

OTTAWA, ONT.

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COMPETITION TRIBUNAL

IN THE MATTER OF the Competition Act, R.S.C. 1985, c. C-34 (the “Act”);

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

AND IN THE MATTER OF an application by JAMP Pharma Corporation for an order pursuant to section 79 of the Act;

BETWEEN:

JAMP PHARMA CORPORATION

Applicant

– and –

JANSSEN INC.

Respondent

COSTS SUBMISSION OF THE APPLICANT, JAMP PHARMA CORPORATION

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December 2, 2024

Via Email

The Honourable Andrew D. Little, Chair, Competition Tribunal
Thomas D'Arcy McGee Building
90 Sparks Street, Suite 600
Ottawa, ON K1P 5B4

Dear Justice Little:

Re: Costs Submission of JAMP Pharma Corporation (“JAMP”) in CT-2024-006

These costs submissions are made pursuant to paragraph 181 of the Tribunal’s Reasons for Order and Order dated November 20, 2024 (the “**Order**”), in which the Tribunal indicated that it “is inclined to fix costs, if any, in an all-inclusive lump sum”.

Subsection 8.1(1) of the *Competition Tribunal Act* provides that the Tribunal may award costs in accordance with the provisions governing costs in the *Federal Courts Rules* (the “**Rules**”).¹

JAMP understands that Janssen, as the successful party, may seek a costs award based on a percentage of its actual legal fees. Such an award, in the context of an *application* based on a paper record, would be directly inconsistent with governing Federal Court jurisprudence (to which JAMP was a party). Even if it were appropriate, Janssen would be required to provide the Tribunal with concrete evidence of its actual legal fees incurred (including actual docket entries). The appropriate award, in the circumstances, is a lump sum based on Tariff B.

A lump sum award based on a percentage of legal fees is not appropriate: JAMP acknowledges that the Federal Court and Federal Court of Appeal have determined that, in certain cases, Tariff B does not provide a level of indemnification sufficient to further the purposes of costs awards,² and that certain indicia render a costs award based on a percentage of actual legal fees incurred to be more appropriate.³

However, in late 2022, when JAMP sought to extend this jurisprudence and these principles to the context of an *application* (rather than a complex intellectual property *action*), the Federal Court rejected JAMP’s invitation in *AbbVie Corporation v. Canada (Health)*, 2022 FC 1538 (the “**Simlandi costs decision**”). This decision flowed from a complex, high-stakes and multi-party

¹ *Competition Tribunal Act*, [1985 RSC c 19](#) ss. 8.1(1); *Federal Courts Rules* SOR/98-106.

² *Nova v. Dow*, [2017 FCA 25 ¶13, 16](#); *Bauer Hockey v. Sport Maska*, [2020 FC 862 ¶10-11](#).

³ *Allergan v. Sandoz*, [2021 FC 186 ¶38](#).

application that culminated in a two-day oral hearing before the Federal Court.⁴

In the Simlandi costs decision, despite JAMP’s arguments regarding a shift toward costs awards based on a percentage of legal fees, and JAMP’s reliance on the jurisprudence described above,⁵ the Federal Court rejected JAMP’s request for a costs award based on a percentage of actual legal fees and instead awarded costs in accordance with Tariff B.⁶ The Federal Court specifically determined that the application “was less complex than many intellectual property disputes”,⁷ which proceed by way of *action* and culminate in a *viva voce* trial.

Respectfully, there is no factual or legal basis for this Tribunal to depart from the Simlandi costs decision and to award costs based on a percentage of actual legal fees in an *application* (as opposed to a complex intellectual property *action*). To overcome the doctrine of judicial comity, Janssen would need to persuade this Tribunal that it should be “convinced” that the Simlandi costs decision is “wrong” and that it can advance cogent reasons in support of this view.⁸

The burden, of course, remains on Janssen to demonstrate why the particular circumstances of this leave application, based upon a *paper* record and *written* argument, warrant a costs award based on a percentage of actual legal fees.⁹

Strict proof is required to support a costs award based on a percentage of legal fees: If, despite the Simlandi costs decision, this Tribunal is inclined to consider awarding costs based on a percentage of actual legal fees, then Janssen faces another hurdle.

Where costs are awarded as a percentage of actual legal fees, the party seeking the award must tender “evidence demonstrating the fees actually incurred” and a “sufficient description of the services provided in exchange for the fees”.¹⁰ The party seeking costs is required to “disclose the detail of its dockets” to satisfy the Court “as to what work was performed, what that work involved, and that it relates to [the action at issue]”.¹¹

If Janssen does not tender evidence of its actual, detailed docket entries to support its request for an award based on a percentage of actual legal fees, then its request must be rejected, as otherwise this Tribunal would be “plucking a number out of the air”, which is impermissible.¹²

A lump sum award based on the Tariff is appropriate: Even when awarding costs as a lump sum, this Tribunal has continued to use Tariff B to determine the appropriate quantum.¹³ In two

⁴ *AbbVie Corporation v. Canada (Health)*, [2022 FC 1209](#) ¶1-2 and 75.

