in Winnipeg and in order to permit counsel and witnesses to safely prepare for and participate in the discoveries and the fact witness portion of the hearing of the Application. In the case of the hearing, the conference room rental was also required to comply with COVID restrictions mandated by the Manitoba government.³⁷

31. The AV-related expenses were essential to the seamless functioning of Mr. Heimbecker's discovery and the virtual hearing and, more particularly, was required to enable those participating in the discovery and the hearing from Winnipeg to be able to do fairly and effectively. By analogy to VAA, it would be unfair to expect a party to comply with the requirement to participate in a virtual discovery or hearing, without allowing for a recovery of the fees incurred for that purpose.³⁸

32. The boardroom and AV expenses were reasonable and necessary, and total \$126,368.82 (the bulk of which (\$101,622.26) relate to the hearing in January 2021).³⁹ P&H submits that it should be entitled to recover those fees in full (plus applicable taxes).

(c) Air Travel Expenses

33. The flight from Toronto to Winnipeg is approximately 2.5 hours in length. In view of the serious

³⁵ See Exhibit 1 to P&H's Bill of Costs, Exhibit A to Penney Affidavit and para 10. [REDACTED]

³⁶ See VAA, paras 822 and 827-28, BOA, Tab 8 and *The Commissioner of Competition v The Toronto Real Estate Board*, 2016 Comp Trib 8 at para k, BOA, Tab 14.

³⁷ See Exhibit B to Penney Affidavit and paras 15 and 16.

³⁸ See VAA, para 823, BOA, Tab 8.

³⁹ See Exhibit 5 to P&H's Bill of Costs, Exhibit A to Penney Affidavit and para 15.

health risks associated with COVID, it was both reasonable and necessary for counsel for P&H to travel to Winnipeg by chartered plane (FastAir) for Mr. Heimbecker's examination for discovery and the fact witness portion of the hearing. Mr. Heimbecker and the fact witnesses called by P&H wished to testify in Winnipeg with counsel for P&H present.⁴⁰

34. The U.S. Centers for Disease Control and Prevention has noted the increased risk of exposure to the virus that causes COVID-19 on commercial flights.⁴¹ The Government of Canada reports domestic flights with confirmed COVID cases. For example, in the one week period between March 24 to March 31, 2021, there were 84 domestic flights with confirmed COVID-19 cases, including four between Toronto and Winnipeg and 20 departing either Toronto or Winnipeg.⁴²

35. Unlike counsel for the Commissioner, who could drive from Toronto to Ottawa to avoid the COVID risk, driving from Toronto to Winnipeg (and back) was not a reasonable option for P&H's counsel.

36. P&H is seeking reimbursement equal to only half the expense of those flights (\$31,483.20).⁴³ P&H submits that it should be entitled to recover that amount in full (plus applicable taxes).⁴⁴

(d) Discovery and Trial Transcription Services

37. Transcripts from the examinations for discovery of the parties' respective representatives were prepared, along with a daily trial transcript. Charges for stenography are recoverable, as an accurate transcript prepared by an independent reporter is essential.⁴⁵

38. Therefore, P&H should be entitled to recoup its transcription services expenses, in the amount of \$31,647.50.⁴⁶ P&H submits that it should be entitled to recover those fees in full (plus applicable taxes).

⁴⁰ See Penney Affidavit, para 13.

⁴¹ See Exhibit C to Penney Affidavit.

⁴² See Exhibit D to Penney Affidavit.

⁴³ See Exhibit 4 to P&H's Bill of Costs, Exhibit A to Penney Affidavit and para 13.

⁴⁴ In the alternative, P&H requests reimbursement of \$4,450.20, equal to the cost of four return economy flights on Air Canada between Toronto and Winnipeg.

⁴⁵ See *Apotex Inc v H Lundbeck A/S*, 2013 FC 1188 at paras 36-38, BOA, Tab 15.

⁴⁶ See Exhibits 2 and 3 to P&H's Bill of Costs, Exhibit A to Penney Affidavit and paras 11 and 12.

(e) Photocopying, Printing and Binding

39. A party is entitled to recover its actual costs of photocopying, printing and binding.⁴⁷ P&H incurred photocopying, printing and binding charges in respect of various trial preparation and hearing-related materials, including witness preparation and examination binders, discovery materials (including answers to undertakings), demonstratives for the Tribunal and witness statements. Those disbursements were essential to P&H's defence of the Application.⁴⁸ No labour costs are included or claimed in the disbursements requested.