⁵ *AbbVie Corporation v. Canada (Health)*, [2022 FC 1538](#) ¶5-9.

⁶ *AbbVie Corporation v. Canada (Health)*, [2022 FC 1538](#) ¶22-33.

⁷ *AbbVie Corporation v. Canada (Health)*, [2022 FC 1538](#) ¶29.

⁸ *Apotex v. Allergan*, [2012 FCA 308](#) ¶43, 46-48; *Glaxo Group v. Apotex*, (1995) 64 C.P.R. (3d) 65 ¶10.

⁹ *Nova v. Dow*, [2017 FCA 25](#) ¶12-13; *Commissioner v. Parrish & Heimbecker*, [2022 Comp Trib 18](#), ¶771.

¹⁰ *Nova v. Dow*, [2017 FCA 25](#) ¶18.

¹¹ *BMS v. Pharmascience*, [2021 FC 354](#) ¶20-22.

¹² *Nova v. Dow*, [2017 FCA 25](#) ¶18; *BMS v. Pharmascience*, [2021 FC 354](#) ¶27.

¹³ *Canada v. Parrish*, [2022 Comp Trib 18](#) ¶781; 785; *Canada v. Rogers*, [2023 Comp Trib 03](#) ¶26, 62 and 67; *Stargrove v. Universal*, [2015 Comp Trib 26](#) ¶45 (“Stargrove”); *CarGurus v. Trader*, [2016 Comp Trib 15](#) ¶157 (“CarGurus”).

relatively recent applications for leave pursuant to section 103.1 (*i.e.*, *Stargrove* and *CarGurus*), this Tribunal arrived at the quantum using the mid-points of Columns IV and III, respectively. Given similarities between *CarGurus* and the within application, JAMP submits that using the mid-point of Column III would be most appropriate.

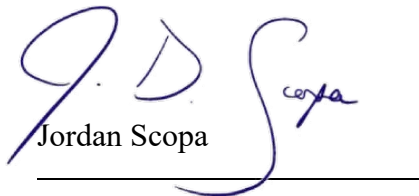
The factors provided by Rule 400(3) support the appropriateness of an award based on the mid-point of column III. JAMP's application raised important issues in the public interest, including whether the entirety of an applicant's business must be affected under subsection 103.1(7).¹⁴ The factual issues were not particularly complex (and no expert evidence was required) and "the procedural steps ... were largely consistent with what one would expect".¹⁵

JAMP has prepared a Bill of Costs in accordance with the mid-point of Column III, which totals \$5,292.¹⁶ This amount is five times higher than that awarded in another relatively recent application for leave pursuant to section 103.1.¹⁷ It is also reasonable in view of the amounts agreed upon in more complex, lengthy and costly proceedings recently before the Tribunal. In *Secure*, following a four-week trial, the parties agreed upon an award of \$150,000 (inclusive of taxes) for fees.¹⁸ In *Cineplex*, following a two-week trial, the parties agreed upon an award of \$77,000 (plus HST) for fees.¹⁹ In this leave application, an award an order of magnitude smaller than the awards flowing from these complex trials would be appropriate.

Any disbursements must be reasonable and necessary: A party may only recover disbursements when reasonable and necessary for the conduct of the proceeding,²⁰ and when it is established by an affidavit that the disbursement was made or is payable by the party.²¹ Given JAMP incurred no disbursements for this proceeding,²² any disbursements incurred by Janssen in excess of \$5,000 could not possibly be both reasonable and necessary.

Conclusion: JAMP submits that costs should be awarded to Janssen in an amount no greater than \$10,000 (inclusive of fees, and disbursements). Any greater award risks creating a chilling effect for potential applicants considering whether to initiate proceedings pursuant to section 103.1.

Yours very truly,
Goodmans LLP


Jordan Scopa

¹⁴ The Commissioner advised the Tribunal that JAMP's application "raises important issues of competition policy and access to justice". See: [Written Representations of the Commissioner](#), ¶1.

¹⁵ *AbbVie Corporation v. Canada (Health)*, 2022 FC 1538 ¶24.

¹⁶ Affidavit of Lisa Ebdon dated December 2, 2024 ("Ebdon Affidavit"), Exhibit "A".

¹⁷ *Luigi Coretti v Bureau de la Sécurité Privée and Garda World Security Corporation*, 2019 Comp Trib 5.

¹⁸ *Canada v. Secure Energy Services Inc*, 2023 Comp Trib 02 ¶720.