40. As Justice Gascon observed during the hearing:

Before we start, I have to say, Mr. Akman ... I see the back of your room and it reminds me that when we are telling the public we are in an electronic hearing, and I see those piles of paper behind you that we counsel, frankly, I know that all of us have some papers around us and, being in an electronic hearing, we still need the paper support to be able to do our work, so we're getting there. The public sometimes has the reaction of saying, "Are you really electronic", when they see all the papers you have. I just had to mention that.⁴⁹

41. Therefore, P&H should be entitled to recoup its photocopying, printing and binding fees in the amount of \$28,636.33 (plus applicable taxes).⁵⁰

(f) Relativity Data Hosting

42. In order to comply with the requirements of document management for the electronic hearing (and, in particular, to store and access the Agreed Book of Documents consisting of 57,692 documents, representing approximately 720 GB of data), P&H incurred fees for relativity data hosting totaling \$10,694.38.⁵¹

43. In accordance with VAA, this disbursement was reasonable and necessary.⁵² P&H submits that it should be entitled to recover those fees in full (plus applicable taxes).

(g) Courier

44. Due to COVID, in the lead up to the hearing and during the hearing itself, counsel and paralegals

⁴⁷ See *Nadeau*, para 21, BOA, Tab 1.

⁴⁸ See Penney Affidavit, para 20.

⁴⁹ P Transcript, Vol. 1, pp. 52:20-53:7. See also, e.g., *Flatwork Technologies, LLC (Powerblanket) v Brierley*, 2020 FC 997 at paras 3 and 128, BOA, Tab 16 [allowing photocopying costs in a virtual hearing].

⁵⁰ See Exhibit 6 to P&H's Bill of Costs, Exhibit A to Penney Affidavit and para 20.

⁵¹ See Exhibit 6 to P&H's Bill of Costs, Exhibit A to Penney Affidavit and para 21.

⁵² See VAA, para 823, BOA, Tab 8.

for P&H worked remotely from home. As a result, P&H incurred fees to ship materials required by them to their homes.⁵³


45. Further, because Borden Ladner Gervais LLP does not have an office in Winnipeg, P&H also incurred courier fees to ship trial and other printed materials as well as various office and technology supplies to Winnipeg so that counsel effectively and efficiently conduct the hearing. P&H also incurred fees to ship printed materials to the Tribunal panel members.⁵⁴

46. P&H should be entitled to recoup its courier fees in the amount of \$5,939.05.⁵⁵ P&H submits that it should be entitled to recover those fees in full (plus applicable taxes).

V. Conclusion

47. For all of these reasons, P&H respectfully submits that, in the event that the Commissioner's Application is dismissed, an award of costs of \$209,197.80 in fees (taxes in), which is the equivalent of only 5.6% of P&H's actual legal fees, plus \$1,997,760.38 (taxes included) in disbursements, for a total cost award of \$2,206,958.18 (inclusive of taxes), should be made in P&H's favour.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 9th DAY OF APRIL 2021



BORDEN LADNER GERVAIS LLP
Lawyers for the Respondent, Parrish & Heimbecker,
Limited

⁵³ See Exhibit 6 to P&H's Bill of Costs, Exhibit A to Penney Affidavit and para 19.

⁵⁴ See *ibid.*

⁵⁵ See *ibid.*

APPENDIX A

Cases	Total Award	Fee Award	% of Actual Fees	Disbursements
<i>Dow Chemical Co v NOVA Chemicals</i> , 2016 FC 91, aff'd 2017 FCA 25	\$6,500,000	\$2,900,000	30%	\$3,600,000
<i>Seedlings Life Science Ventures v Pfizer Canada</i> , 2020 FC 505	\$2,629,062	\$1,091,889	25%	\$1,537,173
<i>Bauer Hockey v Sport Maska</i> , 2020 FC 862	\$2,517,590	\$1,210,858	25%*	\$1,306,732

*The Court doubled this to 50% for fees incurred after a settlement offer pursuant to Rule 420.

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF the acquisition by Parrish & Heimbecker, Limited of certain grain elevators and related assets from Louis Dreyfus Company Canada ULC;

AND IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the *Competition Act*.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- **AND** -

PARRISH & HEIMBECKER, LIMITED

Respondent

SUBMISSIONS OF P&H

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