¹⁹ *Canada v. Cineplex*, 2024 Comp Trib 5 ¶483 and 490.

²⁰ *Exeter v. Canada (Attorney General)*, 2012 FCA 153 ¶13, citing *Merck v. Apotex*, 2006 FC 631 ¶3.

²¹ Subsection 1(4) of Tariff B, *Federal Courts Rules*.

²² Ebdon Affidavit, ¶4.

cc: Andrew Brodtkin, David Rosner, Jon Wall and Arash Rouhi – *Goodmans LLP*
Robert Kwinter, Cathy Beagan Flood, Nicole Henderson, Jonathan Bitran and Brian Facey – *Blake, Cassels
& Graydon LL*

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File No. CT-2024-006

COMPETITION TRIBUNAL**IN THE MATTER OF** the *Competition Act*, R.S.C. 1985, c. C-34 (the “**Act**”);**AND IN THE MATTER OF** an application by JAMP Pharma Corporation for an order pursuant to section 103.1 of the Act granting leave to bring an application under section 79 of the Act;**AND IN THE MATTER OF** an application by JAMP Pharma Corporation for an order pursuant to sections 79 of the Act;**BETWEEN:****JAMP PHARMA CORPORATION**

Applicant

– and –

JANSSEN INC.

Respondent

AFFIDAVIT OF LISA EBDON*(in support of JAMP Pharma Corporation’s costs submission)*

I, LISA EBDON, of the City of Vaughn, in the Province of Ontario, **MAKE OATH AND SAY:**


1. I am a law clerk employed by the firm Goodmans LLP (“Goodmans”), solicitors for JAMP Pharma Corporation (“JAMP”), and as such have knowledge of the matters to which I hereinafter depose.


- 2. Over the past 26 years, I have prepared hundreds of Bills of Costs utilizing Tariff B of the *Federal Courts Rules* in numerous proceedings before the Federal Court of Canada, including motions, applications and actions.

- 3. Given the procedural steps taken in Competition Tribunal File Number CT-2024-006, Mr. Jordan Scopa of Goodmans LLP asked me to prepare a Bill of Costs in accordance with the mid-point of Tariff B from the perspective of the Respondent, Janssen Inc. Accordingly, I prepared the Bill of Costs appended as Exhibit "A".

- 4. Mr. Scopa also asked me to review all of the invoices sent by Goodmans LLP to JAMP related to Competition Tribunal File Number CT-2024-006 to determine if JAMP incurred any disbursements for purposes of that proceeding. I reviewed not only the invoices sent by Goodmans LLP to JAMP related to Competition Tribunal File Number CT-2024-006 but also the work-in-process in the accounting system of Goodmans LLP and JAMP has not incurred and will not incur any disbursements related to Competition Tribunal File Number CT-2024-006.

AFFIRMED before me at the City of Toronto,)
 in the Province of Ontario, on December 2,)
 2024.)
)
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)


 A Commissioner, etc.
 Name: Arash Rouhi


 Name: Lisa Ebdon

This is **Exhibit A** referred to in the
Affidavit of Lisa Ebdon
affirmed before me this
2th day of December, 2024



A Commissioner, etc.
Name: Arash Rouhi

Exhibit "A"

CT-2024-0006

COMPETITION TRIBUNAL

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BILL OF COSTS OF THE RESPONDENT

(Prepared in accordance with Middle of Column III, Tariff B)

Item	Assessable Service	Time (hr)	Counsel	Units	x \$180
A. Originating Documents and Other Pleadings					
2	<i>Preparation and filing of originating documents, other than a notice of appeal to the Federal Court of Appeal, and application records.</i>				
2.1	Janssen's written representations			5.5	\$990.00
2.2	Affidavit of Andy Williams in support of Janssen's response			5.5	\$990.00
B. Motions					
4	<i>Preparation and filing of an uncontested motion, including all materials.</i>				
4.1	Informal motion from JAMP Pharma Corporation re: Confidentiality Order			3	\$540.00
5	<i>Preparation and filing of a contested motion, including materials and responses thereto.</i>				
5.1	Informal motion from Janssen Inc re: request for leave to file responding affidavit evidence and time extension			5	\$900.00
5.2	Janssen's letter requesting leave to file a Sur-Reply			5	\$900.00
G. Miscellaneous					
26	Assessment of costs			4	\$720.00
	Subtotal				\$5,040.00
	GST (5%)				\$252.00
	Total Fees				\$5,292.00
	Total Disbursements				\$0.00
	TOTAL COSTS (Total Fees + Total Disbursements)				\$5,292.00

File No. CT-2024-006

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**COSTS SUBMISSION OF THE APPLICANT,
JAMP PHARMA CORPORATION**

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